


Revised July 25, 2012

BRIEF ANALYSIS AND ARGUMENTS FOR AND AGAINST THE  
**CONSTITUTIONAL AMENDMENTS**  
PROPOSED BY THE LEGISLATURE IN 2011 AND 2012



CONSTITUTIONAL AMENDMENTS PROPOSED IN 2011 AND 2012 ~ ARGUMENTS FOR AND AGAINST

LCS



*Brief Analysis and Arguments  
For and Against  
the  
Constitutional Amendments*

*Proposed by the Legislature  
in 2011 and 2012*

*Amendments Appearing on the November 6, 2012  
General Election Ballot*

*New Mexico Legislative Council Service  
Revised July 25, 2012*

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# General Information & Disclaimer

## **General Information**

In the 2011 and 2012 regular sessions, the Fiftieth New Mexico Legislature passed five joint resolutions proposing amendments to the state constitution, and these proposed amendments will be presented to the voters of New Mexico on the November 6, 2012 election ballot.

The Constitution of New Mexico provides that the Legislature, by a majority vote of all members of each house, may propose amendments revising the constitution and that proposed amendments must then be submitted to the voters of the state for approval. A proposed amendment included in this publication and appearing on the November 6, 2012 election ballot becomes part of the state's constitution if a majority of the votes cast in the election on the proposition are cast in its favor. Proposed constitutional amendments become effective upon approval by the voters unless an effective date is provided within the text of the proposed amendment.

This publication contains, for each proposed amendment that will appear on the November 6, 2012 ballot, a brief analysis and the full text of the joint resolution proposing the amendment. Included with the brief analysis are background information, additional resource information and summaries of arguments for and against the passage of the amendment.

Each joint resolution states whether the proposed constitutional amendment repeals an existing section of the constitution, adds a new section or amends an existing section. When an existing section is being amended, new material is shown by underscoring, and language to be deleted is shown within brackets. The title of the joint resolution, appearing in capital letters, is the only amendment language that will be shown on the ballot.

## **Disclaimer**

The arguments for and against a proposed constitutional amendment do not necessarily reflect legislative deliberations undertaken at the time of the passage of the proposed amendment. They represent suggestions from the Legislative Council Service staff of arguments in support of and in opposition to the proposed amendment. No claim is made for the validity or consistency of these arguments. Cogent and valid arguments may have been omitted by oversight. No attempt has been made to provide the same number of arguments for or against a particular amendment, and the number of arguments does not indicate the weight that should be ascribed to a position for or against a proposed amendment.



## Background and Information Regarding the Judicial Standards Commission and Proposed Constitutional Amendment 1

By virtue of New Mexico voters passing a constitutional amendment in 1967, the Judicial Standards Commission ("Commission") was created as an independent state agency charged with investigating allegations of judicial misconduct or disability. The Commission is the only state agency whose sole mandate is to investigate complaints against judicial candidates and currently serving state, county or municipal judges, including New Mexico Supreme Court justices and Court of Appeals, District, Metropolitan, Magistrate, Municipal and Probate judges. If deemed necessary, the Commission conducts hearings and recommends sanctions against members of the state's judiciary to the New Mexico Supreme Court.

### Composition of the Commission

When originally created, the Commission's membership included nine commissioners. Thirty-one years later, in 1998, New Mexico voters approved a constitutional amendment adding a magistrate member and a citizen member and increasing the commission membership to 11, which reflects the current number of commissioners. The Commission is composed as follows:

- **two justices or judges**, each serving a four-year term and appointed by the New Mexico Supreme Court. Current law specifies that these commissioner positions must be filled by Supreme Court justices, Appellate Court judges or state District Court judges;
- **one magistrate judge**, serving a four-year term and appointed by the New Mexico Supreme Court;
- **two lawyers** licensed in this state, each serving a four-year term and appointed by a majority vote of the members of the Board of Commissioners of the State Bar of New Mexico; and
- **six citizens**, none of whom is a justice, judge or magistrate of any court or licensed to practice law in New Mexico, each serving a five-year term and appointed by the Governor and one of whom serves as Commission chair.

*(Constitutional Amendment 1 proposes to increase the membership of the Commission from 11 to 13 by adding two commissioner positions, one designated specifically for a municipal judge, resulting in four commissioners who are judges and one designated specifically for a citizen who is neither a judge nor an attorney, resulting in seven citizen commissioners. The two lawyer-commissioner positions would remain unchanged.)*



### **What the Commission Does**

The complaints investigated by the Commission include allegations of willful misconduct in office, persistent failure or inability to perform judicial duties, habitual intemperance and disability of a permanent nature that renders a judge incapable of performing judicial duties. Violations of statutes or laws, as well as the Code of Judicial Conduct, provide a framework for assessing possible misconduct by a judge. If deemed appropriate, and with a concurrence of a majority of its members, the Commission may:

- privately inform a judge of conduct that may violate the Code of Judicial Conduct;
- propose professional counseling or assistance; or
- recommend that the New Mexico Supreme Court discipline, remove or retire a judge; the Supreme Court, however, is not bound by the Commission's recommendations and may accept them, in whole or in part, reject them or institute its own discipline.

### **What the Commission Does Not Do**

The Commission does not have jurisdiction over attorneys, judges who are no longer in office, special masters, special commissioners, hearing officers, federal judges, magistrates and administrative law judges or Workers' Compensation Administration judges. Further, the Commission has no authority to intervene in a court case, to change a judge's rulings or orders or to remove a judge from a case, nor can the Commission provide legal advice.

### **The Commission's Staffing**

The Commission operates with a staff of seven employees. The commissioners do not receive salaries for their Commission work, but they are paid per diem and mileage pursuant to New Mexico's *Per Diem and Mileage Act* for their work in the discharge of their official duties and travel on official business.

### **Additional Resources**

Constitution of New Mexico, Article 6, Section 32

New Mexico Statutes Annotated, Chapter 34, Article 10

New Mexico Code of Judicial Conduct, 21-100 NMRA et seq.

New Mexico Judicial Standards Commission web site - [www.nmjsc.org](http://www.nmjsc.org)

New Mexico Supreme Court web site - <http://nmsupremecourt.nmcourts.gov/>

New Mexico Legislature web site - [www.nmlegis.gov](http://www.nmlegis.gov)

## Brief Analysis of Proposed Constitutional Amendment 1

Constitutional Amendment 1 proposes to amend Article 6, Section 32 of the Constitution of New Mexico by adding two members to serve on the Judicial Standards Commission ("Commission"), thereby increasing the membership from 11 to 13. The amendment specifies that one of the additional members must be a municipal judge who would serve a four-year term and would be selected in a manner established by the Legislature, and the other additional member must be a citizen, who is not also a justice, judge or magistrate of any court, nor licensed to practice law in this state, and who would serve a five-year term and would be appointed by the Governor.

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## Arguments For and Against Proposed Constitutional Amendment 1

### ► *Arguments For*

1. **Equal Representation - Municipal Judges Should Be Represented, Along With Other Judges And Magistrates:**

A basic tenet of a representative democracy is the concept of "equal representation". While there are 82 municipal judges in the state, the membership of the Judicial Standards Commission does not include a municipal judge. Conversely, there are only 66 magistrate judges in the state and the Commission membership includes one magistrate judge. Additionally, there are five Supreme Court justices, 10 Appellate Court judges and 89 District Court judges in the state and the Commission membership includes two justices or judges. Adding a municipal judge to the membership of the Commission is a necessary step in providing equal representation for municipal judges on the oversight body that monitors their job performance.

