



Summer 2009

## The Proposed State Ethics Commission Act: Reform for New Mexico's Wild West Politics, or Simply a Mirage

Erin McSherry

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### Recommended Citation

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 (2009).

Available at: <http://digitalrepository.unm.edu/nmlr/vol39/iss3/8>

# THE PROPOSED STATE ETHICS COMMISSION ACT: REFORM FOR NEW MEXICO'S "WILD WEST"<sup>†</sup> POLITICS, OR SIMPLY A MIRAGE?

ERIN MCSHERRY\*

## I. INTRODUCTION

In response to state government scandals and the resulting public outcry, the New Mexico Legislature has considered adopting a "state ethics commission act" for several years.<sup>1</sup> The 2010 regular legislative session marked the fourth legislative session during which such a proposal was introduced.<sup>2</sup> Each version of the proposed act has included the creation of an ethics commission, intended to be an independent government-oversight agency.<sup>3</sup> The proposals have been consistent to the degree that they would create and mandate an ethics commission to: investigate alleged "ethics violations" committed by government actors, hold hearings, issue or recommend discipline for ethics violations, and train government actors in ethics.<sup>4</sup> Additional proposed commission responsibilities have varied between proposals.<sup>5</sup> None of the proposals, however, has been designed to address the causes of known government scandals.<sup>6</sup> Perhaps even more concerning, however, is the array of new problems such an ethics commission could create if one of the proposals were enacted.<sup>7</sup>

Some New Mexico politicians have protested proposed ethics reform legislation, arguing, "[y]ou're never going to be able to legislate morals."<sup>8</sup> That assertion may be true, depending on what is meant by "ethics." Laws are often passed in the name of "ethics reform,"<sup>9</sup> but is the label simply a misnomer? Merriam Webster's Dictionary defines "ethic(s)" as:

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† Stephanie Simon, *New Mexico's Political Wild West*, WALL ST. J., Jan. 17, 2009, at A5. "A cascade of recent corruption scandals," including a "pay-to-play" federal investigation of Governor Bill Richardson's administration, prompted another look at the state's political culture. *Id.*

\* University of New Mexico School of Law, Class of 2010. Erin thanks those individuals who assisted her in researching her topic, including members of the 2006 and 2007 task forces on ethics reform, New Mexico legislators, and a local reporter. She also thanks those who assisted her in her writing, including Professor Elizabeth Rapaport, Professor Michael Browde, and *New Mexico Law Review* editors Kevin Pierce, Jonathan Tsoisie, and Neil Bell. All opinions expressed are her own.

1. See discussion *infra* Part II.

2. See S.B. 43, 108, 154, & 268, 49th Leg., 2d Sess. (N.M. 2010) (as substituted by the senate rules committee); see also New Mexico Legislature, Bill Locator, [http://www.nmlegis.gov/lcs/\\_locatorcom.aspx?year=10](http://www.nmlegis.gov/lcs/_locatorcom.aspx?year=10) (last visited Feb. 28, 2010).

3. See discussion *infra* Parts III–IV.

4. See GOVERNOR RICHARDSON'S TASK FORCE ON ETHICS REFORM, REPORT OF RECOMMENDATIONS 8 (2006) [hereinafter 2006 TASK FORCE RECOMMENDATIONS].

5. See discussion *infra* Part III.

6. See discussion *infra* Part IV.

7. See discussion *infra* Part IV.

8. "The issue here is ethical conduct,' [House Speaker Ben Lujan] said of the proposed commission. 'You're never going to be able to legislate morals. You have those rules in Congress and look at what is happening there.'" Tripp Jennings, *JOURNAL POLL Tougher Ethics Supported*, ALBUQUERQUE J., Sept. 11, 2007, at A1 [hereinafter *Tougher Ethics Supported*]. "You can't legislate ethics,' [Senator] Ingle said. 'You either have ethics or you don't.'" Tripp Jennings, *Ethics Reform on Life Support; Sen. Gives Bill a 50-50 Chance*, ALBUQUERQUE J., Feb. 27, 2007, at A1 [hereinafter *Reform on Life Support*].

9. See generally National Council on State Legislators, Ethics in the News 2009, [http://www.ncsl.org/programs/ethics/Ethics\\_in\\_the\\_News09.htm](http://www.ncsl.org/programs/ethics/Ethics_in_the_News09.htm) (last visited Oct. 31, 2009) (listing ethics legislation by state for 2009).

1 . . . : the discipline dealing with what is good and bad and with moral duty and obligation 2A : a set of moral principles: a theory or system of moral values . . . B *pl but sing or pl in constr* : the principles of conduct governing an individual or a group <professional ~s> C : a guiding philosophy D : a consciousness of moral importance . . . 3 *pl* : a set of moral issues or aspects (as rightness) . . .<sup>10</sup>

The first and third definitions pertain to morality. Whether legislating morality is a proper function of lawmakers is an ongoing debate.<sup>11</sup> The second definition, however, particularly part “b,” describes the type of reform pursued through modern governmental “ethics reform.”<sup>12</sup> While standards for ethical conduct may vary by profession,<sup>13</sup> it is possible to codify the principles of appropriate conduct governing a particular group.<sup>14</sup> By analogy, one may consider government ethics legislation as the codification of professional conduct for government officials, or as the codification of professional canons applied to public employees and officials, similar to the use of ethics codes in other professions.<sup>15</sup>

Despite some legislators’ objections to “legislating ethics,” bills proposing a state ethics commission passed the New Mexico House of Representatives unanimously during the 2008 and 2009 New Mexico legislative sessions.<sup>16</sup> While no version of such a bill has yet passed the New Mexico Senate, legislators are likely to continue to introduce versions of the proposal, because interest in government ethics reform in New Mexico persists.<sup>17</sup> Further, ethics commissions are gaining status as a standard element in state governments. Commissions are now established, in some form, in forty states.<sup>18</sup> While the perceived political climate in New Mexico could make any ethics reform measure attractive, this note suggests that: (1) reform legislation should be designed to resolve known problems and no ethics commission proposal has yet done so; and (2) proposed state ethics commission acts should be modified to avoid likely pitfalls.<sup>19</sup>

This note reviews the impetus for the proposal of a New Mexico ethics commission, describes the 2009 proposal’s development and provisions, assesses the 2009 proposed commission’s likely effectiveness, and finally, suggests improvements.

10. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 429 (11th ed. 2003). Similarly, “ethical” is defined as: “1 : of or relating to ethics <-theories> 2 : involving or expressing moral approval or disapproval <-judgments> 3 : conforming to accepted professional standards of conduct <-behavior> 4 : of a drug : restricted to sale only on a doctor’s prescription” *Id.* (first emphasis added).

11. Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1538–41 (2007).

12. See generally Susan Frelich Appleton & Robyn M. Rimmer, *Power Couples: Lawmakers, Lobbyists, and the State of Their Unions*, 24 WASH. U. J.L. & POL’Y 207 (2007).

13. Journalists and lawyers are examples. See Society of Professional Journalists, Code of Ethics, <http://www.spj.org/pdf/ethicscode.pdf> (last visited Dec. 29, 2009). Legal ethics are: “1. standards of professional conduct applicable to members of the legal profession . . . 2. The study of such standards. 3. A lawyer’s practical observance of, or conformity to, established standards of professional conduct.” BLACK’S LAW DICTIONARY 976 (9th ed. 2009). Teachers similarly have professional rules. See Association of American Educators, Code of Ethics, <http://www.aateachers.org/code-ethics.shtml> (last visited Dec. 29, 2009).

14. See *supra* note 13 (regarding professional ethics codes).

15. See *supra* note 13.

16. See *infra* Part II.

17. See *infra* Part II.

18. See National Conference of State Legislatures, State Ethics Oversight Agencies, [http://www.ncsl.org/programs/ethics/comprehensive\\_list.htm](http://www.ncsl.org/programs/ethics/comprehensive_list.htm) (last visited Dec. 24, 2009).

19. See *infra* Parts IV–V.

Part II places the New Mexico ethics commission proposal into a timeline and into a political context. In order to consider a version of the proposal most likely to become state law, Part III summarizes the legislation that passed the New Mexico House of Representatives in 2009.<sup>20</sup> Part IV examines issues that undermine the appeal of the proposed commission, considering factors such as appropriateness, feasibility, and constitutionality. Part V proposes an alternative framework from which to approach ethics reform in New Mexico, and suggests amendments to ethics commission enabling legislation to address the issues raised by this note in Part IV.

## II. BACKGROUND

### A. *Impetus for Ethics Reform in New Mexico*

Calls for governmental ethics reform often follow widely publicized government scandal. State legislatures passed a wave of state legislation in the name of ethics reform following Watergate.<sup>21</sup> After Watergate, state governments in particular began creating “ethics infrastructure” that included stricter laws, ethics training, and oversight entities.<sup>22</sup>

Scandal was the recent impetus for New Mexico to pursue ethics reform proposals as well. On September 13, 2005, the New Mexico State Treasurer, Robert Vigil, and former Treasurer, Michael Montoya, were federally indicted for extortion and racketeering.<sup>23</sup> A jury convicted Vigil for attempted extortion in violation of the Hobbs Act,<sup>24</sup> and sentenced him to thirty-seven months in prison followed by three years supervised release. Under a plea deal in which he agreed to cooperate with ongoing investigations, Montoya pled guilty to one count of extortion, and admitted he took bribes “almost since he took office.”<sup>25</sup>

### B. *Pursuit of New Mexico Reform in 2006*

Within months of the indictments and Montoya’s guilty plea, New Mexico legislators proposed legislation to enact ethics reform.<sup>26</sup> Proposed bills would have increased oversight over the state treasurer’s office, increased penalties for corruption, and limited campaign contributions and gifts.<sup>27</sup> Although the 2006 ses-

20. See H.B. 151 & 614, 49th Leg., 1st Sess. (N.M. 2009) (as passed by the New Mexico House of Representatives); see also New Mexico Legislature, Bill Locator, [http://www.nmlegis.gov/lcs/\\_locatorcom.aspx?year=09](http://www.nmlegis.gov/lcs/_locatorcom.aspx?year=09) (last visited Dec. 29, 2009).

21. Nicole Casal Moore & Peggy Kerns, *State Ethics Commissions*, LEGISBRIEF (Nat’l Conference of State Legislatures, Denver, Colo.), Apr./May 2006.

22. *Id.*

23. Both indictment counts accused Vigil of Hobbs Act extortion violations. 18 U.S.C. § 1951 (2006). The grand jury returned three subsequent superseding indictments. The fourth accused Vigil of engaging in a pattern of racketeering, conspiring to engage in a pattern of racketeering activity, violating 18 U.S.C. § 1962(d), and money laundering, violating 18 U.S.C. § 1956(a)(1)(A)(i), attempted extortion, and violating the Hobbs Act, 18 U.S.C. § 1951. See Brief for Appellee at 1–2, *United States v. Vigil*, 523 F.3d 1258 (10th Cir. 2008) (No. 07-2060); see also Andy Lenderman, *New Mexico State Treasurers Indicted in Kickback Scheme*, SANTA FE NEW MEXICAN, Sept. 17, 2005, at C4.

24. 18 U.S.C. § 1951.

25. See Scott Sandlin, *Former Treasurer Montoya Pleads Guilty to Extortion*, ALBUQUERQUE J., Nov. 8, 2005, at A1.

26. See Tripp Jennings, *20 Bills Propose Ethics Reforms*, ALBUQUERQUE J., Feb. 12, 2006, at A10. New Mexico legislative sessions start the third Tuesday of January. N.M. CONST. art. IV, § 5(A).

27. Jennings, *20 Bills Proposed Ethics Reforms*, *supra* note 26 at A10.

sion was a “short session,” traditionally limited to budget issues,<sup>28</sup> New Mexico Governor Bill Richardson endorsed a package of “anticorruption and campaign reporting initiatives.”<sup>29</sup>

Only one ethics reform bill passed in 2006. The new law requires prospective state contractors to disclose campaign contributions made during the two years prior to submitting proposals for state contracts, and bans these contractors from making campaign contributions or giving things of value during the contracting process.<sup>30</sup> During the 2006 legislative session, Governor Richardson also supported a proposed campaign reporting act that would have required increased candidate reporting frequency and reporting detail, a bill that would have increased secretary of state oversight and enforcement powers, and an amended version of the government conduct act.<sup>31</sup> These bills did not pass.

After the 2006 legislative session, Richardson announced he had created “Governor Richardson’s Task Force on Ethics and Elections Reform” (2006 Task Force).<sup>32</sup> His executive order stated that “recent events at the federal<sup>33</sup> and state level make it abundantly clear that strong ethics and campaign finance laws are essential building blocks in forming an effective state government.”<sup>34</sup> He cited, as essential, that “the public has the utmost confidence in their government and [confidence] that [the government] works exclusively to advance the best interests of the people of New Mexico.”<sup>35</sup> The order called for the 2006 Task Force to study governmental ethics and campaign finance reform, including a review of current laws and regulations.<sup>36</sup> Based on this study, the 2006 Task Force was to develop a broad package of recommendations for presentation to Richardson prior to the 2007 regular legislative session.<sup>37</sup> The 2006 Task Force members included New

28. Non-budgetary bills may be introduced only if their subject matter appears in a “special message” from the governor’s office. N.M. CONST. art. IV, § 5(B)2. The session was “short,” meaning it lasted thirty days. New Mexico legislators meet for either a thirty- or sixty-day regular session each year. *Id.* § 5(A)–(B). Thirty-day sessions reserved for budgetary issues alternate with the longer sessions that are open to all other types of legislation. *Id.* § 5(A). Despite the reserved purpose for short sessions, numerous non-budgetary bills are often included in special messages from the governor. *See, e.g.*, New Mexico Legislature, Bill Locator, [http://www.nmlegis.gov/lcs/\\_locatorcom.aspx?year=10](http://www.nmlegis.gov/lcs/_locatorcom.aspx?year=10) (last visited Mar. 16, 2010).

29. Press Release, Office of the Governor, Governor Bill Richardson Announces State Treasurer, Former UNM Law School Dean to Spearhead Efforts to Pass Comprehensive Anti-Corruption, Campaign Reporting Initiatives (Jan. 19, 2006) (on file with author).

30. *See* S.B. 344, 47th Leg., 1st Sess. (N.M. 2006). The bill also provides for disclosure of the prospective contractor’s family and representatives’ contributions. *See* Press Release, Office of the Governor, Governor Bill Richardson Forms Bipartisan Task Force to Craft Sweeping Ethics Reform Plan (Apr. 20, 2006) (on file with author).

31. *Compare* Press Release, *supra* note 30, with N.M. LEGIS. COUNCIL SERV., 2006 CONCORDANCE REPORT, 47th Leg., 1st Sess. (N.M. 2006) (listing all legislation passed during the 2006 session).

32. N.M. Exec. Order 2006-021a (May 30, 2006) (on file with author).

33. Federal lobbyist Jack Abramoff pled guilty in January 2006 to fraud, tax evasion, and conspiracy to bribe public officials; many other public officials were implicated. Peter Whoriskey & William Branigin, *Abramoff Is Sentenced for Casino Boat Fraud*, WASH. POST, Mar. 30, 2006, at A1.

34. Exec. Order 2006-021a (May 30, 2006) (on file with author).

35. *Id.*

36. *Id.*

37. *Id.*

Mexico state legislators, other government officials, public policy non-governmental organization leaders, and members of the general public.<sup>38</sup>

After seven meetings, “[e]stablishing an independent state ethics commission” was the first of six 2006 Task Force recommendations.<sup>39</sup> The recommendation proposed charging an ethics commission with promoting increased accountability for ethical behavior through deterrence,<sup>40</sup> education, and improving appointing individuals’ awareness of their appointees’ unethical activity.<sup>41</sup> The 2006 Task Force’s recommended ethics commission would have, by statute and by constitutional amendment, powers to investigate allegations of unethical conduct of public officials, government contractors, and lobbyists.<sup>42</sup> To aid in investigations, an ethics commission would have subpoena power.<sup>43</sup> Further, a separate “whistleblower protection act,” or clause, would be integrated into the commission’s enabling statute, to encourage “the submission of good faith reports.”<sup>44</sup> The commission would discipline by reprimand or censure, or by recommending removal, suspension, or demotion by a party’s employing entity.<sup>45</sup> It would provide education and training in ethical conduct. Specifically, it would implement a “plain language ethics guide” and a “business ethics guide;”<sup>46</sup> it would establish statewide standards of conduct and implement mandatory training programs for public officers and employees.<sup>47</sup> The recommendation was hedged on the premise that the commission would receive “adequate authority, funding and staffing.”<sup>48</sup> The 2006 Task Force estimated adequate funding for such a commission as requiring at least \$1,000,000 annually, and estimated adequate personnel for such a commission as requiring ten staff members.<sup>49</sup>

A commission would have limited interaction with the legislative and judicial branch under the 2006 Task Force recommendation.<sup>50</sup> Legislative oversight by the

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38. *Id.* Richardson appointed Garrey Carruthers and Suellen Scarnecchia as 2006 Task Force co-chairpersons. See 2006 TASK FORCE RECOMMENDATIONS, *supra* note 4, at 3; see also Appendix 1 (listing the 2006 Task Force members and their affiliations).

