

# How One State Legislature Grappled with Creating an Ethics Commission

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*Do you need a scandal to pass ethics reforms in a state? Or can you pass an effective ethics commission without elected officials creating some momentum by breaking the law? This Article reviews how one state, New Mexico, grappled with creating an ethics commission for decades. Enacting ethics commissions that hold state legislators and other elected officials accountable in a public way is a difficult but critical task for advocates across the country.*

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## INTRODUCTION

Do you need a scandal to pass ethics reforms in a state?<sup>1</sup> Or can you pass an effective ethics commission without elected officials creating some momentum by breaking the law?<sup>2</sup> This Article reviews how one state, New Mexico, grappled with creating an ethics commission for decades.<sup>3</sup> Enacting ethics commissions that hold state legislators and other elected officials accountable in a public way is a difficult but critical task for advocates across the country. The vast majority of New Mexicans support creating an ethics commission, while legislators have balked at creating one for years.<sup>4</sup>

### I. THE STATE'S ETHICAL CHALLENGES

There have been many efforts over the years to establish some form of an ethics commission in New Mexico.<sup>5</sup> Ethics scandals have prompted some reform, but passing a bill to create a commission fell short many times.<sup>6</sup> Opposition from the Legislature has been remarkably consistent over the decades, as evidenced by contemporaneous newspaper articles.<sup>7</sup>

A comprehensive look at the last several decades of efforts to create an ethics commission can be found in former State Senator Dede Feldman's

<sup>1</sup> See Luis Sanchez Saturno, *Officials behaving badly: A look back at the misdeeds of New Mexico public officials*, SANTA FE NEW MEXICAN (Dec. 16, 2015), [http://www.santafenewmexican.com/news/local\\_news/officials-behaving-badly-a-look-back-at-the-misdeeds-of/article\\_5236e7bf-293f-51dd-8f93-f7e739511697.html](http://www.santafenewmexican.com/news/local_news/officials-behaving-badly-a-look-back-at-the-misdeeds-of/article_5236e7bf-293f-51dd-8f93-f7e739511697.html) [<https://perma.cc/FC7J-XSA3>].

<sup>2</sup> See *Id.*

<sup>3</sup> See Steve Terrell, Opinion, *Corruption then, corruption now — N.M. doesn't change*, SANTA FE NEW MEXICAN (Aug. 11, 2018), [http://www.santafenewmexican.com/opinion/local\\_columns/corruption-then-corruption-now-n-m-doesn-t-change/article\\_eadf4d87-a0ef-53f7-90f2-0492408bc93d.html](http://www.santafenewmexican.com/opinion/local_columns/corruption-then-corruption-now-n-m-doesn-t-change/article_eadf4d87-a0ef-53f7-90f2-0492408bc93d.html) [<https://perma.cc/4F24-FZZR>].

<sup>4</sup> See Dan Boyd, *Senators express concerns about ethics commission*, ALBUQUERQUE J. (Mar. 11, 2017, 2:41 PM), <https://www.abqjournal.com/967096/senators-express-concerns-about-ethics-commission.html> [<https://perma.cc/CG4H-9KEQ>]; see also COMMON CAUSE NEW MEXICO, *Common Cause Poll: Huge Support for New Mexico Campaign, Ethics Reform*, KRWG PUBLIC MEDIA (Jan. 30, 2017), <http://www.krwg.org/post/common-cause-poll-huge-support-new-mexico-campaign-ethics-reforms> [<https://perma.cc/L6HR-272R>].

<sup>5</sup> See Caudell *Studying Measure for Ethics group in House*, ALBUQUERQUE J., Jan. 20, 1974), at D6 (discussing a proposed "ethics committee" made up of House members); see also John Robertson, *Lawmakers Propose Salaries, Ethics Panels*, ALBUQUERQUE J., Jan. 5, 1990, at B3 (discussing proposed ethics commissions); see also Editorial, *Legislative Ethics MLA*, ALBUQUERQUE J., Oct. 14, 1990, at B2 (calling on the New Mexico legislature to take action on ethics reform); see also Deborah Baker, *On ethics, will legislators be leaning to the right?*, SANTA FE NEW MEXICAN, Jan. 19, 1992, at B6 (discussing calls for a constitutional amendment).

<sup>6</sup> See Saturno, *supra* note 1; see generally *supra* note 5.

<sup>7</sup> See generally *supra* note 5. Deborah Baker notes that "[v]arious reform proposals [had] been around for years . . . occasionally, one [had] passed." Baker, *supra* note 5.

book, *Inside the New Mexico Senate: Boots, Suits, and Citizens*.<sup>8</sup> According to Feldman, there were 49 bills to create an ethics commission introduced between 2007 and 2012.<sup>9</sup> Many made it through House committees and House floor votes only to be stopped in the Senate.<sup>10</sup>

When the constitutional amendment finally passed the Senate Rules Committee in 2017, Senate Minority Leader Stuart Ingle “cast the lone ‘no’ vote in committee, saying the Senate ha[d] ably handled ethics issues that have arisen.”<sup>11</sup> He was quoted in the *Albuquerque Journal* as saying, “I often get dismayed when it looks like we don’t have any ethics here, because we truly do.”<sup>12</sup> Senator Ingle later “expressed concern about complaints possibly being made public or leaked by commission members before they can be thoroughly investigated. He said legislators have in the past received internal ethics complaints about divorces and other personal matters.”<sup>13</sup> “These things can be so treacherous,” Ingle told the *Journal*.<sup>14</sup> “With that many people involved, it’s going to be hard to keep it private.”<sup>15</sup> This sentiment illustrates the difficulty ethics reform advocates had in the Senate for decades.<sup>16</sup>

In 2016, Representative Jim Dines introduced an independent ethics commission bill with Senator (then-Representative) Jeff Steinborn.<sup>17</sup> It passed the House 50-10 and was heard in the Senate Rules committee on February 16, 2016.<sup>18</sup> With many amendments offered in committee that weakened the bill, Representative Dines pulled the legislation from consideration with only two days left in the session. He told the media that it was now a “toothless tiger.”<sup>19</sup> After he withdrew his bill, he worked with other

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<sup>8</sup> See generally DEDE FELDMAN, *INSIDE THE NEW MEXICO SENATE: BOOTS, SUITS, AND CITIZENS* (2014).

<sup>9</sup> *Id.* at 224.

<sup>10</sup> *Id.*

<sup>11</sup> Dan Boyd, *It’s a ‘Historic Day’: Ethics commission clears key panel*, ALBUQUERQUE J. (Mar. 15, 2017, 10:33 PM), <https://www.abqjournal.com/969701/proposed-nm-ethics-commission-clears-key-senate-hurdle.html> [<https://perma.cc/PK9A-ATK7>].

<sup>12</sup> *Id.*

<sup>13</sup> Dan Boyd, *Long road brings NM ethics commission proposal to ballot*, ALBUQUERQUE J. (Oct. 13, 2018, 11:43 PM), <https://www.abqjournal.com/1232940/long-road-brings-nm-ethics-commission-proposal-to-ballot.html> [<https://perma.cc/XBP8-P8SS>].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Trip Jennings, *Competing ethics proposals raise questions of secrecy and oversight*, N.M. IN DEPTH (Feb. 2, 2017), <http://nminddepth.com/2017/02/02/competing-ethics-proposals-raise-questions-of-secrecy-and-oversight/> [<https://perma.cc/EBZ5-5ZKA>]. See also Steve Terrell, *Will 2016 be the year for ethics reform in New Mexico?*, SANTA FE NEW MEXICAN (Nov. 29, 2015), [http://www.santafenewmexican.com/news/legislature/will-be-the-year-for-ethics-reform-in-new-mexico/article\\_78a6eb2e-8992-5001-b1f7-f706da422683.html](http://www.santafenewmexican.com/news/legislature/will-be-the-year-for-ethics-reform-in-new-mexico/article_78a6eb2e-8992-5001-b1f7-f706da422683.html) [<https://perma.cc/6CQK-ERLS>] (noting difficulties faced by advocates in promoting ethics reform).

<sup>17</sup> H.J. Res 5, 52d Leg., 2d Sess. (N.M. 2016).

<sup>18</sup> *Id.*

<sup>19</sup> See Steve Terrell, *Rep. pulls his own ethics bill, saying Senate panel made it powerless*, SANTA FE NEW MEXICAN (Feb. 16, 2016), [http://www.santafenewmexican.com/news/legislature/rep-pulls-his-own-ethics-bill-saying-senate-panel-made/article\\_50a9fb99-e1e0-57f9-9e11-75f0c755e946.html](http://www.santafenewmexican.com/news/legislature/rep-pulls-his-own-ethics-bill-saying-senate-panel-made/article_50a9fb99-e1e0-57f9-9e11-75f0c755e946.html) [<https://perma.cc/NEA7-9NLM>].

legislators in the interim to create a constitutional amendment that passed the next session.<sup>20</sup>

### A. *The Impact of Corruption in New Mexico*

Like many states, New Mexico has had its fair share of ethics and corruption cases involving elected officials.<sup>21</sup> In the last decade, the state treasurer, two long-time state senators and a secretary of state have gone to prison for pay-to-play violations, campaign finance violations, and corruption charges.<sup>22</sup>

The following list is far from complete, but highlights a few of the high-profile elected officials in New Mexico who have served jail time in the last decade. Robert Vigil, State Auditor and then-State Treasurer, was convicted in 2006 of one count of attempted extortion, but the jury acquitted him of 23 other charges of extortion and racketeering.<sup>23</sup> Vigil served two years and two months in federal prison.<sup>24</sup> Manny Aragon, State Senator Pro Tempore, pled guilty in 2008 to conspiracy and mail fraud in a scheme to siphon money from the construction of a courthouse in Albuquerque.<sup>25</sup> Aragon served about four-and-a-half years in federal prison.<sup>26</sup> Dianna Duran, Secretary of State, spent 30 days in jail at the end of 2015 after pleading guilty to two felonies and four misdemeanors for using campaign donations for personal expenses and falsifying public records.<sup>27</sup> Phil Griego, State Senator and Chair of the Corporations and Transportation Committee, is currently serving an 18-month sentence for fraud and bribery after using his position as a State Senator to make money off of a state real estate deal.<sup>28</sup> He was initially sentenced to 12 years.<sup>29</sup> Since then he has pled guilty to using his campaign account for personal use, adding another year to his sentence.<sup>30</sup>

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<sup>20</sup> *Id.*; see also Dan Boyd, *Long road brings NM ethics commission proposal to ballot*, ALBUQUERQUE J. (Oct. 13, 2018, 11:43 PM), <https://www.abqjournal.com/1232940/long-road-brings-nm-ethics-commission-proposal-to-ballot.html> [https://perma.cc/XBP8-P8SS].

<sup>21</sup> See Yue Qiu et al., *How does your state rank for integrity?*, CTR. PUB. INTEGRITY (Feb. 2, 2018, 11:15 AM), <https://www.publicintegrity.org/2015/11/09/18822/how-does-your-state-rank-integrity> [https://perma.cc/L4FW-AADR].

<sup>22</sup> See Saturno, *supra* note 1. See also Colleen Heild, *Treasurer's Office Has a Corrupt Past*, ALBUQUERQUE J. (Oct. 30, 2005), <https://www.abqjournal.com/news/state/403255nm10-30-05.htm> [https://perma.cc/WS3P-WZMX].

