



Winter 2021

## **New Mexico's Independent Ethics Commission and the Long Fight to Constrain Public Corruption**

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### **Recommended Citation**

Lane Towery, *New Mexico's Independent Ethics Commission and the Long Fight to Constrain Public Corruption*, 51 N.M. L. Rev. 275 (2021).

Available at: <https://digitalrepository.unm.edu/nmlr/vol51/iss1/10>

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# NEW MEXICO'S INDEPENDENT ETHICS COMMISSION AND THE LONG FIGHT TO CONSTRAIN PUBLIC CORRUPTION

Lane Towery

## ABSTRACT

*After a string of high-profile corruption scandals<sup>1</sup> in state government, and a decade-long legislative fight to find a solution, in 2018 New Mexico voters passed a popular constitutional amendment creating an independent ethics commission.<sup>2</sup> Enabling legislation cleared the legislature during the 2019 session<sup>3</sup>, and the commission began operating on January 1, 2020. The ethics commission hears complaints made against candidates, lobbyists, and public officials in the executive and legislative branches. In addition, it publishes opinions on questions of ethics in state government. The commission, however, risks failing at its mission to reduce unethical behavior because of a lack of power and gaps in underlying anti-corruption law.*

*Part I of this comment explores the cyclical history of corruption and attempts to pass anti-corruption law in New Mexico. It then explains the legislative history behind the new ethics commission, including the constitutional amendment and enabling legislation. Part II examines the strengths and critiques the flaws of the ethics commission. This comment notes that by passing a constitutional amendment, New Mexico avoided separation of powers concerns*

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1. E.g., Andy Barr, *Bill Richardson Tarnished by Scandal*, POLITICO (Feb. 12, 2009, 4:50 AM), <https://www.politico.com/story/2009/02/bill-richardson-tarnished-by-scandal-018741> [<https://perma.cc/HP29-L7DD>]; Dan Boyd, *Duran Sentenced to 30 Days in Jail, Ordered to Pay \$28,000*, ALBUQUERQUE JOURNAL (Dec. 14, 2015, 10:26 AM), <https://www.abqjournal.com/691066/duran-sentenced-to-30-days-in-jail-she-may-kill-plea-deal.html> [<https://perma.cc/RD7B-JRRQ>] (last updated Dec. 15, 2015, 11:12 PM); Morgan Lee, *Ex-New Mexico State Senator is Convicted in Corruption Trial*, LAS CRUCES SUN NEWS (Nov. 16, 2017, 7:54 PM), <https://www.lcsun-news.com/story/news/local/2017/11/16/ex-new-mexico-state-senator-convicted-corruption-trial/873187001/> [<https://perma.cc/8Z7C-3NTW>] (last updated Nov. 16, 2017, 8:26 P.M.).

2. 2017 N.M. Laws, Constitutional Amendment 2 at 1640; N.M. CONST. art. V, § 17.

3. See Ethics Commission Act, S.B. 668, 2019 N.M. Laws, ch. 86, §§ 1–33 (codified in scattered sections of N.M. STAT. ANN.).

that can undermine statutorily created commissions.<sup>4</sup> On the other hand, the analysis notes gaps that will potentially frustrate the effectiveness of the commission: limited jurisdiction, lack of subpoena power, and an absence of recurring funding.<sup>5</sup> In making these critiques, this comment makes recommendations for strengthening the commission, often looking to other states for examples.

Part III argues that an ethics commission is insufficient to address public corruption by itself without a broad set of laws and norms addressing corruption's root causes.<sup>6</sup> It also makes recommendations for filling gaps in substantive anti-corruption law. While the ethics commission can bring some accountability to bad actors and transparency to bad behavior, other features of state government leave incentives for corruption: a lack of pay for legislators, little conflict of interest enforcement for legislators, opaque capital outlay procedures, and feeble asset disclosure laws for public officials, for example.<sup>7</sup> In such an environment, even a strong ethics commission will struggle to address public corruption. A weak one risks being a salve-turned-irritant, disappointing a citizenry that voted strongly in favor of fighting unethical behavior by its public leaders.

## INTRODUCTION

On the final day of the 2014 legislative session, New Mexico state Senator Phil Griego cast what seemed like a simple vote to approve the sale of state land.<sup>8</sup> Senator Griego held a real estate license himself and was familiar with the historic Santa Fe building which was the subject of the sale.<sup>9</sup> Just a month after making his vote, he brokered the deal to sell the state property to a friend, earning a \$51,389.07 commission in the process.<sup>10</sup> This was, of course, illegal. The New Mexico

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4. See Erin McSherry, *The Proposed State Ethics Commission Act: Reform for New Mexico's Wild West Politics, or Simply a Mirage*, 39 N.M. L. REV. 597, 618–627 (2009) (analyzing constitutional separation of powers problems with a statutory ethics commission).

5. *Essential Elements for an Independent Ethics Commission*, N. M. ETHICS WATCH, <http://nmethicswatch.org/wp-content/uploads/2019/01/NMEW-ESSENTIAL-ELEMENTS-FOR-AN-INDEPENDENT-ETHICS-COMMISSION.pdf> [<https://perma.cc/5VEE-XD4A>].

6. Kayla Crider and Jeffrey Milyo, *Do State Ethics Commissions Reduce Political Corruption?: An Exploratory Investigation*, 3 U.C. IRVINE L. REV. 717 (2013) (discussing the limited evidence of the efficacy of state ethics commissions).

7. See Gwyneth Doland, *New Mexico Gets D- Grade In 2015 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2016), <https://publicintegrity.org/state-politics/state-integrity-investigation/new-mexico-gets-d-grade-in-2015-state-integrity-investigation/> [<https://perma.cc/FG5K-JMKN>] (last updated Nov. 12, 2015, 12:02 PM).

8. Peter St. Cyr, *Sold Out*, SANTA FE REPORTER (July 22, 2014), <https://www.sfreporter.com/news/coverstories/2014/07/22/sold-out/> [<https://perma.cc/K77V-37CF>].

9. *Id.*

10. *Id.*; Matt Grubbs, *Griego Guilty*, SANTA FE REPORTER (Nov. 16, 2017), <https://www.sfreporter.com/news/2017/11/16/griego-guilty/> [<https://perma.cc/6ACE-APVK>].

Constitution prohibits elected officials from benefiting from any contract with the state, let alone one the official cast a vote to approve.<sup>11</sup>

Griego was eventually found guilty of fraud, bribery, violating the ethical principle of public service and having an unlawful interest in a public contract.<sup>12</sup> For these crimes, a judge sentenced him to eighteen months in prison and fined him \$47,225—still less than he pocketed in the real estate deal.<sup>13</sup> At sentencing, Second District Court Judge Brett Loveless said that none of the jurors from the pool selected for trial had a positive view of the public officials representing them.<sup>14</sup> “That perception is the danger here. . . . It’s the danger that when people don’t have confidence in their elected officials, they’re disenfranchised,” the Judge said.<sup>15</sup>

Griego was no aberration. His trial followed on the heels of former Secretary of State Diana Duran’s resignation and plea deal for drawing off campaign funds to spend at casinos.<sup>16</sup> Duran, in turn, won her campaign against previous Secretary of State Mary Herrera, who was mired in corruption charges of her own for allegedly forcing her staff to work on her campaign.<sup>17</sup> All of this was famously preceded by former Governor Bill Richardson losing out on a cabinet position in the Obama administration for an alleged pay-to-play scheme.<sup>18</sup> These are but some of many examples of public misconduct, both recent and old, which give New Mexico a reputation for corruption.<sup>19</sup>

The data confirms the reputation. Whether measured by number of convictions, by public perception, by news stories, or by strength of state laws, New Mexico often compares badly on state-by-state measures of corruption. A 2014 study by Harvard’s Center for Ethics, for example, found that New Mexico ranks in the top quartile of “most corrupt” states according to public perception.<sup>20</sup> In a 2014 article based in part on news reports about corruption, New Mexico was ranked the

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11. N.M. CONST. art. IV, § 28.

12. Grubbs, *supra* note 10.

13. Matt Grubbs, *Prison Time for Phil*, SANTA FE REPORTER (Feb. 16, 2018), <https://www.sfreporter.com/news/2018/02/16/prison-time-for-phil/> [<https://perma.cc/9DA6-Q6FP>].

14. *Id.*

15. *Id.*

16. Morgan Lee, *Duran Reports to Jail for Embezzlement Term*, ALBUQUERQUE J. (Dec. 18, 2015, 10:15 AM), <https://www.abqjournal.com/693244/the-latest-disgraced-new-mexico-official-checks-into-jail.html> [<https://perma.cc/AQ4N-UDNX>] (last updated Dec. 18, 2015, 12:12 PM).

17. Phaedra Haywood, *Court’s Decision Will Allow Suits Against Mary Herrera to Proceed*, SANTA FE NEW MEXICAN (Apr. 9, 2015), [https://www.santafenewmexican.com/news/local\\_news/court-s-decision-will-allow-suits-against-mary-herrera-to/article\\_4658b337-9659-5716-957b-a3b56f380362.html](https://www.santafenewmexican.com/news/local_news/court-s-decision-will-allow-suits-against-mary-herrera-to/article_4658b337-9659-5716-957b-a3b56f380362.html) [<https://perma.cc/8TBL-9L2G>] (last updated Apr. 9, 2015).