39. 2006 TASK FORCE RECOMMENDATIONS, *supra* note 4, at 8. Richardson directed the 2006 Task Force to develop comprehensive ethics and campaign finance reform recommendations; “everything was on the table” and members should “be bold.” *Id.* at 3. The 2006 Task Force methodology was to review existing law; discuss issues to explore; select focus areas and divide into discussion groups; discuss best practices; review options; invite expert speakers from other states to discuss implementation of specific ethics initiatives; research and discuss issues affecting ethics and campaign finance reform; and form subcommittees to make specific recommendations. *Id.* at 6–7, 10. David Freel, Executive Director of the Ohio Ethics Commission, and Todd Lang, Executive Director, Arizona Citizens Clean Elections Commission, were expert speakers about ethics commissions. *Id.* at 6. The five additional 2006 Task Force recommendations sought to address gifts limits, campaign limits and increased reporting, legislator compensation, appointment process changes, state treasurer and auditor qualifications, and publicly financed campaigns. *Id.* at 2.

40. “The threat of investigation of unethical conduct and sanctions for such conduct will serve as a deterrent for unethical practices in state government.” *Id.* at 9.

41. *Id.*

42. See *id.* at 8, 10.

43. *Id.* at 8.

44. *Id.* at 9.

45. *Id.* at 8.

46. *Id.* at 9. The 2006 Task Force recommendation asserted that individuals trained in ethical and unethical behavior “are less likely to engage in behavior that raises ethical questions.” *Id.* The recommendation did not cite a source for this assertion.

47. *Id.* at 8.

48. *Id.* at 9.

49. *Id.* at 10.

50. *Id.* at 8.

commission would be limited to investigation of legislators, with a commission “remitting the results of an investigation to the legislature and making recommendations regarding discipline at the legislature’s discretion.”<sup>51</sup> The New Mexico Judicial Standards Commission (JSC), an existing government agency with oversight of judges, would retain the sole oversight authority for the judicial branch.<sup>52</sup>

### *C. Further New Mexico Scandal in 2006 Provides Fuel for Reform*

A federal corruption investigation into the construction of the Bernalillo County Metropolitan Courthouse in Albuquerque, New Mexico, kept public attention on ethics legislation as the 2007 legislative session approached.<sup>53</sup> The long-anticipated indictments came about *during* the 2007 session. Former Senate *Pro Tempore* Manny Aragon, former Albuquerque Mayor Ken Schultz, former metropolitan court administrator Toby Martinez, Martinez’s wife Sandra Mata Martinez, and metropolitan court project engineer Raul Parra, were accused with collectively skimming \$4,200,000 in public funds off of the \$83,000,000 that financed the construction of the metropolitan court.<sup>54</sup> Plea agreements from former Mayor Schultz, courthouse architect Marc Schiff, and courthouse contractor Manual Guara, became public the same day as the indictments.<sup>55</sup>

### *D. Pursuit of New Mexico Reform in 2007*

Despite the continued public following, and the apparent public support for the 2006 Task Force recommendations,<sup>56</sup> only one 2006 Task Force proposal was signed into law after the 2007 regular legislative session.<sup>57</sup> Lawmakers were unable to come to agreement regarding an ethics commission.<sup>58</sup> Even if the legislature had enacted the ethics commission bill drafted for consideration, that bill did not include the 2006 Task Force recommendations for commission funding and staff. The resulting commission would not have had sufficient funding to carry out a fraction of its outlined responsibilities.<sup>59</sup>

51. *Id.*

52. *Id.* Election oversight and associated campaign law oversight were contemplated, but determined better addressed through a separate entity, or by increased funding for the New Mexico Secretary of State. *Id.* at 9.

53. Jennings, *Reform on Life Support*, *supra* note 6, at A1.

54. Mike Gallagher & Scott Sandlin, *Accused of \$4.2 Million Ripoff: Manny Aragon, Former Mayor Ken Schultz, Five Other People Linked to Scheme to Defraud State in the Building of the Metro Courthouse*, ALBUQUERQUE J., Mar. 30, 2007, at A1.

55. *Id.*

56. Jennings, *Tougher Ethics Supported*, *supra* note 8, at A1 (citing a public poll that indicated public support for task force recommendations).

57. See LEGIS. COUNCIL SERV., CONCORDANCE REPORT, 48th Leg., 1st Sess. (N.M. 2007). The only 2006 Task Force recommended legislation that passed set limits on gifts to public officials. See S.B. 931, 48th Leg., 1st Sess. (N.M. 2007). In addition, during a special session, a bill passed the legislature enacting public campaign financing for appellate judge elections. See H.B. 6, 48th Leg., 1st Spec. Sess. (N.M. 2007).

58. While the house of representatives vote was heavily in support of passing the proposal, with fifty-eight members in support and four members opposed, the bill did not make it to the senate floor. Trip Jennings, *House Approves State Ethics Panel; Funding Still in Question*, ALBUQUERQUE J., Mar. 8, 2007, at A8; see also LEGIS. COUNCIL SERV., CONCORDANCE REPORT, 48th Leg., 1st Sess. (N.M. 2007).

59. Before the house of representatives passed the bill, proposed commission funding was amended to \$250,000. Jennings, *Tougher Ethics Supported*, *supra* note 8, at A8.

With little of the 2006 Task Force's agenda enacted during 2007, Richardson reestablished the group.<sup>60</sup> He called upon the 2007 Task Force to reevaluate the 2006 Task Force proposals that had not passed into law, and to draft a new slate of recommendations for the 2008 legislative session.<sup>61</sup> After meeting five times, the 2007 Task Force recommendations again included creating an ethics commission.<sup>62</sup>

The 2007 Task Force ethics commission recommendation differed significantly from the previous year's recommendations. Most significantly, it called for judges<sup>63</sup> and judicial employees to fall under the commission's jurisdiction, and specified that ethics violations would arise under existing statutes rather than a separate ethics code.<sup>64</sup> Results of investigations into legislative and judicial branch members' conduct would be remitted to the legislature or to the JSC.<sup>65</sup> The 2007 Task Force reduced the recommended commission funding by half to \$500,000, and the anticipated staffing for the commission was not mentioned in the recommendation.<sup>66</sup> The recommendation called for the commission to have the authority to establish its own regulations and the power to file complaints.<sup>67</sup> It conditioned the commission's powers would be limited to the relevant standards of due process of law, and provided that the commission's investigations should not interfere with ongoing criminal investigations.<sup>68</sup> Commission proceedings would become public only if the commission were to determine that good cause existed that an ethics violation had occurred.<sup>69</sup> The 2007 Task Force recommendation also made many specific recommendations regarding commission membership and required tasks.<sup>70</sup>

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60. See Press Release, Office of the Governor, Governor Richardson Names Members of Reinstated Ethics Reform Task Force (Apr. 20, 2007) (on file with author); see also Appendix 2 (listing 2007 Task Force members and their affiliations).

61. *Id.*

62. The 2007 Task Force reconvened with the same chairpersons, much the same membership, and it followed the same methodology as the 2006 Task Force. GOVERNOR RICHARDSON'S TASK FORCE ON ETHICS REFORM, REPORT OF RECOMMENDATIONS 5 (2007) [hereinafter 2007 TASK FORCE RECOMMENDATIONS]; see also Appendix 2 (listing 2007 Task Force members and their affiliations). As an additional step to its methodology, however, the 2007 Task Force also reviewed the experience of the members of the 2006 Task Force promoting the bills that were based on the 2006 Task Force recommendations during the 2007 sessions. 2007 TASK FORCE RECOMMENDATIONS, *supra*, at 5; see also 2006 TASK FORCE RECOMMENDATIONS, *supra* note 4 (discussing 2006 Task Force methodology). The proposal for a state ethics commission act was drafted as House Bill 309 in 2008. H.B. 309, 48th Leg., 2d Sess. (N.M. 2008); see also LEGIS. FINANCE COMM., FISCAL IMPACT REPORT, H.B. 309, 48th Leg., 2d Sess. (N.M. 2008).

63. This aspect of the recommendation, including jurisdiction over judges, was a five to one subcommittee vote, with JSC Director Jim Noel voting against the provision. See GOVERNOR'S TASK FORCE ON ETHICS REFORM, REPORT OF THE SUBCOMMITTEE ON THE CREATION OF A STATE ETHICS COMMISSION 5-6 (2007).

64. Specifically, these complaints could arise under the gift act, government conduct act, procurement code, lobbyist regulation act, financial disclosure act, and New Mexico statutes relating to campaign practices. 2007 TASK FORCE RECOMMENDATIONS, *supra* note 62, at 7; see also *infra* note 109 (listing full citations for all relevant statutes).

65. 2007 TASK FORCE RECOMMENDATIONS, *supra* note 62, at 7.

66. *Id.* at 10. The New Mexico Department of Finance and Administration estimated the commission's cost at \$500,000, based on estimates of \$268,000 for staff salaries, \$75,000 for contractual services, and \$156,000 for administrative costs. *Id.* It is not clear what staff positions were included in this estimate.

67. *Id.* at 7.

68. *Id.*

69. *Id.* at 8.

70. The recommendation added further new details: a three-year statute of limitations, required geographical diversity in commissioner selection, commissioner disqualification for conflict of interest and replacement with a temporary commissioner, and requiring the commission to submit an annual report to the governor, legislature, and chief justice of the supreme court. *Id.* at 8. The annual report would include recommendations for commission jurisdiction, particularly as it related to local-government jurisdiction. *Id.*



The 2007 Task Force recommendations were considered in the drafting of a new package of ethics reform bills proposed during the 2008 legislative session.

### *E. State Scandal in 2007 Sustains Interest in Ethics Reform*

By the 2008 legislative session, former New Mexico Treasurers Robert Vigil and Michael Montoya were sentenced to prison,<sup>71</sup> former New Mexico Senator Manny Aragon was awaiting trial in a federal kickback investigation, and former New Mexico Deputy Insurance Superintendent Joe Ruiz had just been indicted for thirty counts of fraud and corruption.<sup>72</sup> Indictments alleged that Ruiz proposed “win-win” options to insurance companies faced with state fines: if an insurance company accepted Ruiz’s offer, New Mexico Insurance Department fines would be lowered in exchange for donations to a nonprofit organization that published Ruiz’s books.<sup>73</sup> With continued public attention on government corruption, the stage was set for another attempt to pass ethics legislation.

### *F. Legislative Response in 2008*

The ethics commission bill based on the 2007 Task Force recommendation for such a commission passed the New Mexico House of Representatives unanimously in 2008.<sup>74</sup> Once again, however, it never reached the New Mexico Senate floor.<sup>75</sup> Before it passed the house, the bill was amended by the house appropriations and finance committee, cutting the bill’s associated funding to \$250,000.<sup>76</sup> Richardson did not reconvene an ethics task force in 2008, nor did any other group review the 2007 Task Force’s ethics commission recommendation. Thus, the proposed state ethics commission act was not reviewed again before the 2009 legislative session.

### *G. Public Corruption Still at the Forefront Entering the 2009 Legislative Session*

Investigations into New Mexico Housing Authority operations, combined with a federal inquiry into the Richardson administration’s business practices, were among the reasons ethics reform proposals remained in the news in 2009.<sup>77</sup> Shortly before the 2009 session, the New Mexico State Auditor, Hector Balderas, released portions of a housing authority audit, reporting his office’s findings that the New Mexico Region III Housing Authority misspent New Mexico State Investment Council-purchased bonds in 2006.<sup>78</sup> Balderas was quoted as saying, “[g]overnment

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71. Steve Terrell, *Lawmakers Shy Away from Major Ethics Reform*, SANTA FE NEW MEXICAN, Feb. 15, 2008, at A8.

72. Colleen Heild & Mike Gallagher, *Former State Official Indicted in Extortion; Aide Allegedly Squeezed Insurers*, ALBUQUERQUE J., Aug. 25, 2007, at A1.

73. *Id.*

74. *See Sun News Report: Bill to Create a State Ethics Commission, Sponsored by Las Cruces’ Rep. Mary Helen Garcia, Passes Muster in House*, LAS CRUCES SUN-NEWS, Feb. 12, 2008.

75. *See* H.B. 309, 48th Leg., 2d Sess. (N.M. 2008); *see also* New Mexico Legislature, Bill Locator, [http://www.nmlegis.gov/lcs/\\_locatorcom.aspx?year=08](http://www.nmlegis.gov/lcs/_locatorcom.aspx?year=08) (last visited Dec. 26, 2009).

76. *See* HOUSE APPROPRIATION AND FINANCE COMMITTEE REPORT, H.B. 309, 48th Leg., 2d Sess. (N.M. 2008).

77. Heath Haussamen, *Gary King and Bill Richardson Will Push Ethics Reform in Upcoming Legislative Session*, N.M. INDEP., Jan. 9, 2009, available at <http://newmexicoindependent.com/14591/ag-guv-will-push-ethics-reform-in-coming-session>.

78. Thomas J. Cole, *Audit Shows Trip, Booze Purchases; New Housing Authority Probe Reveals Questionable Expenses, Reimbursements*, ALBUQUERQUE J., Jan. 15, 2009, at A1.

must continue to do a better job accounting for programs that are supposed to assist the most vulnerable citizens of our state.”<sup>79</sup> The misspent bonds were intended to purchase and renovate homes for low-income buyers.<sup>80</sup> The council filed a lawsuit against the authority’s former director, Vincent “Smiley” Gallegos, accusing him with responsibility for the misspent funds.<sup>81</sup> At the same time, an investigation into the Richardson administration inquired whether the selection of certain financial advisors for “GRIP” (Governor Richardson’s Investment Project), who had also donated funds to Richardson-founded political action committees, “Moving America Forward” and “Si Se Puede!,” was in accordance with applicable procurement laws.<sup>82</sup>

#### *H. 2009 Legislative (Non) Action*

In 2009, Gary King, the New Mexico Attorney General, and Richardson publicly supported legislation creating an ethics commission. King endorsed an ethics reform package that included the ethics commission legislation that passed the New Mexico House of Representatives the previous year.<sup>83</sup> He pursued sponsorship for the ethics commission bill in the New Mexico Senate.<sup>84</sup> The only difference between the 2008 legislation, and the 2009 King-endorsed legislation, was that the King-endorsed bill returned proposed commission funding to \$500,000 as recommended by the 2007 Task Force.<sup>85</sup> During his 2009 state of the state speech, Richardson stated that creation of an independent, bipartisan, ethics commission was a priority for ethics reform.<sup>86</sup>

Despite the support from King and the Richardson during the 2009 legislative session, an ethics commission bill did not pass. The bill specifically endorsed by King did not leave the senate rules committee.<sup>87</sup> Another similar ethics commission bill, however, House Bill 151, passed the house of representatives unanimously shortly before the end of the session. House Bill 151 is summarized in Part III of this note, and, although it is similar to the 2008 ethics commission proposal, it also has some significant differences.<sup>88</sup>

#### *I. New Mexico Public Scandal Continues . . .*

After the 2009 legislative session ended, Jerome Block, Jr., a recently elected New Mexico Public Regulation Commission commissioner, was indicted for crimi-

79. *Id.*

80. *Id.*

81. *Id.*

82. Haussamen, *supra* note 77.

83. See H.B. 309, 48th Leg., 2d Sess. (N.M. 2008).

84. Senator Dede Feldman introduced the proposal as Senate Bill 140. See Press Release, Office of the Attorney General, AG King Proposes Ambitious Legislative Agenda (Jan. 9, 2009) (on file with author).