2. **Fairness - Fair Complaint Resolution Process Should Include Municipal Judge Commissioner:**

When a complaint alleging misconduct is lodged against any individual, primary to determining the merits of the complaint is a fair resolution process carried out by fully informed individuals. It is inherently unfair for complaints regarding a municipal judge's job performance to be resolved solely by persons without the

current, firsthand experiences and views of a municipal judge. Since the job performance of municipal judges is overseen by the members of the Judicial Standards Commission, and since currently there are no municipal judge members guaranteed a seat on the Commission, adding a municipal judge as a member addresses a matter of fairness.

**3. Retains Current Balance Of Power - While Retaining Commission's Current Balance Of Power By Citizen Members, Proposal Provides Equal Footing For Municipal Judges:**

This amendment would put municipal judges on equal footing with magistrate judges, who are already represented on the Judicial Standards Commission. Including a municipal judge member would ensure that the unique perspectives of municipal judges would be heard alongside those of the other judges, attorneys and citizen Commission members, particularly in the event that a municipal judge is the subject of a complaint alleging misconduct. Additionally, because the amendment will also add a citizen position on the Commission, the current balance of judicial officials and citizens will be retained. If anything, adding a municipal judge and another citizen position to the Commission will serve to expand the insight and knowledge helpful in carrying out the important duties of the Commission, therefore positively impacting its work.

***Arguments Against***

**1. Too Many Members - Increasing Membership Will Impede Commission's Ability To Reach Consensus In Timely Manner:**

Adding two more members to the Judicial Standards Commission will make the Commission too big, impeding its ability to perform its constitutionally mandated duties in a streamlined and timely manner. The Commission was already expanded in 1998 from nine commissioners to its current membership of 11. Adding two more members, for a total of 13, will make the Commission's work unnecessarily difficult because it is always challenging to obtain consensus when more people are involved in a process, and all disciplinary recommendations of the Commission require a majority consensus. If the commissioners are unable to reach agreement concerning the serious matters before them related to alleged judicial misconduct, their work will be hampered and perhaps stalled. If the work of the Commission is delayed or halted due to lack of consensus, the state's judicial system could be negatively impacted. It is not in the best interests of the citizens of this state to take measures that could unnecessarily slow down any governmental oversight process, particularly one designed to ensure the standing of its judiciary.

**2. Wrong Change - Instead, Commission Needs Mechanism For Removing Unfit Commission Members For Cause:**

Increasing its membership is not the change that is needed for the Judicial Standards Commission, at least not until a mechanism for removing commissioners for cause is adopted. The provisions in Article 6, Section 32 of the Constitution of New Mexico, as well as the existing governing statute and this proposed amendment, all fail to provide a mechanism for the removal of a commissioner for malfeasance, conflict of interest or other good cause. Current law provides only for a manner in which to fill a vacancy and for the selection of a successor upon a commissioner's death or resignation or when the commissioner "no longer has the qualifications required for his original selection". Additionally, the New Mexico Supreme Court has held that none of the Commission's appointing parties has the power to remove a commissioner. In the event that a commissioner commits an act determined to be malfeasance, is convicted of a felony or is otherwise no longer fit to serve on the Commission, there is nothing in the statutes providing a mechanism to remove that commissioner. This critical void in the law presents the greatest danger to the work of the Commission and is immeasurably more important than adding yet more commissioner positions.

**3. Unnecessary Constitutional Amendment - Changes Could Be Accomplished By Amending Existing State Law, Instead Of Permanently Changing Constitution:**

It is not necessary to amend the Constitution of New Mexico to add a municipal judge to the membership of the Judicial Standards Commission because if the Legislature wants municipal judge representation on the Commission, it can easily be accomplished by amending existing law while leaving intact the state's constitution. New Mexico's constitution does not bar a municipal judge from serving as a commissioner and already provides that Commission membership will include justices and judges. A statutory change is sufficient to allow representation of municipal judges. Existing state law designates that commissioners' positions 8 and 9 must be filled by a Supreme Court justice, Appellate Court judge or District Court judge. A bill amending that provision of law to also include a municipal judge could be passed by the Legislature. Making that change would not impact the balance of power on the Commission because the six citizen members would still retain a majority. So, there would be no need to add the amendment's proposed citizen member to the Commission. Unlike state laws, the state's constitution is not amenable to frequent alteration because it can only be changed by a majority of voters during a general or special election. Permanently altering the constitution for this proposed change is unnecessary and unwise.

**4. Too Costly - Increasing Commission Memberships Adds Unnecessary Costs:**

Adding more members to the Judicial Standards Commission will increase the costs to the taxpayer for funding the Commission's work. Members of the Commission are entitled to per diem and mileage reimbursement. Adding yet more positions to boards and commissions amounts to a waste of the taxpayers' money. The state cannot afford the increased costs associated with adding members to the Commission.

## Background and Information Regarding the Public Regulation Commission and Proposed Constitutional Amendments 2, 3 & 4

The Public Regulation Commission ("PRC") is a state regulatory authority created by a constitutional amendment passed by New Mexico voters in 1996. At its inception, the PRC was the result of a merger of the State Corporation Commission, which was responsible for regulating corporations, insurance, telecommunications, railroads and motor carriers, and the New Mexico Public Utility Commission, the entity that was responsible for regulating electric, gas and water utilities. The merger became effective on January 1, 1999, resulting in the formation of a state regulatory body with authority over a broad spectrum of activities and industries within the state.

### **What the PRC Does**

The work of the PRC is conducted by the commissioners through meetings and hearings and in large part through operational units, including the: Utility Division (including several bureaus); Insurance Division; Transportation Division; Consumer Relations Division; and Legal Division; as well as the Corporations Bureau and the Fire Marshal's Office. The jurisdiction of the PRC is broad. Examples of its duties and responsibilities are noted below.

### **Through Its Utility Division, the PRC:**

- regulates rates, service and financing for investor-owned electric utilities, including Public Service Company of New Mexico, El Paso Electric Company and Southwestern Public Service Company, and, to a lesser degree, regulates rural electric cooperatives, of which there are currently 18 operating in New Mexico. The PRC does not regulate municipal or governmentally owned electric utilities nor federal government or Native American utilities operating on federal land;
- regulates rates, services and financing for natural gas companies, including the New Mexico Gas Company, and propane and investor-owned water and sewer companies. The PRC does not have jurisdiction over propane prices or safety issues, complaints regarding water, wastewater and gas associations or cooperatives or issues regarding acequias;
- regulates approximately 360 telecommunications companies. Among the entities regulated are: CenturyLink, the largest local exchange company operating in New Mexico; Windstream Corporation, a mid-sized local exchange company; and 154 rural local exchange companies; and

- exercises limited jurisdiction over certain local exchange companies, wireless providers and long-distance providers. The PRC does not have jurisdiction over rates for cellular or inter-LATA long-distance providers.

#### **Through Its Insurance Division, the PRC:**

- appoints the Superintendent of Insurance, who exercises independent statutory powers and approves rates and policies for health, life, property, auto and title insurance (*Constitutional Amendment 4 proposes to create an office of the Superintendent of Insurance, thereby eliminating the PRC's duty to appoint the Superintendent of Insurance and exercise regulatory and oversight functions of the insurance industry in New Mexico. Instead, the amendment would establish an Insurance Nominating Committee composed of members that would be appointed in a manner determined by the Legislature. Under the amendment, the Insurance Nominating Committee would appoint the Superintendent of Insurance after evaluating the qualifications of applicants for the position. The amendment would further allow the Legislature to establish the manner in which the Superintendent of Insurance would regulate insurance companies and other entities engaged in risk assumption in the state*);
- exercises jurisdiction over consumer issues and complaints relating to insurance, including: life, annuities, health, dental, Medicare supplement, long-term care, credit life and disability, property and casualty, and auto and home;
- exercises jurisdiction over licensing of insurance companies and agents, as well as allegations of insurance fraud; and
- exercises jurisdiction over consumer complaints regarding workers' compensation and title insurance, as well as managed health care complaints involving Health Maintenance Organization, Exclusive Provider Organization and Preferred Provider Organization plans and entities that purchase or are authorized to purchase health care benefits pursuant to New Mexico's *Health Care Purchasing Act*.