<sup>23</sup> See Saturno, *supra* note 1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* See also Alan Greenblatt, *Can New Mexico Break its Cycle of Corruption?*, GOVERNING (Dec. 21, 2015), <http://www.governing.com/topics/politics/gov-new-mexico-ethics-dianna-duran.html> [https://perma.cc/Y6MS-TAZF].

<sup>28</sup> *Former New Mexico Senator Starts Prison Term for Corruption*, SEATTLE TIMES (March 8, 2018, 3:25 PM), <https://www.seattletimes.com/nation-world/former-new-mexico-senator-starts-prison-term-for-corruption/> [https://perma.cc/Y6LN-2N57].

<sup>29</sup> *Id.*

<sup>30</sup> Dan Boyd, *Another year in prison for Griego*, ALBUQUERQUE J. (Aug. 20, 2018, 9:52 PM), <https://www.abqjournal.com/1211157/phil-griego-sentenced-to-one-more-year-in-prison-after-guilty-plea.html> [https://perma.cc/9GY7-2LCX].

These are just a sample of the more high-profile officials over the last decade who have served time for breaking the law. There have been many others before 2006 who went to jail, and many more officials have been charged, but not convicted, with crimes.<sup>31</sup>

When elected officials are charged with crimes and spend time in prison, faith in government plummets. This is nowhere more obvious than in Common Cause New Mexico's 2015 poll of New Mexico registered voters.<sup>32</sup> The poll results showed that 64% of voters believed New Mexico's elected officials are more responsive to lobbyists than they are to voters.<sup>33</sup> Less than one-in-five (19%) disagreed.<sup>34</sup>

### B. *New Mexico's Unpaid Citizen Legislature*

New Mexico has a "citizens' legislature," meaning that its legislators do not receive a salary.<sup>35</sup> Instead, they receive a per diem for days they are in session and attending interim committee meetings.<sup>36</sup> Some have suggested this system presents anticipated conflicts of interest.<sup>37</sup> Since legislators are frequently employed at other jobs while in office, they are often faced with legislation in committee or on the floor that will monetarily benefit them.<sup>38</sup> As long as that specific legislator isn't the only one benefiting, the rules for recusal are relatively relaxed.<sup>39</sup> New Mexico legislators rarely excuse themselves from a vote.<sup>40</sup>

However, the public strongly supports self-imposed recusal.<sup>41</sup> Over four-fifths (84%) of New Mexico voters surveyed in 2018 support not al-

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<sup>31</sup> Officials have been charged with offenses such as violating civil rights (Tommy Rodella, Rio Arriba County sheriff), identity and credit card theft (Jerome Block Jr., state Public Regulation Commission member), receiving bribes (James Lujan, Public Works Director for Santa Fe County) and soliciting bribes (Michael Murphy, state district judge in Las Cruces). *See* Saturno, *supra* note 1.

<sup>32</sup> *See* RESEARCH & POLLING, INC., COMMON CAUSE NEW MEXICO PUBLIC OPINION SURVEY 5 (Jan. 2015), <https://www.commoncause.org/new-mexico/wp-content/uploads/sites/19/2018/09/Common-Cause-2015-Polling.pdf> [<https://perma.cc/TWG8-FGGG>].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See* Rob Nikolewski, *No salary: That's how legislators roll in New Mexico*, WATCHDOG (Feb. 14, 2013), [https://www.watchdog.org/new\\_mexico/no-salary-that-s-how-legislators-roll-in-new-mexico/article\\_235a7f38-c4df-5c21-b6ce-f4f45733210a.html](https://www.watchdog.org/new_mexico/no-salary-that-s-how-legislators-roll-in-new-mexico/article_235a7f38-c4df-5c21-b6ce-f4f45733210a.html) [<https://perma.cc/YSW7-AZQ2>].

<sup>36</sup> *See* N.M. CONST. art. IV, § 10 (West, Westlaw through Nov. 1996 amendments).

<sup>37</sup> *See* Nicholas Kusnetz, *Conflicts of interest run rampant in state legislatures*, CTR. PUB. INTEGRITY (Aug. 1, 2018, 10:53 PM), <https://www.publicintegrity.org/2013/03/18/12313/conflicts-interest-run-rampant-state-legislatures> [<https://perma.cc/D9TX-Z6T6>].

<sup>38</sup> *See id.*

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See* RESEARCH & POLLING, INC., COMMON CAUSE NEW MEXICO PUBLIC OPINION SURVEY 5 (Feb. 2018) [hereinafter PUBLIC OPINION SURVEY 2018], <https://www.common-cause.org/new-mexico/wp-content/uploads/sites/19/2018/05/CCNM-2018-poll.pdf> [<https://perma.cc/P77T-XE94>].

lowing legislators to vote on legislation that they could personally benefit from financially.<sup>42</sup> Fourteen percent say they are opposed.<sup>43</sup>

This practice is both loved and hated in New Mexico. It is loved because of the “Wild West” image that a “citizen” legislature conjures in the mind and hated because many believe there is not a true representation of communities because legislators do not receive a salary, thus they have to work elsewhere.<sup>44</sup> This ends up being a barrier to running for young people, people making lower wages, and those whose employers won’t allow them to take 30 or 60 days off each year to attend the legislative session.<sup>45</sup> Therefore, the New Mexico Legislature often is comprised of retired people, people who own their own businesses, and people who can afford to serve in the legislature and not work full-time.<sup>46</sup> This makeup of the New Mexico Legislature in itself is not necessarily contributing to corruption in the state, but when legislators vote on bills that affect their own livelihoods, the potential for abuse is heightened.<sup>47</sup>

This practice prevents the majority of New Mexicans from running as most employers do not allow an employee to take off one or two months each year, in addition to all the time for interim committees and special sessions.<sup>48</sup> Likewise, most younger people cannot afford not to work; they are left out of the political process because they are not able to afford to serve.<sup>49</sup> This is important because many younger people feel disconnected from politics and the decisions legislators make on their behalf.<sup>50</sup> In polling commissioned by Common Cause New Mexico in 2018, two open-ended questions were asked about why more people do not vote and how to en-

<sup>42</sup> See *id.* at 15.

<sup>43</sup> See *id.*

<sup>44</sup> See *New Mexico Voters Warm to Idea of Professional Legislature*, U.S. NEWS & WORLD REP. (Mar. 29, 2018, 2:11 AM), <https://www.usnews.com/news/best-states/new-mexico/articles/2018-03-29/new-mexico-voters-warm-to-idea-of-professional-legislature> [<https://perma.cc/S5K7-CZVX>]; see also Gwyneth Doland, *What New Mexico’s state legislature looks like*, N.M. IN DEPTH (Jan. 16, 2017), <http://nminddepth.com/2017/01/16/what-new-mexicos-state-legislature-looks-like/> [<https://perma.cc/TZ55-UW4J>].

<sup>45</sup> See generally Jason M. Baker, *Outdated part-time Legislature failing New Mexico residents*, ALBUQUERQUE J. (Jan. 16, 2018, 12:02 AM), <https://www.abqjournal.com/1115500/outdated-parttime-legislature-failing-new-mexico-residents.html> [<https://perma.cc/F4WL-C9VZ>]; see also Doland, *supra* note 44.

<sup>46</sup> See Nikolewski, *supra* note 35; see also Doland, *supra* note 44.

<sup>47</sup> See J.B. Wogan, *States Look to Reduce Part-Time Lawmakers’ Bias*, GOVERNING (May 2013), <http://www.governing.com/topics/politics/gov-states-look-to-reduce-part-time-lawmakers-bias.html> [<https://perma.cc/45QR-B8J8>].

<sup>48</sup> Doland, *supra* note 44.

<sup>49</sup> See *id.*; see generally Barry Massey, *NM lawmakers average \$16,000 in compensation*, ALBUQUERQUE J. (Feb. 28, 2014, 12:22 AM), <https://www.abqjournal.com/360656/legislators-compensation-averaged-16k-in-2013.html> [<https://perma.cc/V2G7-GSSM>].

<sup>50</sup> See THE ASSOCIATED PRESS, *Young Americans feel disconnected with major political parties, poll reveals*, TRIB LIVE (Aug. 5, 2016), <https://triblive.com/politics/politicalheadlines/10916136-74/party-clinton-parties> [<https://perma.cc/3A6U-AV4B>].

courage more people to vote.<sup>51</sup> Top results on both questions revealed that voters wanted better candidates to run.<sup>52</sup>

The first question asked was, “Voter participation in state and local elections has been declining over the years. What do you feel are the reasons why registered voters are less likely to participate in elections than they used to be?”<sup>53</sup> When it came to the reasons why participation levels are down, voters were most apt to cite the following: voters not believing their vote counts (24%); people don’t care/are apathetic (17%); candidates don’t represent voters’ interests/no good candidates (17%); people are lazy/uninformed (11%); and corrupt politicians (9%).<sup>54</sup>

The second question asked was, “What do you think needs to be done to encourage more voters to participate in elections?”<sup>55</sup> For this question, voters were most apt to suggest having better candidates (16%), restoring the belief that their vote will count (12%), and building more trust in the political system (11%) as ways to encourage increased voter participation.<sup>56</sup>

In its yearly polling of registered voters in New Mexico in 2018, Common Cause New Mexico also asked if citizens would support paying legislators,<sup>57</sup> which is a proposal that has been frowned upon by legislators and voted down by the citizens more than once.<sup>58</sup> In the late 1980s and early 1990s there were several proposals in the Legislature and constitutional amendments put before the voters for legislator pay, and they all failed.<sup>59</sup> Results in the 2018 poll indicate that a majority, 54%, support paying state legislators a yearly salary equivalent to the average New Mexico household.<sup>60</sup> Surprisingly, after voters not supporting this in past years, the polling found that 65% want to extend the length of the legislative session,<sup>61</sup> which now meets for 30 days in even-numbered years and 60 days in odd-numbered years.<sup>62</sup>

### C. Ethics and Campaign Finance Task Force Momentum

In the wake of State Treasurer Robert Vigil going to jail for attempted extortion, then-New Mexico Governor Bill Richardson convened a Task

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<sup>51</sup> See PUBLIC OPINION SURVEY 2018, *supra* note 41, at 9.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 40.

<sup>54</sup> See *id.* at 9.

<sup>55</sup> *Id.* at 40.

<sup>56</sup> See *id.* at 9.

<sup>57</sup> See *id.* at 42.

<sup>58</sup> See Editorial, *Let’s Pay Lawmakers*, ALBUQUERQUE J. (Dec. 30, 1987) at 5 (noting the lack of action); see also Bill Feather, *15-Day-Longer ‘Short’ Session Sought*, ALBUQUERQUE J. (Jan. 23, 1990), at D4; *Bill would lengthen session*, ALBUQUERQUE TRIB. (Jan. 22, 1990); *More time, pay proposed*, ALBUQUERQUE TRIB. (Jan. 31, 1990); Deborah Baker, *Salary for lawmakers will be on ballot again in November*, ARTESIA DAILY PRESS (Feb. 21, 1992); Editorial, *Better pay will open doors at Roundhouse*, LAS CRUCES SUN NEWS (April 15, 1994).

<sup>59</sup> See generally *supra* note 58.

<sup>60</sup> See PUBLIC OPINION SURVEY 2018, *supra* note 41, at 6.

<sup>61</sup> See *id.*

<sup>62</sup> See Baker, *supra* note 45.

