

A Quick Look at What Happened in New Mexico

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Copyright © 1997 by Richard L. Grossman. This memo responded to a request of the author to provide critical analysis of, and suggest responses to, then current legislation for a constitutional amendment in New Mexico, known as House Joint Resolution 16. The legislation sought to amend the New Mexico constitution to abolish the state Corporation Commission (whose members were elected by the public) and replace it with a single regulatory agency administered by the legislature. [*] This excerpt includes three of the six sections of that analysis.

Defining vs. Regulating

Through most of the nineteenth century in the U.S., the mechanisms people used to define corporations were:

- Actively debating and redefining the society's values and principles -- including the basic concept that corporations were subordinate entities with no role in the mechanics of democracy (elections, law-making, jurisprudence, and education on values and public policy).
- Writing, issuing, amending and enforcing corporate charters.
- Writing, amending and enforcing state corporation codes and state constitutional provisions.
- Convening *quo warranto* ("by what authority") hearings to dissolve corporations which had become cancers upon the body politic.

By World War I, corporations had by and large replaced these mechanisms of *sovereignty* with administrative statutes they wrote which conceded fundamental civil and property rights to corporations, and aspired only to control corporate excesses, to regulate some of their behaviors. These laws instructed governments -- often through regulatory and administrative commissions -- to do the corporations' heavy lifting.[1]

Consequently, the people's authority to *define* the nature of our corporate bodies was replaced with rules which sought instead to *regulate* corporations' behavior, one harm at a time, and usually after the fact. We see the results of this in regulatory commissions -- from public utility commissions to the Federal Communications Commission, Securities and Exchange Commission, Environmental Protection Agency, National Labor Relations Board, etc., which serve as barriers between the corporations and the people. (In Pennsylvania, the Department of Environmental Protection actually calls the regulated corporate polluters -- not people, flora and fauna -- their "clients.")

During the twentieth century, corporations worked diligently to divert movements for justice from taking their struggles into political arenas of authority -- of sovereignty -- to prevent people from using the *defining* mechanisms (like constitutions) to strip corporations

of their privileges and immunities. In New Mexico in 1998, it is obvious that the corporations are still hard at work.

Comparing Language, Then and Now

The reader can compare the language of the 1912 constitution and the amendment and consider the implications of these changes.

A. It is essential to know some recent history here: When was the last time the various (for example, insurance, communications, transportation, banking, energy, etc.) New Mexico corporation codes were rewritten, amended, or modernized? What institutions and persons were behind *those* efforts in New Mexico?

In many states, energy corporations are busy rewriting energy codes; telecommunication corporations are rewriting *their* laws. What institutions and persons were/are behind this current effort?

Over the past half-century, large corporations, with the assistance of the American Bar Association, have been orchestrating rewrites of state corporation laws, under the banner of "modernization." [2] Usually, these efforts receive very little publicity, with no or *pro forma* public hearings, with the heavy work having been done quietly and behind the scenes (often by "liberal" attorneys and law professors). Their productions resemble this legislation: long, with no index or table of contents, consumed with details. The citizenry in general are not involved in planning or writing the new laws.

William Greider, in his 1993 book *Who Will Tell the People*, coined the phrase "deep lobbying":

The larger point is that an informal alliance [is] formed by important players . . . to massage a subject several years before it would become a visible political debate . . . [T]he process that defines the scope of the public problem is often where the terms of the solution are predetermined. That is the purpose of deep lobbying -- to draw boundaries around the public debate.

It is likely that the constitutional amendment and this draft legislation are the result of just such deep lobbying by major New Mexico corporate officials and their associates and hirelings.

B. The original state Corporation Commission created by the constitution of 1912 had some constitutional authority independent of the legislature. For example, it had the "right at all times to inspect the books, papers and records of all such companies and common carriers doing business in this state," and to require from them "special reports and statements, under oath, concerning their business." [3] It was the duty of the commissioners to be informed about rates and charges and to take appropriate action when the public welfare was involved.[4]

The new commission will be totally a creature of the legislature: "The public regulation commission shall have responsibility for chartering and regulating business

corporations in such manner as the legislature shall provide."[5]

How did the original language get into the New Mexico constitution? What was going on at the time of statehood that Article XI was inserted in the constitution? Who organized and mobilized to get some of this defining language into the document?

Did the old state Corporation Commission ever use its authority to advocate for the people? Did it ever support the public against the power and wealth of great corporations doing business in New Mexico? Was there an opportunity for environmental justice, labor and low-income activists to take over the Commission, and to use its constitutional authority to bring about meaningful changes in the rights and powers of New Mexico corporations?

C. Over the past few years I have suggested to friends in New Mexico that campaigns to elect people's commissioners to the old state Corporation Commission could serve as organizing vehicles for raising basic questions about the illegitimacy of the modern large corporation. Such campaigns could educate and mobilize people (and then state power) to define the corporation as a subordinate entity, without legal authority to shape public policy, influence elections, law-making and education, and the culture in general.

Imagine such a campaign. Imagine a majority of new commissioners opening their tenure by:

- Demanding that Intel, and other large corporations operating in New Mexico, surrender all their books and records.
- Scrutinizing past charters and licenses to foreign corporations.
- Convening public hearings about corporations and democracy.
- Issuing subpoenas to corporate executives to testify and supply essential corporate information.
- Prescribing the form of all corporate reports.
- Carrying out "all the provisions of this constitution relating to corporations and the laws made in pursuance thereof."[6]

The new commission, as cumbersomely constituted in the draft legislation, will not offer a like opportunity: instead it will be a giant, all-purpose bureaucracy focusing on regulating corporate behaviors. This draft law is quintessential "regulatoryese," administrative legalese. It is endlessly procedural, as will be the new agency it brings into being. There are no values here, no reflections on relationships, on historical evolution.