18. Barr, *supra* note 1.

19. For a succinct comparison of different measures of state corruption, including New Mexico’s low ranking on public perception of corruption, see Harry Enten, *Ranking the States from Most to Least Corrupt*, FIVETHIRTYEIGHT (Jan. 23, 2015, 7:00 AM), <https://fivethirtyeight.com/features/ranking-the-states-from-most-to-least-corrupt/> [<https://perma.cc/72YC-FXF6>].

20. Oguzhan Dincer & Michael Johnston, *Measuring Illegal and Legal Corruption in American States: Some Results from the Corruption in America Survey*, EDMUND J. SAFRA CTR. FOR ETHICS: BLOG (Dec. 1, 2014), <https://ethics.harvard.edu/blog/measuring-illegal-and-legal-corruption-american-states-some-results-safra> [<https://perma.cc/8GEL-VYVA>].

fifth most corrupt state in America.<sup>21</sup> The Center for Public Integrity, in a 2015 report, gave New Mexico a D-minus grade for state government accountability and transparency.<sup>22</sup>

As the drip of state corruption scandals and bad rankings grew ever steadier, the legislature stepped into the breach. During the 2017 legislative session, lawmakers of both parties passed a constitutional amendment to create an independent State Ethics Commission (hereafter “Ethics Commission” or “Commission”).<sup>23</sup> Voters overwhelmingly approved the amendment seventy-five percent to twenty-five percent.<sup>24</sup> New Mexico was one of only six states without an independent ethics commission at the time.<sup>25</sup> In 2019, lawmakers passed enabling legislation formalizing the Ethics Commission, thus concluding a decade-long effort to create the new body.<sup>26</sup>

The effort to reduce corruption, however, is not over. The State Ethics Commission is designed with endemic weaknesses and risks disappointing its many supporters. Additionally, ethics commissions—even strong ones—are insufficient to address public corruption writ large.<sup>27</sup> Research suggests that state ethics commissions are not correlated with reduced rates of public corruption in states that have implemented them.<sup>28</sup> The research should be seen as a warning, but it is hardly final. Measuring corruption is quite difficult. In the cited research, for example, corruption was measured using criminal convictions in a particular state—a convenient metric but an attenuated proxy for all public corruption.

This Comment assumes that the Ethics Commission can and should be an effective deterrent to corrupt behavior even if implementation is challenging.<sup>29</sup> To

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21. See Oguzhan C. Dincer & Michael Johnston, *Corruption Issues in State and Local Politics: Is Political Culture a Deep Determinant?*, EDMOND J. SAFRA WORKING PAPERS, NO. 48, (September 10, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2491226](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491226) [<https://perma.cc/58L8-4KUH>].

22. Doland, *supra* note 7.

23. 2017 N.M. Laws, Constitutional Amendment 2 at 1640; N.M. CONST. art. V, § 17.

24. OFFICIAL RESULTS 2018 GENERAL – November 6, 2018, N. M. SEC’Y ST. (Nov. 25, 2018, 6:38 PM), <http://electionresults.sos.state.nm.us/resultsSW.aspx?eid=2698&type=SW&map=CTY> [<https://perma.cc/Q95V-H7KR>]

25. Dan McKay, *Independent Ethics Commission, Bond Proposals Win Approval*, ALBUQUERQUE J. (Nov. 6, 2018, 5:53 PM), <https://www.abqjournal.com/1242788/voters-weigh-ethics-commission-state-bonds.html> [<https://perma.cc/WR4R-YQL8>].

26. State Ethics Commission Act, 2019 N.M. Laws, ch. 86, §§ 1–33 (codified at N.M. STAT. ANN. §§ 10-16G-1 to -16 and in other scattered sections of N.M. STAT. ANN.).

27. Crider & Milyo, *supra* note 6, at 732.

28. *Id.*

29. Two very recent court decisions make the State Ethics Commission a critical enforcer of state anti-corruption law. First, in *Kelly v. United States*, the U.S. Supreme Court restricted the Federal Government’s ability to prosecute the behavior of local officials. No. 18-1059, 2020 U.S. LEXIS 2640 140 S. Ct. 1565, 1574 (2020) (“Federal prosecutors may not use property fraud statutes to ‘set[] standards of disclosure and good government for local and state officials.’ . . . In effect, the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking.” (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987))). Shortly thereafter, the New Mexico Court of Appeals held that a section of the Governmental Conduct Act was not impermissibly vague, giving the Ethics Commission and state prosecutors critical power to investigate and prosecute behavior which pursues personal benefit or private interests. *State v. Gutierrez*, 2020-NMCA-045, ¶¶ 34, 36 *cert. granted* (Sept. 8, 2020).

ensure the Commission's success and to meet the goal of reduced corruption, the legislature must act in two ways. First, the Commission must be given greater power. And, second, New Mexico should look beyond the Ethics Commission to address gaps in its substantive anti-corruption law regime.

This Comment proceeds in three parts. Part I explores the waves of corruption and halting efforts at anti-corruption in New Mexico. It also explains the constitutional amendment and enabling legislation. New Mexico avoided constitutional separation of powers problems that can plague statutorily created ethics commissions by going the route of constitutional amendment.<sup>30</sup> But the enabling legislation, a last-minute bill born of political compromise, is not without potential pitfalls.

In Part II, this Comment argues that the legislature must strengthen the Commission if it is to meet its mandate. Specifically, Part II interrogates the legislation for potential weaknesses related to jurisdiction, subpoena power, funding, and political appointments while acknowledging strengths in the commission's legal foundation and transparency.

Finally, Part III argues for strengthening substantive anti-corruption laws in New Mexico. Independent ethics commissions are a popular response to public corruption, though they are best understood as one piece of a complex puzzle which should also include addressing a lack of pay for legislators, feeble asset disclosure laws for public officials, and opaque capital outlay procedures.

## BACKGROUND

### I. PUBLIC CORRUPTION AND NEW MEXICO'S LONG EFFORT TO CONTAIN IT

#### A. Corruption Defined

The narrow definition of corruption, used in U.S. constitutional jurisprudence, is *quid pro quo*—money in exchange for political favors.<sup>31</sup> The narrow definition makes identifying corruption easy, but *quid pro quo* is not the only way positions of public trust are used corruptly. A slightly broader definition is “using public life for private gain.”<sup>32</sup> The broadest definition of corruption is any act that deviates from the public interest:

Institutional corruption is manifest when there is a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including,

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30. See, e.g. McSherry, *supra* note 4, at 602 (discussing a failed bill to create a statutory ethics commission in 2007).

31. Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).

32. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 374 (2009) (arguing that the framers thought of public corruption not as explicit *quid pro quo*, but in moral terms, as a “rotting of positive ideals of civic virtue and public integrity” and “conscious or reckless abuse of the position of trust.”).

to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness.<sup>33</sup>

This definition acknowledges that corruption comes in two flavors—illegal and legal. While both types can have a pernicious effect, the distinction is important and helpful.

Illegal corruption can be understood as “crimes by public officials for personal gain.”<sup>34</sup> This is the type of corruption like that described in the introduction—a governor's pay-to-play scheme or a state senator's vote cast for a government contract benefiting himself individually, for example.<sup>35</sup> Legal corruption, on the other hand, can be defined as serving private ends from a position of public trust in ways that laws have not criminalized. New Mexico's “citizen legislature,” in which legislators work only part-time and maintain regular jobs, is fertile ground for the growth of legal forms of corruption. Senator Phil Griego, who suffered criminal consequences for the illegal corruption already described, voted for years for bills removing title insurance companies' liability while working in the title insurance business—all legally.<sup>36</sup> An opaque capital outlay process also provides opportunity for legislators to direct state money to themselves, their family, or their employers.<sup>37</sup> Both legal and illegal forms of corruption redirect public institutions from their work to serve the public, and for that reason this Comment addresses not only that corruption which is explicitly prohibited in law, but also the spaces in our regulatory regime where corruption can flourish legally.

## B. Anti-Corruption and the New Mexico Constitution

At its founding, New Mexico included certain anti-corruption measures in its constitution. Members of the legislature who accept or solicit bribes of any kind in return for their vote or influence on any legislation are guilty of a felony.<sup>38</sup> No member of the legislature can benefit from a government contract.<sup>39</sup> Officers of the executive branch must report their income annually.<sup>40</sup> Public officers profiting off of public money or misusing public funds are guilty of a felony.<sup>41</sup> In the important “anti-donation” clause, state and local governments are barred from giving aid or donations to individuals or private enterprises—in effect prohibiting nepotistic government contracting.<sup>42</sup> It is even a crime for legislators to accept railroad passes that are not

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33. Lawrence Lessig, *FOREWORD: “Institutional Corruption” Defined*, 41 J. L., MED. & ETHICS, 553, 553 (2013).

34. Crider & Milyo, *supra* note 6, at 717.

35. *See supra* text accompanying notes 8–19.

36. For an extensive treatment of ethical dilemmas and legal forms of corruption in the New Mexico Legislature, *see* DEDE FELDMAN, *INSIDE THE NEW MEXICO SENATE* 215–227 (2014).

37. *See id.* at 220.

38. N.M. CONST. art. IV, §§ 39–40.

39. *Id.* art. IV, § 28.