Force on Ethics Reforms in March 2006 to make policy recommendations surrounding ethics and elections.<sup>63</sup> The Task Force made many recommendations, including the creation of an independent ethics commission.<sup>64</sup> The Governor's Task Force included many well-informed and politically involved individuals.<sup>65</sup> They spent six months meeting, planning, and drafting a final report with specific policy recommendations that was completed in October 2006.<sup>66</sup>

Members of the Governor's Task Force on Ethics Reform included law professors, a former governor, legislators, non-profit leaders, and members of the public.<sup>67</sup>

The Governor's Task Force on Ethics Reform developed recommendations for the following laws and policies:

- Create a state ethics commission;
- Limit gifts to state officials;
- Establish contribution limits;
- Increased campaign reporting requirements;
- Legislative compensation;
- Establish appointive offices;
- Minimum qualifications for the state treasurer and state auditor; and
- Publicly financed elections.<sup>68</sup>

Since 2006, many of these recommendations have passed and become law, while others have failed in committee or have been denied a hearing. The Ethics Commission Constitutional Amendment was one of the recom-

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<sup>63</sup> See GOVERNOR'S ETHICS & CAMPAIGN FIN. REFORM TASK FORCE, APPROVED MINUTES OF THE FIRST MEETING (May 3, 2006), [https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1009&context=law\\_service\\_ethicsreform](https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1009&context=law_service_ethicsreform) [https://perma.cc/8MC4-FLPH].

<sup>64</sup> See GOVERNOR'S ETHICS & CAMPAIGN FIN. REFORM TASK FORCE, REPORT OF RECOMMENDATIONS 8 (Oct. 4, 2006) [hereinafter REPORT OF RECOMMENDATIONS], [https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1000&context=law\\_service\\_ethicsreform](https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1000&context=law_service_ethicsreform) [https://perma.cc/LCP3-92L9].

<sup>65</sup> *Id.* at 3–4.

<sup>66</sup> *Id.* at 3.

<sup>67</sup> Full membership list included Governor Garrey Carruthers, Dean, New Mexico State University College of Business, Co-Chair; Suellyn Scarnecchia, Dean, University of New Mexico School of Law, Co-Chair; Stuart Bluestone, New Mexico Chief Deputy Attorney General; Barbara Brazil, President, New Mexico First; Matt Brix, Executive Director, Common Cause; Doug Brown, New Mexico State Treasurer; Maralyn Budke, Public Member; John Carey, President and CEO, Association of Commerce and Industry; Dede Feldman, New Mexico State Senator; Mary Graña, Public Member; Gay Kernan, New Mexico State Senator; W. Ken Martinez, New Mexico State Representative; Kathy McCoy, New Mexico State Representative; Andrew Montgomery, Public Member; Jim Noel, Executive Director, New Mexico Judicial Standards Commission; Leonard R. Sanchez, CPA, Moss Adams, LLP; Ron Solimon, President and CEO, Indian Pueblo Cultural Center; Hilary Tompkins, Chief Counsel, Office of the Governor; Stewart Udall, Former United States Secretary of the Interior; and Brad Winter, Albuquerque City Councilor. *Id.* at 3–4.

<sup>68</sup> See *id.* at 7.



mentations to pass in 2017. Below are the legislative outcomes for the other Task Force recommendations.

1. *2007 Gift Act*

The Task Force recommendations contained provisions on lawmaker gifts, including suggesting laws be passed to prohibit gifts with a fair market value greater than \$250; establishing a \$1,000 cap on gifts from lobbyists, their employers or government contractors; enacting reporting requirements for gifts that exceed \$100 in value and banning gifts exceeding that value during legislative sessions; and banning gifts to charities designated by state officials in their official capacities.<sup>69</sup>

In 2007, the Gift Act passed because of the task force recommendations and included each specific provision except the recommendation that the New Mexico Legislature enact reporting requirements for gifts that exceed \$100 in value and ban gifts exceeding that value during legislative sessions.<sup>70</sup>

2. *2009 Campaign Contribution Limits*

The Task Force recommended that the Legislature limit campaign contributions to candidates for statewide office to the federal contribution limit for individuals and cap campaign contributions to candidates for district-wide office to one-half of the federal contribution limit for individuals.<sup>71</sup> The Task Force also recommended that the Legislature prohibit cash contributions of more than \$100.<sup>72</sup>

Convincing legislators to accept campaign contribution limits was as difficult a hurdle as creating an ethics commission.<sup>73</sup> That is no surprise, as asking candidates and legislators to limit the contributions they accept after having no limits at all makes it more difficult for them to raise large sums of money from one person or family.<sup>74</sup> New Mexico was one of a handful of states without them in 2010, when contribution limits finally passed and became law.<sup>75</sup>

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<sup>69</sup> See GOVERNOR'S ETHICS & CAMPAIGN FIN. REFORM TASK FORCE SUBCOM., SUBCOMMITTEE REPORT ON GIFTS 1–3 (2006), [https://digitalrepository.unm.edu/law\\_service\\_ethicsreform/26](https://digitalrepository.unm.edu/law_service_ethicsreform/26) [<https://perma.cc/BPJ5-YXC5>].

<sup>70</sup> See N.M. STAT. ANN. §§ 10-16B-1–4 (West, Westlaw through end of First Reg. Sess. of the 54th Leg. (2019)).

<sup>71</sup> See REPORT OF RECOMMENDATIONS, *supra* note 64, at 14.

<sup>72</sup> See *id.*

<sup>73</sup> See ASSOCIATED PRESS, *In New Mexico, Lawmakers Pass Donations Caps*, N.Y. TIMES (March 21, 2009), <https://www.nytimes.com/2009/03/22/us/22newmexico.html> [<https://perma.cc/GV85-AZUW>].

<sup>74</sup> See *id.*

<sup>75</sup> See *Campaign Contribution Limits: Overview*, NAT'L CONF. STATE LEGISLATURES (June 28, 2017), <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx> [<https://perma.cc/R6BG-DQYR>].

While the Task Force's recommendations on gifts and campaign contribution limits were passed by the Legislature, the following policies have been proposed but have yet to be enacted into law.

3. *Update the Campaign Reporting Act (numerous attempts to update have not passed)*

In 2006, the Task Force recommended that the Legislature strengthen campaign reporting requirements and enforcement. Specifically, they suggested that:

[c]ampaign reporting statements be expanded to include information regarding the occupation, business, and employer for donors who contribute more than \$100 to a candidate. The task force also recommended that third-party groups that make "independent expenditures" in support of or in opposition to a clearly identified candidate or ballot measure should be required to report such expenditures. Cumulative totals of contributions received from individual donors and expenditures made to individual vendors per election cycle should also be included in the reporting statements. The task force further suggests the requirement of more frequent reporting in non-election years.

The [T]ask [F]orce [also] recommend[ed] that subpoena power be granted to the Office of the Secretary of State or any created independent state ethics commission to increase the investigatory power of those entities. It also recommends that the Office of the Secretary of State or any created independent state ethics commission be required to perform a desk review of more than ten percent of reporting individuals or a field audit of a defined percentage of reporting individuals.

[Finally,] [t]he [T]ask [F]orce [supported] increasing maximum civil penalties for violation of reporting requirements to \$10,000 . . . [and recommended] that contributors be identified by a unique campaign finance account number, possibly the last four digits of an individual's social security number.<sup>76</sup>

Updating the Campaign Reporting Act (CRA) is another lengthy and hard-fought battle that still is not over.<sup>77</sup> Since much of the Act was ruled unconstitutional in 2010 in *New Mexico Youth Organized v. Herrera*,<sup>78</sup> there have been attempts each year to update and bring the Act into compliance

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<sup>76</sup> See REPORT OF RECOMMENDATIONS, *supra* note 64, at 15.

<sup>77</sup> See Trip Jennings, *'Dark Money' disclosure bill dies in final days of session*, N.M. IN DEPTH (Feb. 17, 2016), <http://nmindepth.com/2016/02/17/dark-money-disclosure-bill-dies-in-final-days-of-session/> [<https://perma.cc/9526-LXLF>].

<sup>78</sup> 611 F.3d 669 (10th Cir. 2010).

with court rulings.<sup>79</sup> And unlike attempts to create an ethics commission where the House of Representatives passed many bills only to have them die in the Senate, the State Senate has passed an update to the CRA five times, only to have the bills die in the House.<sup>80</sup> New Mexico currently has a CRA with many unconstitutional provisions,<sup>81</sup> including requiring anyone who spends \$500 in a calendar year on political purposes to report all contributions and expenditures.<sup>82</sup> The courts have repeatedly ruled that this is too much to require from small spenders in elections and that the term “political purpose” is too vague.<sup>83</sup> An update to the CRA that would have included reporting requirements for individual expenditures passed the Senate five times before finally passing the House in 2017, only to be vetoed by Governor Susana Martinez.<sup>84</sup>

Fortunately, the New Mexico Secretary of State, Maggie Toulouse Oliver, held hearings and passed administrative rules and regulations in 2017 that will capture most independent spending by non-major purpose groups.<sup>85</sup> Senate Majority Leader Peter Wirth has vowed to bring the legislation back in the 2019 session and is currently working with advocates to update the bill.<sup>86</sup>

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<sup>79</sup> *C.f.* Heath Haussamen, *Nonprofits get appellate court's backing in fight with AG, SOS*, NMPOLITICS.NET (June 30, 2010), <http://nmpolitics.net/index/2010/06/appeals-court-backs-nonprofits-in-fight-with-ag-sos/> [https://perma.cc/9B9K-K6S6] (describing the state's resistance to complying with the court's ruling); *see also* Adele Hayer & Alex Tausanovitch, *The Fight Against Dark Money in New Mexico and Beyond*, CTR. FOR AM. PROGRESS (Oct. 10, 2017, 9:10 AM), <https://www.americanprogress.org/issues/democracy/news/2017/10/10/440495/fight-dark-money-new-mexico-beyond/> [https://perma.cc/3Z4H-PX8Z].

<sup>80</sup> *See* Jennings, *supra* note 77.; *see also* Sandra Fish, *Campaign finance reform bill increases lawmaker contribution limits*, N.M. IN DEPTH (Jan. 27, 2017), <http://nminddepth.com/2017/01/27/campaign-finance-reform-bill-increases-lawmaker-contribution-limits/> [https://perma.cc/TJD6-N8BZ].

<sup>81</sup> *See* Joey Peters, *Campaign finance reporting changes prove controversial*, N.M. POLITICAL REPORT (July 24, 2017), <http://nmpoliticalreport.com/2017/07/24/campaign-finance-reporting-changes-prove-controversial/> [https://perma.cc/T9JT-YCV4].

<sup>82</sup> *See* N.M. STAT. ANN. § 1-19-26 (West, Westlaw through end of First Reg. Sess. of the 54th Leg. (2019)). *See also* COMMON CAUSE NEW MEXICO, GUIDE TO NEW MEXICO LAWS GOVERNING CAMPAIGN FINANCE DISCLOSURE BY CAMPAIGN PARTICIPANTS OTHER THAN CANDIDATES (2018), <https://www.commoncause.org/new-mexico/wp-content/uploads/sites/19/2018/03/guide-to-independent.pdf> [https://perma.cc/R7SB-JRMW].

<sup>83</sup> *See* Peters, *supra* note 81; *see also* Viki Harrison, *Guide to Campaign Finance Solutions*, COMMON CAUSE NEW MEXICO (Nov. 23, 2015), <https://www.commoncause.org/new-mexico/democracy-wire/guide-to-campaign-finance-1/> [https://perma.cc/4URT-4JNJ].