#### **Through Its Transportation Division, the PRC:**

- exercises jurisdiction over interstate motor carrier registration and various transportation matters, including billing issues for towing companies, ambulances, limousines and taxis; and
- enforces state and federal regulations regarding oil and natural gas pipeline safety.

#### **Through Its Consumer Relations Division, the PRC:**

- with respect to the industries it regulates, investigates consumer inquiries and acts as the PRC's outreach office by developing and implementing public awareness

programs to educate consumers regarding their rights, particularly in the areas of service quality and consumer protection.

#### **Through Its Corporations Bureau, the PRC:**

- regulates and charters corporations, including issuing certificates of incorporation and verifying the completeness and accuracy of related charter documents (*Constitutional Amendment 3 proposes to remove the duties to regulate and charter corporations from the PRC and to place the duty to charter corporations with the Office of the Secretary of State. The amendment is silent as to whether another entity or governmental agency would regulate corporations*); and
- oversees the organization and registration of limited liability companies.

#### **Through Its Fire Marshal's Office, the PRC:**

- appoints and oversees the State Fire Marshal and oversees the administration of the Firefighter Training Academy; and
- exercises jurisdiction over fire service support, arson investigations and fire code enforcement.

#### **The PRC's Staffing and Commissioners' Salaries**

Operating with a staff of 266, the PRC is composed of five commissioners, each representing a district of the state determined by statute and redrawn each decennial census in the same manner and at the same time as legislative and congressional districts. Commissioners serve staggered four-year terms and receive annual salaries of \$90,000, as provided in statute. After serving two terms, members are not eligible to hold office as a PRC commissioner again until one full term has intervened. Vacancies occurring during the term of a commissioner are filled by appointment by the Governor.

#### **Qualifications for PRC Commissioners**

Under current law, an individual is eligible to serve as a commissioner on the PRC if he or she:

- is at least 18 years of age;
- has lived in the state for at least one year;
- resides in the district for which he or she will serve; and
- has no felony convictions.

*(Constitutional Amendment 2 proposes to allow the Legislature to establish in statute increased qualifications and continuing educational requirements for commissioners elected on or after the general election in 2014 and commissioners appointed to fill vacancies on or after July 1, 2013.)*



**Additional Resources**

Constitution of New Mexico, Article 11, Sections 1 and 2

New Mexico Statutes Annotated, generally, as well as Chapter 8, Articles 7 and 8, and  
Chapters 62 and 63

The PRC web site - [www.nmprc.state.nm.us](http://www.nmprc.state.nm.us)

The New Mexico Legislature web site - [www.nmlegis.gov](http://www.nmlegis.gov)

## Brief Analysis of Proposed Constitutional Amendment 2

Constitutional Amendment 2 proposes to amend Article 11, Section 1 of the Constitution of New Mexico to require the Legislature to establish, in statute, increased qualifications and continuing education requirements for individuals running for and serving as a commissioner of the Public Regulation Commission ("PRC"). The newly established requirements would apply to commissioners elected at the 2014 general election, and all subsequent elections, and to any commissioner appointed to fill a vacancy after July 1, 2013.

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(Revised July 25, 2012 to remove an argument containing a factual inaccuracy.)

### Arguments For and Against Proposed Constitutional Amendment 2

#### ► *Arguments For*

1. **Broad PRC Powers Require Qualifications - Commissioners Have Vast Regulatory Powers And Should Therefore Possess Minimum Qualifications:**

An elected commission is a political commission, and the PRC is even more so because its members are elected to represent specific districts in the state. When elected members represent districts instead of the entire state, their focus may be on the views and needs of the voters in their respective districts and not necessarily the views and needs of the voters throughout the state. Such a scheme may work well with 112 legislators representing their individual districts, but it has proved to be less than ideal when the number of policymakers is limited to the five commissioners of the PRC. With only five commissioners, an alliance of just three can control any and all decisions made by the PRC. Those decisions range from whether a utility company may increase its rates, and whether a shuttle service can operate, to what company can offer phone service or insurance coverage to New Mexico residents. So few commissioners, coupled with the PRC's vast decision-making abilities, provide far too much power to individuals whose only required qualifications are that they are at least 18 years of age, are not a convicted felon and are registered to vote in the state. This amendment simply attempts to ensure that the five PRC commissioners, empowered to make decisions impacting the lives of all of New Mexico's citizens, have a modicum of knowledge about the fields and industries they regulate.

**2. Renew Public Trust - Past PRC Scandals Require Qualified PRC Commissioners To Regain Public Trust:**

This constitutional amendment is long overdue. After numerous scandals in the agency's 16-year history, it is time that the voters demand that public regulation commissioners be qualified for their jobs, either through expertise or experience in relevant fields. After all, it was scandal and controversy that contributed in no small measure to the calls a few years ago to reform both the State Corporation Commission and the New Mexico Public Utility Commission. Those calls resulted in the 1996 merger of the two entities to form the Public Regulation Commission. Fast forward to 2012, and once again controversy abounds. The PRC has suffered from controversy and lack of public trust throughout its existence. Of the 16 people who have served as PRC commissioners, nearly one-third have been embroiled in scandal. A highly publicized case of a commissioner who pleaded guilty to multiple felonies related to misusing public funds is among the most recent. Additionally, in January 2012, the State Auditor called upon the PRC chair to resign in the wake of a special audit that revealed "irregularities". The minimal qualification requirements currently in place for eligibility to serve on the PRC have contributed to the perception, if not the reality, that the commissioners lack the requisite expertise. Increased qualifications requirements, coupled with the already high-paying commissioner salaries, would likely attract individuals who are more qualified and competent to hold those positions. Passing the amendment will ensure that New Mexico legislators require more from PRC commissioners.

**3. Legal Concepts Must Be Understood - Commissioners Must Know And Understand Laws Pertaining To The PRC's Work:**

The PRC is a quasi-judicial body, and as such, it is critical that commissioners know and understand the law and the specifics of the subject areas they regulate. But too often, and at too high a cost, the New Mexico Supreme Court has overruled PRC decisions because commissioners have either not understood the law or, worse, have disregarded the law. It is the right time for the state to establish minimum educational and professional qualification requirements for PRC commissioners. New Mexico residents need more education and expertise from their PRC commissioners.

**4. Education And Experience Are Necessary - Job Of PRC Commissioner Not Well-Suited For Layperson:**

New Mexico PRC commissioners have the broadest regulatory mandate in the entire country but have not been required to possess even minimal subject-matter expertise

or experience. Utility and telecommunications regulation, insurance regulation, pipeline and railroad crossing safety, the State Fire Marshal, market entry regulation of motor carriers and ambulance regulation are among the exceptionally complex topics under the jurisdiction of the PRC. These areas of government directly and profoundly affect all citizens of New Mexico, every day of their lives. The duties of PRC commissioners are not well-suited for the inexperienced or uninformed.

**5. Aligns With Other States - Other States Require Regulatory Commissioners To Have Backgrounds In Accounting, Finance, Related Business Education And Experience:**

Without question, New Mexico's PRC is one of the most powerful state regulatory bodies in the nation, with authority over a broad spectrum of industries within the state. Notably, the PRC's rate-setting function affects virtually every citizen and business in New Mexico. Upon passage of this amendment, what constitutes "increased qualifications" will be determined by the Legislature and incorporated into the *Public Regulation Commission Act*. New Mexico should follow the lead of many other states that require commissioners to be qualified in either accounting, finance, professional engineering, public or business administration, administrative law or economics and to have professional experience in a field relevant to utility regulation. Additionally, *Think New Mexico*, an independent organization, has suggested that, if the commissioners were themselves better educated and qualified, they would not need to employ as large a staff to assist them in understanding the industries they regulate.

