

SUMMARY OF AND ARGUMENTS



THE
CONSTITUTIONAL AMENDMENTS
PROPOSED BY THE LEGISLATURE
IN 2017

AMENDMENTS TO APPEAR ON THE
NOVEMBER 6, 2018
GENERAL ELECTION BALLOT

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TABLE OF CONTENTS

[Proposed Amendments to Appear on November 6, 2018 General Election Ballot \(ballot text\)](#) 1

[General Information](#) 2

[Disclaimer](#)..... 2

CONSTITUTIONAL AMENDMENT 1

[Full Text of Joint Resolution Proposing Constitutional Amendment
 \(Senate Rules Committee Substitute for Senate Joint Resolution 1 - 2017\)](#) 3

[Summary of Proposed Constitutional Amendment 1](#) 4

[Background and Information](#) 4

[Arguments For](#) 5

[Arguments Against](#) 6

CONSTITUTIONAL AMENDMENT 2

[Full Text of Joint Resolution Proposing Constitutional Amendment
 \(House Judiciary Committee Substitute for House Joint Resolution 8 - 2017\)](#)..... 7

[Summary of Proposed Constitutional Amendment 2](#) 8

[Background and Information](#) 8

[Arguments For](#) 10

[Arguments Against](#) 11

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Proposed Amendments to Appear
on the November 6, 2018 General Election Ballot
(ballot text)

Constitutional Amendment 1:

"PROPOSING AMENDMENTS TO ARTICLE 6 OF THE CONSTITUTION OF NEW MEXICO TO GIVE THE LEGISLATURE AUTHORITY TO PROVIDE FOR APPELLATE JURISDICTION BY STATUTE."

Constitutional Amendment 2:

"PROPOSING AN AMENDMENT TO ARTICLE 5 OF THE CONSTITUTION OF NEW MEXICO TO CREATE AN INDEPENDENT STATE ETHICS COMMISSION WITH JURISDICTION TO INVESTIGATE, ADJUDICATE AND ISSUE ADVISORY OPINIONS CONCERNING CIVIL VIOLATIONS OF LAWS GOVERNING ETHICS, STANDARDS OF CONDUCT AND REPORTING REQUIREMENTS AS PROVIDED BY LAW."

General Information

New Mexico voters will be asked in 2018 to consider two proposed amendments to the state's constitution. Constitutional Amendment 1 authorizes the legislature to establish appellate jurisdiction by statute, and Constitutional Amendment 2 creates an independent state ethics commission. Both amendments will appear on the November 6, 2018 general election ballot.

The Constitution of New Mexico provides that the legislature, by a majority vote of all members elected to 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 becomes part of the state's constitution if a majority of the votes cast in an election on the proposition is cast in its favor, unless the proposed amendment affects one of the sections for which a three-fourths' majority is required. (This year's proposed constitutional amendments do not affect one of those sections and, thus, need only a simple majority vote to be approved.) 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 a summary and the full text of the joint resolutions proposing the amendments, as well as background information and summaries of arguments for and against the passage of the amendments.

While the full text of the proposed amendments appears in this publication, the title, which appears in capital letters at the top of each joint resolution, is the only language that will appear on the ballot. New language that is proposed for insertion in the text is shown by underscoring, and language that is proposed for deletion is shown in brackets.

Disclaimer

The arguments for and against the proposed constitutional amendments in this publication do not necessarily reflect legislative deliberations undertaken at the time of the passage of the proposed amendments. They represent suggestions from the Legislative Council Service staff of arguments in support of and in opposition to the proposed amendments. No claim is made for the validity or consistency of these arguments. This is not an exhaustive list of all cogent and valid arguments. 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.

SENATE RULES COMMITTEE SUBSTITUTE FOR
SENATE JOINT RESOLUTION 1
53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

A JOINT RESOLUTION
PROPOSING AMENDMENTS TO ARTICLE 6 OF THE CONSTITUTION OF NEW
MEXICO TO GIVE THE LEGISLATURE AUTHORITY TO PROVIDE FOR APPELLATE
JURISDICTION BY STATUTE.