<sup>84</sup> *See* Press Release, Campaign Legal Ctr., Gov. Martinez Vetoes Disclosure Bill, Rejecting Bipartisan Push for Government Transparency (Apr. 7, 2017), <https://campaignlegal.org/press-releases/gov-martinez-vetoes-disclosure-bill-rejecting-bipartisan-push-government> [https://perma.cc/52GQ-KUZS].

<sup>85</sup> *See* 2017 Campaign Finance Rulemaking, N.M. SEC'Y OF STATE (2017), [http://www.sos.state.nm.us/Elections\\_Data/2017-campaign-finance-rulemaking.aspx](http://www.sos.state.nm.us/Elections_Data/2017-campaign-finance-rulemaking.aspx) [https://perma.cc/J56Q-WA74]. *See also* Dan Boyd, *New campaign spending rules to take effect*, ALBUQUERQUE J. (Sept. 8, 2017, 9:41 PM), <https://www.abqjournal.com/1060480/nm-secretary-of-state-adopts-new-political-spending-rules.html> [https://perma.cc/Z7UD-TJDZ].

<sup>86</sup> *See* Morgan Lee, *New Mexico Democrats solidify control with midterm elections*, ASSOCIATED PRESS (Nov. 7, 2018), <https://www.apnews.com/a9a939443031459b88e9ce8658768935> [https://perma.cc/UL3G-UV7A]; *see also* Adele Hayer & Alex Tausanovitch, *The Fight Against Dark Money in New Mexico and Beyond*, CTR. FOR AM. PROGRESS (Oct. 10, 2017,

#### 4. Publicly Financed Elections (introduced but not passed)

The task force report noted that New Mexico currently has limited public financing for elections, stating that “in 2003, the legislature passed, and the governor signed the Voter Action Act, creating public financing for Public Regulation Commission races.”<sup>87</sup> Additionally, “in 2005, voters in Albuquerque approved a ballot referendum . . . that developed a system of public financing for future mayoral and council races.”<sup>88</sup>

The Task Force report in 2006 recommended that New Mexico provide for public financing of all statewide and contested judicial court elections.<sup>89</sup>

In 2007, the Legislature passed public financing for the state Supreme Court and New Mexico Court of Appeals races.<sup>90</sup> Publicly financed elections are important because they allow anyone to run for public office and not just the wealthy or well-connected.<sup>91</sup> Additionally, these candidates often “spend more time listening to and meeting with their constituents, instead of consistently focusing on raising big money from just a handful of wealthy donors.”<sup>92</sup>

#### D. Previous Efforts to Create Ethics Policies and Commissions

The 2006 task force was not New Mexico’s first attempt to address corruption in government.<sup>93</sup> In 1992, then-Governor Bruce King convened his own Task Force.<sup>94</sup> According to the findings in the 2006 Task Force report:

The 1992 Governmental Ethics Task Force made several recommendations to the legislature with respect to campaign reporting, lobbyist regulation, financial disclosure and governmental conduct at the state level of government . . . The 1992 Governmental Ethics Task Force also recommended the creation of a governmental

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9:10 AM), <https://www.americanprogress.org/issues/democracy/news/2017/10/10/440495/fight-dark-money-new-mexico-beyond/> [<https://perma.cc/3Z4H-PX8Z>].

<sup>87</sup> See GOVERNOR’S ETHICS & CAMPAIGN FIN. REFORM TASK FORCE SUBCOMM., SUBCOMMITTEE REPORT ON PUBLIC FINANCING OF CAMPAIGNS 4 (2006), [https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1026&context=law\\_service\\_ethicsreform](https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1026&context=law_service_ethicsreform) [<https://perma.cc/49VU-D3RK>].

<sup>88</sup> *Id.* at 4.

<sup>89</sup> *Id.*

<sup>90</sup> See Press Release, Bill Richardson, Governor, N.M., Governor Richardson Signs Landmark Public Campaign Financing Bill; Makes State Second in Nation to Provide Public Financing for Statewide Judicial Elections (Apr. 13, 2007), <http://www.presidency.ucsb.edu/ws/index.php?pid=94475> [<https://perma.cc/9S2K-HS3Z>].

<sup>91</sup> See *Putting Everyday New Mexicans Before Big Money Interests*, COMMON CAUSE NEW MEXICO: CAMPAIGN PUB. FIN., <https://www.commoncause.org/new-mexico/our-work/reduce-moneys-influence/campaign-public-financing/> [<https://perma.cc/R3LD-5VHY>] (last visited Nov. 7, 2018).

<sup>92</sup> *Id.*

<sup>93</sup> See REPORT OF RECOMMENDATIONS, *supra* note 64, at 15.

<sup>94</sup> See *id.*

ethics oversight committee and an interim legislative ethics committee to examine campaign financing alternatives to impose a check on the costs of campaigns at the statewide level and to explore the concept of public financing or partial public financing of political campaigns. In addition, the task force suggested that the governmental ethics oversight committee look for reforms necessary in the Anti- Nepotism Act. Finally, the task force recommended further study of means to reimburse legislators for legislative office expenses.<sup>95</sup>

The report also details which of the policies the Legislature addressed between the 1992 and 2006 Task Forces, including the Governmental Conduct Act, NMSA 1978, Chapter 10, Article 16 (“GCA”),<sup>96</sup> that was originally enacted in 1967 as the Conflicts of Interest Act.<sup>97</sup> According to New Mexico Attorney General Hector Balderas, “the current title was enacted as part of an extensive revision to the law in 1993” and was “not significantly amended again until 2007.”<sup>98</sup>

The 1993 amendments included prohibiting the receipt of honoraria by various public officials, introduced new campaign reporting requirements, and prohibited legislators from using campaign funds for living expenses.<sup>99</sup> The state also established legislative committees to examine ethics violations in state government.<sup>100</sup> These are the same legislative ethics committees whose members and actions were unknown to the public until 2016 when former State Senator Phil Griego resigned before the ethics committee finished its investigation.<sup>101</sup> The public found out about this committee after it was reported in the media that it even existed.<sup>102</sup>

### 1. *Weaker Policies Proposed*

In 2010, good government advocates were forced to oppose an ethics commission bill sponsored by Senate Rules committee Chair Linda Lopez. According to a press release, this bill would have created an ethics commission with too many flaws.<sup>103</sup> The danger in passing a weak commission that

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<sup>95</sup> *Id.*

<sup>96</sup> *See id. at 5.*

<sup>97</sup> *See* OFFICE OF NEW MEXICO ATT’Y GEN., GOVERNMENTAL CONDUCT ACT COMPLIANCE GUIDE 1 (2015), <https://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Governmental%20Conduct%20Act%20Compliance%20Guide%202015.pdf> [<https://perma.cc/S5S5-ZCAH>].

<sup>98</sup> *Id.*

<sup>99</sup> *See* REPORT OF RECOMMENDATIONS, *supra* note 64, at 15.

<sup>100</sup> *See id.*

<sup>101</sup> *See* Trip Jennings, *NM Senators like ethics status quo*, N.M. IN DEPTH (Feb. 26, 2016), <http://nmindepth.com/2016/02/26/nm-senators-like-ethics-status-quo-audio/> [<https://perma.cc/97NL-X45B>].

<sup>102</sup> *See id.*

<sup>103</sup> *See* Press Release, Sarah Welsh, *Good Government Groups Raise Objections to Secrecy Provisions in Ethics Commission Proposals*, N.M. FOUND. FOR OPEN GOV’T (Feb. 16, 2010), <https://www.commoncause.org/new-mexico/resource/good-government-groups-raise-objec>

does not have independence and authority is that voters will believe that they have an ethics commission that is functional, and then, when it is not, they are even more disillusioned with the political process.<sup>104</sup>

Additionally, Senate Bill 43 (2010) stated that a private citizen who filed an ethics complaint and then talked about it publicly could face penalties of up to \$26,000 and a year in jail.<sup>105</sup> Ironically, in the same bill, a public official, employee or lobbyist found to have actually committed an ethics violation would only receive a public reprimand from the ethics commission.<sup>106</sup> For these reasons, the New Mexico Foundation for Open Government, Common Cause New Mexico, the Greater Albuquerque Chamber of Commerce, AARP, and the League of Women Voters New Mexico asked legislators to amend the bill and remove these provisions.<sup>107</sup> Having larger violations for talking about a complaint versus actually violating the law makes no sense, and defeating the bill became a priority for these organizations.<sup>108</sup>

Advocates of ethics reform had additional transparency concerns with the bill.<sup>109</sup> The bill required the ethics commission to keep nearly all ethics commission meetings, the entire hearing process, and nearly all documents collected by the commission confidential.<sup>110</sup> In fact, this commission would only be required to release advisory opinions, an annual report, and final reports in the case of a guilty verdict.<sup>111</sup>

Fortunately, this bill did not pass in 2010, nor in any subsequent year.<sup>112</sup> Functional ethics commissions must have open meetings, release reports and have the power to hold legislators accountable.<sup>113</sup> This left an open path for advocates to pursue the constitutional amendment that passed in 2018.<sup>114</sup>

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tions-to-secrecy-provisions-in-ethics-commission-proposals/ [https://perma.cc/K3SQ-ELN8]; see also Terrell, *supra* note 3; see also Jennings, *supra* note 16.

<sup>104</sup> See Jeff Bingaman and Garrey Carruthers, *Independent Ethics Commission can restore faith in state government*, SANTA FE NEW MEXICAN (Oct. 13, 2018), [http://www.santafenewmexican.com/opinion/my\\_view/independent-ethics-commission-can-restore-faith-in-state-government/article\\_e2f6ca34-82e4-5f1d-b7b7-8e1a48b80126.html](http://www.santafenewmexican.com/opinion/my_view/independent-ethics-commission-can-restore-faith-in-state-government/article_e2f6ca34-82e4-5f1d-b7b7-8e1a48b80126.html) [https://perma.cc/3QX3-ZDVS].

<sup>105</sup> See N.M. S.B. 43, 49th Leg., Reg. Sess. (N.M. 2018).

<sup>106</sup> See *id.*

<sup>107</sup> Matthew Reichbach, *A brief history of the Legislature rejecting ethics commissions*, N.M. POL. REP. (Feb. 16, 2016), <http://nmpoliticalreport.com/32322/a-brief-history-of-the-legislature-rejecting-ethics-commissions-nmleg/> [https://perma.cc/QB3Q-TLED].

<sup>108</sup> See *id.*

<sup>109</sup> See Welsh, *supra* note 103.

<sup>110</sup> See N.M. S.B. 43, *supra* note 105.

<sup>111</sup> See *id.*

<sup>112</sup> See Terrell, *supra* note 16.

<sup>113</sup> See Editorial, *Secrecy a Fatal Flaw in Ethics Commission Plan*, ALBUQUERQUE J., Feb. 13, 2010, at A8 (calling for such traits in an ethics commission).

<sup>114</sup> See COMMON CAUSE N.M., PRINCIPLES OF AN EFFECTIVE STATE ETHICS COMMISSION 1 (Sept. 12, 2018) [hereinafter EFFECTIVE STATE ETHICS COMMISSION], <https://www.commoncause.org/new-mexico/wp-content/uploads/sites/19/2018/09/Principles-of-an-Effective-State-Ethics-Commission.pdf> [https://perma.cc/4SJ6-53X3].

