

SUMMARY OF AND ARGUMENTS



THE
CONSTITUTIONAL AMENDMENTS
PROPOSED BY THE LEGISLATURE
IN 2019 AND 2020

AMENDMENTS TO APPEAR ON THE
NOVEMBER 3, 2020
GENERAL ELECTION BALLOT

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Proposed Amendments to Appear
on the November 3, 2020 General Election Ballot
(ballot text)

Constitutional Amendment 1:

"PROPOSING TO AMEND THE CONSTITUTION OF NEW MEXICO TO PROVIDE THAT THE PUBLIC REGULATION COMMISSION CONSIST OF THREE MEMBERS APPOINTED BY THE GOVERNOR FROM A LIST OF PROFESSIONALLY QUALIFIED NOMINEES SUBMITTED TO THE GOVERNOR BY A NOMINATING COMMITTEE AS PROVIDED BY LAW AND THAT THE COMMISSION IS REQUIRED TO REGULATE PUBLIC UTILITIES AND MAY BE REQUIRED TO REGULATE OTHER PUBLIC SERVICE COMPANIES."

Constitutional Amendment 2:

"PROPOSING TO AMEND ARTICLE 20, SECTION 3 OF THE CONSTITUTION OF NEW MEXICO TO PERMIT THE ADJUSTMENT BY LAW OF TERMS OF NON-STATEWIDE ELECTED OFFICERS AND TO STANDARDIZE THE DATE AN OFFICER BEGINS TO SERVE."

General Information

New Mexico voters will be asked in 2020 to consider two proposed amendments to the state's constitution. Constitutional Amendment 1 would provide for a three-member Public Regulation Commission that would be appointed by the governor with the consent of the senate from a list of names submitted by a nominating committee, and Constitutional Amendment 2 would allow the adjustment of terms of non-statewide elected officers by law. Both amendments will appear on the November 3, 2020 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 within 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 JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE RULES COMMITTEE SUBSTITUTE FOR
SENATE JOINT RESOLUTIONS 1 & 4
54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019

A JOINT RESOLUTION

PROPOSING TO AMEND THE CONSTITUTION OF NEW MEXICO TO PROVIDE THAT THE PUBLIC REGULATION COMMISSION CONSIST OF THREE MEMBERS APPOINTED BY THE GOVERNOR FROM A LIST OF PROFESSIONALLY QUALIFIED NOMINEES SUBMITTED TO THE GOVERNOR BY A NOMINATING COMMITTEE AS PROVIDED BY LAW AND THAT THE COMMISSION IS REQUIRED TO REGULATE PUBLIC UTILITIES AND MAY BE REQUIRED TO REGULATE OTHER PUBLIC SERVICE COMPANIES.

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:

"A. The "public regulation commission" is created. Until January 1, 2023, 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; and provided further that commission members elected for terms beginning January 1, 2021 shall hold office for two years.

B. Beginning January 1, 2023, the commission shall consist of three members. The governor shall nominate members from a list of qualified nominees submitted to the governor by the public regulation commission nominating committee, as provided by law, and by and with the consent of the senate shall appoint members to fill positions and vacancies on the commission; provided that no more than two commissioners shall be members of the same political party. Members so appointed shall serve six-year staggered terms; provided that, after serving two consecutive six-year terms, members shall be ineligible to hold office as commissioner until one full term has intervened. A person appointed to fill a vacancy on the commission shall serve for the remainder of the unexpired term.

C. A six-year term for a commission position shall begin on January 1 of the year following the expiration of the prior term for that position; provided that in January 2023, one

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

member shall be appointed for an initial term of two years, one member for an initial term of four years and one member for a six-year term.

D. The legislature shall provide, by law, [increased] for professional 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.] and for the creation of and procedures for the public regulation commission nominating committee.

E. A commission member may be removed by impeachment for accepting anything of value from a person or entity whose charges for services to the public are regulated by the commission, malfeasance, misfeasance or neglect of duty."

SECTION 2. 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 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; and] as provided by law. The public regulation commission may have responsibility for regulation of 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 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: underscoring material = new language proposed for insertion ~~[bracketed material]~~ = existing language proposed for deletion

► **SUMMARY of Proposed Constitutional Amendment 1**

Constitutional Amendment 1 would amend Article 11, Section 1 of the Constitution of New Mexico to reduce the number of Public Regulation Commission (PRC) members to three, with no more than two members from the same political party. Members would no longer be elected, but instead would be appointed for six-year terms by the governor, with the consent of the senate, from a list of nominees submitted to the governor through a newly established Public Regulation Commission Nominating Committee. Constitutional Amendment 1 would also amend Article 11, Section 2 of the Constitution of New Mexico to narrow the scope of the PRC's constitutionally granted regulatory powers to public utilities, while still allowing the legislature to assign responsibility for the regulation of other public service companies to the commission by law.