► ***Arguments Against***

**1. Flawed And Unpredictable - Proposal's "Increased Qualifications" Not Specified So Voters Can't Predict Type Or Level Of Qualifications:**

This amendment is seriously flawed and its application unpredictable because although it calls for "increased qualifications" for commissioners serving on the Public Regulation Commission, the words "increased qualifications" have no context, therefore rendering them ambiguous. First, the voter does not know which qualifications are being increased. Must the increase apply only to existing qualification requirements that are virtually nonexistent, or can entirely new qualifications be imposed? Is it a question of the quality of the qualification, the type of qualification or perhaps the number of qualifications? Another possible reading of the amendment's language raises the question of whether the Legislature could ever change the qualification requirements in a manner that could be construed as *decreasing* the qualifications in even a minor way, such as requiring

four years of experience in a related field after previously establishing a five-year requirement. If the Legislature wants to change or impose qualifications for PRC commissioners, it needs to adopt a clearly written proposal authorizing it to establish specific qualifications, not a proposal so ambiguous that it could be interpreted to mandate that the Legislature may only "increase" commissioner qualifications.

**2. Layperson Unable To Serve - Imposing Qualifications Could Preclude Average Citizen's Opportunity To Serve As PRC Commissioner:**

Depending on what qualifications and educational standards are enacted into law, average citizens may not have the same opportunity to seek election to the PRC as they do for the Legislature and numerous other positions in state and local government. Because the amendment does not specify what the increased qualifications will be, legislators could place onerous qualifications on the PRC positions precluding the average citizen from serving as commissioner. In no event should there be more qualifications required to run for PRC commissioner than are required to run for a seat in the Legislature. As this amendment is written, the voter cannot be certain that the increased qualifications will be reasonable.

**3. Too Vague And Overly Broad - Without Specifics Given, Voters Are Asked To Give Legislature Broad Powers To Increase Unknown Qualifications:**

This proposed amendment is vague and overly broad because it does not specify even minimally what "increased" qualifications for PRC commissioners the Legislature can or might enact, and it asks the voters to provide unlimited power for the Legislature to change anything regarding the qualification requirements. While it may make sense to impose certain qualifications for commissioners, unfortunately, there is no guidance as to what type of qualifications should be "increased". Is "increased" age, education or experience the qualification to be changed? Or perhaps must something else be "increased"? Currently, the only qualifications required to serve as a PRC commissioner are that a candidate be at least 18 years old, be a qualified voter living in the district for which he or she would serve and have no felony convictions. The amendment's lack of specifics presents a significant problem. Since a PRC candidate must be at least 18 years old, simply requiring him or her to be 19 years old would be an "increased" qualification, but it is doubtful that such an increased qualification would satisfy the intentions of the voters being asked to approve the amendment.

**4. Legislative Intent Unclear - Qualifications Not Specified, Unclear How Serious Legislature Is About Imposing Significant Commissioner Qualifications:**

If the Legislature enacts increased qualifications for commissioners comparable to

those expected of private sector executives with similar duties and responsibilities, it could minimize the chances of an unqualified commissioner being elected by an uninformed electorate. However, an earlier version of the amendment may be an indicator that the Legislature is more likely to continue to accept the lowest common denominator when it comes to establishing "increased" qualifications. A previous version of the proposed amendment provided that to be qualified to run for PRC commissioner, a person would need at least a bachelor's degree or five years of "relevant experience". But under that proposed increased requirement, a person with a bachelor's degree in a completely unrelated field would be deemed "qualified" to serve as a PRC commissioner. It can be argued that there is no legislative commitment to getting qualified candidates for the PRC. One could also argue that the mere fact that the Legislature contemplates imposing *continuing* education requirements could indicate its unwillingness to mandate that established professionals serve as commissioners, again keeping the bar low. A commissioner should come to the PRC position with current and appropriate education and expertise.

## Brief Analysis of Proposed Constitutional Amendment 3

Constitutional Amendment 3 proposes to amend Article 11, Section 2 of the Constitution of New Mexico to remove the duties to charter and regulate corporations from the Public Regulation Commission ("PRC"). It proposes to place only the duty to charter corporations with the Office of the Secretary of State to be carried out in a manner established by the Legislature. The amendment is silent as to the regulation of corporations.

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### Arguments For and Against Proposed Constitutional Amendment 3

#### ► *Arguments For*

**1. Aligns With Other States - Most States Assign Duty To Charter Corporations To Secretary Of State:**

It makes perfect sense to designate the responsibilities of chartering corporations to New Mexico's Office of the Secretary of State because that is how most states handle such responsibilities. In fact, the National Conference of State Legislatures reports that 41 of the 50 states provide for the chartering of corporations by their respective offices of the secretary of state. Businesses are used to dealing with corporate charters through each state's secretary of state, so for ease of use, it makes sense to align New Mexico's governmental practices with those of other states, particularly in areas of business. Likewise, individuals seeking information about chartering a corporation do not typically know to contact a regulatory agency like the PRC, which explains why New Mexico's Office of the Secretary of State reports receiving frequent inquiries regarding corporate filings and reports.

**2. Offers Efficiency - Proposal Creates "One-Stop Shop" For Businesses:**

Moving the responsibilities for chartering corporations and corporate filings to the Office of the Secretary of State would provide a "one-stop shop" for businesses filing their required information with the state. Currently, the Office of the Secretary of State already handles registration of limited liability partnerships, state trademarks and service marks, notary certificates and filing of documents under the *Uniform Commercial Code*. Since, currently, corporate charters must be filed with

the PRC, moving this duty to the Office of the Secretary of State would make it easier for businesses, as they would have to deal with only one agency.

**3. PRC Should Focus On Regulatory Duties - Chartering Businesses Should Be Removed From PRC's Responsibilities To Allow Focus On Regulatory Duties:**

The PRC, as presently structured, has too wide an array of diverse responsibilities when its core job should be the regulation of utilities, as is the case in most states. Divesting the PRC of duties that are ancillary, at best, to its core function will allow the PRC to concentrate more effectively on the increasingly complex task of regulating utilities in the state. Requiring all registration and reporting of businesses to be done in the Office of the Secretary of State should streamline the process and reduce confusion, particularly for businesses.

► ***Arguments Against***

**1. Flawed Proposal Omits Corporation Regulation - Proposal Fails To Assign Regulating Corporations To Any State Agency:**

This amendment proposes to remove the responsibilities for chartering *and regulating* corporations from the PRC, but it only proposes to transfer the chartering responsibility to the Office of the Secretary of State, remaining silent as to what governmental entity would "regulate" corporations. Even if it is a good idea to designate the Office of the Secretary of State as the responsible entity for chartering corporations in New Mexico, the proposed amendment is a bad idea because it fails to assign the duty to regulate corporations to any other state entity. Are the voters expected to operate on blind faith and merely hope that the Legislature finds a suitable way to regulate the state's corporations?

**2. No Real Benefit - Proposed Changes Expensive, Cosmetic In Nature And Lacking Real Benefits To Businesses Or Taxpayers:**

This amendment proposes a mere cosmetic change that will not result in any efficiencies for corporations operating in New Mexico, nor will it provide a foreseeable benefit to the taxpayers. Merging the staff and records of the PRC's Corporations Bureau with those of the Office of the Secretary of State will be neither seamless nor inexpensive. The Legislative Finance Committee estimates that migrating the Corporations Bureau's data to the Office of the Secretary of State's system will cost \$120,000. There will also be expenses associated with moving and reorganizing. The functions associated with corporate registration are routine and straightforward and do not require highly trained technical staff, rendering the provisions of this amendment of no real value to businesses or the state.