40. *Id.* art. V, § 9.

41. *Id.* art. VIII, § 4.

42. *Id.* art. IX, § 14.

also available to the general public.<sup>43</sup> These constitutional measures, of course, belie a history of government corruption.

### C. The Cycle of Corruption and Anti-Corruption in New Mexico History

#### 1. 1960s and 1970s Reforms: Conflict of Interest Act, Open Meetings Act, Lobbyist Regulation Act, Campaign Reporting Act.

The common anti-corruption measures instituted by states across the country during the last half century have generally fallen into the categories of freedom of information acts, campaign finance restrictions, lobbying regulations, and independent ethics commissions.<sup>44</sup> New Mexico has followed suit, though often slowly, reluctantly, and in response to public scandals. The history of new laws followed by yet more corruption scandals is a warning to those who place great faith in new measures.

In 1967 the New Mexico Legislature first took aim at corruption broadly by passing the Conflict of Interest Act.<sup>45</sup> The act addressed forms of *quid pro quo* and self-enrichment in government by prohibiting state employees and legislators from accepting any gift that “tends to influence him in the discharge of his official acts.”<sup>46</sup> It required public officials to disqualify themselves from official acts which would have a personal financial benefit.<sup>47</sup> The act also took aim at how government contracts were awarded, restricting state agencies from entering into contracts with a state employee or a legislator or their businesses unless the personal interest was disclosed and a competitive bidding process was used.<sup>48</sup> The law curtailed government’s ability to award contracts to entities represented by former public officials.<sup>49</sup> State employees and legislators were required to make annual disclosures to the Secretary of State regarding personal business interests affected by government acts.<sup>50</sup> Additionally, the new law required every executive agency to create codes of conduct.<sup>51</sup>

The Conflict of Interest Act allowed for only civil enforcement and could include dismissal, demotion, or suspension.<sup>52</sup> The procedure for reaching any enforcement outcome, however, was cumbersome: a group of at least 20 legislators, with no less than eight from each major party, had standing in court to bring a civil

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43. *Id.* art. IV, § 37; *see also* N.M. Att’y Gen. Op. 33-603 (1933) (writing that the purpose of this restriction was to “eliminat[e] graft upon the part of members of the legislature and to relieve said members of any feeling of obligation toward a railroad company by virtue of possession of a free pass.”)

44. *See, e.g.*, Crider & Milyo, *supra* note 6, at 718.

45. *See* Conflict of Interest Act, 1967 N.M. Laws, ch. 306, §§1–17 (codified at N.M. STAT. ANN. § 5-12-1 (1953)).

46. *Id.* § 3.

47. *Id.* § 4.

48. *Id.* §§ 7,9.

49. *Id.* § 8.

50. *Id.* § 10.

51. *Id.* § 11.

52. *Id.* § 14.



enforcement action.<sup>53</sup> If the subject was a legislator removable only by impeachment, the House of Representatives would have to take up the matter internally.<sup>54</sup>

In 1974, the legislature passed the Open Meetings Act, requiring adequate notice of and access to meetings of public bodies in New Mexico—essentially ending secret meetings.<sup>55</sup> The Lobbyist Regulation Act passed in 1977 to bring some transparency and order to legislative lobbying.<sup>56</sup> The Campaign Reporting Act passed shortly after in 1979.<sup>57</sup> The law regulates campaign committees and political action committees and requires reporting of both campaign spending and independent expenditures.<sup>58</sup> Thus, by 1979, New Mexico had a foundation of anti-corruption law on which to stand.

2. *The 1990s Reform Effort: The Financial Disclosures Act, Inspection of Public Records Act, Governmental Conduct Act, and Legislative Ethics Committee*

There was little advance in anti-corruption until a new scandal shook the legislature in 1992. That year, Representative Ron Olguin, a Democrat from Albuquerque, was found to have accepted \$15,000 in exchange for his help obtaining state funding for a community corrections program.<sup>59</sup> The entire House of Representatives gathered to expel him from its body, the exact solution contemplated in the Conflict of Interest Act.<sup>60</sup> But the House balked, merely censuring Olguin and allowing him to keep his seat and committee assignments.<sup>61</sup> He was later tried criminally, but the legislature itself never took action against him.<sup>62</sup> Gallup Representative Dominic Ferrari was caught saying, “I’m concerned that if all were known about everybody, we may be in that same chair.”<sup>63</sup> In response to the public outrage about its inaction, the legislature created a taskforce to address ethics.<sup>64</sup>

From the 1993 taskforce came many recommendations and a few reforms. The legislature passed the Financial Disclosures Act during the 1993 session to clarify public officials’ annual income reporting requirements.<sup>65</sup> The act, however, has often been criticized for its gaps by open government proponents.<sup>66</sup> The

53. *Id.* § 15.

54. *Id.* § 14.

55. 1974 N.M. Laws, ch. 91, §§ 1–7 (codified at N.M. STAT. ANN. § 5-6-23 (1953)).

56. 1977 N.M. Laws, ch. 261, § 1 (codified at N.M. STAT. ANN. § 2-13-1 (1953)).

57. 1979 N.M. Laws, ch. 360, § 1 (current version at N.M. STAT. ANN. §§ 1-19-25 to 36 (1978)).

58. *Id.*

59. See FELDMAN, *supra* note 36, at 217.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 218.

64. *Id.*

65. 1993 N.M. Laws ch. 46, §§ 39–45 (current version at N.M. STAT. ANN. §§ 10-16A-1 to 8 (1978) (requiring legislators to annually report their and their spouse’s income over \$5000, and making violation a misdemeanor).

66. See, e.g. *infra* Part III, Section B; KATHLEEN SABO & TERI AREVALO, N.M. ETHICS WATCH, THIRD TIME NO CHARM, [http://nmethicswatch.org/wp-content/uploads/2018/09/NMEW\\_FDA-Follow-up-Report3.pdf](http://nmethicswatch.org/wp-content/uploads/2018/09/NMEW_FDA-Follow-up-Report3.pdf) [https://perma.cc/JE38-ZC54].

legislature strengthened the Campaign Reporting Act,<sup>67</sup> and passed a new Inspection of Public Records Act, making the rights and procedures related to public records requests clearer.<sup>68</sup>

The legislature's biggest action was in strengthening the Conflict of Interest Act, renaming it the Governmental Conduct Act.<sup>69</sup> The amendment upgraded explicit *quid pro quo* from a civil offense to a fourth degree felony in state law.<sup>70</sup> The amendment also prohibited honoraria collected for speeches made in an official capacity.<sup>71</sup> It required that, in addition to each executive department, the legislative council adopt a code of conduct for legislators.<sup>72</sup> The complaint process was clarified, directing complaints against executive branch employees to be submitted to agency heads, complaints against legislative branch employees to be submitted to the legislative council, and complaints against judicial branch employees to follow the judicial personnel rules.<sup>73</sup>

Finally, the amendment streamlined enforcement. The new law directed the Attorney General to enforce the act, including by civil injunctive or other appropriate orders—significantly simplifying the no longer operative rule which gave standing only to 20 legislators acting together.<sup>74</sup> The Legislative Ethics Committee was created to address ethics violations committed by legislators, however, as of 2014, it had never taken an action against a legislator.<sup>75</sup>

### 3. 2000s Era Reform Effort: The Gift Act and Amendments to Other Acts Regulating Corruption

Little more than a decade later, New Mexico was again hit by a corruption scandal when two consecutive state treasurers, Robert Vigil and Michael Montoya, were indicted in a new pay-to-play scheme and charged with extortion and racketeering for directing state business to certain brokers in return for millions of dollars in kickbacks.<sup>76</sup> Once again, in response, a task force was created. And again,

67. 1995 N.M. Laws, ch. 153, §§ 12, 19 (current version at N.M. STAT. ANN. §§ 1-19-34.1, 34.6 (1978)) (prohibiting legislators from soliciting contributions during the legislative session and providing for civil penalties).

68. See 1993 N.M. Laws, ch. 260, §§ 1–5 (current version at N.M. STAT. ANN. §§ 14-2-1 to 12 (1978)).

69. *Id.*, ch. 46, §§ 26–38 (current version at N.M. STAT. ANN. §§ 10-16-1 to 18 (1978)).

70. *Id.*, § 28 (codified at N.M. STAT. ANN. § 10-16-3(D) (1978)).

71. *Id.*, § 38 (codified at N.M. STAT. ANN. § 10-16-4.1 (1978)).

72. *Id.* § 34 (codified with some differences in language at N.M. STAT. ANN. § 10-16-11 (1978)).

73. *Id.*, § 36 (codified with some differences in language at N.M. STAT. ANN. § 10-16-14 (1978)).