► **BACKGROUND AND INFORMATION**

The 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. In 2012, the constitutional provisions creating and establishing the jurisdiction of the PRC were again amended. One amendment removed the PRC's authority to charter and regulate corporations and transferred authority to charter corporations to the secretary of state. A second amendment removed the regulation of insurance companies and others engaged in the assumption of risk from the PRC and placed it under a superintendent of insurance. A third amendment required the legislature to provide increased qualifications and continuing education requirements for public regulation commissioners.

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, Transportation Division, Consumer Relations Division, Legal Division and Fire Marshal Division. Even after enactment of the 2012 amendments, the jurisdiction of the PRC remains broad.

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, a member is not eligible to hold office as a commissioner again until one full term has intervened. Vacancies occurring during the term of a commissioner are filled by appointment by the governor.

Under current law, an individual is eligible to serve as a commissioner on the PRC if the commissioner is at least 18 years of age, has lived in the state for at least one year, resides in the district from which he or she is elected, has no felony convictions and meets certain professional qualifications, including satisfaction of continuing education requirements, as provided by law.

► ARGUMENTS FOR

1. May allow for increased focus on ratepayer interests.

An elected commission is a political commission, and the PRC may be 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 regional electoral politics rather than the interests of ratepayers throughout the state. By insulating the commission from electoral politics, the commissioners may be better able to carry out their quasi-judicial duties in an unbiased fashion.

2. Offers an opportunity to renew public trust.

The PRC has suffered from controversy and lack of public trust throughout its existence, some of which can be attributed to the nature of electoral politics, whereby candidates may be elected based more on name recognition and political advertisements than on professional qualifications and technical expertise. The proposed amendment would provide for increased vetting of commissioners through the establishment of a Public Regulation Commission Nominating Committee that evaluates potential nominees and submits their names to the governor for appointment, followed by senate confirmation of those appointees. This process would insulate the selection of commissioners from the political process and better ensure that well-qualified individuals are chosen to serve on the PRC, resulting in a renewal of public trust in the PRC.

3. New Mexico would join the vast majority of states that regulate utilities through governor-appointed commissions, including the neighboring states of Colorado, Utah and Texas.

If this amendment is adopted, New Mexico would be following the lead of 38 other states that provide for governor-appointed utility regulation commissions. Given the highly complex and technical nature of public utility regulation, it makes sense that commissioners should be selected on the basis of knowledge and expertise, rather than political considerations. Moreover, the double-vetting process and staggered six-year terms required by this amendment should help ensure that only well-qualified individuals are considered for appointment to the PRC, while preventing governors from packing the commission with political appointees.

4. Promotes a better understanding of the legal complexities inherent in regulating utilities.

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. However, too often the

New Mexico Supreme Court has overruled PRC decisions, resulting in costs to the state and sometimes calling into question the PRC's understanding of or regard for the legal complexities inherent in regulating the state's utilities. Improved screening and qualification requirements would help ensure that commissioners possess the experience and training necessary to make decisions within the complex legal framework that governs public utility regulation.

► ARGUMENTS AGAINST

1. Does not address recommended changes to the PRC that may better address the efficient functioning of the commission.

The key to the efficient functioning of the PRC may not necessarily lie with the manner in which commissioners are appointed. In fact, a study by the National Regulatory Research Institute (NRRI) commissioned by the legislature in 2017 offered several recommendations to improve PRC operations. Those recommendations included establishing stable funding through the fees and assessments collected by the PRC from regulated industries as is the practice in most states, increasing staff salaries to attract and keep highly skilled engineers, accountants, economists, lawyers and other professional staff that are necessary to efficiently conduct rate cases, draft rules and advise the commissioners and increasing opportunities for staff to receive ongoing training and professional development. The proposed amendment does not address any of the many recommendations that could more effectively improve the PRC's operations.

2. Does not change how the PRC actually functions.

As noted above, the provisions of this amendment assume that any problems with the current PRC are related to the fact that it is an elected body. The amendment, however, leaves it up to the legislature to provide for how commissioners will be evaluated and what qualifications commissioners will be required to have. Under current law, the legislature already has the power to set qualifications and continuing education requirements for commissioners. It also has the power to address all of the issues raised by the 2017 NRRI report to the legislature. There is no guarantee that the legislature will appropriately fund the PRC to address the issues raised in the 2017 report simply because the commissioners are appointed rather than elected.

3. Removes the electorate's ability to directly hold commissioners accountable for their actions.

Removing voters' power to directly elect commissioners dilutes the power of the electorate by transferring that decision-making authority to the Public Regulation Commission Nominating Committee, governor and senate. Electing commissioners from their respective districts allows members of the public more direct oversight of their commissioners and the decisions those commissioners make. Removing the power to elect the commissioners by district may result in reduced geographical representation because appointed commissioners could reside anywhere in the state. Even if the commissioners were appointed from different regions of the state, each commissioner would necessarily represent more persons and a larger geographic area than under the current system.