## 2. *Best Principles for Provisions That Should Not Be Included*

As evidenced by advocate opposition to Senate Bill 43 in 2010, certain provisions should not be included in an ethics commission.<sup>115</sup> “Confidentiality requirements that . . . attempt to limit discussion of the case by the complainant, the press or the public”; “[p]rohibitions against filing complaints or conducting commission proceedings during an election year”; and “requirements for proof of “willfulness” as a prerequisite to finding a violation” all “effectively reduce” the effectiveness of a commission.<sup>116</sup>

## II. 2017 ETHICS PASSES AND GOES TO THE VOTERS IN 2018

New Mexico joined forty-four other states in 2017 when the state legislature passed a constitutional amendment calling for an independent state ethics commission. The commission was voted on by the people in November 2018 and passed by 75% of the vote.<sup>117</sup> Creating an effective, fair and impartial ethics commission in any state legislature is no simple task because it requires legislators to give someone else the power to investigate and hold legislators accountable, which legislators often feel they can do themselves.<sup>118</sup> Nowhere is this more obvious than in New Mexico where the effort took more than forty years to bring to fruition.<sup>119</sup> Advocates and legislators championing the commission faced large challenges as they worked to create an ethics commission, and there are future opportunities for legislators to insert weakening language in the subsequent enabling legislation.<sup>120</sup>

The constitutional amendment to the New Mexico State Constitution creates a seven-member “State Ethics Commission”, with the following language placed on the ballot for voters in November of 2018:

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<sup>115</sup> *See id.*

<sup>116</sup> *Id.*

<sup>117</sup> *See Create an Independent State Ethics Commission, COMMON CAUSE NEW MEXICO: ETHICS & ACCOUNTABILITY*, <https://www.commoncause.org/new-mexico/our-work/create-ethical-open-government/independent-state-ethics-commission/> [https://perma.cc/393M-G8S3] (last visited Nov. 7, 2018). *See also* Dan McKay, *Independent ethics commission, bond proposals win approval*, ALBUQUERQUE J. (Nov. 6, 2018), <https://www.abqjournal.com/1242788/voters-weigh-ethics-commission-state-bonds.html> [https://perma.cc/5Q5Q-Y7PD]; *New Mexico overwhelmingly backs ethics commission*, SANTA FE NEW MEXICAN (Nov. 6, 2018), [http://www.santafenewmexican.com/news/local\\_news/new-mexico-overwhelmingly-backs-ethics-commission/article\\_54cd9aca-e4c3-56c8-8bf0-6968fd5018ea.html](http://www.santafenewmexican.com/news/local_news/new-mexico-overwhelmingly-backs-ethics-commission/article_54cd9aca-e4c3-56c8-8bf0-6968fd5018ea.html) [https://perma.cc/BN8Q-657A]; Trip Jennings, *In historic first, NM state senate passes ethics commission proposal*, N.M. IN DEPTH (Mar. 16, 2017), <http://nmindepth.com/2017/03/16/in-historic-first-nm-state-senate-passes-ethics-commission-proposal/> [https://perma.cc/5PUG-RNHH].

<sup>118</sup> *See* Boyd, *supra* note 4; *see also* Nicholas Kusnetz, *Secrecy, corruption and conflicts of interest pervade state governments*, USA TODAY (Nov. 9, 2015), <https://www.usatoday.com/story/news/2015/11/09/center-integrity-corruption-grades-states/74823212/> [https://perma.cc/6SXQ-ZW6B].

<sup>119</sup> *See* Jennings, *supra* note 117.

<sup>120</sup> *See* Trip Jennings, *Lawmakers get started on ethics commission enabling legislation*, N.M. IN DEPTH (Sept. 27, 2018), <http://nmindepth.com/2018/09/27/lawmakers-get-started-on-ethics-commission-enabling-legislation/> [https://perma.cc/EEQ6-9NY3].

Constitutional Amendment 2: Proposing an amendment to Article 5 of the Constitution of New Mexico to create an independent State Ethics Commission with jurisdiction to investigate, adjudicate and issue advisory opinions concerning civil violations of laws governing ethics, standards of conduct and reporting requirements as provided by law.<sup>121</sup>

In the language placed in the New Mexico State Constitution, complaints may pertain to any “state officers and employees of the executive and legislative branches of government, candidates or other participants in elections, lobbyists or government contractors or seekers of government contracts and have such other jurisdiction as provided by law.”<sup>122</sup>

The commission members will have their own subpoena and adjudicatory powers to investigate and resolve complaints received. Keeping these powers in the constitutional amendment was no easy task. There were attempts by legislators to remove this provision. Some felt that according these powers went too far and would cause the ethics commission to become political.<sup>123</sup>

Of the seven members of the commission, no more than three will be members of the same political party. The appointment process is detailed in the Constitutional Amendment and requires that the governor, president pro tempore of the senate, minority floor leader of the senate, speaker of the house of representatives, and minority floor leader of the house of representatives each appoint one member.<sup>124</sup> Then two members of differing parties will be appointed by the four legislatively appointed members.<sup>125</sup>

Since voters passed the amendment in 2018, the legislation that details guidelines for the commission and its specific duties will be introduced in the 2019 legislative session. This “enabling legislation” will empower the ethics commission to begin its work by detailing all the specifics needed for administering the ethics commission.<sup>126</sup>

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<sup>121</sup> For the complete language that passed the legislature in 2017 and will be placed in the New Mexico State Constitution after passing in November 2018 by 75% of the vote, see H.J.R. 8, 53rd Leg., 1st Sess. (N.M. 2017), <https://www.nmlegis.gov/Sessions/17%20Regular/final/HJR08.pdf> [<https://perma.cc/59V9-XK94>] [hereinafter H.J.R. 8].

<sup>122</sup> *Id.*

<sup>123</sup> See Trip Jennings, *House and Senate trade ethics and transparency measures*, N.M. IN DEPTH (Mar. 7, 2017), <http://nminddepth.com/2017/03/07/house-and-senate-trade-ethics-and-transparency-measures/> [<https://perma.cc/756S-A7MR>]; see also Trip Jennings, *Senate committee throws late session ethics commission monkey wrench*, N.M. IN DEPTH (Mar. 13, 2017), <http://nminddepth.com/2017/03/13/senate-committee-throws-late-session-ethics-commission-monkey-wrench/> [<https://perma.cc/8MUJ-CCVP>].

<sup>124</sup> See H.J.R. 8, *supra* note 121.

<sup>125</sup> See *Id.*

<sup>126</sup> See N.M. LEGISLATIVE COUNCIL SERV., PIECEMEAL AMENDMENT OF THE CONSTITUTION OF NEW MEXICO SINCE 1911 ,13 (Dec. 2012), [http://www.sos.state.nm.us/uploads/FileLinks/5956c7d8067d44a58da54d9dc79b50f3/Piecemeal\\_Amendment.pdf](http://www.sos.state.nm.us/uploads/FileLinks/5956c7d8067d44a58da54d9dc79b50f3/Piecemeal_Amendment.pdf) [<https://perma.cc/2JV5-W6XK>].



*A. How 2017 Became the Year for the Winning Campaign*

The New Mexico State Legislature finally passed a constitutional amendment for an ethics commission in 2017.<sup>127</sup> However, what was ultimately passed the House and Senate in March of 2017 was quite different from the constitutional amendment as it was introduced in January 2017.<sup>128</sup>

Sponsors in 2017 included Representatives Jim Dines, Nathan Small, Bill McCamley, and Damon Ely, and Senator Jeff Steinborn.<sup>129</sup> Leadership in both the Senate and House were instrumental to the amendment's passage and House Speaker Brian Egolf, Senate Majority Leader Peter Wirth and House Minority Floor Leader Nate Gentry showed leadership and helped navigate the bill through committees, floor votes, and conference committees.<sup>130</sup>

As often happens in our democratic system, legislators in each committee and on the floors in both houses amended this particular constitutional amendment.<sup>131</sup> It also went to two conference committees, where selected leaders from both parties and both houses sat down and agreed on last minute amendments.<sup>132</sup>

The constitutional amendment was assigned to three committees in the House.<sup>133</sup> It passed the House State Government, Indian & Veterans' Affairs Committee with only one dissenting vote, and then passed the House Local Government, Elections, Land Grants & Cultural Affairs Committee unanimously.<sup>134</sup> Then, the House Judiciary Committee made significant changes to the amendment, passing a committee substitute that kept most of the critical provisions of the amendment.<sup>135</sup> The full House of Representatives then passed the constitutional amendment a few days later on a unanimous 66-0 vote.<sup>136</sup>

The Amendment went to the Senate with only nine days remaining in the legislative session. Fortunately, it was assigned to only one committee in

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<sup>127</sup> H.J.R. 8., *supra* note 121.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Morgan Lee, *Ethics Commission Proposal Advances in New Mexico*, U.S. NEWS & WORLD REP. (Mar. 6, 2017, 8:27 PM), <https://www.usnews.com/news/best-states/new-mexico/articles/2017-03-06/ethics-commission-proposal-advances-in-new-mexico> [<https://perma.cc/27NE-UDNV>].

<sup>134</sup> H.J.R. 8., *supra* note 121.

<sup>135</sup> See Trip Jennings, *NM lawmakers try again on ethics committee bill*, LAS CRUCES SUN NEWS (Mar. 7, 2017, 10:17 AM), <https://www.lcsun-news.com/story/news/local/new-mexico/legislature/2017/03/07/nm-lawmakers-try-again-ethics-committee-bill/98851306/> [<https://perma.cc/X6BC-B4AQ>].

<sup>136</sup> See Dan McKay, *NM House backs independent ethics panel*, ALBUQUERQUE J. (Mar. 9, 2017, 11:47 PM), <https://www.abqjournal.com/966137/house-sends-ethics-commission-to-senate-on-66-0-vote.html> [<https://perma.cc/6E6Q-JEE4>].

the Senate—the Senate Rules Committee (SRC).<sup>137</sup> Unfortunately, this is where the bill died the previous year when many of the amendments offered in committee weakened the bill, and Representative Dines pulled it from consideration with only two days left in the session.<sup>138</sup> The SRC also made substantial changes to the constitutional amendment, virtually replacing all the language and substituting it with a much shorter amendment.<sup>139</sup> Yet, they passed it on a 9-1 vote and sent it to the full Senate with three days left in the session.<sup>140</sup>

The full Senate debated the measure on March 16, 2017 and it passed 30-9, making it the first time an ethics commission bill or constitutional amendment has ever passed the State Senate in New Mexico.<sup>141</sup> But since there were changes made in the Senate, it needed to go back to the House for concurrence on all amendments.<sup>142</sup> The Senate accepted some changes leading to a second conference committee scheduled for later that evening on

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<sup>137</sup> See Jennings, *supra* note 135; see also Steve Terrell, *Proposal for state ethics commission advances to full Senate*, SANTA FE NEW MEXICAN (Mar. 15, 2017), [http://www.santafenewmexican.com/news/legislature/proposal-for-state-ethics-commission-advances-to-full-senate/article\\_c77fe1b5-9901-575f-8195-706aace3b7f8.html](http://www.santafenewmexican.com/news/legislature/proposal-for-state-ethics-commission-advances-to-full-senate/article_c77fe1b5-9901-575f-8195-706aace3b7f8.html) [<https://perma.cc/BK8H-625X>].

<sup>138</sup> See Terrell, *supra* note 19.