85. The bill included an appropriation of \$500,000 before it was amended and passed the house of representatives during the 2008 session. See N.M. H.B. 309; S.B. 140, 49th Leg., 1st Sess. (N.M. 2009). The 2006 Task Force had recommended an appropriation of \$1,000,000. See *supra* text accompanying note 49.

86. See Governor Richardson, New Mexico State of the State Address (Jan. 20, 2009) (on file with author).

87. See New Mexico Legislature, S.B. 140: State Ethics Commission Act, [http://www.nmlegis.gov/lcs/\\_session.aspx?chamber=S&legtype=B&legno=%20140&year=09](http://www.nmlegis.gov/lcs/_session.aspx?chamber=S&legtype=B&legno=%20140&year=09) (last visited Dec. 30, 2009); see also N.M. S.B. 140.

88. See H.B. 151 & 614, 49th Leg., 1st Sess. (N.M. 2009).

nal violations of the New Mexico Election Code and Campaign Act, tampering with evidence, and embezzlement.<sup>89</sup> His father (a former public regulation commission commissioner) was also indicted for violations of the election code and tampering with evidence.<sup>90</sup> These new state indictments spurred journalists to call for reconsideration of the ethics commission proposal.<sup>91</sup> “Supporters [said] such a commission, equipped with subpoena power, would be charged to root out such misdeeds.”<sup>92</sup> In fact, this assertion is misleading, as will become apparent in the following parts of this note. An ethics commission would *not* root out such deeds. In fact, the commission, as proposed, would immediately turn over any complaint that appeared criminal in nature to the appropriate, established, agency (the district attorney, attorney general, or secretary of state, depending upon the violation).<sup>93</sup> Further, even if such criminal acts were within the scope of an ethics commission’s jurisdiction, it is questionable whether such a commission would likely, or best, “root out” such activity.

### III. HOUSE BILL 151

For the purposes of focusing on an ethics commission proposal that was recently close to becoming law, Part III reviews House Bill 151, creating a “state ethics commission act.”<sup>94</sup> The New Mexico House of Representatives passed House Bill 151 unanimously in 2009, making it the most recent proposal with such an endorsement.<sup>95</sup> The following sections describe an ethics commission as it would exist if House Bill 151 had been enacted.

#### A. Ethics Commission: Composition and Administration

The commission would be comprised of seven New Mexico residents; up to four of the seven commissioners could be from the same political party.<sup>96</sup> The governor would appoint three of the seven commissioners.<sup>97</sup> In addition, the president *pro tempore* of the senate, the minority floor leader of the senate, the speaker of the house, and the minority floor leader of the house would each appoint one commis-

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89. See *State v. Block*, No. D101CR200900138 (Apr. 8, 2009) (certificate finding probable cause).

90. See *id.*

91. New Mexico Attorney General’s Office investigations into state housing authority operations and authority use of federal elections funds, combined with a federal inquiry into Richardson administration business practices, were cited as reason to enact ethics commission legislation. Trip Jennings, *Block Scandal Adds to Pressure on New Mexico Democrats*, N.M. INDEP., Apr. 9, 2009, available at <http://newmexicoindependent.com/24458/block-scandal-adds-to-pressure-on-nm-democrats>.

92. *Id.* (referring to the most recent scandals).

93. See *infra* Part III.

94. See H.B. 151 & 614, 49th Leg., 1st Sess. § 1 (N.M. 2009).

95. See New Mexico Legislature, Bill Locator, [http://www.nmlegis.gov/lcs/\\_locatorcom.aspx?year=09](http://www.nmlegis.gov/lcs/_locatorcom.aspx?year=09) (last visited Dec. 28, 2009); see also N.M. H.B. 151 & 614.

96. See N.M. H.B. 151 & 614 § 3(A), (B)(1)–(2).

97. No more than two governor appointees would be from the same political party, and at least one would be from each of New Mexico’s three congressional districts. See *id.* § 3(A)(1). Initially the proposal provided for even distribution from New Mexico Public Regulation Commission districts. See H.B. 8, 48th Leg., 1st Spec. Sess. (N.M. 2007) (creating an ethics commission). One governor appointee would be chosen from a list of five recommended persons, not from the governor’s political party, put forth by the house and senate floor leaders. See N.M. H.B. 151 & 614 § 3(A)(1).

sioner.<sup>98</sup> The commissioners would serve up to two, four-year terms.<sup>99</sup> New Mexico residents who changed their party affiliation would be ineligible for membership on the commission for one year.<sup>100</sup> Commission decisions would require four concurring commissioner votes, including two votes from each of the largest political parties represented.<sup>101</sup>

The seven appointed commissioners would serve as a governing board for a commission administrative staff that would carry out the commission's day-to-day functions. At the least, the commission would have to hire an executive director.<sup>102</sup> The director could then hire a general counsel and other staff.<sup>103</sup> House Bill 151 as passed, however, did not include funding for any salaries or other commission expenses.<sup>104</sup>

### B. Personal and Subject-Matter Jurisdiction

House Bill 151 defined the commission's jurisdiction broadly. Commission oversight would include state officials, state employees, government contractors, and lobbyists.<sup>105</sup> Of particular note, "state officials" and "state employees," were defined, respectively, as the elected and appointed officials within *all three* government branches and the employees of *all three* government branches.<sup>106</sup> The commission would receive complaints about "ethics violations." The ethics violations, as defined by House Bill 151, are analogous to "subject matter" jurisdiction for the commission.<sup>107</sup> Ethics violations could include violations of ethics codes drafted by the commission,<sup>108</sup> and would include violations of existing New Mexico statutes, including the gift act, governmental conduct act, procurement code, lobbyist regulation act, financial disclosure act (campaign practices act), campaign reporting act, and voter action sections of the election code.<sup>109</sup>

98. See N.M. H.B. 151 & 614 § 3(A)(2)–(5). There were numerous iterations of proposed appointing agents and appointee distribution mechanisms to create a commission membership that would represent the state and minimize politicization. See Ethics Commission Questionnaire as filled out by 2007 Task Force Members, Suellyn Scarnecchia, Garrey Curruthers, William McCamley, and Norman Thayer (on file with author).

99. See N.M. H.B. 151 & 614 § 3(C). After initial appointments, the commissioners would draw lots to determine staggered terms such that four commissioners would serve full four-year terms. Three commissioners would serve three-year terms, and three would serve two-year terms. *Id.* If a vacancy occurred, the replacement would be named by the person in the same position as the position held by the person who appointed the previous commissioner. *Id.* § 3(G).

100. See *id.* § 3(B)(2).

101. See *id.* § 3(F). Appointments would be made with "due consideration to achieving geographical representation from the state." *Id.* § 3(B)(3).

102. See *id.* § 4(A)(6).

103. See *id.* § 5(B).

104. See generally N.M. H.B. 151 & 614.

105. See generally *id.*

106. See *id.* § 2(L), (M).

107. Subject matter jurisdiction is: "Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." BLACK'S LAW DICTIONARY 931 (9th ed. 2009).

108. N.M. H.B. 151 § 2(C). These codes would be subject to state-agency approval and thus might, or might not, come to fruition if House Bill 151 were enacted. *Id.* § 4(A)(4).

109. See *id.* § 2(C) (referencing the listed acts: NMSA 1978, §§ 10-16-B-1 to -4 (2007) (gift act); NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2009) (government conduct act); NMSA 1978, §§ 13-1-21 to -47 (1984, as amended through 2005) (procurement code); NMSA 1978, 2-11-2 to -9 (1977, as amended through 2005) (lobbyist regulation act); NMSA 1978, §§ 10-16A-1 to -8 (1993, as amended through 1997)

### C. Duties

House Bill 151 divided commission activities into duties and powers.<sup>110</sup> Duties would be the commission's mandatory activities, while powers would be discretionary.<sup>111</sup> The commission's first duty, as mentioned above, would be to hire an executive director.<sup>112</sup> The prescribed director's activities were similarly divided by House Bill 151 into duties and powers.<sup>113</sup> The director would perform investigations as directed, bring complaints and investigation results before the commission, prepare the commission's annual budget, and make recommendations to the commission regarding rules or legislative changes.<sup>114</sup> The commission would receive complaints of alleged ethics violations and direct investigations of those complaints;<sup>115</sup> keep confidential all advisory opinion requests and solicitors;<sup>116</sup> report findings of ethical violations supported by clear and convincing evidence;<sup>117</sup> maintain publicly accessible advisory opinions, complaints, and reports;<sup>118</sup> and compose an executive branch code of ethics—which would require adoption by each independently elected executive official before application by the commission.<sup>119</sup> The commission would also enact recusal rules for its own members,<sup>120</sup> and it would enact procedural rules for administration of the state ethics commission act, including hearing and meeting rules.<sup>121</sup> Finally, the commission would submit annual legislative recommendations to the leaders of each government branch.<sup>122</sup>

### D. Powers

The commission would have the power, but not the duty, to initiate complaints, issue advisory opinions, reprimand, promulgate ethics guides, and provide ethics training. While the commission would *be required to* receive, and either dismiss or investigate, ethics violation complaints from outside individuals, it could also choose to initiate ethics complaints itself.<sup>123</sup> The commission could also decide

(financial disclosure act); NMSA 1978, §§ 1-19-1 to -36 (1967, as amended through 2007) (campaign practices act); NMSA 1978, §§ 1-1-1 to -24 (1969, as amended through 2008) (election code)).

110. See generally N.M. H.B. 151 & 614.

111. See *id.*

112. See *id.* § 4(A)(6).

113. See *id.* § 5.

114. See *id.* § 5(A)(2)–(6).

115. The commission would investigate violations committed by state officials, employees, government contractors, and lobbyists. See *id.* § 4(A)(1).

116. Some circumstances specifically provide for disclosure. See *id.* § 9.

117. The commission would make reports to the violating individual's employer, appropriate state agency, appointing authority, or other appropriate body. *Id.* § 4A(2). As defined in House Bill 151, state agencies would include all departments, commissions, councils, boards, committees, institutions, agencies government corporations, educational institutions, and elected officials from the three branches of state government. See *id.* § 2(K). There are over 200 such agencies. See NMSA 1978, Executive Agency Index (2009).

118. See N.M. H.B. 151 & 614 § 4(A)(3).

119. See *id.* § 4(A)(4). These independently elected executive officers include the governor, attorney general, state auditor, and state treasurer. See N.M. CONST. art. V, § 1.

120. See N.M. H.B. 151 & 614 § 4(A)(8).

121. See *id.* § 4(A)(5).

122. See *id.* § 4(A)(7).

123. See *id.* § 4(B)(1). It is not clear whether the commissioners would be required to vote on the issue of whether to file a given complaint on the commission's behalf, or whether a single commissioner could file a complaint on behalf of the commission. The commission chairperson, however, would "sign" the complaint. See *id.* § 7(C).

whether to issue advisory opinions, and whether to make public reprimands, censures, or recommendations of disciplinary action, for parties under commission jurisdiction.<sup>124</sup> The commission could subpoena, requiring a witness to attend a hearing or the production of books and other documents, through a petition to the district court.<sup>125</sup> The commission could also take on an educational role by drafting governmental and business ethics guides, or by providing ethics training.<sup>126</sup>

The director would have powers supportive to the commission. The director could hire a general counsel and other “personnel as may be necessary.”<sup>127</sup> The director could also take depositions and administer oaths, as limited by district court discovery rules.<sup>128</sup>

### *E. Staged Enablement*

The ethics commission would be enabled in two stages.<sup>129</sup> In the first year of enactment, commissioners would be appointed; then the commission would hire a director and staff, promulgate rules, write ethics codes, make recommendations for future oversight of local government, and it could provide ethics education.<sup>130</sup> In its second year, the commission could begin issuing advisory opinions, receiving complaints, investigating complaints, making evidentiary findings, and recommending penalties.<sup>131</sup>

### *F. Advisory Opinions, Complaints, and Investigations*

House Bill 151 included guidelines for how the commission should handle issuing advisory opinions, responding to complaints, and conducting investigations. Advisory opinion requests would have to be written, and would have to include a description of the “specific set of circumstances involving an ethics issue.”<sup>132</sup> The commission’s advisory opinions would have to be issued within a given time.<sup>133</sup> While advisory opinions requests would be confidential, the commission’s opinions could be publicly released if the requestor’s name were omitted.<sup>134</sup>

Ethics complaints could come to the commission in one of two ways. The commissioners could file complaints themselves, or the commission could receive complaints from persons with “actual knowledge” of an ethics violation.<sup>135</sup> If a complaint were filed “by the commission,” the director would file the complaint and include specific charges with factual support.<sup>136</sup> Other complainants would

124. *See id.* §§ 4(B)(2), (4). The advisory opinions could bind the commission in any future dealings with the opinion solicitor. The advisory opinions would be binding if the commission did not amend or revoke the opinion, and if the solicitor acted in “good faith and reliance upon the opinion.” *See id.* § 6(A).

125. *See id.* § 4(B)(3).

126. *See id.* § 4(B)(5)–(7).

127. *Id.* § 5(B).

128. *Id.* § 5(C).

129. *See id.* § 17(A)–(B).

130. *See id.* § 17(A).

131. *See id.* § 17(B). Staged enactment would partially address funding issues. *See infra* Part IV.

132. *See id.* § 6(B)(1). Advisory opinion solicitors would have to be state officials, lobbyists, government contractors, or state employees. *See id.* § 6(A).

133. *See id.* § 6(C).

134. *See id.* § 6(B).

135. *Id.* § 7(A)(1)–(2).

136. *Id.* § 7(C).

have to sign their complaints “under penalty of false statement” and would have to include specific factual allegations.<sup>137</sup> In addition, complainants would need to submit evidence such as documents and witness names.<sup>138</sup> Retaliation, or any other adverse action, against good-faith complainants would be prohibited.<sup>139</sup>

After receiving a complaint, the director would decide if the allegations fell within the commission’s jurisdiction, and whether the complaint “warrant[ed] investigation.”<sup>140</sup> Regardless of the outcome of the director’s decision, the director would bring the complaint and recommendation to the commission for action, with one exception—complaints against judges or justices.<sup>141</sup> Those complaints would be “immediately” referred to the JSC.<sup>142</sup> The ethics commission could either accept the director’s recommendation or dismiss. Complaints could be dismissed if they were “frivolous, unfounded or outside the [commission’s] jurisdiction.”<sup>143</sup>

If the commission recommended investigation, the director would investigate the complaint. The director’s investigation could include depositions of witnesses under oath,<sup>144</sup> subpoenaed documents, or witness testimony.<sup>145</sup> District court judges would hear subpoena challenges in confidential proceedings.<sup>146</sup> House Bill 151 would prohibit retaliation or other adverse actions against anyone providing information or materials during an investigation.<sup>147</sup>

After investigating a complaint, the director would determine if clear and convincing evidence of an ethics violation exists. The director would then notify the complainant and respondent regarding the complaint disposition.<sup>148</sup> The respondent would have the right to legal counsel.<sup>149</sup> State officials and employees would be entitled to representation by the New Mexico General Services Department’s Risk Management Division.<sup>150</sup> Such an employee or official receiving representation would have to reimburse the risk management division for “reasonable attor-

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137. *Id.* § 7(B).

138. *Id.*

139. *Id.* § 14(A)(1). There is, however, no provision for enforcement of this prohibition. *Id.*

140. *See id.* § 7(D).

141. *Id.*

142. *Id.*

143. *Id.* § 7(E).

144. *Id.* § 7(F).

145. *Id.* The commission could apply for subpoenas when at least four commissioners concur in the decision. *Id.* § 7(G). The subpoena would describe the nature of the investigation, the information required for production, a deadline and location to produce the information, and the adverse consequences for non-compliance. *See id.*

146. *Id.*

147. *Id.* § 14(A)(2). There is, however, no penalty or mechanism provided to enforce this prohibition. *Id.* If a commission meeting were not scheduled within ninety days of receiving a complaint, then the director would report to the commission the status of investigations. Similarly, if a complaint were not disposed within twelve months of initiation, the director would report to the commission on the complaint’s status. *See id.* § 13(A). The commission could then decide to either dismiss the complaint, or continue the investigation. *Id.* If the investigation continued, the director would have to report the status of the matter every six months, and notify the respondent of the commission’s action. *Id.* § 13(A)–(B).

148. *Id.* § 7(E).

