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Subcommittee Report on the Establishment of a State Ethics Commission

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FINAL DRAFT

GOVERNOR'S ETHICS REFORM TASK FORCE

SUBCOMMITTEE REPORT ON THE ESTABLISHMENT OF A STATE ETHICS COMMISSION AUGUST 29, 2006

I. ISSUE IDENTIFICATION:

How does the issue relate to ethics reform?

The establishment of a State Ethics Commission relates directly to ethics reform in the state of New Mexico. Such a commission does not exist in New Mexico, the establishment of which would represent a tangible and concrete manifestation of a state commitment to ethics reform, as well as the top-down expectation that state officials (elected or otherwise) will be held to the highest standard of conduct in the performance of their duties.

In addition, while New Mexico does have statutory proscriptions against certain kinds of conduct or requiring other kinds of conduct (i.e., the Government Conduct Act, the Procurement Act, Campaign Practices Act), there is no common set of ethical guidelines that apply uniformly to all executive agencies, elected officials, and employees. Moreover, there is no agency or organization that is charged with receiving reports of ethical misconduct, investigating such reports, and taking action as necessary, including disciplinary action.

A state ethics commission could be established to do exactly that.

As a side note, all 50 states, Washington, DC, and Puerto Rico, have judicial disciplinary organizations. In addition, 39 states have State Ethics Commissions, some with jurisdiction over both the legislature and the executive branch, others with jurisdiction just over the executive branch. None have combined jurisdiction over *all three* branches of government.

II. OPTIONS:

A. Introduction:

There exists a distinction between unethical conduct and criminal conduct. While unethical conduct may not always rise to the level of criminality, such conduct, whether by an elected official or a hired state employee, is intolerable. The public interest and the public trust both fall victim to conduct that falls outside the reach of traditional law enforcement, but that undermines the public's confidence that state officials are acting in the public's best interest in the performance of their jobs.

This distinction is important to note, because the creation of an ethics commission is not meant to supplant traditional law enforcement agencies, nor is it meant to supplant existing prosecutorial agencies like the state district attorneys offices, the state attorney general's office, or the U.S. Justice Department.

Rather, the purpose of an ethics commission would be:

1. To demonstrate a top-down commitment to hold state officials to a higher standard of ethical conduct – that is, a standard of conduct commensurate with positions of public trust.
2. To establish, maintain, and enforce a rigorous code of ethics for all state officials.
3. To provide an organization that is *independent* of all other state agencies, whose sole purpose would be to receive and investigate reports of unethical conduct on the part of state officials.
4. To establish a venue that provides due process to the target of an investigation.
5. To establish a process that is non-political, that would not be as lengthy or cumbersome as impeachment and recall, and that provides a venue for citizen complaints between election cycles.
6. To provide education and feedback to state officials, lobbyist, government contractors, and the public as to what constitutes unethical conduct.
7. To provide advice and remedial suggestions in the context of unintentional infractions of ethical standards.
8. To provide meaningful discipline in cases of willful misconduct, including reprimand, fines, censure, up to termination from office, a prohibition against ever holding office or state employment again, and loss of retirement benefits.

B. Summary of Options:

1. Maintain the status quo.
2. Create an independent commission to address executive branch ethical misconduct, either
 - a. Including Elected Officials, or
 - b. Excluding Elected Officials
3. Create an independent commission to address both executive and legislative ethical misconduct (this option would necessarily include elected officials, as it would have jurisdiction over legislators).
4. Create an independent commission to address all three branches of government (again, this would necessarily include elected officials, since it would include legislators and judges).
5. In addition to a state ethics commission, create an independent commission that administers the campaign practices act, candidate financial reporting and disclosures, lobbyist reporting and disclosures, and to administer the New Mexico clean elections law. This proposal does not necessarily include, but could encompass, removing the elections bureau from the Secretary of State's office. Thus, options would be:
 - a. Create a new Elections and Ethics Commission with jurisdiction over candidate filings, PAC filings, Lobbyist filings, and all election related activity (state-wide voter role, machine certification, election policy, poll-worker training, etc.), as well as administering the New Mexico clean elections law.
 - b. Create two new Commissions - One that would be in effect an elections bureau (as identified above), the other would administer New Mexico's Clean Elections law.

NOTE: This raises the question as to whether the operation of elections should be under an elected official or under an independent agency? It also raises the question as to whether this topic warrants further study through its own task force.

C. Review of Option No. 2

In an effort to streamline this analysis, the subcommittee evaluated the pros and cons of option number 2 above. The subcommittee believed that a recommendation to maintain the status quo is not appropriate. As to option nos. 3 & 4, the analysis below would be equally applicable to each of them.

1. Creation and Role

How should the Commission be created?