**3. Goes Too Far - Legislature Needs To Study Where To Best Place Non-Regulatory PRC Functions:**

The Legislature appears to have decided to take non-utility regulatory duties away from the PRC, and the amendment could have simply done that; but it went further. Before deciding what state agency should charter and regulate the state's corporations, the Legislature should have proposed an amendment to remove the responsibility for chartering and regulating corporations from the PRC while providing for those functions in a manner to be established by law. The Legislature has not yet studied the issue of where corporate regulation would best be placed in state government and has not heard testimony on the benefits or drawbacks of having it go to the Office of the Secretary of State or some other state agency. Consequently, while this amendment starts with the good idea of removing non-utility regulation from the PRC, it goes too far. The amendment should have been written to allow the Legislature to determine where to place these functions only after studying the issue during the interim. For that reason, the amendment should be rejected. The voters have a right to expect the Legislature to make a considered and informed decision concerning where this and other functions of state government will best reside.

**4. "Fixes" Nonexistent Problem - Current System Working Well:**

This amendment fixes a nonexistent problem. Corporate registration is generally not regarded as fertile ground for undue influence or large-scale corruption. The Corporations Bureau within the PRC has not been the subject of scandal or charges of incompetence and thus there is no reason or urgency to move corporate chartering and regulation out of the PRC. Additionally, since the amendment does not propose to assign the regulation of corporations to the Office of the Secretary of State, it is unlikely that the Legislature will designate that duty to the secretary of state at a later time, so under this amendment, corporations will ultimately have to deal with two distinct agencies instead of just one for their regulatory needs.

## Brief Analysis of Proposed Constitutional Amendment 4

Constitutional Amendment 4 proposes to amend Article 11 of the Constitution of New Mexico to create an Office of the Superintendent of Insurance, thereby removing the duty of the Public Regulation Commission ("PRC") to regulate insurance companies and others engaged in risk assumption in the state. The amendment would also establish an Insurance Nominating Committee to evaluate applicants and appoint the Superintendent of Insurance based upon qualifications for the position established by the Legislature. Additionally, the Legislature would be allowed to establish the manner in which the Office of the Superintendent of Insurance may regulate the state's insurance industries, and the Legislature would determine the manner of appointing, and the required qualifications for, the members of the Insurance Nominating Committee.

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## Arguments For and Against Proposed Constitutional Amendment 4

### ► *Arguments For*

#### 1. **Ensures Timely Action By Insurance Regulators - Commission's Past Failure To Timely Amend PRC Rules Proved Costly For Some Homeowners:**

One need not look any further than recent headlines to know that this proposed amendment is a great idea. In May 2012, it was reported that, in spite of a 2009 change in the law regarding title insurance policy rates, three years later, as of 2012, the PRC's Insurance Division ("Division") has failed to amend its rules to implement the rate changes. Those rate changes were the result of the enactment of a law that provided for a 10 percent to 60 percent reduction in the full policy price for homeowners who refinance their mortgages. Because the Division failed to update its rules to align properly with current law, some New Mexico homeowners have not received the title insurance policy discounts they are entitled to receive. Clearly, PRC commissioners have not exercised adequate oversight of the Division. Creating an independent office for the Superintendent of Insurance will concentrate insurance regulation in one agency and thus ensure timely compliance with state law.

**2. Insurance Regulation Too Complicated And Too Important - Should Be Overseen By Independent and Qualified Insurance Department:**

The regulation of insurance, particularly in light of recent changes to health insurance laws resulting from the enactment of sweeping federal health insurance legislation, is an issue of great importance to New Mexicans. In fact, the U.S. Supreme Court's action on the federal *Patient Protection and Affordable Care Act* increases the complexity and importance of health insurance industry regulation. In addition, many insurance companies offer financial investment services, another complicated area to understand and regulate. Removing the regulation of insurance companies from the PRC and placing it with an agency dedicated to that function would lead to better attention to and regulation of the insurance industry. Insurance also presents one of the most complicated areas related to public policy, requiring expertise in actuarial science, law and the entities, items or services that insurance covers. New Mexico PRC commissioners do not have the expertise necessary to properly oversee the decisions of the Superintendent of Insurance in the regulation of insurance. The amendment wisely proposes to move the regulation of insurance from the PRC to an independent Office of the Superintendent of Insurance, thus, allowing for a concentration of expertise in the Office of the Superintendent of Insurance that will be singularly devoted to the complex business of insurance. Such a setup is similar to that which exists in 35 other states that have standalone departments of insurance.

**3. Insulates Insurance Division From Politics - Current Insurance Division As Part Of PRC Is Too Entangled With Political Pressures And Special Interests:**

The National Association of Insurance Commissioners' latest accreditation review of the PRC's Insurance Division placed the Division on probation. The factors cited were the Division's apparent inability to perform credible actuarial analyses and otherwise exercise meaningful oversight of the business of insurance in the state. Though currently the Superintendent of Insurance reports that the Division has taken steps to rectify its oversight capabilities, these steps are too little, too late. A 2012 review by the Center for Integrity gave the Division an "F". Among the factors cited for the failing score was the inability of the Division to extricate itself from political pressures and special interests that arise from its placement within the PRC. Clearly, and historically, the Division is incapable of improving its performance, so to better serve New Mexico's residents, the vital work of regulating the state's insurance industry must be moved to an independent entity able to support quality analysis and oversight. That way, the Superintendent of Insurance can be selected and retained through a politically insulated and independent system while providing accountability not present under the current system.

**4. Expertise Is Needed - PRC's Insurance Division Lacks Necessary Expertise To Deal With Complex Issues:**

The Division suffers from at least one of the same shortcomings as does the PRC itself: lack of appropriate expertise to oversee a financially complex and specialized industry. This amendment gives the Legislature the opportunity to establish, by law, much-needed qualifications for the Superintendent of Insurance, ideally, qualifications that are comparable to those that would be expected of a private sector executive tasked with similar duties and responsibilities. In addition, this amendment authorizes the Legislature to establish the qualifications for the members of the proposed Insurance Nominating Committee and the procedure by which the members of that committee will be appointed. A qualified Insurance Nominating Committee will have the appropriate expertise to evaluate the qualifications of candidates for the critically important position of Superintendent of Insurance.

**5. Responsive Insurance Division Is Needed - Proposal Would Reduce PRC Size, Making It More Agile And Responsive To Consumers And Industry:**

This proposed amendment would place the oversight of the state's insurance industry in a standalone agency, significantly reducing the size of the PRC bureaucracy by shrinking the PRC's organization by at least one-third, based on the organizational chart depicted in the PRC's 2011 Annual Report. Currently, there are seven divisions (including the Insurance Division) within the PRC, along with multiple subdivisions under the Insurance Division. One hopes that the amendment's proposed independent Office of the Superintendent of Insurance will be more agile and responsive to the needs of New Mexicans as a standalone agency than has been the case with the Division as a part of the larger bureaucracy of the PRC.

**6. Regulating Utilities Is PRC's Core Function - Removing Insurance Division Will Help PRC Maintain Primary Focus:**

The PRC, as presently structured, has a wide array of diverse responsibilities, when its core job should be the regulation of utilities, as is the case in most states. Divesting the PRC of duties that are ancillary, at best, to its primary function will allow the PRC to concentrate more effectively on the increasingly complex task of regulating utilities in the state. Additionally, although the PRC's present statutory structure gives the Division some independence, this amendment would remove the ambiguity that exists in present law by creating a constitutionally independent Superintendent of Insurance, and would bring New Mexico in line with the practices of most other states.

