



Legislative Background Paper
for the
State Administration and Veterans Affairs' Interim Committee
2013-14 Interim

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HJR 1 Study:
Legislative History on the
Office of the Commissioner of Political Practices

Structure of Office and Scope of Duties

Purpose

The purpose of this briefing paper is to provide historical context to the committee's examination of the Office of the Commissioner of Political Practices (Commissioner) under the House Joint Resolution No. 1 study so that members of the State Administration and Veterans' Affairs Interim Committee (SAVA) may better understand why and how the laws concerning the Commissioner's nomination and appointment and the structure and power of the office evolved as they did.

Butte's Copper Kings

Montana's colorful history of political corruption during the turn of the last century financed by the Copper Kings of Butte is well-known. A Historical Society introduction to the book "The War of the Copper Kings" by C. B. Glasscock summarizes the state of Montana's politics at the time as follows:

Those who controlled the copper mines stood to make billions of dollars, the prize sought by three men who fought for Butte's mineral wealth with greed and generosity, cruelty and compassion, cowardice and courage. In this astonishing battle, they used their fabulous wealth to buy courts, newspapers, politicians, banks, police, and anything and anyone that could help them or hinder their opponents. To get what they wanted, their money flowed like snowmelt throughout the mile-high city and eventually reached the nation's capital.

As noted in a 2012 Montana Law Review Article, the 1899 election of Copper King William Andrews Clark to the U.S. Senate is the most notorious example of Montana's political corruption. At that time, U.S. Senators were elected by state legislatures. Clark is reputed to have spent millions of dollars to brazenly buy the votes of Montana legislators and thus his U.S. Senate seat.

However, the U.S. Senate Committee on Privileges and Elections investigated the many charges of corruption that were made and ultimately concluded that Clark's election should be declared void. Clark resigned rather than battle the committee's findings, but the seismic waves from the far-reaching effects of political corruption in Montana led to numerous laws aimed at cracking down on political corruption, not only in Montana, but throughout the nation.¹

1912 - Montana Corrupt Practices Act - County Attorneys to Enforce

Reeling from this tide of political corruption, Montana voters attempted to take back their government from the Copper Kings and passed a 55-section statutory initiative known as the Montana Corrupt Practices Act of 1912 (Act). This Act, although it has been substantially updated along the way, forms the core of Montana's campaign practice laws still in statute today.

When the Act took effect in 1913, it provided that the election administrators (i.e., the Secretary of State for statewide offices and local town, city, or county clerks and recorders for local offices) were responsible for monitoring compliance with the Act. Under the Act, any person could initiate a complaint with the election administrator. A complaint had to be in writing, be sworn to, and detail the grounds for the complaint. If an election administrator received a complaint or found irregularities in reports to be filed with the administrator's office, the administrator was required to investigate and "forthwith in writing notify the delinquent person"². If the alleged violator failed to comply within 10 days of notification of the violation, the election official was required to "forthwith"³ contact the appropriate county attorney and provide the county attorney with all the papers relating to the case. The county attorney had 60 days to review the case and either dismiss it or proceed with a civil or criminal action against the alleged violator.

The Act also prohibited a person from accepting, receiving, or paying money or "any valuable consideration for becoming or for refraining from becoming a candidate".⁴ The Act provided that anyone could make a complaint of corruption to any district judge. If the judge was convinced that such bribery had taken place, the judge could direct the county attorney to institute criminal proceedings against any and all persons involved in the corrupt practices. A testament to how frustrated the citizens of Montana had become with the Copper Kings and their cohorts purchasing

¹ Larry Howell, "Once Upon a Time in the West: *Citizens United*, *Caperton*, and the War of the Copper Kings", 73 Mont. L. Rev. 25 (2012).

² Laws of Montana 1913, p. 601. Citizen Initiative, Montana Corrupt Practices Act of 1912, Sec. 14.

³ Ibid.

⁴ Ibid, p. 609, Sec. 37.

political officials, the Act specified that if a county attorney failed to prosecute the case (i.e., to "faithfully perform any duty imposed"⁵ under the Act), the county attorney could be charged with a misdemeanor punishable by forfeiture of the office and by a fine or imprisonment, or both.⁶ Requiring a county attorney to prosecute and threatening civil and criminal penalties for failure to do so was probably not constitutional. But, this provision in the 1912 initiative language seems to be a testament to the level of frustration Montana citizens felt against public officials who failed to do anything to curb blatant acts of political corruption.