149. *Id.*

150. The New Mexico General Services Department has a risk management division that provides legal representation in certain torts claims act lawsuits. *See* NMSA 1978, §§ 41-4-16 (1977), 15-7-3 (1997); *see also infra* Part IV (discussing issues with risk management division involvement in ethics commission representation).

ney fees and costs” if the commission were to find the individual indeed committed an ethics violation.<sup>151</sup>

Complaints filed with the commission, and records of commission investigations, would be confidential unless otherwise provided.<sup>152</sup> A breach of the required confidentiality would be a misdemeanor punishable by a maximum fine of \$1000, or up to one year imprisonment.<sup>153</sup> A civil penalty for breach of confidentiality could be assessed for up to \$25,000 per confidence violation.<sup>154</sup>

### G. Post-Investigation

After an investigation, the director would present a written report of the investigation results to the commission during a closed hearing.<sup>155</sup> The commission would notify the respondent and the respondent’s counsel of the director’s presentation and would allow them to participate.<sup>156</sup> The commission would make a finding at the hearing as to whether clear and convincing evidence existed that an ethics violation had occurred. The commission would base its decision on the outcome of the director’s investigation and the facts alleged in the complaint. If the investigated acts were found to be *criminal* violations, the commission would refer the matter to an appropriate district attorney, or the attorney general, along with all of the documents and evidence that supported the finding.<sup>157</sup>

If the commission were to decide there was clear and convincing evidence of a non-criminal ethics violation, the commission would publicly report its findings, unless the matter was a legislator violation.<sup>158</sup> In all cases, the commission would submit the report and all evidence to the respondent, the attorney general, and to a party to which the respondent is accountable (the respondent’s “appointing authority,” the appropriate legislative body, the appropriate state agency, or the respondent’s employer).<sup>159</sup> If the violation was committed by an executive branch employee or official, the report could reprimand or censure the person and make recommendations for discipline.<sup>160</sup> If a legislator committed the ethics violation, the commission would make a public (generic) notice of referral, and confidentially report the investigation resulting in clear and convincing evidence to the appropriate legislative ethics committee.<sup>161</sup> Legislative committees would be required to take action on legislator referrals and would be required to publish some indication of that action.<sup>162</sup>

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151. *Id.*

152. *See id.* § 9. Confidentiality would not be protected if the records entered evidence through a judicial, legislative, or administrative proceeding; if confidentiality is not permitted by law or court order; or if a respondent filed a waiver of confidentiality. *Id.*

153. *Id.* § 11(A).

154. *Id.* § 11(B).

155. *Id.* § 7(H).

156. *Id.*

157. *Id.* § 12. The appropriate district attorney is that individual elected to prosecute in the jurisdiction where the suspected criminal activity occurred. Alternatively, jurisdiction could revert to the 1st Judicial District Attorney of New Mexico. *Id.*

158. *Id.* § 7(I), (J).

159. *Id.* § 7(J)(1)–(4).

160. *See id.* § 7(I).

161. *See id. supra* N.M. H.B. 151, § 8(A).

162. *See id.* § 8(B). Recommendations to the legislature for reprimand, censure, or other action would be made publicly. Decisions regarding complaints that did not warrant action, and committee members’ votes,



If the commission decided there was not clear and convincing evidence of an ethics violation, it would have to dismiss the complaint, report its findings to the respondent, and keep the report confidential unless the respondent requested that the commission make the report public.<sup>163</sup>

#### *H. Restrictions*

The commission would be restricted from reviewing certain ethics complaints, and filing complaints would not be permitted during certain time periods. For example, the commission would be prohibited from investigating misconduct related to campaign advertising.<sup>164</sup> The commission would be prohibited from taking action on complaints filed against candidates for public office between the candidate's primary election filing date and the day of that candidate's general election (dismissal of such a complaint by the commission, however, would be allowed).<sup>165</sup> The commission would be required to notify complainants that criminal conduct should be reported to the attorney general, or appropriate district attorney, rather than to the ethics commission.<sup>166</sup> The commission could only review complaints regarding conduct that occurred after July 1, 2009.<sup>167</sup> In addition, a statute of limitations would require that the conduct alleged in a complaint had occurred within three years of the complaint filing date.<sup>168</sup>

#### *I. Conflicts of Interest*

House Bill 151 attempted to reduce possible commissioner conflicts of interest. Under its provisions, commissioners would be required to disqualify themselves from any proceedings pertaining to the person who appointed them; they would also be required to disqualify themselves for any other conflict of interest.<sup>169</sup> The commission could disqualify a commissioner if that commissioner's participation were questioned due to a conflict of interest.<sup>170</sup> If four or more commissioners were disqualified, the commission could appoint temporary commissioners by a majority vote.<sup>171</sup> During their service with the ethics commission, commissioners and the commission director would be prohibited from holding or pursuing public office.<sup>172</sup> In addition they would be prohibited from accepting appointment to public positions or political party offices.<sup>173</sup> Further, commissioners would not be allowed to accept state employment, contract for their services with the state government, or

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would be publicly reported regarding their general nature without disclosure of the legislator's name. Further investigations would be reported within ninety days of complaint receipt, and every year following, until a final decision is made. *Id.* § 8(C).

163. *Id.* § 7(K).

164. *Id.* § 10(C).

165. *Id.* § 10(B).

166. *Id.*

167. *Id.* § 16.

168. *See id.* § 10(A).

169. *Id.* § 3(I).

170. *Id.*

171. Temporary appointments would be in accordance with the geographical and political distinctions provided for in the original commissioner appointments. *Id.*

172. *Id.* §§ 5(D)(1), 3(H)(1).

173. *Id.* § 3(H)(1).

lobby the legislature during their commission terms.<sup>174</sup> Similarly, the year after leaving the commission, commissioners and the director would not be allowed to pursue public office, to accept state employment or appointed public positions, or to represent respondents in front of the commission (unless they were to appear in front of the commission on their own behalf).<sup>175</sup> Finally, commissioners would be prohibited from taking employment from, or providing services for, any respondent,<sup>176</sup> unless the employment or services were agreed upon before the related complaint was filed.<sup>177</sup>

Permanent commissioner removal could only take place for incompetence, neglect of duty, or malfeasance in office.<sup>178</sup> Removal proceedings could only be commenced by the commission, or by the attorney general at the commission's request.<sup>179</sup> The New Mexico Supreme Court would have sole jurisdiction over commissioner-removal proceedings.<sup>180</sup>

#### IV. ETHICS COMMISSION ISSUES

##### A. Creation of an Ethics Commission Previously Contemplated and Set Aside

The year 2006<sup>181</sup> was not the first in which a government committee considered the creation of an ethics commission in New Mexico.<sup>182</sup> In 1992, the "Governmental Ethics Task Force" (1992 Task Force), a committee of New Mexico citizens and state legislators, also considered such an idea.<sup>183</sup> The 1992 Task Force recommended an ethics reform package that was, for the most part, adopted that year.<sup>184</sup> After specifically contemplating the creation of an ethics commission, the 1992 Task Force decided not to pursue the creation of such a commission for five explicitly articulated reasons: (1) added bureaucracy with significant expense; (2) existing structures, primarily the secretary of state, were sufficient, with additional resources and authority; (3) enhanced political responsibility needed a chance to

174. *Id.* § 3(H)(2).

175. *Id.* §§ 3(J), 5(D).

176. Respondents would be state officials, employees, government contractors, or lobbyists who are the subject of a complaint filed with the commission. *Id.* § 2(J).

177. *Id.* § 3(J)(3).

178. *Id.* § 3(G). "Incompetence, neglect of duty or malfeasance in office" is not defined. This language, however, is the same provided for removal of university boards of regents members, N.M. CONST. art. XII, § 13, State Investment Council members, NMSA 1978, § 6-8-3 (1983), economic development commission commissioners, NMSA 1978, § 9-15-11 (1997), and other boards' members. New Mexico courts interpret the removal standard as pertaining only to an individual's current term of office. Thus, if an individual serves two consecutive terms of office, they cannot be removed during their second term for acts committed during their first term of office. See *State v. Santillanes*, 99 N.M. 89, 91, 654 P.2d 542, 544 (1982). Malfeasance by a public officer is "acting wholly wrongful and unlawful," where that action is connected to that officer's official duties, and combined with an "evil intent or motive," with gross negligence equivalent to fraud. 63C AM. JUR. 2D *Public Officers and Employees* § 373 (1964).

179. N.M. H.B. 151 & 614 § 3(G).

180. *Id.*

181. See generally *supra* Part II.B.

182. See generally GOVERNMENT ETHICS TASK FORCE, FINAL REPORT-FINDINGS AND RECOMMENDATIONS (1993).

183. *Id.* at 1.

184. The package included campaign reporting proposals, the lobbyist regulation act, and conflict of interest act amendments (including renaming it the government conduct act). *Id.* at 10-24. James "Bud" Mulcock and J. John Underwood co-chaired the 1992 Task Force. *Id.* at 1.

operate and was a more appropriate option than extra-political processes; 4) an independent commission could be a source for further conflict and divisiveness, undermining public confidence; and 5) separation of powers precluded delegation to one administering body.<sup>185</sup> The 1992 Task Force chose to focus, rather, on laws being “sound, workable, understandable and properly enforced.”<sup>186</sup> While, arguably, some of the concerns the 1992 Task Force cited may no longer apply, they were not formally addressed by any of the more recent ethics commission proposals.<sup>187</sup>

### *B. House Bill 151 Weaknesses*

Thirteen years after the 1992 Task Force decided not to pursue creating an ethics commission, the idea resurfaced with greater interest, as demonstrated by the 2006 Task Force recommendations.<sup>188</sup> The newly proposed commission, however, would face even more issues than those foreseen in 1993. This Part identifies five weaknesses of an ethics commission as proposed in House Bill 151.<sup>189</sup> First, the commission was proposed without identifying the state’s needs. Thus House Bill 151 was not crafted to address specific problems (other than public perceptions), but was rather intended to address *everything*, generally, and thus likely ineffectively. Second, House Bill 151 was not adequately funded. The commission would have substantial direct, and indirect, financial impacts that should be considered. Third, the commission’s jurisdictional scope would be unconstitutionally broad under New Mexico’s separation of power protections. Fourth, many proposed commission responsibilities are already held by other government agencies, and such redundancy could hinder rather than strengthen those agencies’ ethics oversight. Finally, while retaliation or other adverse actions against complainants and informants would be prohibited, House Bill 151 did not provide penalties or other protections to enforce its bare assertion of prohibition.<sup>190</sup>

### *C. House Bill 151 Was Not Tailored to Address a Known Problem*

Enacting House Bill 151 in the name of ethics reform would have been like a doctor applying a bandage to a tender lump that has not yet been diagnosed. The bandage would create the appearance that medical action was taken, and the “treatment” would cost less than the potentially more-appropriate chemotherapy. It is possible the bandage would help heal the inflammation, or that bandaging was the exact treatment the painful protuberance needed. Unfortunately, however, without a proper diagnosis and treatment based on the findings of that diagnosis, the lump could become more insidious, and it would be hidden while it festered.

A push to study and propose solutions, before assessing the underlying problems, crippled both the 2006 and 2007 task forces before they even began their

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185. *Id.* at 8–9.

186. *Id.* at 9.

187. The 1992 Task Force concerns may have been considered informally. Whether that may have happened is not known.

188. *See supra* Part II.B.

189. Some of these weaknesses would be shared amongst all proposed ethics commissions while other weaknesses are specific to House Bill 151.

190. *See supra* notes 139, 147 and accompanying text.

work. Richardson directed his task force members to “study the issues of governmental ethics and campaign finance reform . . . includ[ing] . . . [making a] review of current . . . laws and [regulations].”<sup>191</sup> He asserted that “strong ethics and campaign finance laws are essential building blocks in forming an effective state government,” and that it is essential that the public have the “utmost confidence in their government and that [the government] works exclusively to advance the best interests of the people of New Mexico.”<sup>192</sup>

Based on the vague directive to “study” ethics reform, and the ambiguous goals of “utmost public confidence” and “strong” ethics laws, the 2006 and 2007 task forces, understandably, proceeded to adopt methodologies that skipped a diagnosis and went straight to comparing and selecting possible statutory treatments. They sought a bandage for a nameless infection, manifested by symptoms of extortion, kickbacks, and embezzlement.<sup>193</sup> Further, they needed to address Richardson’s fear of negative public perception due to “weak” laws. Recommendations were based on: a comparison of New Mexico’s statutory and administrative ethics provisions with those of other states; task force discussions, and presentations about other states’ ethics infrastructures.<sup>194</sup> Given such a strategy, the creation of an ethics commission was an obvious inclusion in the package of recommendations that resulted, particularly since forty other states either already had a commission, or were in the process of implementing such a commission.<sup>195</sup> Whether the ethics-commission bandages applied in other states had effectively treated those states’ underlying lesions was not considered. Similarly, whether New Mexico’s inflamed lump was an illness related to ethical illnesses treated elsewhere by an ethics-commission bandage was not contemplated.

Because of the flawed methodology applied to New Mexico’s elusive ethics disease, the 2006 and 2007 task forces proclaimed aspirational, rather than curative, “justifications” for creating a commission. A commission would “promote increased accountability for ethical behavior among state officials and employees, lobbyists and those that conduct business with the state, . . . [it would] encourage the reporting of ethics violations and protect the rights of those that file such reports,” and “serve as a deterrent for unethical practices in state government.”<sup>196</sup> These assertions are analogous with predicting that a bandage applied to an undiagnosed lump would “comfort the sick, reduce swelling, and deter dangerous physical activities.” While the assertions might or might not have been true, the aspirations expressed do not necessarily address underlying problems, nor are the evils proclaimed as remedied known to exist. Along the same lines, additional task force aspirations for the commission included making appointing authorities aware of the unethical practices of their appointees such that the appointees might be removed, and making state officials more knowledgeable as to what constitutes ethical behavior through ethics training. No findings were made as to whether such governmental authorities are unaware of their appointees’ unethical practices; no

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191. 2006 TASK FORCE RECOMMENDATIONS, *supra* note 4, at 3.

192. See N.M. Exec. Order 2006-021a (May 30, 2006) (on file with author).

193. See *supra* Part II.

194. See *supra* notes 39, 62 (discussing 2006 and 2007 task force methodology).

195. See *supra* note 18; see also appendices 3 and 4.

196. See 2007 TASK FORCE RECOMMENDATIONS, *supra* note 62, at 9.

findings were made that state officials lack knowledge of existing ethical rules. Further, no research showed the implementation of a commission would remedy an existing problem of authorities' awareness of ethics violations or their knowledge of ethical practices. Finally, no correlation was documented between government authorities' improved ethics knowledge and an improved political culture in New Mexico.

The fact that New Mexico is one of only ten states without an ethics commission, for some, is reason enough to justify implementing one.<sup>197</sup> This logic, however, is flawed. If there were evidence that ethics commissions changed the political culture in other states, and that those states had the same problems as New Mexico prior to the implementation of their ethics commissions, that conclusion might make sense.<sup>198</sup> The task forces, however, did not review data suggesting a known prevalence of non-criminal acts that would constitute "ethics violations" (such data did not exist).<sup>199</sup> Thus, they did not *diagnose* New Mexico's ailment. There is no indication that a new commission with oversight of existing statutes—statutes with existing enforcement provisions—would provide greater deterrence than already exists for individuals breaking the law. Therefore, the Task Forces did not treat New Mexico's *known* symptoms. The relative level of state officials' awareness of what constitutes ethical behavior under existing acts was not known. Thus, the commission would treat symptoms that *may or may not* exist in New Mexico.

Whether an ethics commission is part of an appropriate treatment plan to address New Mexico's government scandals is impossible to say since the problems it seeks to address have never been diagnosed. Whatever the true disease may be, however, the ethics commission as proposed would not directly address the visible symptoms, primarily high-profile, criminal corruption.<sup>200</sup> Without a clearly identified baseline from which to work, the commission's success or failure would be doomed to ambiguity, resources would be wasted, and more productive options would be neglected.

#### D. Inadequate Funding

House Bill 151 did not provide funding for an ethics commission's direct and indirect financial impacts. Several proposals preceding House Bill 151 (including an earlier version of House Bill 151) did provide operational funding for the direct financial needs of a commission. An ethics commission's indirect financial impact, however, has never been accounted for in any known proposal, nor was it considered in either task force's recommendation. The amount of recurring (operating) funding included in House Bill 151, *none*, would be insufficient to allow the proposed commission to fulfill its proposed mandatory and discretionary roles.<sup>201</sup> The

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197. See generally Jennings, *Tougher Ethics Supported*, *supra* note 8, at A1; Editorial, *Our View: Legislators Need Ethics Reform*, SANTA FE NEW MEXICAN, Apr. 3, 2007, at A5.