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

SECTION 1. It is proposed to amend Article 6, Section 13 of the constitution of New Mexico to read:

"The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as ~~[may be conferred]~~ provided by law, and appellate jurisdiction of ~~[all]~~ cases originating in inferior courts and tribunals in their respective districts as provided by law, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise, in the exercise of their jurisdiction; provided that no such writs shall issue directed to judges or courts of equal or superior jurisdiction. The district courts shall also have the power of naturalization in accordance with the laws of the United States. Until otherwise provided by law, at least two terms of the district court shall be held annually in each county, at the county seat."

SECTION 2. It is proposed to amend Article 6, Section 27 of the constitution of New Mexico to read:

"Appeals shall be allowed in all cases from the final judgments and decisions of the probate courts and other inferior courts ~~[to the district courts, and in all such appeals, trial shall be had de novo unless otherwise]~~ as provided 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.

Note: underscored material = new language proposed for insertion ~~[bracketed material]~~ = existing language proposed for deletion

► **SUMMARY of Proposed Constitutional Amendment 1**

Constitutional Amendment 1 would give the legislature authority to prescribe the court that will hear an appeal of a case decided in a probate, metropolitan, magistrate or other inferior court, and it removes the default requirement that appeals of cases decided in those courts be heard *de novo* through a new trial in district court.

► **BACKGROUND AND INFORMATION**

Under current constitutional provisions, all appeals of decisions of probate, metropolitan, magistrate and other inferior courts are required to be heard in district court. Unless otherwise provided by law, those appeals are heard *de novo*. In general, magistrate courts are not "courts of record", and, therefore, *de novo* appeals to the district court allow for the development of a formal record of proceedings. However, probate courts and metropolitan courts, in part, are courts of record, and, thus, their decisions could, except for the constitutional prohibition, be reviewed by the court of appeals instead of a district court. In short, the proposed amendments to Sections 13 and 27 of Article 6 of the Constitution of New Mexico (Sections 1 and 2 of the joint resolution) would allow the legislature to determine by statute which court will hear appeals of the decisions of magistrate, metropolitan, probate and other inferior courts and would remove the default requirement for a *de novo* trial in those appeals.

► ARGUMENTS FOR

1. May allow for a faster and less costly appeals process.

Because probate courts and metropolitan courts, in part, are both courts of record, appeals of decisions of those courts could go directly to the court of appeals instead of first going to the district court for an intermediate ruling. The proposed amendment would allow the legislature to provide for direct appeals to the court of appeals from those lower courts, which could save both time and money for parties involved in appeals.

2. May reduce caseloads in district courts.

The caseloads of district courts could be reduced by eliminating some appeals from inferior court cases. If legislation were enacted to direct record review appeals to appellate courts, the district courts would benefit from fewer cases. Reducing the caseloads in district courts could also benefit the public by reducing the time it takes for a case to be resolved in district court.

3. May align appellate review of court decisions to the seriousness of the offense.

According to the *New Mexico Judicial Branch 2017 Annual Report*, 56 percent of the new and reopened cases in New Mexico magistrate courts in fiscal year 2017 were for traffic violations. Under the current system, such cases may be appealed to district court, and the district court decision may then be appealed to the court of appeals and supreme court, resulting in up to three levels of review of relatively minor offenses. By contrast, cases with more serious penalties, such as felony criminal cases, are first heard in district court and may receive only two levels of appellate review. The proposed amendment would authorize the legislature to align court review with the seriousness of the offense and reduce unnecessary layers of appeal that are conducted at public expense.

4. Allows the legislature the flexibility to address evolving needs of the lower courts.

Constitutional provisions pertaining to appeals from probate courts and other inferior courts were last addressed through a constitutional amendment in 1966. The current proposed amendment would allow the legislature to provide greater flexibility in accommodating evolving needs associated with the review of inferior court cases.