<sup>139</sup> Compare H.J.R. 8, 53rd Leg., 1st Sess. (N.M. 2017), <https://www.nmlegis.gov/Sessions/17%20Regular/resolutions/house/HJR08.pdf> [<https://perma.cc/4X5P-Y29A>] (explanation of the important details of the original amendment that changed), with H.R.J. Res. 8, 53rd Leg., 1st Sess. (N.M. 2017), <https://www.nmlegis.gov/Sessions/17%20Regular/resolutions/house/HJR08JCS.pdf> [<https://perma.cc/5JW7-P4A3>] (Language removed from the original version includes the funding requirement, “[t]he state ethics commission shall receive an annual appropriation sufficient to enable it to perform its duties,” staffing requirements, “[t]he state ethics commission shall employ an executive director, who shall be a licensed attorney in the state, and other staff as necessary to fulfill its duties,” public hearings, “upon the presentation of clear and convincing evidence to the commission in a public hearing,” the ethics commission’s exclusive civil jurisdiction, “[t]he state ethics commission shall have exclusive jurisdiction over civil violations of law that are within its jurisdiction,” when dismissed complaints are made public “[t]he commission shall make public complaints that have been dismissed without a hearing and the reason for the dismissal,” that complaints with findings will be made public “[t]he commission shall maintain as confidential the complaint and the response to the complaint until such time as the response to the complaint is filed or the date the response to the complaint is due to be filed, whichever is earlier,” and the definitions of “standards of conduct” and “state officer or employee,” with the full definitions here removed from the final version, “standards of conduct” include statutes and rules promulgated pursuant to statutes that regulate conduct in a manner designed to: (a) avoid conflicts of interest or the appearance of corruption; (b) define appropriate or inappropriate conduct of public officers and employees, candidates for public office, participants in the political process, government contractors or lobbyists; (c) discourage the inappropriate use of public resources by persons for private gain; (d) encourage the use of the powers and resources of public office to advance the public interest and to not obtain personal benefits or pursue private interests; or (e) discourage the abuse of power by public officers and employees;” and “state officer or employee” means any elected or appointed official or employee of a state agency, instrumentality or institution of the state in the executive or legislative branch of government.”).

<sup>140</sup> See Terrell, *supra* note 137.

<sup>141</sup> See Jennings, *supra* note 117.

<sup>142</sup> See Steve Terrell, *Ethics commission amendment hits roadblock*, SANTA FE NEW MEXICAN (Mar. 16, 2017), [http://www.santafenewmexican.com/news/legislature/ethics-commission-amendment-hits-roadblock/article\\_cfa22758-09be-53d7-a27d-ea7f9185525f.html](http://www.santafenewmexican.com/news/legislature/ethics-commission-amendment-hits-roadblock/article_cfa22758-09be-53d7-a27d-ea7f9185525f.html) [<https://perma.cc/4FG2-4Y7J>]; see also *The Latest: Negotiations extended on ethics commission*, ASSOCIATED PRESS (Mar. 16, 2017) [hereinafter *Negotiations extended on ethics commission*], <https://>

Friday, less than 24 hours before the end of the session.<sup>143</sup> Once again, the conference committee accepted some of the changes. But this time, when it went back to the Senate for concurrence, the Senate concurred and the constitutional amendment to create an independent ethics commission in New Mexico was complete and ready for the November 2018 ballot.<sup>144</sup>

Some of the amendments weakened the constitutional amendment and thus the independent ethics commission itself.<sup>145</sup> Supporters will advocate to change these pieces in the enabling legislation to be considered in the 2019 session.<sup>146</sup>

One provision that was amended out of the 2017 constitutional amendment is how complaints are dealt with by the commission. This includes determining how long complaints will be kept confidential before being released to the public, how many public hearings are held, and how responses are released to the public will now be included in the subsequent enabling legislation considered in the 2019 legislative session.<sup>147</sup> Additionally, establishing guidelines for how the commission is funded each year and how staff is hired will be important to the commission's success.<sup>148</sup>

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www.apnews.com/d320860719364ffa9c2fdabc4ba1fe31/The-Latest:-Negotiations-extended-on-ethics-commission [https://perma.cc/U3AU-Q5MS].

<sup>143</sup> See Morgan Lee, *Details of New Mexico ethics commission under negotiation*, LAS CRUCES SUN NEWS (Mar. 16, 2017), <https://www.lcsun-news.com/story/news/2017/03/16/details-new-mexico-ethics-commission-under-negotiation/99291304/> [https://perma.cc/W2UD-T34W].

<sup>144</sup> See Morgan Lee, *Ethics commission initiative heads to ballot in New Mexico*, WASH. TIMES (Mar. 17, 2017), <https://www.washingtontimes.com/news/2017/mar/17/compromise-outlined-on-new-mexico-ethics-commission/> [https://perma.cc/T7TV-YZGU].

<sup>145</sup> See Boyd, *supra* note 11; see also Trip Jennings, *Ethics watchdog says bill before the Senate lacks teeth*, N.M. IN DEPTH (March 14, 2017), <http://nminddepth.com/2017/03/14/ethics-watchdog-says-bill-before-the-senate-lacks-teeth/> [https://perma.cc/QX86-WNBS].

<sup>146</sup> See, e.g., John Dilmore, *Ethics Commission advocates seek Roswell's input*, RDR ONLINE (May 28, 2018), <https://www.rdrnews.com/2018/05/28/ethics-commission-advocates-seek-roswells-input/> [https://perma.cc/F4A6-G9QG]; see also Steve Terrell, *After past corruption, ethics panel on ballot*, SANTA FE NEW MEXICAN (Oct. 23, 2018), [http://www.santafenewmexican.com/news/local\\_news/after-past-corruption-ethics-panel-on-ballot/article\\_a0059f11-cc9a-55db-83ad-be6043fe3df9.html](http://www.santafenewmexican.com/news/local_news/after-past-corruption-ethics-panel-on-ballot/article_a0059f11-cc9a-55db-83ad-be6043fe3df9.html) [https://perma.cc/F2FQ-JSZU].

<sup>147</sup> Compare H.R.J. Res. 8, 53rd Leg., 1st Sess. (N.M. 2017), <https://www.nmlegis.gov/Sessions/17%20Regular/resolutions/house/HJR08.pdf> [https://perma.cc/4X5P-Y29A] (explanation of the details of the original version with respect to confidentiality, public hearings, and how responses are released), *with* H.R.J. Res. 8, 53rd Leg., 1st Sess. (N.M. 2017), <https://www.nmlegis.gov/Sessions/17%20Regular/final/HJR08.pdf> [https://perma.cc/92HV-3WEX] (Language removed from the original version around confidentiality, public hearings, and how responses are released include “upon the presentation of clear and convincing evidence to the commission in a public hearing, . . . [t]he commission shall make public complaints that have been dismissed without a hearing and the reason for the dismissal,” and “[t]he commission shall maintain as confidential the complaint and the response to the complaint until such time as the response to the complaint is filed or the date the response to the complaint is due to be filed, whichever is earlier.”). See also Trip Jennings, *Ethics commission proposal clears perennial hurdle, heads to full Senate*, SANTA FE NEW MEXICAN (March 15, 2017), <http://nminddepth.com/2017/03/15/ethics-commission-proposal-clears-perennial-hurdle-heads-to-full-senate/> [https://perma.cc/VBW6-AK8V].

<sup>148</sup> See H.J.R. Res. 8, *supra* note 121. See also MEGAN COMLOSSY, NAT'L CONF. OF STATE LEGISLATURES, ETHICS COMMISSIONS: REPRESENTING THE PUBLIC INTEREST, [http://www.ncsl.org/documents/lss/ethics\\_commissions.pdf](http://www.ncsl.org/documents/lss/ethics_commissions.pdf) [https://perma.cc/WQ2R-3W6U]; NAT'L CONF. OF STATE LEGISLATURES, STATE ETHICS COMMISSIONS: POWER

B. *Opposition and Doubt from Legislature*

As evidenced by the decades it took to get the Legislature to pass an independent ethics commission to send to the voters, opposition to ethics reform ruled the halls of the New Mexico Roundhouse for many years.<sup>149</sup> The Senate proved more obstructionist than the House.<sup>150</sup> The House routinely passed ethics bills, which the State Senate refused to hear.<sup>151</sup>

For years, Senate leaders felt that an ethics committee or commission was unnecessary, and as Senator Stuart Ingle said many times, “you either have ethics or you don’t – you can’t legislate [it].”<sup>152</sup> He, along with Senator Michael Sanchez (former Senate majority leader), served on the Senate Rules Committee, and even when ethics commission bills passed the House, they did not get a hearing in the Rules Committee, which is an essential first step for any good government bill in New Mexico.<sup>153</sup>

Of course, there have been “ethics committees” established in the New Mexico Legislature where legislators police themselves, and only recently (since Senator Phil Griego resigned from the Senate in 2016) have the names of those on the committees been made public.<sup>154</sup> The meetings are still private and the committees do not release any findings.<sup>155</sup>

Another argument against an independent ethics commission has been the old adage, “If the voters don’t like me, they can vote me out.” However, voters are often unable to vote legislators out because New Mexico’s legislative races are some of the most uncontested in the country thanks to gerrymandering that ensures one political party always has the advantage in a given district.<sup>156</sup> In the 2016 primary elections, 47.3% of New Mexico’s state legislative districts only had candidates from one major party file to run, which means that only one major party candidate was on the ballot in November, making New Mexico the eighth worst in the country for lack of

AND DUTIES (Jan. 4, 2018) [hereinafter STATE ETHICS COMMISSIONS], <http://www.ncsl.org/research/ethics/50-state-chart-state-ethics-commissions-powers-a.aspx> [https://perma.cc/LW4D-8P5Y].

<sup>149</sup> See Dede Feldman, *When it comes to ethics, can citizen legislators draw bright lines in gray area?* N.M. POL. REP. (Feb. 10, 2016), <http://nmpoliticalreport.com/2016/02/10/when-it-comes-to-ethics-can-citizen-legislators-draw-bright-lines-in-a-gray-area-nmleg/> [https://perma.cc/99AH-3QWJ]; see also Terrell, *supra* note 16.

<sup>150</sup> See Boyd, *supra* note 4.

<sup>151</sup> See *id.* See also H.B. 190, 51st Leg., 1st Sess. (N.M. 2013); H.B. 43, 49th Leg., 2nd Sess. (N.M. 2010); H.B. 151, 49th Leg., 1st Sess. (N.M. 2009).

<sup>152</sup> Trip Jennings, *Ethics Reform on Life Support*, ALBUQUERQUE J. (Feb. 27, 2007), <https://www.abqjournal.com/news/xgr/2007/541906xgr02-27-07.html> [https://perma.cc/FF88-6DHS].

<sup>153</sup> See *id.*

<sup>154</sup> See *Interim Legislative Ethics Committee*, N.M. LEGISLATURE (2018), [https://www.nmlegis.gov/Committee/Interim\\_Committee?CommitteeCodeLEC](https://www.nmlegis.gov/Committee/Interim_Committee?CommitteeCodeLEC) [https://perma.cc/CPH4-V6FX].

<sup>155</sup> See Jennings, *supra* note 101.