1975 - Commissioner of Campaign Finances & Practices

A comprehensive overhaul of Montana's campaign laws came in 1975, when Senator Mike Greely, who later became Montana's Attorney General, carried Senate Bill No. 76. The bill was part of a package of three election reform bills aimed at consolidating and updating the Corrupt Practices Act of 1912. Senate Bill No. 76 revised and reordered existing sections but also enacted several new campaign practices provisions.⁷

Commissioner to be appointed by legislators

Among the bill's new provisions was the creation of the position of a Commissioner of Campaign Finances and Practices (Commissioner). The Commissioner was given the powers and duties previously assigned to the election administrators. The bill provided for the appointment of the Commissioner as follows:

- the Commissioner was to be appointed by a majority of a four-member legislative selection committee, which consisted of the;
 - speaker of the House;
 - president of the Senate;
 - minority leader in the House; and
 - minority leader in the Senate.
- the Montana Supreme Court was to appoint a fifth member to the selection committee if there was a tie vote;
- the Commissioner's term was set at 5 years, the Commissioner could not be reappointed, and the person was precluded from being a candidate for public office for 5 years after the person's term as Commissioner expired;

⁵ Ibid.

⁶ Ibid.

⁷ Ch. 480, L. 1975.

- the Commissioner could be removed by legislative impeachment; and
- the Commissioner's office was administratively attached to the Office of the Secretary of State.

A motion to amend the bill to provide that the Secretary of State would appoint the Commissioner failed in the Senate State Administration Committee by a vote of 5 to 2, but there is no record of substantive debate about this idea.⁸

Commissioner authorized special prosecutors

Under Sen. Greely's 1975 bill, the Commissioner was given the authority to hire or retain attorneys who were empowered to act as special prosecutors. County attorneys retained concurrent jurisdiction to prosecute violations but could waive their right to prosecute. The bill provided that if the county attorney declined to prosecute, the commissioner could initiate the prosecution.

Proponents and opponents

Proponents at the bill included a representative of Governor Tom Judge's office, the AFL-CIO, the League of Women Voters, the state Democratic Party, and Secretary of State Frank Murray. The lone opponent, who appeared only during the senate hearing, was a representative of the Montana Chamber of Commerce who argued that the office would become a "super office" and the Commissioner was being given "super powers".⁹

1979 - Governor to Appoint

Legislators to nominate

During the 1979 regular legislative session, Rep. Ralph Eudaily (R-Missoula) introduced House Bill No. 456, revising campaign laws. According to the minutes of the committee hearings, HB 456 was one of several bills produced by the Interim Subcommittee on Legal Services and Election Laws. The bill provided that the governor rather than the legislative committee would appoint the Commissioner, though the Governor's appointment was subject to Senate confirmation. Under the bill, the four-member legislative committee was transformed into a nomination committee. The nomination committee was required to submit "a list of not less than two or more than five names of individuals for his [the Governor's] consideration".¹⁰ The bill also provided that a "majority of the members of the

⁸ 44th Legislature, Senate State Administration Committee, Minutes, Feb. 15, 1975.

⁹ Ibid.

¹⁰ Sec. 1, Ch. 483, L. 1979.

selection committee shall agree upon each nomination".¹¹ The bill also changed the Commissioner's term of office from 5 years to 6 years. These provisions have not been substantially changed since 1979 and so remain current law.

Separation of powers at issue

According to the summary minutes available from committee hearings on HB 456, there had been a state district court decision arising out of an alleged violation of the campaign laws in Missoula County.¹² Although the case was dismissed and there is nothing in the court's decision concerning appointment powers, testimony during the hearings on HB 456 and a report to the governor by the Commissioner imply that, during the course of that case, concerns arose about the method of the Commissioner's appointment. The concern was that the legislative appointment of the Commissioner and the Montana Supreme Court's role in appointing a member to the selection committee to break tie votes could be unconstitutional because legislators and the Montana Supreme Court were being given powers that properly belonged to the executive branch under the separation of powers doctrine. This concern could be why the bill not only provided for the Governor to make the appointment but also struck the provision that the Montana Supreme Court would appoint a fifth member to the legislative committee to break a tie vote. At any rate, although the Montana Supreme Court's role was stricken, the bill did not make any substitute provision for breaking a tie vote in what became the four-member nominating committee.

1980 - Initiative No. 85 - The Lobbyist Disclosure Initiative

Legislation failed, citizen initiative passed

After legislation proposed to tighten Montana's lobbying disclosure laws in 1977 and 1979 failed,¹³ a group called Montanans for Lobbying Disclosure¹⁴ successfully petitioned to place their Lobbyist Disclosure Initiative on the November 1980 ballot. The initiative passed 259,698 votes to 76,358 votes.¹⁵

Lobbying and ethics duties become Commissioner's

Under the initiative, the Commissioner rather than the Secretary of State became

¹¹ Ibid.

¹² *State v. Matthews*, 183 Mont. 405, 600 P.2d 188 (1979).

¹³ Legislative Services Division, History and Final Status, 1977 and 1979.

¹⁴ Newspaper Archive of The Mountaineer, Big Sandy, Montana, November 29, 1979, p. 3.
<http://mou.stparchive.com/Archive/MOU/MOU11291979P03.php>

¹⁵ Montana Office of Secretary of State.

responsible for the administration and enforcement of Montana's lobbying laws contained in Title 5, chapter 7, of the Montana Code Annotated (MCA). The initiative also required elected officials to file business disclosure statements with the Commissioner under a statute now codified in Title 2, chapter 1, MCA. This chapter of code governs ethical conduct by elected officials, appointed state officials, and public employees. Finally, the initiative changed the title of the Commissioner's office from Commissioner of Campaign Finances and Practices to the Commissioner of Political Practices.