 *Arguments Against*

1. **Too Vague - Voters Can't Form Reasoned Opinion Regarding Merits of Insurance Nominating Committee:**

This amendment would transfer the Office of the Superintendent of Insurance to an independent agency, with a superintendent selected by an Insurance Nominating Committee whose members would be "appointed and have such qualifications as may be provided by law". This language is far too vague to give voters the adequate information needed to make a reasonable choice regarding the establishment of an Insurance Nominating Committee. The amendment does not specify whether the makeup of the committee would include or exclude elected or appointed officials, public members, PRC commissioners or insurance experts. Without such information, it is unclear what level of political pressure would influence the Insurance Nominating Committee. Voters cannot properly decide the merits of such a committee without knowing the requirements for the committee's membership.

2. **Proposed Change Premature - Insurance Division On Path Of Reform:**

This amendment would effectively remove the Division and the business of insurance regulation from the Public Regulation Commission. This step is premature. Although the National Association of Insurance Commissioners ("NAIC"), has placed the Division's accreditation on probationary status, the NAIC will have revisited the Division in July 2012 and a redetermination will have been made in August 2012. The Division is implementing numerous corrective measures to ensure compliance with NAIC standards. The Division should be allowed to continue on its course of improvement.

3. **Accountability To Voters Needed - Moving Insurance Division From Public Scrutiny Precludes Accountability To Voters:**

The public must retain its voting power to hold accountable the PRC commissioners who oversee the Insurance Division. Moving the Division further from public scrutiny or voting power to an independent agency will not provide the much-needed oversight of insurance activities that affect New Mexicans on a daily basis.

4. **Fails To Address Hiring Of Unqualified Employees - Proposal Does Not Deal With Issues Of Political Patronage And Cronyism In Hiring Of Unqualified Persons For PRC Positions:**

This amendment does not address the problems related to the hiring of unqualified persons to fill Public Regulation Commission agency positions that should require

financial and subject-matter expertise. Recent allegations and lawsuits raise concerns about the PRC's hiring practices. The amendment's proposed and unknown Insurance Nominating Committee provides no assurance that staff qualifications and hiring practices would improve.

**5. Consumer Complaints Not Addressed - Proposal Unclear, Fails To Specify How Complaints Against Division Would Be Handled:**

This amendment fails to assign ultimate accountability for the newly proposed agency, the Office of the Superintendent of Insurance. If the Superintendent of Insurance is appointed by an Insurance Nominating Committee whose members are also appointed, it is unclear from whom the public may seek recourse. While the amendment provides for the appointment of a Superintendent of Insurance by the Insurance Nominating Committee, it is silent as to whether the committee also has the power to entertain complaints regarding the Superintendent of Insurance or the new agency or to remove a Superintendent of Insurance for cause, like malfeasance.

**6. Too Broad - Qualifications For Members Of Insurance Nominating Committee And Superintendent Of Insurance Are Unknown To The Voter:**

With limited details, this vague and broadly worded amendment would allow the Legislature to determine the qualifications and the manner of appointment for the Insurance Nominating Committee and, ultimately, for the Superintendent of Insurance. Since the amendment provides no specifics, the voters are asked to provide broad powers to the Legislature to establish a new scheme for the oversight and regulation of New Mexico's insurance industry, and, therefore, approval of the amendment could result in unforeseen and detrimental consequences.

## Background and Information Regarding the Public Defender Department and Proposed Constitutional Amendment 5

In 1973, the Legislature enacted the *Public Defender Act* to meet New Mexico's state and federal constitutional obligations to provide criminal defense representation for indigent persons charged with crimes in New Mexico state courts. The act provides for a Public Defender Department ("Department") using state-appropriated funds and a centralized administration structure. The Department is administratively attached to the Corrections Department. (*Constitutional Amendment 5 proposes to enact a new section of the Constitution of New Mexico creating a Public Defender Department as an independent state agency, thereby removing the Department from its current location, where it is administratively attached to the Corrections Department.*)

### **The Chief Public Defender — Appointment**

The Chief Public Defender is the attorney appointed by the Governor to oversee the Department and administer the provisions of the *Public Defender Act*. The Chief Public Defender reports to, and serves at the pleasure of, the Governor. (*Constitutional Amendment 5 proposes to create an 11-member "Public Defender Commission" that, among its duties, would appoint the Chief Public Defender and exercise oversight of the Department. The amendment further proposes to allow the Legislature to establish the qualification requirements and the length of terms for an individual serving as the Chief Public Defender and individuals serving on the Public Defender Commission.*)

### **The Public Defender Department's Staffing**

The Department employs nearly 320 people, including lawyers, social workers, investigators, paralegals and support staff, and it contracts with more than 130 private lawyers. The Department provides legal services for indigent adults and juveniles charged with criminal or delinquent acts in the state's trial and appellate courts. Department lawyers handle around 70,000 cases annually. Eligibility for legal representation through the Department is primarily based upon an individual's income and assets.

### **The Legal Services Provided by the Public Defender Department**

Included in the statewide legal services that the Department provides are:

- district office services — providing direct representation at the trial level for adults and juveniles;
- Appellate Division services — post-conviction representation and direct appeals

legal services for public defender cases before the New Mexico Supreme Court, the Court of Appeals and the Second Judicial District Court "on record" appeals from the Bernalillo County Metropolitan Court;

- Capital Crimes Unit services — defense of clients who have been convicted of first degree murder and other serious violent felonies;
- Mental Health Unit services — direct and advisory support services dealing with a broad range of policy and program issues impacting the mentally ill and developmentally disabled involved in the criminal and juvenile justice systems; and
- Post-Conviction Conflict Unit services — representation of clients who have completed the direct appeal process but who challenge their underlying criminal conviction on constitutional and other legal grounds.

### **Additional Resources**

Constitution of New Mexico, Article 2, Sections 14, 15 and 18, and Article 6

New Mexico Statutes Annotated, Chapter 31, Article 15

United States Constitution, Fifth and Sixth Amendments

The New Mexico Public Defender Department web site - [www.pdd.state.nm.us](http://www.pdd.state.nm.us)

New Mexico Legislature web site - [www.nmlegis.gov](http://www.nmlegis.gov)



## Brief Analysis of Proposed Constitutional Amendment 5

Constitutional Amendment 5 proposes to add a new section to Article 6 of the Constitution of New Mexico establishing the Public Defender Department ("Department") as an independent state agency, thereby removing the Department from its current location, where it is administratively attached to the Corrections Department. The amendment would remove the authority of the Governor to appoint the Chief Public Defender and, instead, create a Public Defender Commission empowered to appoint and provide administrative guidance to the Chief Public Defender and exercise oversight of the Department. Additionally, the amendment proposes to allow the Legislature to establish the term and qualification requirements for both the Chief Public Defender and the members of the Public Defender Commission and to establish the manner in which the members of the commission would be appointed.

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### Arguments For and Against Proposed Constitutional Amendment 5

#### ► *Arguments For*

1. **May Help Department With Funding Needs - Public Defender Department Lacks Sufficient Funding, Repositioning Department As Independent State Agency May Help Secure Necessary Funding:**

The Public Defender Department performs the politically unpopular, yet constitutionally mandated, function of protecting the rights of people accused of committing crimes, and financing the defense of those people is expensive. Currently, the Department receives less money and has fewer resources than it needs to properly perform its functions, and it is often difficult for the Department to successfully ask for funding and resource increases. Many elected officials do not want to be seen as "soft on crime" by supporting the defense of alleged or known criminals. Several other states' public defender departments are structured as independent state or county agencies, or they are situated within a state's court system. This amendment would better position the Department to seek and lobby for the resources it deems necessary, much like the state's district attorneys.