► ARGUMENTS AGAINST

1. May increase the number of cases in the appellate courts.

According to the *New Mexico Judicial Branch 2017 Annual Report*, the court of appeals had 826 new and reopened cases in fiscal year 2017, and the New Mexico Supreme Court had 613 new and reopened cases that same fiscal year. The addition of appeals from inferior courts to those caseloads could substantially increase appellate court caseloads. This may result in reduced time and resources devoted to cases traditionally reviewed by the appellate courts, or it might result in the need to direct additional resources to the appellate courts.

2. A new appellate process might not yield greater efficiency.

An appeals process is already in place for lower court cases, and there is no guarantee that potential benefits, such as greater court efficiencies and related cost-savings, will be realized. In fact, implementation of a new and untested process may carry a significant learning curve for lawyers, judges and court staff, possibly adversely affecting the relief sought by litigants.

3. District courts might be best suited to establish a record for review.

District courts have the benefits of experience and resources already available to them in establishing a record in cases appealed from inferior courts. Moreover, while district court judges must be at least 35 years old and have practiced law for at least six years, probate judges and the magistrate judges in 31 counties are not required to be licensed attorneys or trained in the law. Thus, a case appealed from one of these courts may benefit from a *de novo* trial in a district court, in which a district court judge with more experience and training in the rules of evidence and civil procedure may preside.

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE JOINT RESOLUTION 8
53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

A JOINT RESOLUTION

PROPOSING AN AMENDMENT TO ARTICLE 5 OF THE CONSTITUTION OF NEW MEXICO TO CREATE AN INDEPENDENT STATE ETHICS COMMISSION WITH JURISDICTION TO INVESTIGATE, ADJUDICATE AND ISSUE ADVISORY OPINIONS CONCERNING CIVIL VIOLATIONS OF LAWS GOVERNING ETHICS, STANDARDS OF CONDUCT AND REPORTING REQUIREMENTS AS PROVIDED BY LAW.

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

SECTION 1. It is proposed to amend Article 5 of the constitution of New Mexico by adding a new section to read:

"A. The "state ethics commission" is established as an independent state agency under the direction of seven commissioners, no more than three of whom may be members of the same political party, whose terms and qualifications shall be as provided by law. The governor shall appoint one commissioner. One commissioner each shall be appointed by the president pro tempore of the senate, the minority floor leader of the senate, the speaker of the house of representatives and the minority floor leader of the house of representatives, all as certified by the chief clerks of the respective chambers. Two commissioners, who shall not be members of the same political party, shall be appointed by the four legislatively appointed commissioners.

B. The state ethics commission may initiate, receive, investigate and adjudicate complaints alleging violations of, and issue advisory opinions concerning, standards of ethical conduct and other standards of conduct and reporting requirements, as may be provided by law, for state officers and employees of the executive and legislative branches of government, candidates or other participants in elections, lobbyists or government contractors or seekers of government contracts and have such other jurisdiction as provided by law.

C. The state ethics commission may require the attendance of witnesses or the production of records and other evidence relevant to an investigation by subpoena as provided by law and shall have such other powers and duties and administer or enforce such other acts as further 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.

Note: underscored material = new language proposed for insertion [bracketed material] = existing language proposed for deletion

► **SUMMARY of Proposed Constitutional Amendment 2**

Constitutional Amendment 2 would amend Article 5 of the Constitution of New Mexico by adding a new section establishing a state ethics commission. Per the amendment, the legislature would determine how the commission would initiate, receive, investigate and adjudicate complaints, and issue advisory opinions, concerning violations of standards of ethical conduct, other standards of conduct and reporting requirements. The commission would have jurisdiction as provided by law over state officers and employees of the executive and legislative branches; candidates and other participants in elections; lobbyists; and government contractors or seekers of government contracts. The legislature could also provide for other jurisdiction by law. The amendment authorizes the commission to require the attendance of witnesses or the production of records or other relevant evidence by subpoena, as provided by law, and allows the legislature to grant the commission such other powers and duties and administrative and enforcement authority of other acts as provided by law.