4. Changing the removal process for commissioners may result in delayed proceedings.

The proposed amendment provides that a commissioner may be removed "for accepting anything of value from a person or entity whose charges for services to the public are regulated by the commission, malfeasance, misfeasance or neglect of duty", but a commissioner may only be removed by impeachment. Pursuant to Article 4, Section 35 of the Constitution of New Mexico, impeachment can only be exercised by a majority of the members of the house of representatives and must be followed by a trial in the senate. Thus, impeachment of a commissioner may only occur when the legislature is convened in session or called into a special or extraordinary session, possibly delaying hearings required to respond to a serious allegation against a serving commissioner. Currently, the Constitution of New Mexico provides to the New Mexico Supreme Court the jurisdiction to remove a commissioner for cause, which may provide for a more timely response.

HOUSE JOINT RESOLUTION 8
54TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2020

A JOINT RESOLUTION

PROPOSING TO AMEND ARTICLE 20, SECTION 3 OF THE CONSTITUTION OF NEW MEXICO TO PERMIT THE ADJUSTMENT BY LAW OF TERMS OF NON-STATEWIDE ELECTED OFFICERS AND TO STANDARDIZE THE DATE AN OFFICER BEGINS TO SERVE.

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

SECTION 1. It is proposed to amend Article 20, Section 3 of the constitution of New Mexico to read:

"A. The term of office of every state, county or district officer, except ~~[those elected at the first election held under this constitution, and]~~ those elected to fill vacancies, shall commence on the first day of January next after ~~[his]~~ the officer's election.

B. A state, county or district officer elected to fill a vacancy in office shall take office on the first day of January next after the officer's election to serve the remainder of the unexpired term for that office.

C. The term of a state, county or district officer may be adjusted by law to align or stagger the election of officers for a particular state, county or district office throughout the state. Any such adjustment shall require a legislative finding that the adjustment is to provide for consistency in the timing of elections for that office or to balance the number of offices appearing on the ballot. The term of any officer affected by such adjustment shall not be shortened or extended by more than two years. An extended term shall be counted as one term for the purposes of any limitation on the number of terms an officer may serve. A shortened term shall not be counted as a term and shall be disregarded for the purposes of any limitation on the number of terms an officer may serve. No statewide elective office may be adjusted pursuant to this subsection."

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.

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► **SUMMARY of Proposed Constitutional Amendment 2**

Constitutional Amendment 2 proposes to amend Article 20, Section 3 of the Constitution of New Mexico to allow the legislature to adjust the term of a state, county or district officer to align or stagger the election of officers for a particular state, county or district office throughout the state. No statewide elective office would be subject to adjustment. The proposed amendment also clarifies that officers elected to fill a vacancy in office shall take office on the first day of January following their election.

► **BACKGROUND AND INFORMATION**

Statutory provisions that would have had the effect of lengthening or shortening the terms of office of certain elected officers were declared unconstitutional in *State ex rel. Sugg v. Toulouse Oliver*, 2020-NMSC-002. If approved, this amendment would address the court's concerns and require a legislative finding that any adjustment to align or stagger the terms of a state, county or district officer is only to provide for consistency in the timing of elections for that office or to balance the number of offices appearing on the ballot in the election.

► **ARGUMENTS FOR**

1. Provides the legislature with the constitutional authority to ensure uniformity of elections and balance the number of offices on the ballot.

This constitutional amendment is a natural and necessary extension of the legislature's intent demonstrated by the passage of House Bill 407 (2019). This law changed and updated numerous provisions throughout the Election Code to standardize the election dates for certain elected officials and balance out the number of county and district officers on the ballot in any given election year. In a legal case that followed the passage of this law, the New Mexico Supreme Court ultimately held, in part, that if the legislature wishes to alter the election dates of officers whose terms are enumerated in the constitution for the purpose of ensuring uniformity, this must be first permitted through a constitutional amendment. This amendment would effectively amend the Constitution of New Mexico to allow for the enforcement of those statutory provisions.

2. Provides the legislature with a tool to address election cycle concerns without requiring individual constitutional amendments for each office.

Without this constitutional amendment, if the legislature determines that it is necessary to change the election cycle in which a state, county or district officer is elected to provide for consistency in the timing of elections for that office or to balance the number of offices appearing on the ballot, the legislature must first pass and the voters must adopt a constitutional amendment for each relevant office. The legislature is prohibited from extending or shortening the terms of constitutional officers to stagger or align them on the same ballot in the same election year without a constitutional amendment being presented to and adopted by the voters. If stand-alone constitutional amendments must be adopted to address these election cycle concerns, the one-time adjustments to the terms of individual offices in the constitution will clutter the constitution with provisions that are temporal in nature, which is antithetical to the enduring nature of constitutions. This proposed constitutional amendment, however, would allow the legislature to adjust the number of offices on the presidential or gubernatorial general election ballot without needing to propose a constitutional amendment for each relevant office, thus allowing the legislature to expediently address these election concerns when they arise and preventing the constitution from being filled with temporary provisions.