74. *Id.*

75. See FELDMAN, *supra* note 36, at 218–219.

76. See, e.g. *id.* at 222; see also *New Mexico Treasurer, Ex-Treasurer Arrested*, ASSOCIATED PRESS, (Sept. 17, 2005) [http://www.nbcnews.com/id/9373061/ns/us\\_news-crime\\_and\\_courts/t/new-mexico-treasurer-ex-treasurer-arrested/](http://www.nbcnews.com/id/9373061/ns/us_news-crime_and_courts/t/new-mexico-treasurer-ex-treasurer-arrested/) [<https://perma.cc/SNA4-2X7G>]; Felicia Fonseca, *Treasurer Michael Montoya Sentenced to 40 Months*, ALBUQUERQUE J. (Sept. 26, 2007) <https://www.abqjournal.com/news/apmichael09-26-07.htm> [<https://perma.cc/9DWV-7NBR>]; Daniel J. Chacon, Steve Terrell & Staci Matlock, *New Mexico Is No Stranger to Crimes Committed by Officials, but is it Worse Here Than in Other States?*, SANTA FE NEW MEXICAN (Dec. 27, 2015) [https://www.santafenewmexican.com/news/local\\_news/new-mexico-is-no-stranger-to-crimes-committed-by-officials/article13bd63e8-1284-5b37-9cd1-f760c337718f.html](https://www.santafenewmexican.com/news/local_news/new-mexico-is-no-stranger-to-crimes-committed-by-officials/article13bd63e8-1284-5b37-9cd1-f760c337718f.html) [<https://perma.cc/92BG->

legislative pushback led to the failure of many recommendations, but the Gift Act was passed in 2007 and the Governmental Conduct Act and Campaign Reporting Act were strengthened yet again.<sup>77</sup> Amendments to the Governmental Conduct Act required disclosure by public officials of any employment entered into outside of the official's public job.<sup>78</sup> It also prohibited government employees participating in the contracting process from becoming employed by the business contracting with the government.<sup>79</sup> The amendments extended the restrictions on how government contracts are awarded, adding family members of state employees and legislators to the constraints, and expanding the law to cover local government contracts in addition to the state level.<sup>80</sup>

#### D. The Long Road to an Independent Ethics Commission

Legislation for an independent ethics commission made its first appearance in 2007.<sup>81</sup> The commission failed in Senate committees then, as it continued to do for a decade.<sup>82</sup> In the five years from 2007 to 2012, forty-nine bills creating an ethics commission were introduced in the legislature—and each of them died.<sup>83</sup>

While the proposed ethics commission stalled in the Senate, the Senate President Pro Tempore pled guilty to attempting to defraud the state of \$4.4 million in 2009.<sup>84</sup> The plot involved the Senate leader directing extra capital outlay funding to the construction of the Bernalillo County Metropolitan Courthouse—funds which eventually found their way back to his pockets.<sup>85</sup> The same year, Governor Richardson was caught up in an FBI investigation into his alleged pay-to-play scheme.<sup>86</sup> As a bookend, in 2015 Secretary of State Diana Duran went to jail for embezzling state funds.<sup>87</sup>

In 2017 the legislature changed course to the harder path of introducing the ethics commission as a constitutional amendment, which finally passed both

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2YYK] (quoting from an FBI affidavit in which Secretary Montoya told one investment advisor, “that’s the way we do business in New Mexico.”).

77. Gift Act, 2007 N.M. Laws, ch. 226, §§ 1–4; Governmental Conduct Act, 2007 N.M. Laws, ch. 362, §§ 1–12; Governmental Conduct Act, 2011 N.M. Laws, ch. 138, §§ 1–15; Campaign Reporting Act, 2009 N.M. Laws, ch. 68, §§ 1–6; Campaign Reporting Act, 2009 N.M. Laws, ch. 67, §§ 1–7.

78. 2007 N.M. Laws, ch. 362, § 10 (codified with some differences in language at N.M. STAT. ANN. § 10-16-4.2 (1978)).

79. 2011 N.M. Laws, ch. 138, § 1.

80. See 2007 N.M. Laws, ch. 362, § 5; see also 2011 N.M. Laws, ch. 138, § 3 (current version at N.M. STAT. ANN. § 10-16-7 (1978)).

81. See H.B. 822, 48th Leg., 1st Sess. (N.M. 2007), <https://nmlegis.gov/Sessions/07%20Regular/bills/house/HB0822.pdf> [<https://perma.cc/B5SB-FJAE>].

82. 2007 Regular Session – HB 822, N.M. LEGISLATURE, <https://nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=822&year=07> [<https://perma.cc/LLC7-MZNP>].

83. FELDMAN, *supra* note 36, at 224.

84. Chacon, et al., *supra* note 78.

85. *Id.*

86. See Barr, *supra* note 1.

87. See Boyd, *supra* note 1.

houses.<sup>88</sup> This route is more complicated than a statute because a constitutional amendment must be voted on by the public.<sup>89</sup> New Mexicans spoke loudly, approving the Ethics Commission seventy-five percent to twenty-five percent on the 2018 general election ballot.<sup>90</sup> Now, not only was the commission enshrined in the constitution, but the fifty-percentage-point margin put pressure on recalcitrant legislators to finally empower an independent ethics agency.<sup>91</sup>

### **E. The Constitutional Amendment**

The language of the constitutional amendment created the Commission as an “independent state agency,” and prescribed seven commissioners.<sup>92</sup> The amendment described in detail how the commissioners were to be selected—one each by the governor, speaker of the house, house minority floor leader, senate pro tempore, and minority floor leader of the senate with the legislatively selected members choosing two more members from different political parties.<sup>93</sup> As for addressing the Commission’s actual work, the constitutional amendment empowered the Commission to

initiate, receive, investigate and adjudicate complaints alleging violations of, and issue advisory opinions concerning, standards of ethical conduct and other standards of conduct and reporting requirements, as may be provided by law, for 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>94</sup>

Additionally, the constitution allows the Commission to require the attendance of witnesses and production of evidence by subpoena “as provided by law” and gives the legislature leeway to further empower the Commission.<sup>95</sup> The legislature, then, still had an integral role to play in defining the powers, procedures, and funding of the Commission.

### **F. The Enabling Legislation**

The terms of the enabling legislation were heavily disputed and demonstrated the legislature’s fear of the new Ethics Commission. The House and

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88. 2017 N.M. Laws, Constitutional Amendment 2 at 1640.

89. See N.M. CONST. art. XIX, § 1.

90. *OFFICIAL RESULTS 2018 GENERAL – November 6, 2018*, *supra* note 24.

91. Interview with Daymon Ely, District 23 Representative, New Mexico House of Representatives, in Albuquerque, N.M. (Oct. 23, 2019) (“The voters had overwhelmingly approved the constitutional amendment so there was real pressure on the legislature to get this passed.”).

92. N.M. CONST., art. V, § 17.

93. *Id.*

94. *Id.*, § 17(B).

95. *Id.*, § 17(C).

Senate introduced bills which would create starkly different Commissions.<sup>96</sup> At issue, in particular, were the subpoena power, the blackout period, transparency, and burdens of proof.<sup>97</sup> Additionally, the Senate version provided stiff penalties for anyone—including the complainant—found leaking confidential information, making such disclosure a misdemeanor punishable by a \$10,000 fine and a year in prison.<sup>98</sup> The Senate bill manifested the political threat legislators felt from the Commission. Legislators feared that the Commission could be used for nefarious purposes by political enemies bringing unsubstantiated complaints to tarnish a public career or interfere with an election.<sup>99</sup> Legislators also worried, perhaps correctly, that even bogus complaints would require hiring a lawyer at the personal expense of the unpaid law makers.<sup>100</sup>

The House of Representatives passed its version easily, setting up a showdown in the Senate Rules Committee where the chair, Senator Linda Lopez, was the sponsor of the Senate's own distinct version of the Ethics Commission bill.<sup>101</sup> Representative Daymon Ely, who sponsored the House bill, appeared before the Senate Committee. Representative Ely struck a nerve by telling the committee that it had a choice to choose a bill which “tramples on the first amendment” by criminalizing leakers or one that does not, and both versions of the bill were tabled.<sup>102</sup>

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96. *Compare* H.B. 4, 54th Leg., 1st Sess. (N.M. 2019), <https://www.nmlegis.gov/Sessions/19%20Regular/bills/house/HB0004.pdf> [<https://perma.cc/FFZ5-SDH4>], *with* S.B. 619, 54th Leg., 1st Sess. (N.M. 2019), <https://nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0619.pdf> [<https://perma.cc/9M5G-7FQ2>].

97. The House would enable the Commission with subpoena power while the Senate would not; the House would prohibit complaints against candidates during a 45-day period before elections, the Senate from primary dates until general elections; the House would allow more public access earlier, while the Senate preferred greater secrecy; the House would require a preponderance of the evidence standard, the Senate clear and convincing evidence. *Compare* N.M. H.B. 4, *with* N.M. S.B. 619,; *see also* interview with Daymon Ely, *supra* note 92.

98. N.M. S.B. 619, § 16.

99. Interview with Daymon Ely, *supra* note 92 (“The way I think politicians view the ethics commission—which I don’t think is illegitimate—is that it can be a tool for nefarious purposes, that people can make last-minute complaints that are not substantiated and they’ll be used against them. That’s what they’re worried about: everybody’s got to lawyer up, it’s a citizen legislature and we’re all going be spending money on lawyers and you’re going to drive everyone away. All of those are legitimate concerns.”).

100. *Id.*

101. *2019 Regular Session – HB 4*, N.M. LEGISLATURE, <https://www.nmlegis.gov/Legislation/Legislation?chamber=H&legType=B&legNo=4&year=19> [<https://perma.cc/A69L-PYNA>] (follow “Actions” link at left) (passing the House by a vote of 56 to 11).