Option A- By constitution and statute

Option B- By statute only

Option C- By Executive order

Pro: The advantage of seeking creation of the Commission through statute is the greater likelihood of passage. The advantage of creating the Commission via the state constitution is that the Commission could be established as an independent state agency, in but not of, a branch of government. Moreover, if created by the constitution, the Commission could avoid separation of powers problems, and could be granted appropriate disciplinary powers, including removal from office, permanent bar from office or state employment, and loss of retirement benefits.

Con: The disadvantage of pursuing an amendment is the difficulty of achieving constitutional changes. In addition, it would be necessary to pursue a special election in the fall of 2007, which has its own set of political difficulties, or wait until the fall of 2008. Another possibility is to seek/suggest a constitutional convention in order to address this matter along with others derived from this task force (legislative salaries for one). The disadvantage of creation by statute is making it open to politically driven statutory changes and/or restrictions, limitations on jurisdiction and authority, and limitations on disciplinary recommendation. The disadvantage of relying on an executive order is that the Commission will lack the statutory power to subpoena documents and people, would have limited jurisdiction, and would have *no authority or jurisdiction* over elected executive officials.

Where should the Commission be housed?

Option A- Independent state agency

Option B- Administratively attached to Secretary of State

Option C- Administratively attached to Judicial Standards Commission

Option D- Create FTE with SOS as Inspector General

Pro: The advantage of an independent agency is that it will be seen as having no political ties to any other organization. The advantage of attaching it to an existing agency is that agency will have a building and FTEs already in place.

Con: The disadvantage of an independent agency is that the Legislature would need to allocate money for rent, computers. The disadvantage of attaching it to an existing agency is that the Commission may beholden to the agency's resources and commitment.

Over whom should the Commission has jurisdiction/oversight?

Option A - Executive Branch

Option B - Executive Branch, local governments

Option C - Executive Branch, local governments, and judiciary

Option D - Executive Branch, local governments, judiciary, and legislative

Pro: The advantage of oversight over all branches is general uniformity. The advantage of oversight over local governments is that the public testified that these ethical matters are left unexamined. The advantage of a Commission with oversight over only the Executive is it will be the least controversial to implement (i.e. avoid opposition of local governments, judiciary and legislative.)

Con: The disadvantage of a Commission with oversight over local governments is that Commission may have to accept complaints against hundreds of employees and officials (i.e. Sanitary Districts, Boll Weevil Control Districts). The disadvantage of a Commission with oversight on the judiciary is that the Judicial Standards Commission may need to altered (unintended consequence).

Should the Commission have continuing oversight?

Option A- Some reasonable period (i.e., two years) after employee leaves work

Option B- Ends when employee leaves office/employment

Pro: The advantage of continuing oversight is that it would prevent state employees and officials from escaping accountability for ethical breaches by simply resigning or retiring from office.

Con: The disadvantage of continuing oversight is that the Commission may be criticized for pursuing cases of employees who have long since left government.

Other General Characteristics to Consider:

- Commission's investigative and disciplinary powers and duties
- Extent of Commission's disciplinary authority (penalties)
- Jurisdiction of review
- Instruction and advice

2. Membership of Commission

How should Commissioners be appointed?

Option A- public citizens by governor

Option B- public citizens by governor, confirmed by the legislature

Option C- public citizen majority by governor plus by some legislature

Option D- state officials plus public citizens by governor

Pro: The advantage of having public citizens serve is that 28 (of the 39 state commissions) that are composed of solely public members.

Con: The disadvantage of having solely public citizens serve is that the Commission may need to some member who works in or is experienced in state personnel matters.

Who appoints/hires Executive Director?

Option A: Governor

Option B: Commission

Pro: The advantage of the governor appointing the Executive Director is that a governor should have the right to select this high-level state government position.

Con: The disadvantage of the Governor appointing the Executive Director is that he/she will be viewed as having less independence from elected officials.

How many Commission member should there be?

Option A- zero to three

Option B- three to five

Option C- five to seven

Option D- ten

Pro: The advantage of a smaller membership is it is easier to get a quorum and business can be conducted more expeditiously. The advantage of a larger membership is it may be more representative of NM.

Con: The disadvantage of a small membership is it is may be easier to lose a quorum.

What is the composition of the membership?

Option A- balanced by political party

Option B- balanced by geography

Option C- both
Option D- no make-up requirement

Pro: The advantage of mixed membership is it may be more representative of NM. Oregon has a 7-member commission with 3 gubernatorial appointments and four appointments upon the recommendation of Democratic and Republican leaders of the state house and senate with no more than 4 total from the same political party. In Delaware, the executive commission has seven public members, all appointed by the Governor, and confirmed by the state Senate, with no more than 4 members from any given political party. 28 states also have prohibitions against members from holding public office, from holding offices of a political party or campaign committee, or employment of a lobbying group.