<sup>156</sup> See DAN VICUNA ET AL., COMMON CAUSE EDUC. FUND, RESTORING VOTER CHOICE: HOW CITIZEN-LED REDISTRICTING CAN END THE MANIPULATION OF OUR ELECTIONS 8 (2016), <http://www.restoringvoterchoice.org> [https://perma.cc/B7MD-VNTE].

competition in the general election.<sup>157</sup> In addition to that low percentage of competition, in 44% of these races, there was no competition within the primaries – only one person from a major party filed to run (fourth worst), which means that the campaign was over even before the primary election as the one person has no opposition in either the primary or the general election.<sup>158</sup>

Gerrymandering affects democracy in many different ways, particularly in diminishing voter choice at the ballot.<sup>159</sup>

The most effective gerrymanders slice and dice communities with surgical precision to make the outcomes of district-wide elections as predictable and favorable as possible to the party in power. . . . In the most egregious cases, incumbent protection gerrymanders result in districts in which even major party primaries are uncontested. As a result, the election is over when the filing deadline passes— before a single vote is cast.<sup>160</sup>

A final note on opposition is that advocates of ethics reform continually told legislators and the media that pushing an ethics commission each year did not mean that advocates believed all elected officials were corrupt. Instead, a few corrupt legislators tarnished the Legislature’s public image. The passage of an effective, independent ethics commission could help restore public trust in the legislative process.

### C. Drivers of Legislative Support for Ethics Reform

Many legislators support the passage of an independent ethics commission to improve transparency and restore the public’s faith in elected officials.<sup>161</sup> Other key policy motivations include improving transparency and

<sup>157</sup> See *id.* In the general election, 61.6% of races had no competition.

<sup>158</sup> See *id.* at 8.

<sup>159</sup> See *id.* at 3.

<sup>160</sup> *Id.* at 3.

<sup>161</sup> The strongest champions over the last decade or so have included former State Senator Dede Feldman, former House Representative Mary Helen Garcia, State Representative Gail Chasey, then-State Representative and now-State Senator Joe Cervantes, House Speaker Brian Egolf, Senate Majority Leader Peter Wirth, State Senator Jeff Steinborn and State Representative Jim Dines. See Heath Haussamen, *Open-government champion retiring from Senate*, NMPOLITICS.NET (Feb. 24, 2012), <https://nmpolitics.net/index/2012/02/open-government-champion-retiring-from-senate/> [<https://perma.cc/9ZA8-6RNA>]; see also Heath Haussamen, *Richardson proposes powerful ethics commission, limits on gifts and campaign contributions*, NMPOLITICS.NET (Dec. 20, 2006), <https://nmpolitics.net/index/2006/12/richardson-proposes-powerful-ethics-commission-limits-on-gifts-and-campaign-contributions/> [<https://perma.cc/EM7G-MPC7>]; Dan Boyd, *State ethics panel is a work in progress*, ALBUQUERQUE J. (June 22, 2017, 12:05 A.M.), <https://www.abqjournal.com/1021774/state-ethics-panel-a-work-in-progress.html> [<https://perma.cc/7LFX-AZDD>]; see also Feldman, *supra* note 149; see also Trip Jennings, *Will independent ethics oversight catch in 2017?*, N.M. IN DEPTH (Jan. 17, 2017), <http://nminddepth.com/2017/01/17/will-independent-ethics-oversight-catch-on-in-2017/> [<https://perma.cc/XF6E-X9KG>]; Heath Haussamen, *Q&A: Majority Leader Wirth discusses ethics and transparency, the budget, and Michael Sanchez*, NMPOLITICS.NET (Jan. 11, 2017), <http://nmpolitics.net/index/2017/01/qa-majority-leader-wirth-discusses-ethics-and->

accountability, restoring faith in elected officials, maintaining healthy democracy, and preventing the flight of businesses.<sup>162</sup>

Former State Senator Dede Feldman often led the charge for ethics reform, campaign finance improvements, transparency, and contribution limits. She wrote in her blog in February 2015 that:

Almost all of the ethics initiatives were victims of a short session—and political moves designed to kill them. The Governor didn’t give messages or gave them too late, and House members got to vote for measures they knew would never make it through the Senate. Such is life in a divided body. The legislature may be able to save itself at the 11th hour from Real ID but can’t enact systemic reform to address deep-seated problems like declining public trust or economic stagnation.<sup>163</sup>

When then-Governor Bill Richardson proposed an ethics commission in 2006, then-State Representative Mary Helen Garcia, applauded his efforts even though she had her own ethics bill. As she told *NM Politics*, “his sounds much stronger than mine was and, for that reason, it’s even better. I really applaud his efforts. I think it’s very necessary.”<sup>164</sup> Her comments highlighted familiar arguments over the years about ethics in New Mexico—legislators introducing weaker bills than they personally support because of the difficulty getting any measure through the Legislature.

Shortly before the 2016 legislative session began, House Speaker Brian Egolf held a news conference and told the crowd, “Ethics appears to be like other issues in which you need to have a crisis before we get the momentum and the attention of the legislative body. . . . Clearly with what we’ve seen happening in the office behind us with Secretary Duran as well as questions swirling around the governor’s campaign finance regime, the time is now for a statewide ethics commission.”<sup>165</sup>

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transparency-the-budget-and-michael-sanchez/ [https://perma.cc/E7F4-NVY5]; Boyd, *supra* note 11; *New Mexico voters to decide on need for ethics commission*, KRWG PUBLIC MEDIA (Oct. 28, 2018), <http://www.krwg.org/post/new-mexico-voters-decide-need-ethics-commission> [https://perma.cc/E8CZ-82YN].

<sup>162</sup> See Dede Feldman, *Ground Control to Major Tom: We May Have a Systems Failure*, SENATOR DEDE FELDMAN’S BLOG (Feb. 23, 2016), [http://senatorfeldman.typepad.com/senator\\_dede\\_feldmans\\_blo/2016/02/ground-control-to-major-tom-we-may-have-a-systems-failure.html](http://senatorfeldman.typepad.com/senator_dede_feldmans_blo/2016/02/ground-control-to-major-tom-we-may-have-a-systems-failure.html) [https://perma.cc/9PSH-LFQH]; see also Trip Jennings, *Ethics proposal could double as business recruiting tool, supporters say*, N.M. IN DEPTH (Nov. 5, 2018), <http://nmindepth.com/2018/11/05/ethics-proposal-could-double-a-business-recruiting-tool-supporters-say/> [https://perma.cc/2XGN-9UQY]; see also Jennings, *supra* note 161.

<sup>163</sup> *Id.*

<sup>164</sup> Heath Haussamen, *Richardson proposes powerful ethics commission, limits on gifts and campaign contributions*, NMPOLITICS.NET (Dec. 20, 2006), <http://nmpolitics.net/index/2006/12/richardson-proposes-powerful-ethics-commission-limits-on-gifts-and-campaign-contributions/> [https://perma.cc/R696-WB8W].

<sup>165</sup> Steve Terrell, *State House Democrats propose ethics reform bills*, SANTA FE NEW MEXICAN (Nov. 24, 2015), [http://www.santafenewmexican.com/news/legislature/state-house-democrats-propose-ethics-reform-bills/article\\_4588b87b-edf9-5878-a1bc-39d859b2ac2d.html](http://www.santafenewmexican.com/news/legislature/state-house-democrats-propose-ethics-reform-bills/article_4588b87b-edf9-5878-a1bc-39d859b2ac2d.html) [https://perma.cc/KYA4-KRVA].

Representative Jim Dines,<sup>166</sup> the lead sponsor in 2017, promoted ethics reform on the grounds that it would help foster an atmosphere of healthy democracy. More ethical transparency would “lessen the public’s view of New Mexico as a very corrupt state.”<sup>167</sup> Such reform may also mitigate the problem that “businesses are leaving New Mexico.”<sup>168</sup>

When asked by *NM Politics* if he supported the creation of an independent ethics commission to set standards for conduct in government and police violations, Senator and Senate Majority Leader Peter Wirth replied, “Yes. I have always supported an independent ethics commission and have sponsored or co-sponsored bills and joint resolutions over the years. A commission provides a necessary forum to resolve complaints. It also is a place where ethical questions and dilemmas can be addressed before mistakes are made.”<sup>169</sup> Providing advisory opinions and answering questions about ethics for elected officials is an important piece for the commission and one that is critical for a citizens’ legislature with few staff and resources for members.<sup>170</sup>

Additionally, numerous non-profit organizations and businesses supported this effort over the years.<sup>171</sup> The Committee for Economic Development (CED) conducted surveys and focus groups with businesses to gauge their attitudes on ethics, campaign finance reform, contribution limits, and lobby disclosure.<sup>172</sup> The businesses supported an ethics commission more than the people did year after year.<sup>173</sup> According to the CED report, the research objectives “are to assess New Mexico business leaders’ perceptions of the influence of money in politics, campaign finance reform and transparency, the effects of crony capitalism on government corruption, and pro-

<sup>166</sup> The lead sponsor in 2017, Representative Jim Dines, was a tireless champion day and night in 2016 and 2017 to get this message to the voters. *See New Mexico voters to decide, supra* note 161.

<sup>167</sup> Trip Jennings, *Will independent ethics oversight catch in 2017?*, N.M. IN DEPTH (Jan. 17, 2017), <http://nminddepth.com/2017/01/17/will-independent-ethics-oversight-catch-on-in-2017/> [<https://perma.cc/XF6E-X9KG>].

<sup>168</sup> *Id.*

<sup>169</sup> Haussamen, *Q&A: Majority Leader Wirth, supra* note 161.

<sup>170</sup> *See* Jeff Bingaman & Garrey Carruthers, *Election 2018: Independent Ethics Commission Best Way to Restore Faith in New Mexico Government*, KRWG PUBLIC MEDIA (Oct. 9, 2018), <http://www.krwg.org/post/election-2018-independent-ethics-commission-best-way-restore-faith-new-mexico-government> [<https://perma.cc/7RHV-6B3F>].

<sup>171</sup> In addition to Common Cause New Mexico, the League of Women Voters New Mexico, the Albuquerque Chamber of Commerce, the New Mexico Foundation for Open Government, and many others worked tirelessly year after year advancing the reform. For a list of business leaders that also supported the measure, *see* Michael Stanford, *Ethics commission a first step to ending corruption*, ALBUQUERQUE J. (Oct. 1, 2015, 12:02 AM), <https://www.abqjournal.com/651937/ethics-commission-a-first-step-to-ending-corruption.html> [<https://perma.cc/TQ58-HK6W>].

<sup>172</sup> *See generally* COMM. FOR ECON. DEV., NEW MEXICO BUSINESS LEADERS SURVEY (2017) [hereinafter BUSINESS LEADERS SURVEY], <https://www.ced.org/reports/new-mexico-business-leaders-survey> [<https://perma.cc/5LJ9-6LV7>]; COMM. FOR ECON. DEV., CRONY CAPITALISM, CORRUPTION AND THE ECONOMY IN THE STATE OF NEW MEXICO (2016) [hereinafter CRONY CAPITALISM], [https://www.ced.org/pdf/NM\\_Report.pdf](https://www.ced.org/pdf/NM_Report.pdf) [<https://perma.cc/3KPH-RT5Y>].