102. Interview with Daymon Ely, *supra* note 92. (“I said, look you have choices between the House and Senate version. Public has a choice. Senate Committee has a choice. You can either have a bill that provides that the ethics commission is transparent or not. The House version is essentially transparent. The Senate bill is not. You can have the House bill where the commission has direct subpoena power or the Senate bill where they don’t. You can have a bill that tramples on the first amendment which is the Senate version or one that doesn’t which is the House version. And then everyone went apeshit on me as expected. So everybody got pissed and it just stopped everything but neither version was going to get out anyway.”)

The Senate then felt pressure to act for fear of seeming like it was the chamber against the Ethics Commission.<sup>103</sup> So Senator Mimi Stewart revived the effort in the Senate Education Committee where she had already submitted a “dummy bill”<sup>104</sup> which she substituted to look more like the House version.<sup>105</sup> A manic amendment process followed, revealing the compromises necessary to pass the bill. Some changes created higher bars to submitting complaints. A requirement was added that complainants attest under oath subject to penalty of perjury when submitting a complaint.<sup>106</sup> A new clause required a vote by five commissioners to instigate a complaint process.<sup>107</sup> Other amendments restricted the scope of the Commission’s authority. Public school districts and boards were removed from the Commission’s jurisdiction.<sup>108</sup> Similarly, an amendment removed the Open Meetings Act, Inspection of Public Records Act, and the School District Campaign Reporting Act from the Commission’s jurisdiction.<sup>109</sup> Finally, the length of time from a finding of probable cause until a complaint is made public was extended from twenty days to thirty days.<sup>110</sup>

Senator Stewart’s bill passed both houses unanimously, although with some remaining differences between the two chambers.<sup>111</sup> In a midnight conference committee meeting on the last day of the session, representatives from the House and Senate compromised on both the subpoena power and blackout period, and a final bill was agreed upon.<sup>112</sup> Governor Lujan Grisham later signed the State Ethics Commission Act into law.<sup>113</sup>

The debates between chambers and each amendment to the final bill makes clear that the legislative intent manifest in the final State Ethics Commission Act was not to create the strongest or most independent commission possible. Instead, the powers of the commission were negotiated against the desire to protect legislators’ careers and pocketbooks from frivolous complaints, resulting in a compromise law which chipped away at the Commission’s power in impactful ways.

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103. *Id.* (“Now there is pressure on the Senate . . . the Senate has a political problem, they look terrible.”).

104. A dummy bill refers to a procedural maneuver in which a legislator submits a blank bill at the beginning of the session and, after the deadline for filing new bills has passed, brings the blank bill up for consideration in committee with an amendment constituting the entire text of a new substitute bill. See Andy Lyman, ‘Dummy Bills’ Can Create New, Resurrect Old Bills, N.M. POL. REP. (Feb. 4, 2016), <http://nmpoliticalreport.com/2016/02/04/dummy-bills-can-create-new-resurrect-old-bills-nmleg/> [<https://perma.cc/9MLP-492K>].

105. See S.B. 668, 54th Leg., 1st Sess. (N.M. 2019), <https://www.nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0668EDS.pdf> [<https://perma.cc/Y9FR-PKCU>].

106. *Id.* (providing in-line, text-specific changes to the bill per each amendment),

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See 2019 Regular Session – SB 668, N.M. LEGISLATURE <https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=668&year=19> [<https://perma.cc/6WLP-SQPJ>] (follow “Actions” link at left).

112. See *id.*; see also Interview with Daymon Ely, *supra* note 93.

113. 2019 Regular Session – SB 688, *supra* note 113.

### G. The Ethics Commission

The State Ethics Commission Act defines the powers and many procedures of the Commission.<sup>114</sup> The primary roles of the Commission are to investigate and adjudicate complaints, issue advisory opinions, and provide training to state employees.<sup>115</sup> The complaint process begins by intaking complaints.<sup>116</sup> In response to concerns about bad-faith complaints, complainants must attest to the truth of their allegations in the presence of a notary public and submit their complaint under penalty of perjury.<sup>117</sup> This represents a compromise between the House's preference for an open door to complaints and the Senate's provisions criminalizing leakers.<sup>118</sup> Under this version, complainants can still go public if they want to but there are protections in place to disincentivize complaints made in bad faith.

Complaints are limited in two other ways. A statute of limitations is imposed. Complaints must be made within two years from the time when the alleged conduct occurred or could have reasonably been discovered.<sup>119</sup> Second, a blackout period is observed. The Commission will not adjudicate complaints made against a candidate within 60 days of a primary or general election.<sup>120</sup>

Once a complaint is received, the Commission's Executive Director will decide if the complaint is within its jurisdiction.<sup>121</sup> Surviving that barrier, a complaint goes to the general counsel to conduct a preliminary investigation.<sup>122</sup> If the counsel determines the complaint is unsubstantiated, it will be dismissed, and it will not be made public.<sup>123</sup> But if the general counsel finds probable cause, the complaint will continue, and it will be made public within 30 days.<sup>124</sup> After the bill was passed, Senate Majority leader Peter Wirth said the "initiative strikes the right balance between public transparency and due process for the accused."<sup>125</sup>

The general counsel has the right to administer oaths, interview witnesses, and examine records.<sup>126</sup> If a subpoena becomes necessary, the counsel may communicate such to the director, who can request that the full commission petition a district court judge to issue such a subpoena.<sup>127</sup> If a subpoena requires enforcement, the same process is followed to request the district court issue an order.<sup>128</sup>

114. 2019 N.M. Laws, ch. 86, §§ 1–42 (codified at N.M. STAT. ANN. §§ 10-16G-1 to 16 (1978)).

115. N.M. STAT. ANN. § 10-16G-5 (1978).

116. *Id.* § 10-16G-10.

117. *Id.* § 10-16G-10(B).

118. *See supra* note 96.

119. N.M. STAT. ANN. § 10-16G-15(A) (1978).

120. *Id.* § 10-16G-15(B).

121. § 10-16G-10(D).

122. § 10-16G-10(E).

123. *Id.*

124. § 10-16G-10(G).

125. *New Mexico Forges Ahead with Independent Ethic Commission*, AP (Mar. 28, 2019), <https://apnews.com/28c002e81dc94d969ae828d8d469608d> [<https://perma.cc/4P77-FC4E>].

126. § 10-16G-10(I).

127. *Id.*

128. § 10-16G-10 (J). Of note, the Commission will have a specific district court judge assigned to it for two-year terms by the Chief Justice of the state Supreme Court. *Id.*

If the general counsel's investigation suggests there was an ethical violation, a hearing officer will adjudicate the complaint.<sup>129</sup> The complainant may settle the complaint without a finding, or the hearing officer will make a determination using a preponderance of the evidence standard.<sup>130</sup> Complainants or subjects of complaints may appeal a ruling to the full seven-member Commission.<sup>131</sup> The Commission may refer criminal issues to the Attorney General, refer other issues back to an executive agency or legislative council for enforcement, file for civil enforcement in court, or issue fines for civil violations of several state laws.<sup>132</sup>

The Ethics Commission Act made few changes to substantive anti-corruption law, and where it did the purpose was to centralize processes in the Commission rather than across executive agencies. The commission has jurisdiction to enforce a discrete group of laws which formerly rested with the Attorney General: the Campaign Reporting Act, Financial Disclosure Act, Gift Act, Lobbyist Regulation Act, Voter Action Act, Governmental Conduct Act, Procurement Code, the Ethics Commission Act, and article IX, section 14 of the New Mexico Constitution.<sup>133</sup> Other substantive changes include an amendment to the Governmental Conduct Act which removes from the Secretary of State and gives to the commission responsibility for receiving agency codes of conduct, for designing legislators' ethics training, and for advising and educating government employees about ethical requirements.<sup>134</sup>

While the creation of the Ethics Commission is worthwhile, there are remaining steps to take if the commission is to succeed. The Commission as currently structured evinces critical gaps in enforcement power that must be fixed, and gaps in the underlying anti-corruption law that must also be filled.

## ANALYSIS

### II. NEW MEXICO MUST STRENGTHEN THE ETHICS COMMISSION

The Ethics Commission, as currently empowered in the enabling legislation, risks failing to meet its mandate. If the purpose of the Commission is to discourage public corruption and build public trust in government, then the Commission's strength and the public's perception of its independence are both paramount. Observers consider the following factors when evaluating the strength and independence of ethics commissions: jurisdiction, budget and staffing, transparency, legal structure, and commissioner selection and removal.<sup>135</sup> This

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129. N.M. STAT. ANN. § 10-16G-12(A)(2) (1978).

130. N.M. STAT. ANN. §§ 10-16G-10(F), 10-16G-12(D) (1978).

131. § 10-16G-12(E).

132. N.M. STAT. ANN. §§ 10-16G-9, 10-16G-12(D), 10-16G-14 (1978)

133. § 10-16G-9.

134. 2019 N.M. Laws, ch. 86, §§ 23–24; N.M. STAT. ANN. §§ 10-16-11, 13.1 (Effective January 1, 2020) (1978).