Con: The disadvantage of mixed membership is that governor may not be able to appoint the best person for the job (just the person who fits the membership make-up requirement).

How long is the term?

Option A-zero to two years
Option B- two to four years
Option C- more than four years
Option D-more than four year, but cannot serve more than eight years.

Pro: The advantage of shorter terms is it may be more representative. The advantage of longer term is the member will not be subject to elective/political pressures.

Con: The disadvantage of a longer term is the member may become set in his/her ways.

Do the terms overlap?

Option A- staggered
Option B-not staggered

Pro: The advantage of staggered terms is not all of the membership will turn over at the same time.

Con: The disadvantage of staggered terms is that after several resignations and re-appointments, it gets very confusing on who is serving what term.

How much money do the Commissioners get paid?

Option A- salary

Option B- per diem
Option C- volunteer

Pro: The advantage of per diem payment is that it is the common process for New Mexico state boards and commissions. Most state ethics commissions do not pay commissioners, but do have provisions to reimburse for travel and per diem. New Jersey recommended Commissioner stipends of \$250 per meeting, and mirrors what other states do (Delaware, Iowa, Mississippi, Missouri, Nevada Ohio, Pennsylvania, and Rhode Island).

Con: The disadvantage of per diem is that the Commission may be very busy and a daily per diem under \$100 may not cover the cost of spending a night in Santa Fe.

How does a member get removed?

Option A- malfeasance
Option B- at will of governor
Option C- malfeasance + senate trial

Pro: The advantage of removal for malfeasance is that a newly elected governor cannot remove all the members at once.

Con: The disadvantage of removal for malfeasance is that it is difficult to prove and unlikely to be used without creating a controversial show down.

3. Funding of Commission

How is the Commission Funded?

Option A- all general fund
Option B- 80% general fund, 20% new filing fees
Option C- 100% filing fees

Pro: The advantage of using all general fund monies is that no new candidate filing fees or court fees will have to be raised.

Con: The disadvantage of using all general fund monies is the Commission may feel beholden to the Legislature to acquire its full funding.

How much funding for staff?

Option A- one to ten.

Option B- more than ten.
Option C- more than twenty.

Pro: The advantage of a staff of 10 is: The **New Jersey** Special Counsel recommended a \$1.1 million budget for FY2006, staff of 10 or more, overseeing 70,000 state employees. **Alabama** has staff of 10; with FY2004 budget of \$914K. Georgia has staff of 10, with FY2004 budget of \$1,016K. **Hawaii** has staff of 10 with FY2004 budget of \$730K. **San Francisco Ethics Commission** (not a state commission) has a staff of 10, with FY2004 budget of \$1,722K. **Rhode Island** Ethics Commission has a staff of 9 with FY2004 budget of \$942K. **Connecticut** State Ethics Commission has a staff of 12, jurisdiction over 62,470 legislative and executive branch employees, and lobbyists, with a 2004/05 budget of \$1,085K, going up to \$1,431K in 2005/06, and an increased staff of 4 FTEs.

The advantage of a staff of 20 is: **Ohio** Ethics Commission has a staff of 20, with jurisdiction over 56,500 executive and local officials, with a FY2004 budget of \$1,710K. **New York** State Ethics Commission has a staff of 20, with jurisdiction over 250,000 executive branch officers and employees and had a FY2004 budget of \$1,520K. **Pennsylvania** Ethics Commission has a staff of 21 and a FY2004 budget of \$1,650K. **Massachusetts** Ethics Commission has a staff of 19 and a FY2004 budget of \$1,265K

Con: The disadvantage of having a staff is that it will require FTEs.

III. SUBCOMMITTEE RECOMMENDATION:

A. Objectives:

The subcommittee's recommendation is based on an attempt to meet the following objectives:

1. To demonstrate a top-down commitment to holding state officials to a higher standard of ethical conduct – that is, a standard of conduct commensurate with persons employed in positions of public trust.
2. To provide an organization that is *independent* of all other state agencies, which would receive and investigate reports of ethical misconduct on the part of state officials.
3. To establish a venue that provides for due process to the target of an investigation, but that also provides for correction short of impeachment, recall, or a 4-year election cycle.