The proposed constitutional amendment provides that the state ethics commission be composed of seven commissioners: one appointed by the governor; four appointed, respectively, by the president pro tempore of the senate, the minority floor leader of the senate, the speaker of the house of representatives and the minority floor leader of the house of representatives; and two appointed by the four legislatively appointed commissioners. The terms and qualifications of the commissioners are to be provided by law.

► **BACKGROUND AND INFORMATION**

Since at least 2005, the establishment of a state ethics commission has been the subject of debate in the Roundhouse. Interest from both sides of the aisle and from the executive branch has stemmed, in large part, from federal investigations and prosecutions of a state treasurer and a state legislator; state prosecutions of a public regulation commissioner, a secretary of state and a state legislator; and other investigations involving New Mexico public officials at various levels of government. In 2006, a state task force recommended the establishment of an independent state ethics commission, and since 2007, more than 35 pieces of legislation to establish a state ethics commission have been introduced. In 2017, House Judiciary Committee Substitute for House Joint Resolution 8 was the first to clear both chambers of the legislature and will be considered by the voters as Constitutional Amendment 2 on the 2018 general election ballot.

New Mexico is one of only a few states that does not have a state ethics commission; however, multiple state agencies and legislative committees are empowered with oversight of certain ethical matters and enforcement of ethical standards on participants in state and local government. The State Personnel Office is the state agency with oversight over executive employees pursuant to the Personnel Act and the governor's Code of Conduct. The secretary of state investigates violations of numerous laws related to elections, political campaigns and lobbyist activities. The Interim Legislative Ethics Committee investigates ethics complaints against legislators occurring during the interim. The house of representatives and the senate each has rules and committees to investigate ethics complaints against their respective members. The attorney general has authority to enforce or prosecute violations by state officers, state employees, legislators and legislative staff pursuant to many laws, including the Election Code, Lobbyist Regulation Act, Financial Disclosure Act and Governmental Conduct Act. Additionally, the Judicial Standards Commission oversees ethical issues for the judicial branch.

► **ARGUMENTS FOR**

1. Supports continued review and development of the state's ethics laws.

Given that several attempts to pass legislation establishing an ethics commission have failed, voter approval of the proposed amendment could serve as a call to action to the legislature, sending a message that voters support the establishment of a state ethics commission and the continued review and development of laws governing ethics in the public sphere.

2. The national trend is to establish state ethics commissions.

The vast majority of states have at least one ethics commission. The trend toward establishing ethics commissions suggests that the voters and their legislators recognize the need for them. The existence of a commission dedicated to investigating complaints alleging violation of ethical conduct could help deter ethical misconduct.

3. Establishes an ethics commission in the Constitution of New Mexico.

The proposed constitutional amendment would establish an ethics commission that could only be removed in the future with another constitutional amendment approved by the voters.

4. The legislature will use the deliberative process to create the best policies for the state ethics commission.

The framework of the proposed amendment allows a deliberative process through which the legislature may establish the powers of and constraints on the commission. This requires the legislature to provide by law for the functioning of the commission and its powers and duties. The proposed amendment places few restrictions on enabling legislation. The legislature would have wide latitude to use this opportunity to fill the gaps in existing law and ensure that there is a mechanism for investigation and adjudication of ethics law violations. Over time, the legislature may amend the law to implement provisions that reflect best practices.

5. The state ethics commission could be a resource for public servants and encourage ethical behavior.

The commission's issuance of advisory opinions to public servants, candidates for public office, lobbyists and government contractors could improve guidance provided to those individuals and clarify the ethical rules where there may be conflicting interpretations. In turn, the guidance could assist and encourage those individuals in making ethical decisions in their professional roles. Moreover, having one agency focus on the ethical conduct of those involved in the political process and public service could result in a more consistent interpretation of the law and provide for a more efficient mechanism for enforcing the law.