<sup>173</sup> *See* BUSINESS LEADERS SURVEY, *supra* note 172. *See also* CRONY CAPITALISM, *supra* note 172, at 15.

posals the New Mexico State Legislature may consider to change transparency laws and the campaign finance system.”<sup>174</sup>

As reported by the CED, 251 business leaders from across the state were surveyed between December 2016 and January 2017, and some of the top results were consistent with the 2016 study, including:

- Over nine-in-ten (92%) leaders somewhat (17%) or strongly (75%) support the proposal requiring all political contributions and expenditures from individuals, corporations, political action committees (PACs), non-profits, or unions be made public.
- Over eight-in-ten (83%) leaders say they somewhat or strongly support the creation of an independent Ethics Commission to establish and enforce rules regarding the ethical behavior and actions of state officials. Of note, 82% were supportive in the 2016 study and 76% were supportive in the 2015 study.
- The vast majority (89%) of business leaders either strongly (66%) or somewhat (23%) support continuing to place limits on how much individuals and PACs can give to candidates. The percentage of leaders who are strongly supportive has increased since the previous study (66%, compared to 59% in the 2016 study).<sup>175</sup>

### III. EXPECTATIONS AND REALITIES OF LEGISLATIVE REFORM

Passing legislation to create an ethics commission is particularly difficult because it involves policy that directly affects the legislature.<sup>176</sup> However, legislators do not pose the only impediment to ethics reform.<sup>177</sup> Many advocacy organizations and business leaders also wanted more than what ended up being in the constitutional amendment.<sup>178</sup> Though this legislation is a start, advocates of ethics reform continue to seek additional improvements to build on this momentum.<sup>179</sup>

Some of Common Cause New Mexico’s partners felt that removing the provisions around public meetings and public complaints was an obstacle for advocates of the reform. All advocates of reform would have preferred to include these measures in the constitutional amendment. However, these provisions can be pursued in the enabling legislation in January 2019.

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<sup>174</sup> See BUSINESS LEADERS SURVEY, *supra* note 172.

<sup>175</sup> See *id.*

<sup>176</sup> See Douglas H.M. Carver, *An ethics commission? Not Quite*, NMPOLITICS.NET (June 5, 2017), <http://nmpolitics.net/index/2017/06/an-ethics-commission-not-quite/> [<https://perma.cc/G5BH-CSKY>].

<sup>177</sup> See *id.*

<sup>178</sup> See Boyd, *supra* note 161.

<sup>179</sup> See Dillmore, *supra* note 146.



*A. Is There an Exemplary National Program?*

When researching good ethics commission model language, Wisconsin stood out as a system that was considerably more non-partisan due to the members of that ethics board all being retired judges, familiar with the laws and ethics. According to the National Conference of State Legislatures (NCSL), New Mexico was one of only nine states without an ethics commission before 2018.<sup>180</sup> On the other hand, the 41 states with commissions all operate in different ways with various jurisdictions, duties and powers.<sup>181</sup>

Wisconsin was the gold standard for ethics commissions from 2007 until 2015. Wisconsin was unique because its Government Accountability Board was made up of retired judges, and not people appointed by elected officials—the latter being very common across the country in ethics commissions, including the commission in New Mexico.<sup>182</sup> Another unique and critical aspect of the Wisconsin Board was that the members of the Board, and not the elected officials, controlled funding for investigations.<sup>183</sup> This policy of allowing the Board to fund investigations and expenses without relying on the elected officials they are policing ensures the legislature and the governor cannot interfere with investigations by removing funding.<sup>184</sup>

Common Cause New Mexico suggested this idea of creating an ethics commission composed solely of retired judges to New Mexico legislators in 2014 and 2015 and found both strong support and strong opposition. Many Republicans feared that too many of New Mexico retired judges were Democrats, which may risk creating a partisan board even in the absence of political appointments.

In 2015, Wisconsin Governor Scott Walker dismantled and replaced the Government Accountability Board (GAB) with two much weaker elections and ethics commissions.<sup>185</sup> As the *Wisconsin State Journal* reported then, “The GAB, made up of six nonpartisan former judges, oversees elections, campaign finance, ethics and lobbying. The bill replaces it with two separate elections and ethics commissions overseen by appointees, most of them partisans, made by legislative leaders and the governor.”<sup>186</sup> Going from

<sup>180</sup> See COMLOSSY, *supra* note 148 at 2; see also STATE ETHICS COMMISSIONS, *supra* note 148.

<sup>181</sup> See *id.*

<sup>182</sup> See Jonathon Rauh, *Predicting Political Influence on State Ethics Commissions: Of Course We Are Ethical—Nudge Nudge, Wink Wink*, PUB. ADMIN. R. (Dec. 5 2014) <https://doi.org/10.1111/puar.12290> [<https://perma.cc/652W-3UX7>]; see also COMLOSSY, *supra* note 148; STATE ETHICS COMMISSIONS, *supra* note 148.

<sup>183</sup> See generally WIS. ELECTIONS COMM’N, HISTORICAL INFORMATION ABOUT THE FORMER WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, <https://elections.wi.gov/gab> [<https://perma.cc/4YBN-SXVS>]; S.B. 1, 2007–08 Leg., Jan. 2007 Spec. Sess. (Wis. 2007) [hereinafter S.B. 1].

<sup>184</sup> See *id.*

<sup>185</sup> See Julie Bosman, *Scott Walker Proposes Shutting Wisconsin Ethics Board*, N.Y. TIMES (July 20, 2015), <https://www.nytimes.com/2015/07/21/us/scott-walker-proposes-shutting-wisconsin-ethics-board.html> [<https://perma.cc/5XD7-6JUK>].

<sup>186</sup> See Mark Sommerhause, *Scott Walker signs bills dismantling GAB, overhauling campaign finance law*, WIS. ST. J. (Dec. 16, 2015), <https://madison.com/wsj/news/local/govt-and-poli>

nonpartisan retired judges with the authority to fund their own investigations to political appointees reliant on the legislature and governor for funding and enforcement, left Wisconsin with much weaker commissions.<sup>187</sup>

### B. *Best Elements of an Ethics Commission*

Common Cause New Mexico, along with input from many partners and experts, put together “best practices and principles from ethics commissions” to serve as a guide for ensuring the proper balance between transparency and the fear of false complaints.<sup>188</sup> These principles address specific powers and duties, confidentiality of proceedings, and non-inclusive provisions.<sup>189</sup>

#### 1. *Best Principles for Specific Powers and Duties of the Ethics Commission*

The highlights in the section pertain to the operating structure of the ethics commission.<sup>190</sup> Making sure the ethics commission receives complaints from anyone, that complaints not dismissed be investigated in a timely manner, that the ethics commission will be authorized to compel witnesses and production of evidence are but a few of the best principles identified for specific powers and duties.<sup>191</sup> Two more important pieces in this section are that the commission have a sufficient budget and that, following a hearing, the commission will make and publish its determination, accompanied by detailed written findings and conclusions, of whether a violation of the law had been established.<sup>192</sup>

#### 2. *Best Principles for Confidentiality of the Commission's Proceedings*

Confidentiality and false complaints have been a barrier to passing an ethics commission in New Mexico, and this section reflects the balance between the public knowing about corruption, and legislators being protected from frivolous complaints.<sup>193</sup> The commission and its staff should be subject to a duty of confidentiality at all stages of a proceeding.<sup>194</sup> However, once complaints have been determined to have merit, hearings will be conducted

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tics/scott-walker-signs-bills-dismantling-gab-overhauling-campaign-finance-law/article\_1b7a6063-8e98-514b-bceb-269f21f44574.html [https://perma.cc/W6BD-EKVR].

<sup>187</sup> *See id.*

<sup>188</sup> *See* EFFECTIVE STATE ETHICS COMMISSION, *supra* note 114.

<sup>189</sup> *Id.* at 1–2.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 2.

<sup>194</sup> *Id.*

in public.<sup>195</sup> Finally, “all determinations and dispositive orders of the commission will be published.”<sup>196</sup>

#### CONCLUSION

When the New Mexico Legislature convenes in January 2019, passing the ethics commission’s enabling legislation will be a critical task.<sup>197</sup> How the commission works, transparency and meeting format, hiring procedures, confidentiality, when to release complaints and responses, and much more will be debated and considered.<sup>198</sup>

The enabling legislation must contain the key provisions and principles described above. These include ensuring the ethics commission does not limit complaints, the ethics commission will be authorized to compel witnesses and production of evidence, hearings will be conducted in public, and all determinations and dispositive orders of the commission will be published.<sup>199</sup>

This effort will be competing with many other measures in the Legislature’s “long” session. With a new governor and nineteen new House members, at least one hundred important, must-pass bills are expected to be introduced.<sup>200</sup> This is in addition to a multitude of other legislation sure to be considered.<sup>201</sup>

As noted above, the enabling legislation is critical to a well-functioning independent ethics commission and will face challenges.<sup>202</sup> Many legislators who opposed creating an ethics commission will be ready to weaken its powers and limit its scope.<sup>203</sup> Additionally, they could work to stop or slow down the release of complaints and responses.<sup>204</sup> Yet, advocates are ready for any attempt to weaken the legislation. Common Cause New Mexico met with

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See Jennings, *supra* note 120.

<sup>198</sup> See *id.*

<sup>199</sup> See EFFECTIVE STATE ETHICS COMMISSION, *supra* note 114.

<sup>200</sup> This is something advocates have heard from leaders on both sides of the aisle in the Senate and House at outreach events throughout 2018. See Dan Boyd, *Progressive Democrats may not get all they want in session*, ALBUQUERQUE J. (Nov. 17, 2018, 11:41 PM), <https://www.abqjournal.com/1247883/progressive-democrats-may-not-get-all-they-want-in-session.html> [<https://perma.cc/MGD5-LRML>]; see also Steve Terrell, *Legislature to welcome 19 new members after election*, LAS CRUCES SUN NEWS (Nov. 14, 2018, 10:26 AM), <https://www.lcsun-news.com/story/news/local/new-mexico/legislature/2018/11/14/legislature-welcome-19-new-members-after-election/2000607002/> [<https://perma.cc/4953-3YU4>].

<sup>201</sup> For reference, see NEW MEXICO LEGISLATIVE SERVICES, [https://www.nmlegis.gov/Legislation/Legislation\\_List](https://www.nmlegis.gov/Legislation/Legislation_List), [<https://perma.cc/P9V6-NH6P>] (listing 1017 bills in the 2018 session).

<sup>202</sup> See Jennings, *supra* note 120.

<sup>203</sup> See generally *id.*; see also Trip Jennings, *Lawmakers race to finesse state ethics commission details as session winds down*, N.M. IN DEPTH (Mar. 17, 2017), <http://nminddepth.com/2017/03/17/lawmakers-race-to-finesse-state-ethics-commission-details-as-session-winds-down> [<https://perma.cc/BFP8-CHUZ>] (noting the Senate had proposed a “bare-bones” version that leaves greater discretion to enabling legislature).

<sup>204</sup> See Jennings, *supra* note 120.

all 112 legislators and many state House candidates throughout 2018 to discuss the enabling legislation and share the above principles with each of them. While fully funding the ethics commission has always been a battle with the Legislature, both gubernatorial candidates in 2018 pledged to fully fund the commission during a Sunshine Week debate.<sup>205</sup>

If advocates successfully work with supportive legislators during the 2019 legislative session to enable legislation that ensures the ethics commission is strong and protected from partisan attempts to limit its scope, then the decades-long campaign will be truly successful. Many of the details and procedures that will be discussed are critical to whether or not the commission functions as anticipated. A non-partisan, non-candidate commission that instills trust from both the public and elected officials is crucial. The ethics commission must be fully funded, procedures around transparency must allow for citizen and free press access, and complaints and responses must be released to the public in a timely manner. If the enabling legislation passes the House and Senate and is then signed by the Governor with these provisions included and intact, then New Mexico will have passed and codified into law an independent ethics commission that could end up on a “best of” list in the future.

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<sup>205</sup> N.M. Found. for Open Gov't, *Sunshine Week Gubernatorial Candidate Forum*, FACEBOOK (Mar. 12, 2018), <https://www.facebook.com/NMFOG/videos/2084389721601739/> [<https://perma.cc/FUL8-8JQT>].