135. See, e.g., *Principles of an Effective Ethics Commission*, N. M. ETHICS WATCH, <http://nmethicswatch.org/wp-content/uploads/2019/02/NMEW-Principles-of-An-Effective-Ethics-Commission.pdf> [<https://perma.cc/8JZ8-2WLV>]; CAMPAIGN LEGAL CTR, PRINCIPLES FOR DESIGNING AN



section acknowledges the Commission's legal foundations and transparency as strengths, but critiques other significant weaknesses in the current Ethics Commission Act and makes recommendations for addressing them.

### A. Legal Foundation

New Mexico's Commission, by virtue of being created constitutionally rather than statutorily, begins on solid legal footing. The constitutional amendment solves separation of powers concerns that can arise when an ethics commission is created within one branch of government but attempts to provide oversight for other branches.<sup>136</sup> In this way, the Ethics Commission will not be vulnerable to legal challenges that could undermine its ability to operate. In addition, by being outside of any one branch of state government, the Ethics Commission is assured a certain amount of independence. It will never be tasked with investigating a public official who has oversight or control over it in any organizational chart.<sup>137</sup>

### B. Public Disclosure and Transparency

Public trust and public knowledge of ethics violations are paramount for the effectiveness of an ethics commission. The New Mexico Ethics Commission is required to make complaints public within thirty days after a finding of probable cause and all hearings must be open to the public.<sup>138</sup> This is a significant improvement from earlier drafts of the bill in which no public disclosure was required.<sup>139</sup> In fact, it requires public disclosure earlier in the process than many other states. Florida's ethics law, upheld as an exemplar of transparency by organizations like the Campaign Legal Center,<sup>140</sup> requires public reporting of the results of an investigation only after an investigation has been completed.<sup>141</sup> The legislature should guard against any future attempts to diminish the transparency of the Ethics Commission.

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INDEPENDENT ETHICS COMMISSION <https://campaignlegal.org/sites/default/files/2018-06/Principles%20for%20Designing%20an%20Independent%20Ethics%20Commission.pdf> [<https://perma.cc/4MWA-SPYG>].

136. See, e.g., McSherry, *supra* note 4, at 602, 618–627 (discussing a failed bill to create a statutory ethics commission in 2007 and potential constitutional problems of a legislatively-empowered commission investigating other branches).

137. See, e.g., Marianne Goodland, *COVER STORY: Colorado's Independent Ethics Commission on Uncertain Course*, GAZETTE (June 21, 2020), [https://gazette.com/news/cover-story-colorado-s-independent-ethics-commission-on-uncertain-course/article\\_8132b6ac-b06c-11e8-9c01-b338b2bab7ad.html](https://gazette.com/news/cover-story-colorado-s-independent-ethics-commission-on-uncertain-course/article_8132b6ac-b06c-11e8-9c01-b338b2bab7ad.html) [<https://perma.cc/FAF6-XDHW>] (discussing Colorado moving its commission from the executive branch to the judicial branch to protect its independence).

138. N.M. STAT. ANN. §§ 10-16G-10(G), 10-16G-12(A)(2) (1978).

139. See S.B. 619, 54th Leg., 1st Sess. (N.M. 2019), <https://nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0619.pdf> [<https://perma.cc/9M5G-7FQ2>].

140. See CAMPAIGN LEGAL CENTER, *supra* note 138.

141. FLA. STAT. ANN. § 112.322(2)(b) (West 2020).

### C. The Ethics Commission's Limited Jurisdiction

Though the Ethics Commission is often sold as a panacea for government corruption, it is a body with surprisingly limited jurisdiction. It has subject matter jurisdiction over the civil enforcement of a discrete set of enumerated laws,<sup>142</sup> and it asserts personal jurisdiction over a specific sub-group of public officials: state executive branch officials, state legislative and state-wide elected officials or candidates, government contractors, lobbyists and lobbyists' employers.<sup>143</sup> The statute of limitations is relatively short—two years from the date of the alleged conduct.<sup>144</sup> Jurisdiction is limited in time in one other way; complaints may not be considered against a candidate within 60 days of an election.<sup>145</sup>

It is worth noting that the Ethics Commission does not have jurisdiction over criminal matters, though the Commission can refer complaints containing criminal allegations to the Attorney General or a district attorney.<sup>146</sup> This jurisdictional limitation is appropriate, but given that most of the cases of corruption that have been discussed in this comment, for example, are criminal issues, this limitation reveals that the Commission has less authority than the general public might expect, which has the potential to undermine public confidence in the commission.

Many potential corrupt actors or actions lay outside the bounds of the given jurisdiction. The largest gap in Commission jurisdiction is that it covers only state-level employees or elected officials. Local government, school districts, charter schools, and state-level commissions were exempted from Commission oversight completely.<sup>147</sup> Any county commissioner, city councilor, mayor, school board member, district superintendent, or acequia mayordomo<sup>148</sup> accused of wrongdoing is spared a public and independent investigation by the Ethics Commission.<sup>149</sup>

There are many forms of corrupt behavior that fall outside the bounds of the enumerated bills. The Commission does not have discretion to address forms of legal

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142. N.M. STAT. ANN. § 10-16G-9 (1978) (allowing jurisdiction over “(1) the Campaign Reporting Act; (2) the Financial Disclosure Act [Chapter 10, Article 16A NMSA 1978]; (3) the Gift Act [10-16B-1 to 10-16B-4 NMSA 1978]; (4) the Lobbyist Regulation Act [Chapter 2, Article 11 NMSA 1978]; (5) the Voter Action Act [1-19A-1 to 1-19A-17 NMSA 1978]; (6) the Governmental Conduct Act [Chapter 10, Article 16 NMSA 1978]; (7) the Procurement Code [13-1-28 to 13-1-199 NMSA 1978]; (8) the State Ethics Commission Act ; and (9) Article 9, Section 14 of the constitution of New Mexico.”)

143. *Id.*

144. N.M. STAT. ANN. § 10-16G-15 (1978).

145. *Id.*

146. N.M. STAT. ANN. § 10-16G-14 (1978).

147. *See* N.M. CONST. art. V, § 17; N.M. STAT. ANN. § 10-16G-1 to -18. (1978).

148. Acequia associations manage common waterways in New Mexico, and must by law appoint commissioners and a mayordomo, or superintendent, for the management thereof. *See* N.M. STAT. ANN. § 73-2-1 to -68 (1978).

149. They may, however, still face prosecution for criminal violations of anti-corruption law. *See supra* note 149 and accompanying text. In addition, at least the City of Albuquerque has established an Inspector General's Office meant to investigate fraud, abuse, mismanagement, and waste in city government. *See Inspector General*, CITY OF ALBUQUERQUE, <https://www.cabq.gov/inspectorgeneral> [<https://perma.cc/8F83-6BBX>].

corruption which arise in state government.<sup>150</sup> But more to the point, certain anti-corruption bills are not within the scope of the Ethics Commission, like the Open Meetings Act or Inspection of Public Records Act, for example.<sup>151</sup> The power to investigate alleged violations of the Campaign Reporting Act were, unlike other laws, not given exclusively to the Ethics Commission. Instead, the Commission and Secretary of State are required to share jurisdiction.<sup>152</sup>

Also outside of Ethics Commission domain are the codes of ethics for the legislature and executive agencies unless or until the Commission is able to negotiate memoranda of understanding for shared jurisdiction with those bodies.<sup>153</sup> In the meantime, the legislature still gets to write its own ethics rules and investigate alleged violations of those rules by its own members without interference from the independent ethics commission. In practice, this would mean that the existence of the new Ethics Commission would not change the process regarding a complaint like the one brought against Representative Carl Trujillo in the run-up to the 2018 election. Trujillo was accused of sexually harassing a lobbyist and was investigated by his peers on the Legislative Ethics Committee, where his accuser refused to submit to questioning.<sup>154</sup> Even if the accuser had agreed to submit for questioning before the Committee, and had the Committee found reason to pursue a reprimand for Trujillo, the recommendation would still have had to go before the full seventy-member house for a vote.<sup>155</sup> While the investigation was open, Trujillo lost his seat in a primary election, and the issue became moot—leaving both accuser and accused with plenty of reason for frustration with the process.<sup>156</sup> That process remains unchanged despite the passage of the new State Ethics Commission. Because the accusation against Trujillo violated the legislature’s anti-harassment policy but not any existing anti-corruption law over which the Commission has authority, the complaint would have still been adjudicated by Trujillo’s peers in the Legislative Ethics Committee and House of Representatives. All of this is to say that in New Mexico, a large body of ethics rules will still be written by state agencies or the legislature and complaints made pursuant to those rules will still be handled internally rather than by the independent Commission.

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150. See *supra* section I, part A; *infra* section III, parts A and C.

151. See *supra* note 111 and accompanying text.

152. 2019 N.M. Laws, ch. 86, § 19; N.M. STAT. ANN. § 1-19-34.8 (1978)

153. N.M. STAT. ANN. § 10-16G-9(E) (1978).

154. Andrew Oxford, *Legislative Panel Scraps Harassment Case Against Rep. Trujillo*, SANTA FE NEW MEXICAN (Nov. 28, 2018), [https://www.santafenewmexican.com/news/local\\_news/legislative-panel-scraps-harassment-case-against-rep-trujillo/article\\_2c88edfe-a74b-5dcc-be18-085f8cc5a64a.html](https://www.santafenewmexican.com/news/local_news/legislative-panel-scraps-harassment-case-against-rep-trujillo/article_2c88edfe-a74b-5dcc-be18-085f8cc5a64a.html) [<https://perma.cc/V26G-9RLL>].

