

<b>LFC Requester:</b>	<b>Aurora Sanchez</b>
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**AGENCY BILL ANALYSIS  
2015 REGULAR SESSION**

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**     **Amendment**      
**Correction**     **Substitute**   

**Date** February 10, 2015  
**Bill No:** HJR 11

**Sponsor:** Rep. Zachary J. Cook  
**Short**    Nonpartisan Judicial  
**Title:**    Elections

**Agency Code:** Attorney General's Office  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act:

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

**BILL SUMMARY**

Synopsis: House Joint Resolution 11 proposes to change one word of Article 6, Section 33 of the New Mexico Constitution. Paraphrased, the change would require judicial candidates to be elected “in a *nonpartisan* election,” instead of in a “*partisan*” election, before being eligible for a nonpartisan retention election. (Italics added.)

**FISCAL IMPLICATIONS**

N/A

**SIGNIFICANT ISSUES**

Intention of the Amendment: It is unclear exactly what change in the judicial selection/election process will result from this Amendment. Only changing the modifying word “partisan” to “nonpartisan” in Article VI, Section 33 of the New Mexico Constitution may not achieve the type or extent of change intended or anticipated by those who advocate this change in language. “In construing a constitutional amendment, the true meaning and intent of the amendment as adopted by the people must be determined.” N.M. Att’y Gen. Op. 95-03 (1995) (citing *Flaska v. State*, 51 N.M. 13, 18, 177 P.2d 174 (1947)). Further, constitutional provisions are to be construed as a whole, rather than in isolation. *Id.* (citing *In re Generic Investigation into Cable Television Services in State of N.M.*, 103 N.M. 345, 349, 707 P.2d 1155 (1985)); *see also Incorporated County of Los Alamos v. Johnson*, 108 N.M. 633, 634, 776 P.2d 1252 (1989).

The Amendment does not appear to eliminate competitive elections of judges after a gubernatorial appointment. It appears only to eliminate the identification of a candidate’s political party affiliation in that contested election.

Apparently Incorrect Public Interpretations of the Amendment’s Intent: There appears to be an incorrect assumption in the public media that the proposed amendment will affect the selection *mechanism* by which a candidate’s name may be included on a general election ballot, either in a competitive election against other candidates or in a non-competitive retention election.

A recent letter to the Albuquerque Journal by District Court Judge Alan Malott appears incorrectly to suggest that this one word change would allow a governor's interim judicial appointee to completely avoid the competitive election process and go straight into a non-partisan retention election. See Alan M. Malott, *We Need to Keep Politics Out of the Courthouse* (Feb. 6, 2015), <http://www.abqjournal.com/537349/opinion/we-need-to-keep-politics-out-of-the-courthouse.html> ("Simply removing the requirement of a partisan election race after a judge's initial appointment, it makes New Mexico a straight retention system in line with a number of other states.")

Similarly, an Albuquerque Journal Editorial appears to incorrectly assess the effect of the proposed change as one that would protect an interim gubernatorial judicial appointee from political forces that would prevent the interim appointee from even getting on the general election ballot. See Editorial, *Make Judicial Elections Nonpartisan All the Way* (Feb. 9, 2015), <http://www.abqjournal.com/538656/opinion/make-judicial-elections-nonpartisan-all-the-way.html> (suggesting that the proposed change would prevent a major political party from selecting a general election candidate other than the person - also a member of that major political party - who had been selected by the governor to occupy the judicial position). To the contrary, changing Article VI, Section 33 by insertion of the word "nonpartisan" would not alter the effect of Article VI, Sections 35 to -37 of the New Mexico Constitution, which provide that "[a]ny [Supreme Court Justice, Court of Appeals Judge, District Court Judge, or Metropolitan Court Judge] appointed [by the governor] shall serve **until** the next general election." (Emphasis added.)