**2. Helps Protect Against Conflicts Of Interest - Establishing Department As Independent State Agency Helps Guard Against Conflicts Under Rules Of Professional Conduct For Attorneys:**

To protect the constitutional rights of indigent persons accused of crimes, the state, through the Public Defender Department, makes available public defender services. The Department, as situated within the state governmental structure, is ripe for conflict with the Rules of Professional Conduct for legal professionals. Under those rules, attorneys are prohibited from allowing a non-client who is paying for the client's defense to direct or regulate the attorney's professional judgment in providing legal services. Additionally, attorneys cannot accept compensation from someone other than their client, without the client's consent, when there is potential for interference with the attorney's independent professional judgment. However, the Department is headed by a Chief Public Defender who is appointed by and serves at the pleasure of the Governor. Since the Chief Public Defender serves at the Governor's pleasure, exercising truly independent professional judgment, particularly when the Department is defending an unpopular or notorious alleged criminal, could prove to be exceptionally challenging. This amendment proposes to establish the Public Defender Department as an *independent* state agency, therefore ensuring that the Chief Public Defender and the Department can exercise truly independent judgment that is in line with generally accepted professionalism standards of the legal profession.

**3. Balanced Approach - Proposal Equalizes Governor's Power To Set Criminal Justice Policy:**

This amendment attempts to ensure a more balanced approach within the state's criminal justice system. The Governor already sets many policies of the criminal justice system by appointments to various departments and through the executive's legislative initiatives and priorities. The current system, which allows the Governor to also appoint the Chief Public Defender and retain oversight authority of the Public Defender Department, affords the Governor more power in ultimately determining the policies and practices of the state's criminal justice system. The amendment offers a clear way to balance that power by establishing the Department as an independent agency that is no longer accountable to the executive branch.

**4. Allows Department To Independently Advocate - Standalone Public Defender Department Will Be Best Situated To Independently Advocate Rather Than Compete With Other Executive Agencies For Resources:**

Protecting the constitutional rights of indigent persons accused of crimes is required by the federal and state constitutional guarantees for representation. Public

defenders that represent indigent defendants need resources comparable to those of the district attorneys. A Department that is answerable to the executive branch may not have the ability to advocate for all that is required for public defendants as it must compete against the demands, needs and desires of other executive agencies. A standalone Department, however, would be in a better position to establish itself as an independent, constitutional office charged with protecting a basic constitutional right.

### ► *Arguments Against*

#### **1. Too Costly - Establishing Independent Department And Creating New Commission Means Higher Undetermined Costs Paid By Taxpayers:**

This amendment creates added expense to taxpayers because it requires amending the Constitution of New Mexico to make the Public Defender Department an independent state agency, and it requires the creation of a Public Defender Commission charged with appointing the Chief Public Defender and with providing guidance and oversight to the Department. In addition to the Department's operational and capital needs, the members of the newly created commission would be entitled to per diem and mileage reimbursement when conducting the business of the commission. There is no way to accurately estimate those costs, except to note that the current statutory daily rate is \$95.00 per day. The voter has no way of knowing how many members will be on the commission nor how many days of work-related travel and expenses those members will incur. The changes proposed by this amendment constitute a needless additional expenditure of taxpayer funds for a Department that is already in existence.

#### **2. May Have Unintended Funding Consequences - Without Executive Support, Public Defender Department May Be Less Able To Advocate For Funding:**

This amendment could have far-reaching negative consequences related to the necessary funding for the work of the Public Defender Department. Under current law, the Department is an executive agency, and as such, the Governor requests and advocates for the Department's budget. If, as proposed by the amendment, the Department becomes an independent agency, the Department will have to request from the Legislature, and advocate for, a sustainable budget that includes the necessary funding to represent alleged criminals. Tough economic times, like the recent recession, coupled with society's general unease with funding the defense of persons alleged to have committed crimes, could result in a severe underfunding of the Department charged with the constitutional and statutory mandate to provide fair and effective assistance of counsel to the accused indigent.

**3. Creates Bigger Bureaucracy - Proposal's Creation Of Commission Unnecessary, Does Nothing Toward Providing Actual Representation Of Indigent Persons:**

This constitutional amendment creates yet another level of bureaucracy that is unnecessary, time-consuming and costly to the taxpayer. The amendment's proposed Public Defender Commission cannot actually assist in the representation of indigent defendants or in the core mission of the Public Defender Department. Instead, it would merely be a redundant and superfluous layer of management, requiring consultation and approval regarding decisions that should be left to a qualified Chief Public Defender. The result would be unnecessary delays in the operations of the Department.

**4. Current Status Less Political - As Currently Situated Within The Executive, Chief Public Defender And Department Are More Insulated From Politics Than Are District Attorneys And State Attorney General's Office:**

The Chief Public Defender is a political appointee of the Governor. However, the positions of district attorneys and the state Attorney General are even more subject to political influence, since they are elected partisan offices. The Chief Public Defender is primarily an administrative department head, with duties comparable to those of a district attorney or the state Attorney General. It is deputy public defenders, like deputy district attorneys, that typically handle the Department's cases. Under the current statutory and regulatory scheme, the assistant public defenders who perform the day-to-day representation of indigent clients operate under the same professional constraints as their counterparts, assistant district attorneys and assistant state attorneys general. Also, concerns about undue political influence in representing indigent defendants are effectively addressed by the rules of professional conduct that prohibit an attorney from permitting a non-client, such as the Governor or a Chief Public Defender appointed by the Governor, to direct or regulate a lawyer's professional judgment in rendering legal services to a client. Changing the Department's executive agency status for political purposes is unnecessary.

**5. Been Tried Before - 30 Years Ago Chief Public Defender Was Appointed By Board But Legislature Changed To Governor Appointment In 1985:**

At one time, the Chief Public Defender was appointed by a board instead of the Governor. Then, in 1985, the Legislature enacted a law providing the Governor with the authority to appoint a Chief Public Defender to serve at the Governor's pleasure. If the Legislature now believes the Public Defender Department would be

somehow better served by having an independent commission appoint the Chief Public Defender, it can provide for that change statutorily.

6. **Too Vague - Without Details, Voters Asked To Allow Legislature To Create Independent Agency And Commission And Provide For Appointment Of Chief Public Defender:**

While this constitutional amendment would create the Public Defender Commission, it provides virtually no detail regarding how the proposed Public Defender Commission will be organized. The amendment states that the "[t]erms, qualifications and membership of the ... commission shall be as provided by law". Therefore, allowing the specifics of the commission to be solely established by the Legislature leaves voters with little understanding regarding the number of commission members, how they would be appointed and the extent of the commission's authority. Knowledge regarding these basic factors is important for voters to make informed decisions and, as such, should have been included in the amendment. Additionally, the amendment's silence as to any qualification requirements for the Chief Public Defender results in merely shifting significant authority over the Public Defender Department from the Governor to the Legislature, most likely undermining any real goal of creating an independent Department.

## **APPENDIX**

### **Full Text of Joint Resolutions Proposing Constitutional Amendments**



## CONSTITUTIONAL AMENDMENT 1

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HOUSE JOINT RESOLUTION 18  
50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

## A JOINT RESOLUTION

PROPOSING AN AMENDMENT TO ARTICLE 6, SECTION 32 OF THE CONSTITUTION OF NEW MEXICO TO PROVIDE FOR TWO ADDITIONAL MEMBERS TO SIT ON THE JUDICIAL STANDARDS COMMISSION, A MUNICIPAL JUDGE AND A PUBLIC MEMBER.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 6, Section 32 of the constitution of New Mexico to read:

"There is created the "judicial standards commission", consisting of two justices or judges, one magistrate, one municipal judge and two lawyers selected as may be provided by law to serve for terms of four years, and [~~six~~] seven citizens, none of whom is a justice, judge or magistrate of any court or licensed to practice law in this state, who shall be appointed by the governor for five-year staggered terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated. No act of the commission is valid unless concurred in by a majority of its members. The commission shall select one of the members appointed by the governor to serve as [~~chairman~~] chair.