155. Dan McKay & Dan Boyd, *Investigators Move Sexual Harassment Case Against Legislator Forward*, ALBUQUERQUE J. (July 28, 2018, 11:18 PM), <https://www.abqjournal.com/1202149/investigation-finds-probable-cause-in-case-against-rep-trujillo.html> [<https://perma.cc/S565-W7EY>].

156. *Id.*

### **Recommendation**

The legislature should expand the scope of the Ethics Commission to cover local government, school boards, and state-wide commissions. Doing so would expand the number of potential victims and whistleblowers able to appeal to the Commission and would expand the Commission's deterrent effects down to the levels of government closest to the citizenry. The legislature should also give the Ethics Commission the authority to write codes of ethics and enforce them for all government entities, including the legislature itself. By doing this, all violations of ethics would be investigated and adjudicated by the independent body and not by a legislator's own peers in the Legislative Ethics Commission. Both changes could be accomplished through an amendment to the Ethics Commission Act.

In giving the Commission the ability to write and enforce codes of ethics, New Mexico would not be unique. Oklahoma's ethics commission not only has jurisdiction over violations of governmental codes of ethics, but it writes the codes of ethics itself.<sup>157</sup> While the legislature has demonstrated a reluctance to abdicate power over its own ethics rules, its hesitation is misplaced. A fear of politicizing the complaint process should lead, logically, to desiring investigations and findings by an independent body.

### **D. Subpoena Power, Interrupted**

After tough debate between a House version with full subpoena power and a Senate version without any subpoena power, the final Ethics Commission Act contained a compromise allowing the Commission indirect subpoena power.<sup>158</sup> The Commission must petition a district court judge assigned to it by the Supreme Court to issue a subpoena on its behalf.<sup>159</sup> While this compromise gives the Commission much more power than if it had no subpoena authority at all, it adds an extra step and another layer of potential conflict of interest to Commission investigations. Imagine the conflicts, real and perceived, if the assigned judge knew the legislator or state employee who is the subject of a complaint. The extra step also provides more opportunity for inefficiency or obstruction. If a judge decided to be antagonistic to the Commission and not approve subpoenas, there would be a significant wrench in the system. The extra layer of permission, which may very well pose no problem much of the time, has the potential to create a significant barrier to the Commission's functional independence. Even when working well, the extra step has the potential to add to a public perception that the Commission lacks independence.

#### *Recommendation*

The obvious solution is to empower the Commission with direct subpoena power. Oklahoma's commission, for example, includes in the state constitution that the commission may issue subpoenas independently.<sup>160</sup> New Mexico's constitution

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157. OKLA. CONST. art. XXIX, § 3.

158. *See supra* notes 99, 124–130 and accompanying text.

159. N.M. STAT. ANN. § 10-16G-5(C)(2) (1978).

160. OKLA. CONST. art. XXIX, § 4(C).

creates space for the Ethics Commission to have its own subpoena power, leaving the nature of the power up to the legislature.<sup>161</sup> An amendment to the Ethics Commission Act, therefore, could give the Commission full independence to conduct its own investigations without a judicial branch gatekeeper. The Legislature should amend the Ethics Commission Act to give the Ethics Commission full, independent, and direct subpoena power.

### E. The Lack of Recurring Funding

Conspicuously absent from both the constitutional amendment and the enabling legislation is any reference to funding for the Commission. The Commission is required to reimburse members for travel and to have at minimum an Executive Director and General Counsel on staff.<sup>162</sup> It will also require office space, a meeting location, basic office equipment an internet presence, and a docketing system at the very least. All of these things are necessary for it to function, and ostensibly require funding. For its first year, the Commission received a \$500,000.00 appropriation.<sup>163</sup> This is less than the \$1,000,000 recommended by civic organizations.<sup>164</sup> And a single-year appropriation does not guarantee future funding.

Even if the legislature feels public pressure to keep the Ethics Commission funded now, the Commission loses its independence without guaranteed recurring funding. It will always be forced to advocate for its funding and to hope that the complicated politics of the legislative budget and gubernatorial veto processes result in the full funding requested. Although it is hard to imagine a politician being willing to be publicly against the Ethics Commission, it is entirely possible for a frustrated legislator or governor to hold up funding for the Commission. This gives both the legislative and executive branches opportunities to coerce, manipulate, or punish the Commission—and the ability to shut it down entirely by defunding it. In practical terms, this is a direct threat to the Commission’s ability to investigate and hold government officials accountable independently and without fear of reprisal.

#### *Recommendation*

New Mexico should ensure the Commission has recurring funding in law. The strongest way of accomplishing this would be to mimic Oklahoma, which in its state constitution compels the state legislature to annually appropriate funding “sufficient to enable it to perform its duties.”<sup>165</sup> Short of going through the more challenging constitutional amendment process, the legislature could provide for recurring funding statutorily in an amendment to the Ethics Commission Act. In this

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161. N.M. CONST. art. V, § 17(C) (“The state ethics commission may require the attendance of witnesses or the production of records and other evidence relevant to an investigation by subpoena *as provided by law*”) (emphasis added).

162. N.M. STAT. ANN. §§ 10-16G-3(G), 10-16G-6.

163. General Appropriation Act, H.B. 2, 54th Leg., 1st Sess., Sec. 5, § 39 at 179 (N.M. 2019), <https://nmlegis.gov/Sessions/19%20Regular/final/HB0002.pdf> [<https://perma.cc/N73Y-6PA2>].

164. See, e.g., N. M. ETHICS WATCH, *supra* note 5.

165. OKLA. CONST. art. XXIX, § 2.

way, the Commission would be assured of a minimum level of funding and could operate independently and effectively.

### **III. AN ETHICS COMMISSION IS NOT A PANACEA AND THE NEW MEXICO LEGISLATURE SHOULD CONTINUE TO FILL GAPS IN ANTI-CORRUPTION LAWS**

The Ethics Commission, a supposed answer to the problem of government corruption, makes few changes to substantive anti-corruption law in New Mexico. The Commission is tasked with enforcing the laws as they exist, and as such is limited in its scope and force by those laws. For the Commission to meet its broad mandate, the legislature must not only strengthen the Commission directly, but must also address gaps in anti-corruption law broadly. While the purpose of this comment is not to give a comprehensive survey of all anti-corruption law in New Mexico, this section will exemplify the problems of unaddressed gaps by recommending changes to three areas of law and legislative procedure where corruption seeps into the system legally and beyond the reach of the new Commission: the unpaid legislature, income disclosure, and the capital outlay process.

#### **A. Professionalize the Legislature**

New Mexico's so-called "citizen-legislature," is rife with legal corruption. Because the state constitution prohibits state legislators from receiving a salary, New Mexico's legislators often have jobs on the side—if they are not retired or independently wealthy.<sup>166</sup> In contrast to full-time, salaried legislators elsewhere, New Mexico's lawmakers cannot approach policy decisions only being concerned about the public good, but are forced to consider how each vote might impact their livelihood. When legislation about the insurance industry is being considered, for example, legislators who work in insurance are incentivized to act in their own self-interest to protect the industry.<sup>167</sup> This type of corruption is inherent in a citizen legislature, and lawmakers vote on bills affecting their day jobs entirely legally. Nothing about the creation of an independent ethics agency changes that fact. The citizen legislature serves as an example of the simple, common, and legal ways public decisions can be made in the private interest, undermining government effectiveness and public trust.

#### *Recommendation*

The direct solution to this problem is to professionalize the legislature by paying lawmakers a salary sufficient to live on. Eliminating legislators' need for a separate source of income would relieve policymaking of many conflicts of interest. This solution is easier identified than implemented. Because the citizen legislature is a constitutional creation, it requires a constitutional fix. Moreover voters in the past

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166. N.M. CONST. art. IV, § 10.

167. *See supra* note 36 and accompanying text.

have shown little interest in allowing legislators a salary.<sup>168</sup> The concern of this comment, however, is not the politically possible, but the legally preferable. To meet the goal of reducing public corruption and conflicts of interests, paying legislators is a necessary step.

## B. Strengthen Income Disclosure Laws

As long as legislators do maintain personal careers, the public has an interest in transparently knowing how those legislators make money.<sup>169</sup> The Financial Disclosures Act (“the Act”), however, permits legislators to keep details of their finances in the dark.<sup>170</sup> The Act only requires disclosure of “general category descriptions” of sources of income above \$5,000.<sup>171</sup> In practice, legislators are able to list vague, non-specific sources of income. For example, a legislator who is a practicing attorney could list “General Civil Law Practice” without the public ever knowing whose interests that attorney is paid to represent.<sup>172</sup> Legislators are also free to avoid disclosing the specific amount of income generated from a source.<sup>173</sup> The public is left to guess whether or not the legislator’s income or business interest is worth thousands of dollars or millions—surely a meaningful distinction when the legislator is considering laws that may affect those interests. Finally, financial interests from out of state are generally not vulnerable to disclosure.<sup>174</sup>

It is possible for legislators to fill out an annual disclosure form which reveals very little about potential conflicts of interest. The public deserves to know what private interests a legislator has by knowing for whom and with whom they are doing business—and the extent to which those interests relate to bills that legislators write, support, and vote on.