198. There are other considerations as well, such as whether the commission would achieve any functions not already accomplished through existing governmental agencies. See *infra* Part IV.F.

199. See *supra* note 39.

200. See generally *supra* Part II.

201. A \$250,000 budget could include salaries for an executive director and a general counsel with salaries of \$75,000 and \$60,000 respectively, benefits and other employment costs for approximately \$45,000, and

\$250,000 included in the 2008 bill that passed the house of representatives,<sup>202</sup> and the \$500,000 dollars included in the 2007 Task Force recommendation, would also likely fall short of the proposed agency's needed budget, despite the recommendation by the department of finance and administration for \$500,000.<sup>203</sup>

In order to function—even minimally—the commission would need a recurring operational budget.<sup>204</sup> The commission's minimum requirements would be hiring a director, drafting ethics codes, receiving advisory opinion requests and complaints, and holding meetings. Thus, at the very least, the commission would need funding for one director's salary and benefits, storage, an office, office supplies, and travel budgets for the commissioners.

To be fully operational, the commission would need the ability to use its discretionary powers as well.<sup>205</sup> The commission's director would need to hire other employees such as administrative staff, investigator(s), and a general counsel. The commission would likely exercise its power to investigate complaints, engage in legal research for advisory opinions, and hold hearings. The commission might also decide to engage in its optional educational role by publishing manuals and hosting trainings. The investigations would require either an investigator, or contractual services for investigations, and additional travel funding for the person(s) investigating complaints. The legal research and opinion writing tasks would require trained personnel and legal resources. If the commission were to sponsor ethics trainings, it would need funding for additional supplies and contractual services, as well as funding for dedicated staff for those purposes. If the commission were to decide to publish ethics manuals, it would need funding for publications contracts, and it would need additional funding for research, preparation, and drafting.<sup>206</sup>

The New Mexico General Services Department Risk Management Division would bear the primary indirect financial impact from the commission.<sup>207</sup> The risk management division is the agency that would be tasked with providing counsel for government actors accused of ethics violations under House Bill 151.<sup>208</sup> If the ethics commission were implemented as proposed in that bill, the risk management division would have to represent a whole new class of individuals, and the agency would likely need additional resources in order to do so. In the realm of the federal government, representation of government employees during investigations,

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contractual investigation services, office space, audit, etc. for \$60,000, leaving \$10,000 for supplies. A lesser amount would easily result in an under-funded agency from its inception.

202. See H.B. 309, 48th Leg., 2d Sess. (N.M. 2008).

203. See *supra* note 69.

204. See *infra* Part III.C. (describing the duties the ethics commission would be required to accomplish under House Bill 151).

205. See *supra* Part III.D. (discussing the optional, but central, "powers" delegated to the ethics commission under House Bill 151).

206. The commission would need to research mechanisms used by state-government contractors, and research state-government business climate and processes, in order to draft the "business ethics guide" suggested in House Bill 151. See *supra* Part III.D.

207. This assumption is based on the explicit House Bill 151 provision assigning the risk management division to provide representation for certain government employees accused of ethics violations. See *supra* Part III.F. It is also possible that any agency or government branch whose officials are under investigation by the ethics commission would be indirectly financially impacted in that it could not fully function during the investigation. The risk management division, however, would be systematically impacted as the agency tapped for ethics commission defense counsel duties.

208. See *supra* Part III.F.

hearings, and prosecutions, has proved very costly for both the government and the individuals.<sup>209</sup> Another indirect expense created by a commission would be the time and resources that would be lost when state actors are wrongly accused, and when indirectly associated employees, contractors, lobbyists, and other government actors take part in commission investigations and hearings about their colleagues' alleged behavior.

### *E. Separation of Powers Issues*

#### 1. Analyzing Separation of Powers Issues Under the New Mexico Constitution

House Bill 151 risks violating the separation of powers protections provided in the New Mexico Constitution because it would give an ethics commission multi-branch personal jurisdiction.<sup>210</sup> The New Mexico Constitution provides that powers of the state are divided into "three distinct departments."<sup>211</sup> This provision reflects a principle "fundamental to the structure of the federal government and the governments of all fifty states," the goal of preventing any one branch from accumulating too much power, and threatening liberty.<sup>212</sup> Persons and groups "charged with the exercise of powers properly belonging to one of these departments" are prohibited from exercising powers belonging to one of the other branches, except as provided expressly in the New Mexico Constitution.<sup>213</sup>

New Mexico courts find constitutional infringements when one government branch "unduly 'interfer[es] with or encroach[es] on the authority or within the province of' a coordinate branch of government."<sup>214</sup> The New Mexico Supreme Court is guided in its separation of powers analysis by the structure of the federal government; the legislative, judicial, and executive powers are not "hermetically sealed," but still are "functionally identifiable."<sup>215</sup> Absolute separation of functions is not the meaning of separation of powers, and has been recognized as "neither desirable nor realistic."<sup>216</sup> Rather, an unconstitutional infringement of separation of powers occurs when the "'action by one branch prevents another from accomplishing its constitutionally assigned function."<sup>217</sup>

In a given separation of powers case, the court first identifies which branch of the government is acting.<sup>218</sup> Then the court determines whether the act in question

209. See generally Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways that Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65 (1997).

210. See *supra* Part III.B. While the commission, under House Bill 151, would receive complaints regarding all three branches' officials and employees, it would refer judicial complaints to the JSC, and would refer legislator-investigation results to the appropriate legislative committee. Legislative committees would then be required to act in response to commission referrals. See *supra* Part III.B.

211. N.M. CONST. art. III, § 1.

212. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 573, 904 P.2d 11, 22 (1995) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991)).

213. N.M. CONST. art III, § 1.

214. *Clark*, 120 N.M. at 573, 904 P.2d at 22 (citations omitted).

215. *Id.* (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983)).

216. *Id.*

217. See *State ex rel. N.M. Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, ¶ 12, 73 P.3d 197, 201 (quoting *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 13, 125 N.M. 343, 961 P.2d 768).

218. Sometimes determining to which branch an actor belongs can be straightforward. See *Clark*, 120 N.M. at 573, 904 P.2d at 22 (in which the actor was the governor, and was obviously part of the executive

embodies the power of another branch.<sup>219</sup> Finally, the court analyzes whether the act potentially “disrupts the proper balance” between the two government branches.<sup>220</sup> If there is not a disruption of the proper balance, then there is not a constitutional separation of powers violation. Conversely, if there is a disruption of the proper balance, there might be a constitutional violation. The ultimate question becomes whether a disruption is “undue.”<sup>221</sup> The New Mexico Supreme Court has found an undue disruption when an action by one branch is foreclosed by another in an area in which the first branch’s authority is undisputed.<sup>222</sup>

## 2. An Ethics Commission Would Be Part of the Executive Branch

The classification of the ethics commission, as outlined in House Bill 151, into one of the three state government branches is not clear on the face of the bill.<sup>223</sup> Because the New Mexico Constitution provides that “[t]he powers of the government of this state are divided into three distinct departments,” the commission would have to belong to one of the three branches. It could not belong to all three branches, nor could it represent its own branch, despite assertions it would be “independent.”<sup>224</sup> Without enabling language enacted through a constitutional amendment, the commission would not be constitutionally designated as part of one branch. Such constitutional language is used to explicitly designate to which government branch some other state agencies belong.<sup>225</sup> Looking to the appointing authority of the commission for guidance in commission classification is not determinative because both the governor and legislative leaders would appoint commissioners.<sup>226</sup> Also, House Bill 151 explicitly provides that commission authority would reach employees and public officials from all three branches of the New Mexico government.<sup>227</sup>

Comparing the proposed ethics commission with the JSC, the New Mexico state agency most similar to an ethics commission, provides guidance as to the appropriate ethics-commission taxonomy. The New Mexico Supreme Court recognizes the JSC as a “creature of the judicial branch,” despite the governor’s power to appoint commissioners.<sup>228</sup> The court has classified the JSC as part of the judiciary because the JSC was created by constitutional enabling provisions in the “judicial department,” and because the JSC purpose is investigating members of the judiciary.<sup>229</sup>

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branch). It can also be less obvious, for example in *Espinosa*, in which the court had to determine to what branch the JSC belonged. See *Espinosa*, 2003-NMSC-017, ¶ 13, 73 P.3d at 201.

219. See *Clark*, 120 N.M. at 573–74, 904 P.2d at 22–23.

220. *Id.* at 574, 904 P.2d at 23 (citations omitted).

221. *Id.*

222. *Id.*

223. See generally H.B. 151 & 614, 49th Leg., 1st Sess. (N.M. 2009).

224. It may be argued that the commission as proposed in 2008 would not be as independent as other proposals would be due to its requirement to request subpoenas through the attorney general. See *supra* Part III for a description of the 2006 Task Force recommendation. See also Moore & Kerns, *supra* note 21 (summarizing how other states describe their respective commissions).

225. See, N.M. CONST. art. V, §§ 1, & 14; see also N.M. CONST. art. VI, §§ 1, 13, 28 & 32.

226. See *supra* Part III. Previous versions of the bill proposed commissioner appointments from all three branches. See H.B. 309, 48th Leg., 2d Sess. (N.M. 2008).

227. See *supra* Part III.B.

228. State *ex rel.* N.M. Judicial Standards Comm’n v. *Espinosa*, 2003-NMSC-017, ¶¶ 8–9, 73 P.3d 197, 200.

229. *Id.* ¶ 9, 73 P.3d at 200.



House Bill 151 would not create constitutional enabling provisions, nor would it limit the ethics commission's investigation powers to members of one government branch. The court's JSC classification is helpful, however, because it teaches that appointing authority shared with an executive branch official is not a controlling factor in classifying state agencies. The court's analysis also teaches the use of a multi-factor approach for classification.

Because an ethics commission would have to belong to one branch if created, it should be considered part of the executive branch. This conclusion is based on a multi-factor analysis. First, a majority of individuals over whom the commission would have jurisdiction are members of the executive branch.<sup>230</sup> Second, the manner in which the commission would function is similar to executive branch administrative agencies because it would have the power to make and enforce rules.<sup>231</sup> Third, in at least one ethics commission proposal, an executive branch officer, the attorney general, would have had an ongoing special relationship with the commission through the requirement that he or she authorize subpoenas.<sup>232</sup> Finally, the commission would investigate violations of statutes that are currently administered by executive branch officials.<sup>233</sup>

### 3. Judicial Branch Infringement

Assuming an ethics commission would belong to the executive branch,<sup>234</sup> the commission's enabling statute, and commission's acts, must not unconstitutionally infringe upon judicial branch powers.<sup>235</sup> For the purposes of examining an "enabling statute," House Bill 151 provisions will be considered here. Because the commission's identity as part of the executive branch has been established,<sup>236</sup> the next step of the separation of powers analysis is determining whether commission powers and duties would embody the powers of another branch.<sup>237</sup> For the purpose of determining whether an ethics commission would infringe upon the judicial branch, this section addresses judicial powers. The third step in the separation of powers analysis is determining if the commission's enabling statute, or commission's actions, would disrupt the proper balance between the executive and judicial branches.<sup>238</sup> If the commission would cause a disruption then it shall not be "undue," or the action causing the disruption would be unconstitutional under the separation of powers doctrine.<sup>239</sup>

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230. There are 19,826 state classified employees and at least an additional 425 exempt executive employees. The New Mexico Legislature has 176 full-time employees; the New Mexico Judiciary has 2055. *See* STATE PERSONNEL OFFICE CLASSIFIED SERVICE COMPENSATION REPORT 2008 (2008). This conclusion does not take into account, however whether the majority of the complaints would be about executive branch members. That factor is unknown. There is no basis upon which to speculate about from which branch the majority of complaints would arise. In order to make such an estimate, further information about the non-criminal ethics problems among the proposed population for commission oversight would be necessary.

231. *See supra* Part III.C.

232. *See* H.B. 309, 48th Leg., 2d Sess. (N.M. 2008) (as passed by the New Mexico House of Representatives).

233. *See supra* Part III.B.

234. The same argument would apply if the commission were part of the legislative branch.

235. *See supra* Part IV.E.1.

236. *See supra* Part IV.E.2.

237. *See supra* Part IV.E.1.

238. *See supra* Part IV.E.1.

239. *See supra* Part IV.E.1.

### a. Judicial Powers

House Bill 151 provides for an ethics commission that would embody judicial powers. In order to reach this conclusion, a brief overview of judicial powers as construed constitutionally, statutorily, and through caselaw is appropriate. The New Mexico Constitution assigns the state's judicial power to the New Mexico Supreme Court, court of appeals, district courts, probate courts, magistrate courts, and inferior courts created by law.<sup>240</sup> Also as per constitutional decree, the supreme court has superintending control over all inferior courts.<sup>241</sup> It "may appoint and remove at pleasure its reporter, bailiff, clerk and such other officers and assistants as may be prescribed by law."<sup>242</sup> The supreme court's "superintending control" over all lower courts includes administrative matters, as well as maintenance of public confidence in the administration of justice and the judiciary.<sup>243</sup> The fact that the director of the administrative office of the courts is subject to removal by the supreme court, in combination with the fact that the director "supervises all matters relating to administration of the courts," provides conclusive evidence that the supreme court has "ultimate authority over administrative matters."<sup>244</sup> As per statute, the state courts provide administration over all the judicial employees.<sup>245</sup>

In addition to the state's courts, the JSC also defines the character of the judicial branch. The JSC is empowered to discipline or remove any justice, judge, or magistrate for "willful misconduct in office, persistent failure or inability to perform a judge's duties, or habitual intemperance."<sup>246</sup> By constitutional decree, the JSC receives and keeps confidential complaints filed; investigates complaints about judges, justices, and magistrates; holds hearings; and makes recommendations regarding JSC findings to the supreme court.<sup>247</sup> Although the JSC is recognized as playing no role in the judicial functions of construing law and rendering judgments,<sup>248</sup> its creation as part of the judicial branch caused "the functions of the [JSC] itself" to become judicial functions.<sup>249</sup>

Against the preceding constitutional, statutory, and caselaw backdrop, the ethics commission envisioned by House Bill 151 would clearly embody judicial powers. The power to receive and adjudicate complaints about judges,<sup>250</sup> and the power

240. The constitution also gives the power to the New Mexico Senate "when sitting as a court of impeachment." N.M. CONST. art. VI, § 1.

241. *Id.* § 3.

242. *Id.* § 9.

243. This finding was a corollary to the finding that a justice of the New Mexico judiciary was acting within his constitutionally granted judicial powers when he ordered the Bernalillo County Metropolitan Court to terminate its court administrator. *See* *Rusillo v. Scarborough*, 935 F.2d 1167, 1173-74 (1991) (citing *State v. Roy*, 40 N.M. 397, 411, 60 P.2d 646, 660 (1936); N.M. *ex rel.* *Anaya v. Scarborough*, 75 N.M. 702, 706, 410 P.2d 732, 734 (1966)).

244. *Id.* at 1174 (citing NMSA 1978, §§ 34-9-1, -3(A)).

245. New Mexico Court of Appeals employees "serve at the pleasure of the court," and "perform duties as provided by the court of appeals." NMSA 1978, § 34-5-5(A), (D) (1966). District court employees are similarly provided for by law, as are metropolitan court employees, magistrate court employees, and administrative office of the courts employees. *See* NMSA 1978, § 34-6-19 (1968); § 34-8A-7 (1980); § 34-9-1 (1959); § 34-9-2 (1959); § 34-7-10 (1979).

246. N.M. CONST. art. VI, § 32.

247. *Id.*

248. *State ex rel. N.M. Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, ¶ 13, 73 P.3d 197, 201.

249. *Id.* ¶ 14, 73 P.3d at 201.