In accordance with this section, any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office, persistent failure or inability to perform a judge's duties, or habitual intemperance, or [~~he~~] may be retired for disability seriously interfering with the performance of [~~his~~] the justice's, judge's or magistrate's duties that is, or is likely to become, of a permanent character. The commission may, after investigation it deems necessary, order a hearing to be held before it concerning the discipline, removal or retirement of a justice, judge or magistrate, or the commission may appoint three masters who are justices or judges of courts of record to hear and take evidence in the matter and to report their findings to the commission. After hearing or after considering the record and the findings and report of the masters, if the commission finds good cause, it shall recommend to the supreme court the discipline, removal or retirement of the justice, judge or magistrate.

The supreme court shall review the record of the proceedings on the law and facts and may permit the introduction of additional evidence, and it shall order the discipline, removal or



retirement as it finds just and proper or wholly reject the recommendation. Upon an order for [~~his~~] retirement, any justice, judge or magistrate participating in a statutory retirement program shall be retired with the same rights as if [~~he~~] the justice, judge or magistrate had retired pursuant to the retirement program. Upon an order for removal, the justice, judge or magistrate shall thereby be removed from office, and [~~his~~] the justice's, judge's or magistrate's salary shall cease from the date of the order.

All papers filed with the commission or its masters, and proceedings before the commission or its masters, are confidential. The filing of papers and giving of testimony before the commission or its masters is privileged in any action for defamation, except that the record filed by the commission in the supreme court continues privileged but, upon its filing, loses its confidential character, and a writing [~~which~~] that was privileged prior to its filing with the commission or its masters does not lose its privilege by the filing. The commission shall promulgate regulations establishing procedures for hearings under this section. No justice, [~~or~~] judge or magistrate who is a member of the commission or supreme court shall participate in any proceeding involving [~~his~~] the justice's, judge's or magistrate's own discipline, removal or retirement.

This section is alternative to, and cumulative with, the removal of justices, judges and magistrates by impeachment and the original superintending control of the supreme court."

SECTION 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

## CONSTITUTIONAL AMENDMENT 2

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HOUSE VOTERS AND ELECTIONS COMMITTEE SUBSTITUTE FOR  
HOUSE JOINT RESOLUTION 11  
50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012

## A JOINT RESOLUTION

PROPOSING AN AMENDMENT TO ARTICLE 11, SECTION 1 OF THE CONSTITUTION OF NEW MEXICO TO INCREASE THE QUALIFICATIONS FOR PUBLIC REGULATION COMMISSIONERS.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 11, Section 1 of the constitution of New Mexico to read:

"The "public regulation commission" is created. The commission shall consist of five members elected from districts provided by law for staggered four-year terms beginning on January 1 of the year following their election; provided that those chosen at the first general election after the adoption of this section shall immediately classify themselves by lot, so that two of them shall hold office for two years and three of them for four years; and further provided that, after serving two terms, members shall be ineligible to hold office as a commission member until one full term has intervened. The legislature shall provide, by law, increased qualifications for commissioners and continuing education requirements for commissioners. The increased qualifications provided by this 2012 amendment shall apply to public regulation commissioners elected at the general election in 2014 and subsequent elections and to commissioners appointed to fill a vacancy at any time after July 1, 2013. No commissioner or candidate for the commission shall accept anything of value from a person or entity whose charges for services to the public are regulated by the commission."

SECTION 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

## CONSTITUTIONAL AMENDMENT 3

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HOUSE JOINT RESOLUTION 16  
50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012

A JOINT RESOLUTION  
PROPOSING TO AMEND ARTICLE 11, SECTION 2 OF THE CONSTITUTION OF NEW MEXICO AND TO ENACT A NEW SECTION OF ARTICLE 11 TO REMOVE AUTHORITY TO CHARTER AND REGULATE CORPORATIONS FROM THE PUBLIC REGULATION COMMISSION AND PROVIDE AUTHORITY TO CHARTER CORPORATIONS TO THE SECRETARY OF STATE.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 11, Section 2 of the constitution of New Mexico to read:

"The public regulation commission shall have responsibility for ~~chartering and regulating business corporations in such manner as the legislature shall provide. The commission shall have responsibility for~~ regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; insurance companies and others engaged in risk assumption; and other public service companies in such manner as the legislature shall provide."

SECTION 2. It is proposed to amend Article 11 of the constitution of New Mexico by adding a new section to read:

"The secretary of state shall have responsibility for chartering corporations in such a manner as the legislature shall provide."

SECTION 3. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

## CONSTITUTIONAL AMENDMENT 4

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HOUSE JOINT RESOLUTION 17  
50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012

## A JOINT RESOLUTION

PROPOSING TO AMEND ARTICLE 11 OF THE CONSTITUTION OF NEW MEXICO TO REMOVE THE REGULATION OF INSURANCE COMPANIES AND OTHERS ENGAGED IN RISK ASSUMPTION FROM THE PUBLIC REGULATION COMMISSION AND PLACE IT UNDER A SUPERINTENDENT OF INSURANCE APPOINTED BY THE INSURANCE NOMINATING COMMITTEE AS PROVIDED BY LAW.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 11, Section 2 of the constitution of New Mexico to read:

"The public regulation commission shall have responsibility for chartering and regulating business corporations in such manner as the legislature shall provide. The commission shall have responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; ~~[insurance companies and others engaged in risk assumption]~~ and other public service companies in such manner as the legislature shall provide. The public regulation commission shall have responsibility for regulating insurance companies and others engaged in risk assumption as provided by law until July 1, 2013."

SECTION 2. It is proposed to amend Article 11 of the constitution of New Mexico by adding a new section to read:

"A. The office of "superintendent of insurance" is created as of July 1, 2013. The superintendent of insurance shall regulate insurance companies and others engaged in risk assumption in such manner as provided by law. The superintendent of insurance shall be appointed by the insurance nominating committee and serve for such terms as may be provided by law; provided that the term of the first superintendent of insurance appointed pursuant to this 2012 amendment shall begin on July 1, 2013 and end on December 31, 2015.

B. The insurance nominating committee shall be appointed and have such qualifications as may be provided by law. The insurance nominating committee shall evaluate applications for superintendent of insurance in accordance with qualifications for superintendent of insurance established by law."

SECTION 3. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

## CONSTITUTIONAL AMENDMENT 5

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HOUSE JOINT RESOLUTION 26  
50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012

A JOINT RESOLUTION  
PROPOSING AN AMENDMENT TO ARTICLE 6 OF THE CONSTITUTION OF NEW  
MEXICO TO ADD A NEW SECTION THAT PROVIDES FOR THE ORGANIZATION OF  
AN INDEPENDENT PUBLIC DEFENDER DEPARTMENT.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 6 of the constitution of New Mexico by adding a new section to read:

"A. A "public defender department" is established as an independent state agency. The chief public defender is the administrative head of the public defender department. The term and qualifications of the chief public defender shall be as provided by law.

B. The "public defender commission" is established. The public defender commission shall appoint the chief public defender. The public defender commission shall exercise independent oversight of the department and provide guidance to the chief public defender in the administration of the department and the representation of indigent persons. The commission shall not interfere with the discretion or the professional judgment or advocacy of a public defender office, a public defender contractor or assigned counsel in the representation of individual cases. Terms, qualifications and membership of the public defender commission shall be as provided by law."

SECTION 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.



New Mexico Legislative Council Service  
Santa Fe, New Mexico