B. Recommendation:

1. Establish an *independent* State Ethics Commission that will have jurisdiction over all executive branch employees and elected officials. It should be perceived as a “watchdog” organization, and should act accordingly.
 - a. Such a Commission should be perceived as an independent watch-dog organization, and should act accordingly. According to the New Jersey Special Counsel on Ethics Reform, “one of the most important issues in ethics reform is the need for an *independent state ethics commission* with the responsibility to oversee the implementation and enforcement of [state] ethics laws and the authority to impose stringent penalties for violations of those laws.”
 - b. The Commission should have eight members. There should be four “lay-members,” or public members, appointed by the Governor, with no more than two of the five from the same political party as the Governor. The public members shall not have held public office, shall not at the time of appointment or for the duration of appointment, hold elected office or an office of a political party or campaign committee, or employment as a lobbyist or with a lobbying group. The Commission should have four members appointed by the Democratic and Republican leaders of the State House and Senate. The Chair and Vice-Chair should be selected from the public members by vote of the whole Commission.
 - c. Commissioners should have staggered four-year terms initially chosen by lot. No one person, regardless of appointing authority, shall serve more than two partial of whole terms, consecutive or otherwise.
 - d. Commissions should not receive pay for their service on the Commission, but should be reimbursed for travel and should receive per diem.
2. The Commission should be vested with investigatory and enforcement powers, responsibility for undertaking routine ethics audits, and implementing mandatory training programs.
 - a. The Commission should have the authority to impose a broad range of significant penalties for non-compliance and ethics violations, including:
 - Reprimand
 - Public censure
 - Demotion

- Restitution for ill-gotten gains
 - Rigorous fine structure
 - Suspension from office
 - Removal from office and/or permanent bar from elected, appointed, or hired state office
 - Loss of pension
 - NOTE: Granting authority for the removal of an elected official, in addition to impeachment by the legislature, represents a radical change in the current constitutional structure. With this in mind, a commission created by statute could be authorized to impose some of the sanctions above for elected officials, but not all – specifically removal and loss of pension.
- b. The Commission should be authorized to promulgate its own regulations and rules governing its operations, and should have authority to enforce executive orders.
 - c. The Commission’s jurisdiction should continue for a two year period of time after a public official leaves office. Such jurisdiction would prevent state employees and officials from escaping civil liability (and general accountability) for ethical breaches by simply resigning or retiring from office.
 - d. Commission should be able to issue subpoenas, and its orders should be enforceable in district court.
3. The Commission should conduct mandatory ethics training for all (executive) state employees, lobbyist, state contractors, and the public. The Commission should have a full-time training coordinator, develop manuals, and each state agency should have an ethics liaison officer.
 4. The Commission should perform regular and systematic ethics audits. The Commission should have a full-time ethics compliance officer, whose job is to ensure that all disclosures mandated by ethics laws are made, to monitor outside employment, business activities, gifts, procurements, etc.
 5. The Commission should coordinate efforts with other enforcement agencies charged with fighting fraud waste, and ethical misconduct in office. This should include:
 - State Auditor
 - Attorney General
 - Department of Taxation and Revenue
 - Other Ethics Commissions (in-state)

6. The Commission should serve as the conduit to improve ethics advice and information. This should include the authority to provide advisory opinions in a confidential setting.
7. The executive and legislative branches of government should demonstrate their institutional commitment to ethics in state government in the form of adequate funding and staffing for a state ethics commission.
 - a. The New Mexico Commission should begin with 5 staff in its first year, and ramp up to 9-11 staff by its third year of operation. It should have an annual budget of approximately \$1 million.
 - b. Ensure adequate technological resources (on-line disclosures and filing).
 - c. Staff salaries should be competitive with the private sector and commensurate with national averages.
8. The Commission should implement a *Plain Language Ethics Guide* that can be easily understood by all state employees and the public. The guide should provide state officers and employees with the information they need to make ethical decision on a day-to-day basis. It should identify the types of issues likely to arise, provide general ethics advice regarding standards of conduct, conflicts of interest, gifts, nepotism, compensation, financial disclosures and post employment restrictions.
9. The Commission should implement a *Business Ethics Guide* that is binding on third parties that do business with the state. It is not enough to impose strictures on state employees. Many ethics violations occur with the participation and consent of third parties. A precondition to doing business with the state is a certification from that business that they understand the rules of the guide, and are in compliance therewith.
10. The ED of the State Ethics Commission should meet with every new cabinet member soon after inauguration. The ED should appear before the Cabinet at least once a year to remind all members of the ethics strictures, and to report on the state of the state on ethics.
11. The intent is to avoid “even the appearance of impropriety” so that an “appearance of impropriety” is by definition a violation of the ethics code.

C. Additional Commission:

1. Establish Independent Commission on Campaign Practices, Financial Reporting, Lobbyist Oversight, and Clean Elections Administration and monitoring.

IV. METHOD OF IMPLEMENTATION;

- A. Enactment by statute creating a State Ethics Commission enumerating the necessary criteria as put forth above. This route could/would limit the Commission's authorities with respect to elected officials, and jurisdiction over multiple branches of government.
- B. Resolution from the legislature for a constitutional amendment creating a State Ethics Commission, enumerating the necessary criteria as put forth above.
- C. Suggest that one or more individuals be identified/hired to steward this change through the statutory and if needed constitutional process. This should include a national survey of commission structures, what should be contained in the constitution, what should be statutory, and what should be left for the procedural rules of the commission itself.