250. *See supra* Part III.C.

to investigate judicial employees and make recommendations to the appropriate supervising authority (the New Mexico Supreme Court or other judicial agency), are judicial in nature because they are JSC and court functions, explicitly defined in the New Mexico Constitution, or because the New Mexico Supreme Court has identified them as such.<sup>251</sup> The commission's employee-oversight and code-drafting functions would attempt to administer judicial personnel matters, as well as influence the public confidence in the administration of justice and the judiciary, both functions recognized as judicial.<sup>252</sup> Similarly, the release of advisory opinions to the courts would assume part of the supreme court's judicial function to provide superintending control over the lower courts.<sup>253</sup> The commission's power to draft a judicial code of ethics, and its power to release advisory opinions regarding the conduct of judges, are judicial as well, in that these powers are mechanisms for providing "superintending control," and therefore they are properly under the supreme court's purview.

#### b. Judicial Encroachment

Because House Bill 151 would create an ethics commission that would embody judicial powers, the next questions within the separation of powers analysis are whether those functions would encroach upon the judicial branch, and whether the encroachment would be an undue disruption.<sup>254</sup> Based on a comparison with New Mexico precedent addressing such questions, the commission's proscribed powers and duties would unduly encroach upon the judiciary. When the governor removed six of eleven JSC commissioners, *Espinosa* held that no encroachment on the judicial branch had occurred. The petitioners in that case challenged the JSC commissioners' removal as an unconstitutional infringement of the executive branch into the realm of the judicial branch.<sup>255</sup> The supreme court asserted, however, that "[a]n actual attempt to influence the actions of the [JSC] would be an attempt to control the judiciary and, therefore, a violation of separations of powers."<sup>256</sup> The court reasoned that because the constitution *intentionally* gave the governor the appointing power for the majority of JSC commissioners, the executive power did not increase if the governor replaced the commissioners he was already constitutionally authorized to appoint.<sup>257</sup> The court further reasoned that, because the JSC works in secret, the governor could not interfere with an ongoing investigation, and as such there was a check on his potential abuse of power.<sup>258</sup>

Unlike the situation described in *Espinosa*, the ethics commission's powers and duties relating to judicial oversight *would* attempt to control the judiciary, *without* any constitutional grant of power to do so, and *without* any check on that power. The first example of this attempt to control the judiciary is the power the commission would have to receive complaints, investigate, and make recommendations to

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251. See *supra* notes 249, 241 and accompanying text.

252. See *supra* note 243.

253. See *supra* note 241.

254. See *supra* Part IV.E.1.

255. *Espinosa*, 2003-NMSC-017, ¶ 15, 73 P.3d at 201.

256. *Id.* ¶ 16, 73 P.3d at 201.

257. *Id.* ¶ 15, 73 P.3d at 201.

258. *Id.*

the supreme court regarding judicial branch employees. These acts would encroach upon constitutionally protected judicial powers of the supreme court to “appoint and remove at pleasure” its employees and to administer and oversee the lower courts.<sup>259</sup> The judiciary’s constitutionally protected powers in this realm are not tempered by a constitutional assertion of executive involvement, as was the case in *Espinosa*.<sup>260</sup> Further, the government conduct act specifically provides that complaints against judicial branch employees may be filed and reviewed pursuant to the procedures provided in the judicial personnel rules, avoiding involvement of any executive or legislative actors.<sup>261</sup> This is an indication that the type of conflict that would be established by a commission with judicial oversight was purposefully avoided previously. The judicial branch personnel rules were adopted by the New Mexico Supreme Court pursuant to its constitutional decree of superintending control, and provide for making complaints against judicial employees for twenty-eight activities, from violations of state laws, to “acting in a manner that reflects poorly upon the integrity of the Judicial Branch.”<sup>262</sup> The rules provide procedures for receiving complaints and holding informal hearings.<sup>263</sup> An executive procedure for the same purpose would only frustrate the supreme court’s constitutionally granted administrative and oversight powers.

The ethics commission would also attempt to control the judiciary by receiving complaints regarding judges’ conduct. In contrast to the inconsequential effect on the balance of powers in *Espinosa*, when the governor removed JSC commissioners he already appointed, commission receipt of complaints would create a valve on the flow of complaints about judges, and thus could have a substantial effect on the intended balance between the branches. The ethics commission would have to affirmatively refer the complaints it received about judges to the JSC. Unlike the safeguard against indiscretion pointed to in *Espinosa* as a check on balance of powers infringement, the ethics commission initiative in referring judge complaints, or its lack thereof, would not have an integrated check provided by another branch.<sup>264</sup> The referral responsibility could cause judicial branch dependence upon the commission to refer complaints. The JSC currently receives judge complaints directly as the body vested, constitutionally, with the power to receive them.<sup>265</sup> Papers filed with the JSC are constitutionally provided as *confidential*.<sup>266</sup> Ironically, filing complaints about judges with the ethics commission (as part of the executive branch) would entirely defeat the *Espinosa*-asserted check against exec-

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259. See *supra* note 242 and accompanying text.

260. See *supra* note 257 and accompanying text.

261. NMSA 1978, § 10-16-14(D) (1993) (“Complaints against executive branch employees may be filed with the agency head and reviewed pursuant to the procedures provided in the Personnel Act. Complaints against legislative branch employees may be filed with and reviewed pursuant to procedures adopted by the New Mexico legislative council. Complaints against judicial branch employees may be filed and reviewed pursuant to the procedures provided in the judicial personnel rules.”).

262. SUPREME COURT OF N.M., JUDICIAL BRANCH PERSONNEL RULES 60–62 (2005).

263. *Id.*

264. The JSC was the judicial actor in *Espinosa*; the governor was the executive actor. *Espinosa*, 2003-NMSC-017, ¶ 15, 73 P.3d at 201. House Bill 151 did include provisions requiring confidentiality by the commission and the executive actor, but those provisions would not provide a check upon the commission’s power to act as a valve.

265. See N.M. CONST. art. 6, § 32.

266. *Id.*

utive branch abuse of power that currently exists—confidentiality from the executive branch—by eliminating the possibility that the constitutionally required JSC confidentiality could be sustained.<sup>267</sup>

An ethics commission would encroach upon judicial powers in a third way. The commission's power to draft a code of ethics for judges and judicial employees, and its power to release advisory opinions, would encroach on the judicial powers of the supreme court to administrate and impose superintending control over the lower courts and judicial employees. Advisory opinions and codes of conduct, by definition, are an attempt to control the behavior of the actors for whom they are provided. The judicial branch already has a code of conduct, and it already has a system for providing advisory opinions for its judges. The code of conduct was mentioned previously, the judicial branch personnel rules.<sup>268</sup> The personnel rules are adopted, amended, and repealed at the discretion of the supreme court.<sup>269</sup> Further, a committee within the judicial education center, the advisory committee on the code of judicial conduct (a New Mexico Supreme Court-appointed advisory committee), has released over one hundred advisory opinions on judicial conduct since 1986.<sup>270</sup> That committee responds to inquiries from judges seeking guidance on personal business dealings, political activities, acceptance of gifts, charitable work, teaching and writing, and many other issues.<sup>271</sup> The introduction of a new code of conduct for judicial employees, and another committee providing advice on ethical conduct of judges, would be confusing. Further, they would force the judicial branch codes and advisory opinions to compete for legitimacy with ethics commission codes and advisory opinions.

Because the ethics commission would foreclose judiciary actions that are indisputably judicial, through its numerous encroachments upon judicial powers, the disruptions are unconstitutional.<sup>272</sup>

#### 4. Legislative Infringement

Again assuming the ethics commission would belong to the executive branch,<sup>273</sup> it must not unconstitutionally infringe upon the legislative branch. The analysis to determine legislative branch infringement entails the same steps taken to determine whether the commission would cause judicial infringement in the preceding sections.<sup>274</sup> Because the identity of the acting branch has been identified (as executive), the next step is characterizing the commission's acts as to the type of power they embody.<sup>275</sup> Finally, whether those acts disrupt the proper balance between the executive and legislative branches must be determined.<sup>276</sup>

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267. *Id.*

268. SUPREME COURT OF N.M., JUDICIAL BRANCH PERSONNEL RULES 47–49 (2005).

269. *Id.* at 4.

270. Judicial Education Center, Judicial Conduct Advisory Opinions, Institute of Public Law, <http://jec.unm.edu/resources/advisoryopinions/index.htm> (last visited Dec. 29, 2009).

271. *Id.*

272. *See supra* Part IV.E.1.

273. *See supra* Part IV.E.2.

274. *See supra* Part IV.E.3.

275. *See supra* Part IV.E.1.

276. *See supra* Part IV.E.1.

### a. Legislative Powers

House Bill 151 provides for a commission that would embody some legislative powers. The New Mexico Supreme Court has recognized the legislature's proper role as "creating law," distinguishable from the executive role, "execution of laws."<sup>277</sup> The legislature is constitutionally granted the power to "select its own officers and employees."<sup>278</sup> Further, the legislature is "the judge of election and qualification of its members."<sup>279</sup> The legislature may determine its rules of procedure and it may punish its members or others for contempt or disorderly behavior in its presence.<sup>280</sup> The New Mexico House of Representatives has sole impeachment power, and the New Mexico Senate tries all impeachments.<sup>281</sup> These constitutional provisions, taken together, make administering legislative employees, and legislator oversight, "legislative powers." The constitutional provision providing for employee selection power is analogous to the New Mexico Supreme Court's constitutionally granted power to hire and fire employees.<sup>282</sup> Similarly, although there is not a New Mexico "Legislative Standards Commission" explicitly created in the constitution, the constitutional provisions granting the legislature the power to determine the qualification of its members, the power to punish them, and the power to take them to trial, all implicitly designate the legislature as holding the power to judge and evaluate its own members as to their continued membership.

There are several ethics commission powers that embody legislative powers. House Bill 151 provides for a commission with the authority to promulgate rules and draft ethics codes that would embody the legislative power to make law. The commission's procedural and due process rules would be applied in the same manner as court rules or administrative agency rules. The commission-drafted codes of ethics would be applied in the same manner as violations of other statutes deemed "ethics violations."<sup>283</sup> Similarly, House Bill 151 provisions embody legislative powers by giving the commission authority to receive and investigate complaints about legislators, giving the commission authority to receive, investigate, and make public reports and reprimands about legislative employees, and by mandating legislative committee action on commission referrals.

### b. Legislative Encroachment

If House Bill 151 provisions would give the commission legislative powers, and would prevent the legislative branch from accomplishing its assigned functions, those provisions would unconstitutionally infringe upon the legislative branch.<sup>284</sup> The following analysis will first consider the commission's lawmaking powers and analyze them for potential legislative infringement. Next, it will analyze the com-

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277. *Clark*, 120 N.M. at 573, 904 P.2d at 22 (citing *State v. Fifth Judicial Dist. Court*, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932)).

278. N.M. CONST. art. IV, § 9.

279. *Id.* § 7.

280. *Id.* § 11.

281. *Id.* § 35.

282. *See supra* Part IV.E.3.

283. *See supra* Part III.B.

284. *See State ex rel. Clark v. Johnson*, 120 N.M. 562, 573, 904 P.2d 11, 22 (1995).

mission's powers to administer legislative employees and to provide oversight for legislators.

The lawmaking functions delegated to the commission would be less invasive than executive actions found unconstitutional previously. In *Clark*, the New Mexico Supreme Court found the governor's act of entering into compacts with governors of New Mexico pueblos for revenue sharing unconstitutionally infringed upon the legislature's lawmaking powers.<sup>285</sup> The governor's "law making" acts gave a tribe a "virtually irrevocable right" that the legislature could not take away through future legislation.<sup>286</sup> Further, compacts struck "detailed and specific agreement" against the legislature's implied will, regarding activities that the legislature was authorized to prohibit or regulate.<sup>287</sup>

The lawmaking functions delegated to the proposed commission would not prevent the legislature from accomplishing its constitutionally-assigned lawmaking functions. First, unlike the gaming compacts the governor entered in *Clark*, which could not be altered by the legislature, the legislature could override any code adopted by the ethics commission by passing a statute for that purpose. Also unlike *Clark*, in which the governor had acted contrary to legislative posture, the legislature's adoption of ethics commission legislation, such as House Bill 151, would suggest legislative delegation of lawmaking power. The *Clark* opinion did caution, however, that a delegation of authority by the legislature must be express and provide clear standards.<sup>288</sup>

Whether a delegation of lawmaking power includes clear and express standards is the focus of separation of powers analysis when New Mexico courts determine if an administrative agency is acting within constitutionally acceptable limits.<sup>289</sup> When the clear and express standards analysis was applied in *Montoya v. O'Toole* to determine whether the New Mexico Board of Pharmacy had a constitutional delegation of authority to schedule drugs, the New Mexico Supreme Court found that the board's authority was clear and express. The legislature had established "strict guidelines for the Board . . . to follow in determining the substance's potential for abuse."<sup>290</sup> The legislative mandate required placing substances in categories based on specific criteria; for example, a substance should be placed in Schedule I if the

285. *See id.*

286. *Id.* at 574, 904 P.2d at 23.

287. *Id.* at 573-75, 904 P.2d at 22-24. The governor's actions were like those taken by U.S. President Harry Truman in *Youngstown Sheet & Tube Co.*, in which U.S. Supreme Court Justice Robert Jackson wrote that the executive powers were at their lowest ebb when contrary to the expressed or implied will of Congress. *Id.* at 575, 904 P.2d at 24 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952)).

288. *Id.* at 576-77, 904 P.2d at 25-26.

289. *See State ex rel. Sofeico v. Heffernan*, 41 N.M. 219, 67 P.2d 240, 245 (1937). The general rule is that: [A] statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business [or] profession . . . in public officials, without prescribing a uniform rule of action . . . and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform, is unconstitutional and void.

*Id.* Nevertheless, some situations require discretion "where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation and it is necessary to protect the public morals, health, safety, and general welfare." *Id.* (citations omitted).

290. *Montoya v. O'Toole*, 94 N.M. 303, 304, 610 P.2d 190, 191 (1980). The guidelines required consideration of: "actual or relative abuse of the substance; . . . scientific evidence of the pharmacological effect; . . . state of current scientific knowledge regarding the substance; . . . history and current pattern of abuse; . . . [and] scope, duration and significance of abuse. . ." *Id.* (omitting three more guidelines).

substance: “(1) has a high potential for abuse; and (2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.”<sup>291</sup>

House Bill 151 does not provide express and clear standards for commission procedural rules or ethics codes, and thus the lawmaking delegation would likely be unconstitutional. In fact, House Bill 151 provides no standards for rules of procedure, rules of investigation, or hearings.<sup>292</sup> It simply calls for the commission to make its own rules in these areas.<sup>293</sup> In addition, House Bill 151 provides no standards for drafting the proposed act’s mandated ethics codes.<sup>294</sup> The commission could define anything as an ethical violation in its proposed codes.<sup>295</sup> While agencies’ elected leaders would have to adopt the ethics codes after the commission drafted them, this requirement would simply incorporate additional executive actors in the legislative action of lawmaking.<sup>296</sup> Thus, House Bill 151 would violate the constitutionally protected separation of powers by delegating legislative lawmaking powers without incorporating clear and express standards.

The proposed ethics commission’s legislative powers to administer legislative employees and provide legislator oversight would be more substantial than the commission’s proposed judicial powers to administer judicial employees and provide judicial oversight.<sup>297</sup> Because the commission’s legislative powers would be greater than the commission’s judicial powers that would infringe upon the judicial branch,<sup>298</sup> and because the legislature is constitutionally authorized to administer legislative employees and to regulate its own membership similarly to the judicial branch,<sup>299</sup> the ethics commission’s legislative powers to regulate legislative actors would unconstitutionally infringe upon the legislative branch.

#### F. Redundant Oversight

Setting separation of powers considerations aside, an ethics commission—particularly as proposed in House Bill 151—would otherwise overlap powers and duties with existing agencies. It is possible that the redundant responsibilities would enhance the respective agencies’ efficacies. The redundancy, however, might also hinder such agencies if confusion or inefficiency resulted.

The redundancy is first apparent in the House Bill 151 “ethics violation” definition, which defines such violations as including violations of several existing statutes. There are already enforcement mechanisms for violations of these statutes. Commission involvement would create an additional layer of oversight. For example, the secretary of state currently administers parts of the government conduct act, from the agency’s receipt of complaints arising under the act, to the agency’s enforcement of the act’s provisions. The commission would also receive complaints about violations of the government conduct act, and would investigate, hold hear-

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291. *Id.*

292. *See supra* Part III.

293. *See supra* Part III.

294. *See supra* Part III.

295. *See supra* Part III.

296. *See supra* Part III.

297. *See supra* Part III.G.

298. *See supra* Part IV.E.3.b.