2005 - Qualifications and Restrictions for Holding Office

During the 2005 Legislative Session, Rep. John Sinrud (R-Bozeman) introduced House Bill No. 386, which, as passed:

- required the Commissioner to be a U.S. citizen, a resident of Montana, and a registered voter;¹⁶ and
- prohibited the Commissioner from:
 - holding any other position of public trust or engaging in any other occupation or business that interferes with or is inconsistent with the duties of the office;
 - participating in any political activity or campaign during the Commissioner's term of office;
 - making contributions to support or oppose a candidate, political committee, or ballot issue;
 - attending any political fundraising event;
 - participating in any matter that results in a real or perceived conflict of interest or that involves a relative.¹⁷
- required that a decision by the Governor to remove the Commissioner must be stated in writing and that the removal was subject to judicial review;¹⁸
- eliminated the provision prohibiting the Commissioner from being a candidate for public office for 5 years after leaving office as Commissioner;¹⁹

¹⁶ Section 13-37-107, MCA, enacted by Sec. 1, Ch. 479, L. 2005.

¹⁷ Section 13-37-108, MCA, enacted by Sec. 2, Ch. 479, L. 2005.

¹⁸ Amendment to section 13-37-102(2), MCA, by Sec. 5, Ch. 479, L. 2005.

¹⁹ Amendment to section 13-37-103, MCA, by Sec. 6, Ch. 479, L. 2005.

and

- required the Commissioner to recuse himself or herself in matters where there could be a real or perceived conflict of interest and to appoint a deputy who meets the qualification criteria.²⁰

One proponent testified in the House State Administration Committee hearing. No one testified in opposition. The Commissioner of Political Practices, Gordon Higgins, testified as an informational witness.²¹ No proponents, opponents, or informational witnesses testified during the Senate State Administration Committee hearing.²² The bill received third-reading votes of 84 to 16 in the House and 50 to 0 in the Senate.²³

In Summary

Originally, under the Corrupt Practices Act of 1912, the Secretary of State and local election administrators monitored compliance with campaign finance disclosure laws, while county attorneys prosecuted alleged violations. Complaints of political corruption and bribery could be made by anyone directly to a district court judge. If a county attorney failed to prosecute when a judge directed the county attorney to prosecute, the county attorney could be charged with a misdemeanor for failure to faithfully execute the duties of the office and be forced to forfeit office.

A bill by Sen. Mike Greely established the Office of Commissioner of Campaign Finances and Practices in 1975. The bill also substantially revised and updated the Corrupt Practices Act. Under the bill, the Commissioner was to be appointed by a four-member legislative committee and was given the powers to receive complaints, investigate, and issue orders of noncompliance, which were previously in the hands of election administrators. County attorneys retained jurisdiction to prosecute but could waive that right. If the county attorneys declined prosecution, attorneys hired or contracted by the Commissioner could become special prosecutors.

Concern over the 1975 law's method of appointing the Commissioner led to a bill by Rep. Eudaily in 1979 to change the law so that the Governor would appoint the Commissioner, subject to Senate approval. The four-member legislative selection committee was changed to a nominating committee, but the Governor was not required to appoint a person who the committee nominated. The Supreme Court's

²⁰ Amendment to section 13-37-111, MCA, to create new subsections (3) through (5) by Sec. 7, Ch. 479, L. 2005.

²¹ House State Administration Committee, Minutes, Feb. 4, 2005.

²² Senate State Administration Committee, Minutes, April 1, 2005.

²³ Legislative Services Division, History and Final Status, 2005.

role in appointing a member to the four-member committee to break ties was also axed.

A citizen initiative in 1980, the Lobbying Disclosure Act, substantially tightened regulations on lobbyists and those who hired them, and handed the job of enforcing those laws to the Commission. The initiative also gave the Commissioner the responsibility to enforce ethics laws and created a new requirement that public officials file business disclosure statements. Under the initiative, the Commission's title was changed from Commissioner of Campaign Finances and Practices to the Commissioner of Political Practices.

Qualifications and restrictions were added to the law in 2005 as a result of a bill brought by Rep. John Sinrud. The bill provided that the Commissioner had to be a U.S. citizen and registered voter in Montana, prohibited the Commissioner from holding another public or private job that would interfere with the Commissioner's performance of duties, and required the Commissioner recuse himself or herself if the Commissioner had a real or perceived conflict of interest in a case.

Understanding this evolution of current laws governing the structure of the Commissioner's office and the scope of the Commissioner's jurisdiction will inform SAVA's HJR 1 study on whether and how to further revise the Commissioner's office and authority.

Attachment 1 - Montana Corrupt Practices Act of 1912

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