3. Includes protections against legislative overreach in amending terms of certain elected officers.

The proposed amendment protects against legislative overreach in arbitrarily changing the terms of certain elected officers by requiring the legislature to adopt specific legislative findings

supporting an adjustment. In order for the legislature to make an adjustment, the legislature must find that the adjustment is necessary for consistency in the timing of elections for that office or to balance the number of offices appearing on the ballot. This requirement is unique and requires a level of deliberateness and intention by the legislature. The proposed amendment also limits the reach of any law by limiting a one-time adjustment to two years. This limitation effectively adjusts a term no more than necessary to accomplish the desired alignment. Further, persons elected to affected offices are protected and not penalized. In running for a second term for an office, if the person's first term is extended, the extended term is only to be counted as one term, and a shortened term is not to be considered a term for the purposes of any limitation on the number of terms an officer may serve.

4. Addresses election cycle issues and increases efficiency.

Balancing the number of contests appearing on a ballot during alternating election cycles and implementing a standardized start date for all newly elected officers may help alleviate issues created by an overloaded or long ballot and increase efficiency in the state's administration of elections and training. An overloaded or long ballot may result in longer lines at the ballot box and voter fatigue when there are "too many" offices up for grabs. A more balanced ballot could provide voters with a better opportunity to educate themselves about the candidates and their positions, and therefore make more informed choices. A balanced ballot could also create the perception among voters that there is an equal number of important races during alternating election cycles, thereby increasing voter turnout. In addition, balancing the number of contests appearing on a ballot between election cycles and implementing a standardized start date for all newly elected officers may increase efficiency by allowing the state to plan for, organize and carry out the election and training of statewide and non-statewide officers at the same time.

► ARGUMENTS AGAINST

1. Expands the legislature's constitutional power over election policy and requires use of legislative findings that are not typical of constitutional provisions.

The proposed amendment expands the legislature's constitutional power over election policy issues and could be legally challenged. It requires a legislative finding that an adjustment is necessary "to provide for consistency in the timing of elections for that office or to balance the number of offices appearing on the ballot". While this provides some guidance, it may allow the legislature to amend terms for other reasons as long as the finding states that it is meant to provide for consistency or balance. This possibility for other motivating reasons demonstrates that the finding requirement may not be as exacting as it may appear. Furthermore, this finding requirement does not exist in any other provision of the Constitution of New Mexico and is generally at odds with legislative style.

2. May not be narrowly tailored to address the problem the proposed constitutional amendment is trying to solve.

There are a small number of state, county and district positions throughout the state that may need to be aligned on the same ballot or staggered in different election cycles. The proposed constitutional amendment may be overly broad and not sufficiently tailored to address the problem it is trying to solve. The constitutional amendment does not address only those offices that are in need of being aligned or staggered on the presidential or gubernatorial general election ballots, but it gives the legislature broad discretion to change the election cycle in which a state, county or district officer is elected, provided that the legislature includes the required finding in the legislation that adjusts the election cycles.

3. Shortening or lengthening of terms may be inequitable.

As a result of this amendment, some incumbent officeholders will gain an extra two years in office, while others will serve terms that expire two years early for reasons unrelated to their performance. Incumbents seeking reelection after a shortened term could be disadvantaged by the adjustment because they will have had only two years in office to accomplish their goals, gain constituent support and prepare for a reelection campaign. Additionally, during the period when election cycles are being synchronized, term limits will not apply to the affected offices. At the time of an election, voters elect candidates and candidates run for office with the expectation that the winner will serve a four-year term and that term limits will apply. Whether an incumbent's term is shortened or extended, the end result may implicate the

democratic process and may be inequitable to both voters and officeholders because it occurs retroactively after the officer has been elected. This amendment may undermine their expectations and act against their interests.

4. Benefits to voters are unclear.

Proposed changes to election policy require careful scrutiny; in particular, assessing whether and how the changes would affect voters' ability to participate in the election process. This amendment does not provide any clear benefit to voters. Whether all New Mexico voters are scheduled to vote for their county or district officers during the same election cycle serves no purpose for voters. The residents of a county or a district are the only voters who are eligible to participate in an election for officers of the county or district, and are, therefore, unaffected by the outcomes of corresponding contests held in other parts of the state. Without evidence that the existing election cycle distribution burdens voters, there is no clear justification for a constitutional amendment that would allow a change to the status quo.