299. *See supra* part IV.E.4.a.



ings, and recommend enforcement for complaints about non-criminal violations. House Bill 151 does not delineate the relationship that is envisioned between the entities that currently have oversight over existing statutes and the newly proposed commission.

One possible outcome of commission redundancy with other agencies' responsibilities is that the existence of the commission might have no effect other than to waste funds, and to create the *appearance* of greater government oversight.<sup>300</sup> Creating a new governmental body, however, should have greater consequence than improving the image of government accountability. Public complacency under a perception of strong safeguards may be more dangerous than no safeguards. At least without such a perception, the public may accept responsibility for evaluating public actors, and thus may be more aware of government conduct. With perceived safeguards in place, however, the public may see less need for citizen vigilance, even if that perception has no basis in reality.

A second possible, and contrasting, outcome of commission redundancy with other state agencies is that the commission might become the de-facto one-stop shop for all government-related complaints, as a result of having such broad personal jurisdiction. The commission, however, would have to refer many of these complaints to other oversight agencies: the JSC, the secretary of state, the attorney general, the legislative ethics committee, the senate rules committee, and the district attorneys. These referrals would result due to the nature of the complaints. Complaints describing criminal violations, complaints relating to judges, and complaints about any activities not included in the definition of an ethics violation under House Bill 151, would have to be referred to other agencies or would have to be dismissed. The referrals could also result because, even if the commission had concurrent jurisdiction with other agencies, the commission would not have time for anything other than categorizing and directing complaints. This outcome, although not inherently negative, would defeat the implementation of one of the key desired characteristics of an ethics commission—its ability to independently investigate complaints.<sup>301</sup> Such a demotion to “referral service,” simply redirecting complaints to the agencies that would have received the complaints prior to the creation of the commission, would preclude any possible improvement to the existing oversight system through the commission's supposed independence from other oversight agencies.

Promulgating ethics codes for each government agency would be another redundant commission duty.<sup>302</sup> House Bill 151 calls for the ethics commission to draft an ethics code for each state agency.<sup>303</sup> Under the existing government conduct act, however, each executive agency is already required to file codes of conduct with the secretary of state.<sup>304</sup> If an agency does not file a code of conduct, the agency is

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300. This is the idea that more oversight agencies should be equated with more public protection from corruption.

301. Moore & Kerns, *State Ethics Commissions*, *supra* note 217.

302. *See supra* Part III.C.

303. *See supra* Part III.C. There are over 300 state agencies. *See* NMSA 1978, Executive Agency Index (2009).

304. *See supra* note 108; *see also* Appendix 3 (listing New Mexico agencies with a code of conduct filed with the secretary of state).

subject to the code of conduct filed by the office of the governor.<sup>305</sup> Many of the codes on file with the secretary of state were filed years ago, but they are still enforceable.<sup>306</sup> In addition to the required executive codes of conduct, both the legislature and judiciary have published conduct guides for their employees and elected officials.<sup>307</sup> No commission proposal provision calls for the use of the existing codes of conduct, and the use of the new ethics codes would depend upon adoption by each governmental agency after the commission drafted them.<sup>308</sup> House Bill 151 does not provide guidance as to the effect the new ethics codes would have on the already-filed codes of conduct. It also does not provide for the likely scenario that some agencies would readily adopt ethics codes promulgated by the commission, while others might never do so. Thus, some agencies would have a valid code of conduct filed with the secretary of state, and others would have a valid code of ethics with oversight provided by the commission.

Legislator oversight would be yet another redundant component of the proposed commission. The legislature has its own code of ethics<sup>309</sup> and internal oversight mechanisms, including the house rules committee, senate ethics committee, and interim legislative ethics committee.<sup>310</sup> These committees meet to provide published advisory opinions,<sup>311</sup> to investigate allegations,<sup>312</sup> and to recommend action based on their findings.<sup>313</sup> These committees are not independent, however, from the legislature itself.<sup>314</sup> House Bill 151 does not suggest a solution to reconcile conflicting advisory opinions issued by the commission and legislative oversight committees, nor does it describe the relationship that would exist between the commission and the three legislative ethics committees.

Redundant statutory oversight, uncoordinated sets of conduct codes, and redundant legislator oversight are ingredients in a recipe for confusion and inefficiency. Without explicit delineation between the powers and duties of the proposed ethics commission and the responsibilities held by existing agencies, confusion will reign.

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305. See Appendix 4 (discussing agencies without a code of conduct filed with the secretary of state).

306. Several codes on file with the secretary of state as of 2009 were for agencies that no longer exist, or for agencies that exist under a new name since the time the codes were filed. See Appendix 3.

307. See *supra* Part IV.C.

308. See *supra* Part III.C.

309. See LEGIS. COUNCIL SERV., NEW MEXICO LEGISLATIVE ETHICS GUIDE (2007).

310. See N.M. HOUSE RULES 9-1 (2007) to -2 (1993); N.M. SEN. RULES 9-13-1 to -7 (1992); see also N.M. HOUSE RULES 26-1 (1991) to -2 (2004); N.M. SEN. RULES 26-1 (1992) to -2 (2004) (discussing ethics and ethics training for legislators).

311. In the last fifteen years the house rules committee published two opinions. The senate ethics committee published one. The interim legislative rules committee published three advisory opinions and one letter (in response to a request for an advisory opinion in a matter in which the committee stated it did not have jurisdiction to issue an advisory opinion). See generally Advisory Opinions: LEC97-2; LEC97-1; LEC96-1; S94-1; H94-2; H94-1; see also Letter from Interim Legislative Ethics Committee to Linda M. Lopez, Senator (Jan. 22, 1998) (on file with author). No advisory opinions from any of these committees have been published in over ten years.

312. There is no record of committee investigations or discussions because allegations are confidential unless and until the committee finds reason to make them public and bring them to the full house or senate. See N.M. HOUSE RULES 9-13-4 (1993); N.M. SEN. RULES 9-13-6 (1992).

313. See N.M. HOUSE RULES 9-13-6 (1993); N.M. SEN. RULES 9-13-4 (1992).

314. All legislative ethics committee members are legislators themselves, and the committees are staffed with legislative staff members. See generally N.M. HOUSE RULES; N.M. SEN. RULES.

### G. Complainant Protections

Under House Bill 151, retaliation against complainants, witnesses, and others providing assistance to the commission, would be prohibited during the investigation of alleged ethics violations.<sup>315</sup> The bill does not, however, provide any penalty for violation of those prohibitions. The bill also does not classify the violation of that prohibition as a misdemeanor or criminal offense. In effect, the omission of a penalty for the prohibited retaliation would swallow any effect the prohibition could have had.

## V. RECOMMENDATIONS

If the proposed commission is more than a symbolic proposition, directed towards the ambiguous goal of improved state government ethics, lawmakers should address the issues raised in the previous Part. This Part makes some recommendations to avoid the identified issues.

### A. Improved Methodology for Reform Recommendations

New Mexico political leaders should revise their methodology used to design ethics reform. Rather than studying the various laws and administrative schemes available for “reform,” and then making recommendations designed to catch up with other states’ “advancements,” recommendations should address known problems through solutions tailored to solve those problems. If the governor and legislators are serious about improving government ethics, they must first articulate the specific problems they wish to remedy. The proposed ethics commission would not provide relief for New Mexico’s *known* problems of brazen criminal corruption. If an ethics commission would serve some purpose, then, it must be assumed that there are governmental ethical problems beyond the known criminal scandals.<sup>316</sup> In order to address such problems, however, they must first be named.

The idea to first articulate a state’s needs before proposing remedies is not original. Other states have assessed their needs. New Jersey, for example, conducted an ethics audit before proposing legislative recommendations.<sup>317</sup> The audit involved a survey of all government employees as to their knowledge of the state’s conflict of interest laws.<sup>318</sup> The state then designed a program to educate their employees based on the survey results.

New Mexico leaders could similarly use a self-assessment to define the state’s problems (that is, those beyond the known criminal scandals covering the front pages of the state’s newspapers on a frequent basis). New Mexico would not have to limit its self-assessment to surveys of employee knowledge of ethics laws. Rather, the evaluation could be much more comprehensive. The assessment could gauge and evaluate agency adherence to established codes of conduct. Similarly, random audits of candidate’s financial reports could be assessed as to their accuracy and completeness. Continuing this line of logic, employees’ and government

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315. See *supra* Part III.

316. See generally *supra* Part II.

317. See REPORT OF THE SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY 2–3 (2005).

318. *Id.*

officials' knowledge of, and adherence to, each existing statute, violations of which were included in the House Bill 151 definition of "ethics violation," could be evaluated. After such an evaluation, leaders could assess whether non-criminal ethics problems exist, and assess the relative magnitude of these problems.

In order to determine whether the proposed commission's various powers and duties would address existing problems, the New Mexico self-assessment could specifically question whether the existence of such a commission would change employee, candidate, and politician behavior. For example, government employees could anonymously disclose whether they know about ethical violations they have not reported under the state's existing oversight structure. The assessment could determine why those individuals have not reported violations, and how the violation occurred without others' knowledge. Do employees know where to report violations? What kind of violations are occurring that are not being reported? Do employees or government officials fear retaliation? Do they lack confidence in the institutions currently vested with the power to receive a particular type of complaint? Is the unethical conduct part of a culture of accepted conduct? Would an employee willingly submit and sign a complaint to report unethical conduct if retaliation for such a report was known to be prohibited? Depending upon the answers to these questions lawmakers might have a good reason to implement a remedy.

Once the state's needs are established through self-assessment, proposals for reform should be specifically crafted to address those needs. This may be accomplished through designing original reforms, or by looking at other states' best practices to solve those specific problems. If what is needed is improved public perception, or a feeling of equivalence as compared to other states, however, creating an ethics commission as proposed in House Bill 151 may be the perfect remedy.

### *B. Appropriate Funding*

If a need for an ethics commission were established, the commission should be adequately funded so that it may accomplish its legally mandated duties. Further, if the commission were to exert any of its powers described in House Bill 151 to investigate, hold hearings, and make findings, both the commission and risk management division of the general services department should be funded commensurately with the commission's workload.

The appropriate level of direct funding for the commission can be estimated by looking to analogous agencies. The most similar New Mexico agency,<sup>319</sup> the JSC, has an annual operational budget of approximately \$851,000.<sup>320</sup> The JSC's jurisdiction, however, is limited to oversight of district, magistrate, and appellate judges,<sup>321</sup>

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319. See *supra* Part IV.E.2.

320. The JSC budget for fiscal year 2009 was \$851,000. The JSC employs an executive director, and seven other staff. In addition, it contracts for investigation support. The JSC received 2,500 inquires regarding judicial disciplinary matters and docketed 144 complaints during fiscal year 2008. See LEGIS. FINANCE COMM., REPORT OF THE LEGISLATIVE FINANCE COMMITTEE TO THE FORTY NINTH LEGISLATURE 4 (N.M. 2009).

321. See N.M. CONST. art. VI, § 32.

less than a few hundred individuals.<sup>322</sup> The commission, on the other hand, would have jurisdiction over all state employees, including regular, appointed, and elected individuals.<sup>323</sup> In addition, commission jurisdiction would extend to state officials not included on the state payroll; for example, the appointed board members on professional boards such as the board of pharmacy, and the regents on all state university boards of regents, would be under the commission's jurisdiction.<sup>324</sup> The commission would have jurisdiction over lobbyists<sup>325</sup> and government contractors.<sup>326</sup> This breadth of jurisdiction would be *massive*, particularly for one executive director and a general counsel, and could translate into a massive workload. Even if the commission did not receive substantial numbers of complaints, or requests for advisory opinions, it would still have to draft ethics codes for all state agencies, provide legislative recommendations, and submit an annual report.<sup>327</sup>

The commission's operating budget should finance the commission's staff salaries and benefits as state employees, as well as any contractual services and supplies the commission would likely require. The commission would need at least the amount originally recommended in the 2006 Task Force proposal, \$1,000,000.<sup>328</sup> Because the first year of commission operation would be limited,<sup>329</sup> the first year's operational budget might appropriately be set lower.

Because it is difficult, at least initially, to estimate commission and risk management division workload, the legislature should create a revolving fund to finance investigations, hearings, and legal representation. The fund would only be used for those purposes. The fund would allow both agencies to track the costs of investigations and representation—the work-load-dependent aspects of the two agencies' assigned duties under House Bill 151. Further, such a fund would allow the risk management division relief from seeking the funding to cover new legal expenditures not included in its current budget.

### C. Separation of Powers

To avoid the likely successful challenges to the commission's constitutionality under the separation of powers provision in the New Mexico Constitution, there are at least two options. First, many constitutional violations would be protected

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322. There are ten court of appeals judges, NMSA 1978, § 34-5-1 (1990); eighty-eight district court judges, NMSA 1978, § 34-6-4 to -16 (2009); eighteen metropolitan court judges, N.M. LEGIS. FINANCE COMM., REPORT OF THE LEGISLATIVE FINANCE COMMITTEE TO THE FORTY NINTH LEGISLATURE 39 (2009); sixty-five magistrate judges, *see generally id.*, and an unknown number of municipal judges.

323. *Id.* *See supra* note 230 and accompanying text.

324. *See supra* Part III.B.

325. There were 768 registered lobbyists during the 2009 legislative session. Secretary of State, Index of Active Lobbyists, <http://ethics.sos.state.nm.us/LOBBY/LOB.htm> (last visited Dec. 29, 2009).

326. The number of government contractors in New Mexico is unknown. This author contacted various department of finance and administration contract administrators who reported that the information would only be possible to ascertain upon the implementation of a new database of government contractors. Such a database was required by a bill that was passed by the legislature in 2009. *See* LEGIS. COUNCIL SERV., 2009 CONCORDANCE REPORT, 49th Leg., 1st Sess. (N.M. 2009); *see also* H.B. 546, 49th Leg., 1st Sess. (N.M. 2009); *see also* Email from Nicole Gillespie, senior policy analyst, New Mexico Department of Finance and Administration, to Erin McSherry, Class of 2010, University of New Mexico School of Law (Apr. 20, 2009, 14:45 MDT) (on file with author).

327. *See supra* Part III.C.

328. This assumes a workload greater than that experienced by the JSC.

329. *See supra* Part III.E.

against through a constitutional amendment. Second, because it is difficult to amend the constitution, it is also useful to explore how to statutorily create a commission in such a way that it would not violate constitutionally protected separation of powers.

A constitutional amendment would address violations of separation of power protections by creating the commission within the executive branch, or by creating the commission as a “fourth branch” or intermediate, quasi-branch. If the commission were created in the executive branch, then its duties would by definition embody executive powers, rather than legislative and judicial powers, and might therefore avoid infringement upon the other two branches.<sup>330</sup> The constitutionality of the commission would also likely persevere if the commission were created through a constitutional amendment as a quasi-branch, or as a fourth branch of government. In that case, however, the established separation of powers analysis might require an entire revision.<sup>331</sup>

The New Mexico Constitution could also be amended to create a separate ethics commission assigned to each branch, or it could be amended to allow for the creation of such branch-specific commissions statutorily. There are other states with multiple commissions, each with responsibility over only one branch or group of government-related actors.<sup>332</sup> Because the JSC already exists within the judicial branch, its jurisdiction could be expanded to include judicial employees in order to accomplish the full scope of judicial-branch duties contemplated in House Bill 151. Similar commissions could be established in both the legislative and executive branches. Because implementing stronger oversight for government contractors and lobbyists would not risk violating separation of powers protections, that goal could be approached constitutionally or statutorily.

If a commission were enacted by statute, the legislature should implement the desired oversight without incorporating shared jurisdiction over any combination of executive, legislative, and judicial actors. An executive branch commission, without legislative or judicial oversight, would be constitutional under the separation of powers doctrine and could have jurisdiction over approximately 20,000 executive branch employees, many elected and appointed officials, government contractors, lobbyists, and all candidates for office. Because the judicial branch’s constitutional provisions provide for self-regulation, statutes creating non-judicial commissions with judicial oversight would not be constitutional without passing constitutional amendments. Because the legislature similarly has the constitutional power to self-regulate, statutes creating non-legislative commissions with legislative oversight may be unconstitutional as delegations of power, unless the delegation is expressed with clear standards; however, the legislature could also pass legislation that would further clarify its own oversight power.

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330. *See supra* Part IV.E.

331. It seems that such a creation would cause disruption to many existing governmental checks and balances and such a proposal is beyond the scope of this note.