► ARGUMENTS AGAINST

1. A constitutional amendment is not necessary to create a state ethics commission.

The Constitution of New Mexico does not prohibit enactment of a statute that would establish an independent state ethics commission, and, therefore, a constitutional amendment is not necessary to accomplish this purpose.

2. The amendment would only create a state ethics commission — the legislature still must enact laws to provide for the commission's powers and duties and the commissioners' qualifications and terms.

The title of House Judiciary Committee Substitute for House Joint Resolution 8 is the only part of the proposed amendment that will appear on the ballot, and it may give the false impression that the amendment actually creates a fully functioning state ethics commission. In fact, before the commission can function, the legislature must first pass laws granting the commission all of its powers and duties, as well as setting the qualifications and terms of the commissioners. In short, voters may think that voting for the proposed amendment does far more than just create an agency that has no established statutory authority to operate or function.

3. A state ethics commission could duplicate efforts to combat unethical behavior already prohibited in law.

Creating a new state ethics commission could result in duplication of effort and may be costly. Under existing law, multiple state agencies already have oversight over ethics matters affecting their respective branches of government. These include the State Personnel Office, the secretary of state, the attorney general, the Interim Legislative Ethics Committee and designated house and senate ethics committees. Broadening or amending those agencies' powers or duties to meet any unmet needs might be more efficient than creating another oversight entity.

4. Creating a new state ethics commission could be costly, and there is no guarantee that it would be more effective in deterring unethical conduct than the current system.

The estimated cost of maintaining the state ethics commission is considerable. The current system has, in fact, worked in that there have been several successful prosecutions of public officers and employees for violations of various laws defining unethical conduct. The creation of three house investigative (pre-impeachment) committees and the hearings held by those committees have seemingly caused three elected officials to resign. Improvement of the current law and enforcement procedures could be accomplished without the expense of creating a whole new bureaucracy.

5. Appointment of the commissioners would be dominated by the legislature, which may undermine the independent nature of the commission.

Because the legislature would select the majority of the commissioners on the state ethics commission, it may "color" the manner in which the laws are to be executed, thus ignoring the principle established in United States constitutional law that the same persons should not both legislate and administer the laws. *Buckley v. Valeo*, 424 U.S. 1, 139 (1976). Furthermore, with six of the seven members of the commission appointed by the legislature, or appointed by commissioners who are appointed by the legislature, too much power may be consolidated in the legislative branch. Additionally, the proposed amendment assumes that the speaker of the house of representatives, the president pro tempore of the senate and the respective chambers' minority floor leaders would be evenly divided by party, but that may not necessarily be the case. Thus, questions about the independence of the commission may arise.

6. The commission's ability to exercise authority over any unethical behavior of legislators is limited by the Constitution of New Mexico.

If the intent of the proposed amendment is to provide additional authority over the legislature in regard to ethics matters, the resulting enabling legislation that must be passed to give the state ethics commission its powers and duties will likely fall short of that intent. A state agency – independent or not – cannot determine the qualifications of a state legislator, nor can it remove a state legislator from the legislature. Article 4, Section 7 of the Constitution of New Mexico provides that each house of the legislature shall determine the qualifications of its members, so only each respective house of the legislature can judge the eligibility of its members. Article 4, Section 11 of the Constitution of New Mexico provides the only legal authority to remove a state legislator from office, which is expulsion by the legislative body to which the legislator belongs. If the state ethics commission finds that a legislator has violated a law governing ethics, the commission could only issue an advisory opinion. The commission could not be given the authority to remove that legislator from office. To give the commission that power would violate Article 4, Sections 7 and 11 of the Constitution of New Mexico or would require a change in those constitutional sections.