### *Recommendation*

The legislature should amend the Financial Disclosure Act to require greater transparency. The Ethics Commission, in its new capacity, could immediately issue advisory opinions defining the types of actions which represent conflicts of interests and could advocate for strengthening of reporting laws. Specific

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168. Constitutional amendments allowing for a paid legislature have been voted down by the general public in 1961, 1965, 1969, 1974, 1978, 1990, and 1992. See N.M. Compilation Comm’n, *Constitution of New Mexico Sec. 10 [Compensation of Members]*, Annotations, NMONESOURCE <https://laws.nmonesource.com/w/nmos/const-nm#!b/aIVs10> [<https://perma.cc/BFE8-66SZ>].

169. See generally Justin Horwath, *Inaccurate Financial Disclosures Leave Voters in Dark*, SANTA FE NEW MEXICAN (Sept. 24, 2016), [https://www.santafenewmexican.com/news/local\\_news/inaccurate-financial-disclosures-leave-voters-in-dark/article\\_9f40569a-a084-578b-80a5-51e24717608b.html](https://www.santafenewmexican.com/news/local_news/inaccurate-financial-disclosures-leave-voters-in-dark/article_9f40569a-a084-578b-80a5-51e24717608b.html) [<https://perma.cc/62TV-MWQC>].

170. See N.M. STAT. ANN. § 10-16A-1 to -8 (1978).

171. *Id.* § 10-16A-3(D)(2).

172. See, e.g., Kathleen A. Sabo, *Public Deserves More Info on Financial Forms*, ALBUQUERQUE J., (Nov. 10, 2019, 12:05 AM), <https://www.abqjournal.com/1389714/public-deserves-more-info-on-financial-forms.html> [<https://perma.cc/HBJ7-7TBH>].

173. See DOUGLAS CARVAR & LUCY RIVER, N.M. ETHICS WATCH, *LEARNING TO WALK: NEW MEXICO’S ANEMIC FINANCIAL DISCLOSURE REGIME 5*, [http://nmethicswatch.org/wp-content/uploads/2017/01/NMEW\\_FinancialDisclosures\\_WalkingBeforeRunning\\_WEB5.pdf](http://nmethicswatch.org/wp-content/uploads/2017/01/NMEW_FinancialDisclosures_WalkingBeforeRunning_WEB5.pdf) [<https://perma.cc/5K4A-M3FQ>].

174. *Id.*

changes should include (1) requiring “the reporting of names, addresses, and employers of the” legislator plus their spouse/domestic partner, “children, children’s spouses, and household members”; (2) requiring “that the relationship between co-owners of real estate be revealed”; (3) requiring “specificity when reporting income sources so that it is clear that sources reported throughout the form are captured in the income source reporting”; and (4) “requiring reporting of tiers of economic interest . . . so that it is clear how significant a reported financial interest is.”<sup>175</sup> Even if legislators were paid, these disclosure requirements should still be operative and would be worthwhile for revealing lawmakers’ personal financial interests.

### C. Shine Sunlight on Capital Outlay Procedures

New Mexico’s public infrastructure funding process is non-transparent and political, giving legislators a simple way to engage in legal corruption and quid pro quo. Public infrastructure spending, or capital outlay spending, is the process by which the state funds public works—roads, bridges, dams, courthouses or community centers.<sup>176</sup> In 2019, the legislature appropriated over \$900 million in capital outlay.<sup>177</sup>

The problem is that the process is anonymous and political. Every year, the pot of money allocated for capital outlay is divvied up between 112 legislators and the governor.<sup>178</sup> Each individual legislator then confidentially requests local projects for funding and those recommendations are rolled up into a single appropriations bill, with each project’s requestor remaining secret.<sup>179</sup> New Mexico is the last state in the country that allows individual legislators to earmark funds for their districts.<sup>180</sup>

Without objective criteria for selection, or transparency about who is selecting which projects, it is impossible to know why state money is being doled out to its recipients—making it possible for legislators to wield the power of the purse for corrupt ends.<sup>181</sup> An individual legislator can easily direct funding not based

175. SABO & AREVALO, *supra* note 67, at 386.

176. See, e.g., Jens Gould, *Many Seek Capital Outlay, But Process Opaque*, SANTA FE NEW MEXICAN (Feb. 1, 2020), [https://www.santafenewmexican.com/news/legislature/many-seek-capital-outlay-but-process-opaque/article\\_b16c0d00-4486-11ea-a3a6-3fed84de9521.html](https://www.santafenewmexican.com/news/legislature/many-seek-capital-outlay-but-process-opaque/article_b16c0d00-4486-11ea-a3a6-3fed84de9521.html) [<https://perma.cc/TLG3-5BVL>].

177. Marjorie Childress, *NM Doles out Billion Dollars in Capital Outlay, Funding Decisions Remain Secret*, N. M. IN DEPTH (Mar. 11, 2019), <http://nmindepth.com/2019/03/11/nm-doles-billion-dollars-for-capital-outlay-funding-decisions-remain-secret/> [<https://perma.cc/4KD6-XAJZ>].

178. See FRED NATHAN & KRISTINA G. FISHER, THINK N.M., *THE STORY OF THE CHRISTMAS TREE BILL: FIXING PUBLIC INFRASTRUCTURE SPENDING IN NEW MEXICO* 13 (2015) <http://www.thinknewmexico.org/wp-content/uploads/pdfs/CapitalOutlayReportWeb.pdf> [<https://perma.cc/4FXJ-35H6>].

179. See, e.g., *id.* at 15; Childress, *supra* note 191; Steve Terrell, *Outlook Uncertain for Reform of State’s Ridiculed Capital Outlay Process*, TAOS NEWS (Feb. 5, 2016), <https://taosnews.com/stories/outlook-uncertain-for-reform-of-states-ridiculed-capital-outlay-process,26954> [<https://perma.cc/5FF6-MLR9>].

180. Sandra Fish, *Analysis: Weaknesses Mar NM’s Capital Outlay System*, N. M. IN DEPTH (Aug. 15, 2015), <http://nmindepth.com/2015/08/15/analysis-weaknesses-mar-nms-capital-outlay-system/> [<https://perma.cc/P79L-H2QY>].

181. See, e.g., NATHAN & FISHER, *supra* note 192, at 13. (“Michael Pagano, a professor in the Department of Public Administration at the University of Illinois and a national expert on state capital budgeting said that New Mexico’s annual Christmas Tree Bill ‘would be the illustration about how not to do capital improvement planning.’”).



on the public good, but as a tool for rewarding political supporters, coercing non-supporters, or enriching self and friends.<sup>182</sup> Indeed, without transparency, it is nearly impossible for the public to know whether or not that is happening.

Because this type of corruption is entirely legal, the new Ethics Commission will not have any authority to address it. If the goal is to reduce public corruption in New Mexico government, addressing the capital outlay disbursement processes is critical.

### *Recommendation*

There are any number of solutions to this problem. A direct one for reducing opportunities for corruption is to make the current system transparent. Ensuring the public knows who is recommending which projects and why would, at the very least, allow journalists and other watchdogs to follow the money. The more comprehensive solution would be to make the process entirely non-political by removing capital outlay from the legislature and giving it to a commission focused on long-term planning and objective prioritization, as nineteen other states have done.<sup>183</sup> In this way, the public interest would be elevated and legislators' opportunities to use the funds personally would be eliminated. Finally, the Ethics Commission's jurisdiction could be expanded to include overseeing public infrastructure projects, as is the case with New York's Inspector General.<sup>184</sup>

These three holes in anti-corruption law—the unpaid legislature, the weak income disclosure, and the secret capital outlay—are not a comprehensive description of gaps in the law, but they are representative of the problem. The Ethics Commission can only enforce the law to the extent that it exists. In order to support the Commission's success, the legislature should continue to push urgently to repair breaches in laws and legislative procedures that allow legal corruption to continue.

## CONCLUSION

This Comment began by describing a string of high-profile corruption scandals in New Mexico in recent years. The New Mexico legislature, as a solution, created the State Ethics Commission to curb illegal corruption. The reduction of public corruption is a worthy goal, and an independent ethics agency could very well be a contributing part of the effort. But for the Ethics Commission to succeed, it must be strengthened, and gaps in the underlying anti-corruption law it is meant to enforce must be filled. Without a continued effort to build strong constraints and create powerful disincentives to public corruption, the Ethics Commission is set up to fall short of expectations. New Mexico citizens backed the Ethics Commission with a

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182. See, e.g., *supra* notes. 86–87 and accompanying text (discussing a Senate Pro Tem directing extra capital outlay money to a building project which he pocketed).

183. See NATHAN & FISHER, *supra* note 192, at 19. [content/uploads/pdfs/CapitalOutlayReportWeb.pdf](https://www.nmlegis.gov/content/uploads/pdfs/CapitalOutlayReportWeb.pdf) (describing the independent commissions in Oklahoma and Utah and listing the models of 20 states with independent commissions).

184. *About The Office*, N. Y. OFF. INSPECTOR GEN., <https://ig.ny.gov/offices/inspectorgeneral> [<https://perma.cc/K8DX-4CPB>]

landslide vote. But a flailing or failing Commission, created in part to build public trust in government, risks having the opposite effect, disappointing and disillusioning the public which supported it.