332. For example, Washington has a state legislative ethics board, a state executive ethics board, and a public disclosure commission. The public disclosure commission receives financial disclosures from both legislative and executive officials, but the other two boards are branch-specific. *See* National Conference of State Legislatures, State Ethics Commissions: Jurisdiction, [http://www.ncsl.org/programs/ethics/ec\\_jurisdiction.htm](http://www.ncsl.org/programs/ethics/ec_jurisdiction.htm) (last visited Dec. 29, 2009).

#### D. Redundancy

There are at least two ways to resolve the issues likely to arise due to commission redundancy with existing state agencies' powers and duties.<sup>333</sup> The commission enabling legislation should either recognize and streamline any ethics commission responsibility overlaps with other state agencies' responsibilities, or it should eliminate the redundancies. Either of these changes would provide more clarity of process for all parties involved, thus avoiding confusion, waste of time, and sullied investigations.

Commission enabling legislation should provide specific guidelines both recognizing and streamlining any duties and powers that would overlap other state agencies' duties and powers. Whether and how such overlapping powers should be shared between agencies depends upon the outcome of the ethics audit recommended in this note.<sup>334</sup> If there are certain illegal acts that are not currently reported, or effectively enforced, and the assessment indicates such situation would be best remedied through an ethics commission, then delegating such responsibility to an ethics commission may be appropriate. In such circumstances, ethics commission enabling legislation should specify that the commission is the preferred oversight agency for such violations. The enabling legislation should also provide a process to follow if two agencies investigate a complaint simultaneously, or directions as to how that situation would be avoided. If the existing oversight for a particular ethics violation is partially functional, but requires commission assistance due to the existing oversight's inherent limitation, the commission's designated responsibility should reflect that need. If an existing oversight mechanism is functioning, then commission enabling legislation should either recognize that success and specify that complaints for that type of violation should be referred to the existing oversight agency, or the legislation should not assign responsibility for that oversight to an ethics commission at all.

If redundancies between the commission and existing agencies are to be eliminated or reduced, some of the powers House Bill 151 assigned to the commission, such as the ethics training function, should be defined as duties, and some of the assigned duties should be eliminated. These suggestions would ensure the commission has assigned responsibilities beyond those already assigned to other agencies, and would reduce the risk that the commission would simply create a veneer of improved governmental ethics. At the same time, existing agencies' responsibilities would not be partially usurped. If those agencies are not satisfactorily engaged in their responsibilities, the executive and legislature should investigate ways to improve their performance. The legislature should not create new agencies to compensate for the others' ineffectiveness without ensuring the existing agencies have the tools for success.<sup>335</sup>

To eliminate or streamline the code of conduct redundancy, codes of conduct filed under the requirements of the government conduct act should be eliminated,

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333. See *supra* Part IV.F.

334. See *supra* Part V.A.

335. The 1992 Task Force recognized this when it decided not to implement an ethics commission. See *supra* note 182 and accompanying text. Without an ethics audit, it is difficult to know whether existing agencies are effective at responding to ethics violations and whether any deficiencies would be resolved through implementation of an ethics commission. See *supra* Part V.A.

should stand and be improved without the interference of new ethics codes, or they should be incorporated into the ethics codes the commission would be required to draft. Eliminating the commission's ethics code drafting responsibility is another option to eliminate this redundancy. Although the codes filed with the secretary of state may not be current, they could be updated rather than completely replaced by, or confused with, new commission ethics codes. If eliminating or improving the existing government conduct act codes of conduct is not undertaken, commission-enabling legislation should include violations of those codes within its definition of an "ethics violation," providing for a more streamlined set of rules and reduced confusion.

#### *E. Complainant Protections*

A state ethics commission act should encourage good faith reporting of ethics violations by minimizing fear of backlash from supervisors and coworkers. While House Bill 151 prohibited retaliation and other adverse actions against complainants, witnesses, and others providing assistance during the investigation of alleged ethics violations, in order to be effective the legislation should also specify a penalty and an enforcement authority to respond to violations of those prohibitions.

### VI. CONCLUSION

The ethics commission proposed in House Bill 151 would not address the criminal political corruption that has driven the search for ethics reform in New Mexico during the last four years. While the creation of a new agency with broad jurisdiction and "independence" from the existing branches may seem attractive when corruption appears rampant in all government branches, if the effort to create such an agency is actually more of a distraction from, rather than a solution to, the state's real problems, it is a mirage. The risk of grasping at such a perceived waterhole in the desert was recognized in 1993, when the idea of creating an ethics commission was concluded to "skew the proper focus of attention."<sup>336</sup> What was important then was that laws made sense, that they were workable, sound, and were enforced. In reality there is no reason an ethics commission would not have the same challenges as any other—existing—oversight agency, and because *criminal* scandals have primarily caused the public to question the legitimacy of the government, alternative reforms should be prioritized to expose and destroy the roots of these glaring unacceptable acts. An ethics commission would not address New Mexico's criminal scandals and should only be created if an assessment of the state government demonstrates a need for such a commission. Further, enabling legislation should only be considered when it designs a commission to address a documented need, clearly delineates commission responsibilities shared with other agencies, protects constitutional separation of powers, commits adequate funds, and protects complainants.

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336. See GOVERNMENT ETHICS TASK FORCE, *supra* note 182, at 9.



## APPENDIX 1

*Governor Richardson's Task Force on Ethics and Election Reform Members*<sup>337</sup>  
(2006 Task Force)

*Co-Chairs:*

Garrey Carruthers, former governor, New Mexico State University Vice President for Economic Development

Suellen Scarnecchia, University of New Mexico School of Law Dean

*Members:*

Stuart Bluestone, New Mexico Deputy Attorney General

Barbara Brazil, New Mexico First

Matt Brix, Common Cause

Doug Brown, New Mexico State Treasurer

Maralyn Budke, public member

John Carey, New Mexico Association of Commerce and Industry

Dede Feldman, New Mexico State Senator

Mary Grana, public member

Gay Kernan, New Mexico State Senator

W. Ken Martinez, New Mexico State Representative

Kathy McCoy, New Mexico State Representative

Andrew Montgomery, public member

Jim Noel, Judicial Standards Commission

Leonard R. Sanchez, Moss-Adams, L.L.P.

Ron Soloman, Indian Pueblo Cultural Center

Hilary Tompkins, Office of the Governor

Steward Udall, former U.S. Secretary of the Interior

Brad Winter, Albuquerque City Councilor

## APPENDIX 2

*2007 Members of The Governor's Task Force on Ethics and Election Reform*<sup>338</sup>  
(2007 Task Force)

*Co-Chairs:*

Garrey Carruthers, former governor, New Mexico State University Vice President for Economic Development

Suellen Scarnecchia, University of New Mexico School of Law Dean

*Members:*

Diane Denish, New Mexico Lieutenant Governor

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337. See 2006 TASK FORCE RECOMMENDATIONS, *supra* note 4, at 3. Members of the 2006 Task Force are listed with the affiliations they held at the time they were appointed.

338. See 2007 TASK FORCE RECOMMENDATIONS, *supra* note 62. Members are listed with the affiliations they held when they were appointed to the 2007 Task Force.

Stewart Udall, former Secretary of the Interior  
 Governor Charlie Dorame, Tesuque Pueblo  
 James Lewis, New Mexico State Treasurer  
 Stuart Bluestone, Deputy Attorney General  
 Dede Feldman, New Mexico State Senator  
 John Ryan, New Mexico State Senator  
 Ken Martinez, New Mexico House of Representatives Majority Leader  
 Jeff Steinborn, New Mexico State Representative  
 Don Tripp, New Mexico State Representative  
 Bill McCamley, Doña Ana County Commissioner  
 Jim Noel, Judicial Standards Commission  
 Doug Brown, Brown and Brown Ventures  
 Leonard Sanchez, CPA, Moss Adams LLP  
 Norman Thayer, Sutin, Thayer, & Browne  
 Tom Keesing, Santa Fe Agency Real Estate  
 Geno Zamora, Zamora Strategic Advisors  
 Fred Nathan, Think New Mexico  
 Matt Brix, Center for Civic Policy  
 Claire Weiner, public member  
 Maralyn Budke, public member

### APPENDIX 3

#### *New Mexico Agencies with Codes of Conduct Filed with the New Mexico Secretary of State*<sup>339</sup>

Advisory Board of Respiratory Care Practitioners<sup>340</sup>  
 Attorney General<sup>341</sup>  
 Board of Examiners for Architects<sup>342</sup>  
 Board of Landscape Architects<sup>343</sup>  
 Board of Optometry<sup>344</sup>  
 Board of Podiatry<sup>345</sup>

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339. The listed agencies had codes of conduct on file with the New Mexico Secretary of State as of February 6, 2009. See email from Tracey Littrell, Ethics Administration, Secretary of State Office to Erin McSherry, Class of 2010, University of New Mexico School of Law (Feb. 6, 2009 15:02 MST) (on file with author). Agencies are listed alphabetically as indexed in the New Mexico Statutes Annotated, by their statutory name (if not listed in the index), or as named in the New Mexico Constitution. See NMSA 1978, Executive Agency Index (2009) (listing statutorily-created executive, legislative, and judicial agencies); § 34-14-1 (2001) (creating the civil legal services commission); § 61-12C-7 (1999) (creating the massage therapy board); § 61-28B-4 (2003) (creating the New Mexico public accountancy board); § 67-3-6 (2003) (creating a department of transportation); see also N.M. CONST., art. V, § 1 (establishing the governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, and commissioner of public lands); N.M. CONST., art. XII, § 11 (establishing the New Mexico School for the Deaf).

340. See ADVISORY BD. FOR RESPIRATORY CARE PRACTITIONERS, BOARD MEMBER CODE OF CONDUCT (1998).

341. See ATTORNEY GEN., STATE OF N.M., CODE OF CONDUCT (2007).

342. See BD. OF EXAM'RS FOR ARCHITECTS, STATE OF N.M., CODE OF CONDUCT STATEMENT (1996).

343. See BD. OF LANDSCAPE ARCHITECTS, STATE OF N. M., CODE OF CONDUCT (2005).

344. See BD. OF EXAM'RS IN OPTOMETRY, STATE OF N.M., 2005 BOARD MEMBER CODE OF CONDUCT (2005).

345. See BD. OF PODIATRY, STATE OF N.M., CODE OF CONDUCT (1995).

Border Authority<sup>346</sup>  
 Children, Youth and Families Department<sup>347</sup>  
 Civil Legal Services Commission<sup>348</sup>  
 Department of Transportation<sup>349</sup>  
 Energy Minerals and Natural Resources Department<sup>350</sup>  
 Environmental Improvement Board<sup>351</sup>  
 General Services Department<sup>352</sup>  
 Governor<sup>353</sup>  
 Human Services Department<sup>354</sup>  
 Labor Department<sup>355</sup>  
 Legislative Council Service<sup>356</sup>  
 Lieutenant Governor<sup>357</sup>  
 Massage Therapy Board<sup>358</sup>  
 New Mexico Public Utility Commission<sup>359</sup>  
 New Mexico School for the Deaf<sup>360</sup>  
 Nutrition and Dietetics Practice Board<sup>361</sup>  
 Personnel Board<sup>362</sup>  
 Public Accountancy Board<sup>363</sup>  
 Secretary of State<sup>364</sup>  
 State Auditor<sup>365</sup>  
 State Board of Nursing Home Administrators<sup>366</sup>  
 State Board of Psychologist Examiners<sup>367</sup>  
 State Board of Thanatopractice of the State of New Mexico<sup>368</sup>

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346. See N.M. BORDER AUTHORITY BD. OF DIRS., 2004 BOARD MEMBER CODE OF CONDUCT (2004).

347. See CHILDREN, YOUTH & FAMILIES DEP'T, CODE OF CONDUCT 2.1 (1999).

348. See N.M. CIVIL LEGAL SERVS. COMM'N, CODE OF CONDUCT (2001).

349. See N.M. DEP'T OF TRANSP., CODE OF CONDUCT AD 628 (2006).

350. See ENERGY, MINERALS & NATURAL RES. DEP'T, STATE OF N.M., SEPARATE AGENCY CODE OF CONDUCT (2007).

351. See ENVTL. IMPROVEMENT BD., STATE OF N.M., CODE OF CONDUCT (1997).

352. See GEN. SERVS. DEP'T, STATE OF N.M., CODE OF CONDUCT 350-2.00 (1998).

353. See GOVERNOR, STATE OF N.M., CODE OF CONDUCT (2007).

354. See GEN. SERVS. DEP'T, EMPLOYEE CODE OF CONDUCT 041 (1994).

355. See EMPLOYMENT SEC. DIV. BD. OF REVIEW, DEP'T OF LABOR, CODE OF CONDUCT (1995). In 2007, the labor department became the workforce solutions department. See NMSA 1978, § 9-26-15 (2007).

356. See LEGISLATIVE COUNCIL SERV., NEW MEXICO LEGISLATIVE STAFF CODE OF CONDUCT (2008).

357. See LIEUTENANT GOVERNOR, STATE OF N. M., CODE OF CONDUCT (2003).

358. See MASSAGE THERAPY BD., CODE OF CONDUCT-RESOLUTION 2 (2008).

359. See N.M. PUB. UTIL. COMM'N, CODE OF CONDUCT (1995). As of 1999, the New Mexico Public Utility Commission is part of the New Mexico Public Regulation Commission. See NMSA 1978, § 8-8-21 (1998).

360. See N.M. SCH. FOR THE DEAF, CODE OF CONDUCT 135 (1996).

361. See NUTRITION & DIETETICS PRAC. BD., STATE OF N.M., CODE OF CONDUCT (2005).

362. See PERSONNEL BD., STATE OF N.M., CODE OF CONDUCT (2008).

363. See PUB. ACCOUNTANCY BD., STATE OF N.M., CODE OF CONDUCT (2003).

364. See SEC'Y OF STATE, STATE OF N.M., CODE OF CONDUCT (1999).

365. See STATE AUDITOR, STATE OF N.M., CODE OF CONDUCT (1998).

366. See NURSING HOME ADMIN'RS BD., STATE OF N. M., 2006 BOARD MEMBER CODE OF CONDUCT (2006).

367. See N.M. STATE BD. OF PSYCHOLOGIST EXAM'RS, 2007/2008 BOARD MEMBER CODE OF CONDUCT (2007).

368. See N.M. BD. OF THANATOPRACTICE, CODE OF CONDUCT-RESOLUTION 2 (2004).

State Corporation Commission<sup>369</sup>  
State Land Office<sup>370</sup>  
State Treasurer<sup>371</sup>  
Transportation Authority<sup>372</sup>

#### APPENDIX 4

##### *Agencies Without a Code of Conduct Filed with the New Mexico Secretary of State<sup>373</sup>*

Over 200 New Mexico state agencies have not filed a code of conduct with the secretary of state. There are over 300 statutorily created agencies listed in the New Mexico state agency index, which is not exhaustive, while there are approximately thirty state agencies with codes of conduct on file with the secretary of state.<sup>374</sup> Further, some of the codes of conduct on file are for agencies that no longer exist.<sup>375</sup> Notably, several cabinet-level agencies have not filed a code of conduct with the secretary of state. For example, the secretary of state does not have codes of conduct filed for the department of public safety, economic development department, department of agriculture, and cultural affairs department.<sup>376</sup>

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369. See N.M. STATE CORP. COMM'N, CODE OF CONDUCT (2004).

370. See N.M. COMM'R FOR PUB. LANDS, CODE OF CONDUCT (1993).

371. See STATE TREASURER, STATE OF N.M., EMPLOYEE CODE OF CONDUCT NO. 17-01 (2008).

372. See STATE TRANSP. AUTH., STATE OF N.M., CODE OF CONDUCT (1994). The transportation authority no longer exists. See N.M. Laws 1997, Ch. 52 § 8 (1997).

373. Compare NMSA 1978, Executive Agency Index (2009) (listing all statutorily-created executive, legislative, and judicial agencies in New Mexico) with Appendix 3. An agency without its own code of conduct filed with the New Mexico Secretary of State falls under the governor's code of conduct. See *supra* Part III.F.

374. Under the government conduct act, agencies are required to file a code of conduct, or to follow the code filed by the office of the governor. See *supra* Part IV.

375. See, e.g., *supra* notes 372, 355, and accompanying text.

376. See *supra* Appendix 3.