Meaning of "Nonpartisan": The word "*nonpartisan*" is already used in Article VI, Section 33 with reference to a subsequent referendum election. As applied in that context "*nonpartisan*" means only that the party affiliation of a sitting judge or justice is not identified on the ballot during a general election retention election. As used in connection with other elective offices, the term has the same meaning. See e.g., NMSA 1978, §3-8-29 C (1985, amended 1999) ("No ticket designations or party affiliations shall be shown on the ballot. Municipal elections shall be nonpartisan."); NMSA 1978, §1-22-10 D (1985, amended 2009) ("A school district election shall be a nonpartisan election, and the names of all candidates shall be listed on the ballot without party or slate designation.")

Accordingly, using the term *nonpartisan* in Article VI, Section 33 with respect to the initial competitive general election of a judge or justice means the same thing as it presently does, i.e., only that the party affiliation of any and all candidates is not to be listed on the general election ballot.

Partisan Mechanisms for Inclusion of Name on General Election Ballot Not Affected by Amendment: What is not addressed or affected by the proposed change in HJR 11 are the mechanisms by which a prospective candidate's name will be allowed for inclusion on a general election ballot. Accordingly, the effect of the proposed change may mean only that the same "partisan" mechanisms will apply to determine whose name will be included on the general election ballot – the only difference being that their party affiliation may not be identified.

Current Mechanisms for Inclusion of Judicial Candidates on General Election Ballot: Under current law, the mechanisms for inclusion of a judicial candidate's name on the general

election ballot depend upon whether the judicial candidate is (1) a registered member of a *major* political party (i.e., through partisan primary election, *see* NMSA 1978, §1-8-1 A; (2003), or party convention designation, *see* NMSA 1978, §1-8-7; (1979); (2) a registered member of a *minor* political party (i.e., through political convention, *see* NMSA 1978, §1-8-2 (2007), or “other methods”; *see* NMSA 1978, §1-8-3; (1998); or (3) *not a registered member* of any qualified political party (i.e., through nominating petition, *see* NMSA 1978, §1-8-50 (2011), NMSA 1978, §1-8-51 C and E (1998)). These mechanisms for a judicial candidate to be included in the general election ballot are not changed or affected by the proposed amendment to Article VI, Section 33 of the New Mexico Constitution.

No Protection for Gubernatorial Interim Judicial Appointees: Additionally, the proposed amendment would not permit an interim judicial appointee of the governor to get on the general election ballot other than through the existing statutory mechanisms. Mere appointment by the governor to an interim judicial position has not and will not guarantee inclusion of that appointee’s name on the general election ballot; that person still must satisfy the current laws’ requirements to be listed on the ballot. The only certain change to result from HJR 11 seems to be that the candidates in a contested election would not be identified by their political party affiliation.

Conclusion: The impact of the proposed amendment of Article VI, Section 33 would be to eliminate from the general election ballot identification of the party affiliation of such persons who otherwise were qualified for inclusion of their names as candidates through existing partisan statutory procedures. It would not appear to change the existing partisan mechanisms by which a candidate’s name is to be included on the general election ballot. A “political party central committee [will still be able to replace] a candidate who had cleared the merit selection process with one who hadn’t.” *Cf.* Albuquerque Journal Editorial, *supra*. Also, “a judge [appointed by the governor still] must take on all comers in the next general election cycle, often only a few weeks or months after his or her appointment.” *See* Judge Malott letter, *supra*. If more extensive changes are intended, different or additional constitutional and/or statutory amendments should be considered.

**PERFORMANCE IMPLICATIONS**

N/A

**ADMINISTRATIVE IMPLICATIONS**

N/A

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

N/A

**TECHNICAL ISSUES**

N/A

**OTHER SUBSTANTIVE ISSUES**

N/A

## **ALTERNATIVES**

If the intent of HJR 11 is to allow a governor's judicial appointments to avoid any contested election and stand only for a retention election, the Joint Resolution should be amended accordingly.

Similarly, if the intent of HJR 11 is to automatically qualify a judge appointed by the governor to run as a nonpartisan candidate in the next general election after appointment, the Joint Resolution should also be amended to achieve that result.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

## **AMENDMENTS**

See discussion above.