Life, health, wealth and democracy will be shaped by this piece of legislation . . . yet the language here is as antiseptic as can be.

Concluding Thoughts

Given that few New Mexican activists seemed knowledgeable about the old Corporation Commission, or sought to explore and invoke its constitutional authority and helpful precedents, the changes brought about by the constitutional amendment and the reorganization of regulatory bureaucracies probably will not make a hell of a lot of

difference as to how things work. The relationship between large corporations, the state and the people will continue to be defined and dominated by the corporations.

What concerns me is that a major restructuring of the way New Mexico will deal with its people, and with corporate existence and behavior, has been under way for quite some time with (I've been led to believe) hardly any public input or awareness; that activists have not regarded this process as important, and therefore have not forced their way into it. They have not prepared by digging up relevant history and learning the law. Nor have they sought to take the offensive by using this amending or rewriting process as an opportunity to instigate a different debate about the proper relationship between the people of New Mexico and the corporate bodies they allow into their state.

Clearly, some people and organizations have gone to great lengths to arrange for the state constitution to be amended, and to restructure the regulatory agencies as they see fit. It looks as if they pretty much have had a free hand, and that they will get just what they wanted.

For environmental justice and other activists at this late date to inject values, principles and definitions establishing the proper subordinate role of corporations in a democratic New Mexico, and asserting the proper sovereign role of people in this entire revision and future governing, will be a stretch. This is because the forces behind the scenes have obviously greased a great many skids via well-planned deep lobbying, and now have the momentum. The new draft legislation -- without an index, without a table of contents -- is a study in administrative and procedural minutiae. But it is possible, and I believe essential, for people interested in New Mexico's future to interrupt the corporate steamroller by forcing debate on the core issues glossed over during this process:

- What was going on in New Mexico in 1912 that people were able to get strong provisions subordinating corporations in the New Mexico constitution? What is the history of corporations, corporate law, and human opposition to corporate concentration of power in this state?
- Who should be in charge in New Mexico, the people or the corporations?
- What will be the mechanisms for We the People *defining* all corporations which seek to do business in the state? The new commission will essentially be a permitting agency, occasionally addressing specific corporate behaviors, after the fact and no doubt over and over again. OK, so who in the state is going to define corporate nature? Or do we just leave that to the corporate lawyers and public relations experts?
- Our states' elected officers are not empowered to create corporations (or help existing corporations) to cause harms to life, place, species or democracy. So, how will your state deal with corporations which persist in causing harms? (In other states, for example, corporations which have been convicted time after time of violating labor, environmental and other regulatory law cite these convictions as "proof" that the regulatory system works. [7] Which activist groups are prepared to challenge this insanity?)
- Corporations should not be regarded as persons under the law, with the ability to lobby, participate in elections, influence education and public policy, to shape the culture of the state.
- What about labor, environmental and other organizations of people? Why should they

have fewer rights than the organizations of capital?

Without intentional efforts to educate and create a ferment around fundamentals, what has been a corporate-controlled process from the beginning will produce the desired corporate result, with no increase in public awareness, or will, or practical authority. Activists will experience this in the years ahead when they appeal to the new regulatory commission for justice.

What could have been an occasion for a statewide ferment about democracy and the institutions people create or allow will pass into history as having resulted in yet one more efficient "modernization" of law and regulation.

And in the future, when people realize that the harmful behaviors of giant corporations are forever, and start mobilizing to define corporate natures as limited and subordinate, plenty of official voices will be able to reply: "You had your chance. There was a constitutional amendment on the ballot for you people to discuss and vote on; new legislation was circulated across the state, and then voted on by the people's representatives. Where were you? We've *done* corporations." And the new regulatory commission will loom large before you.

I therefore suggest that some organized group or groups begin agitating for statewide teach-ins on the nature and role of giant corporations created in our names, or allowed to do business in our states; for public hearings across the state on the nature and role of giant corporations; and for a large-scale public offensive -- centered around *people's* draft legislation limiting the civil, political and property rights of corporations which do business in New Mexico -- as a counter to the current 94 page draft drivel.

Please note that I am not proposing arguing over the procedural minutiae that characterizes the draft legislation. Indeed, contesting its procedural and explanatory minutiae would be like punching a marsh mallow, and end up being an extraordinary waste of time and energy.

Rather, activists can provoke discussion and debate around the big issues of We the People: self-governance, democracy, and our responsibility as sovereign people not to allow the subordinate institutions we create from destroying the vital legacies of the people who struggled before us; from overpowering the body politic, the land, and future generations.

There are ample precedents across the nation -- and no doubt in New Mexico and across the southwest -- for such an offensive. There are even major and potentially powerful historical traditions -- which courts once respected -- against granting to corporations governing powers. For example, the United States Supreme Court, in *West Virginia State Board of Education v. Barnette*, 1943, noted that:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all its creatures . . . There is no mysticism in the American concept of State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

In *Nebbia v. New York*, 1934, the U.S. Supreme Court declared:

Under our form of government, the use of property and the making of contract are normally matters of private and not of public concern. The general rule is that both shall be free of government interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows; or exercise his freedom of contract to work harm . . . The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people . . .

In *Railroad Co., v Collins*, a late nineteenth century decision, the Supreme Court of Georgia noted that:

All experience has shown that large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar faculties for such accumulation, and most governments have found it necessary to exercise great caution in their grants of corporate powers. Even religious corporations, professing and in the main, truly, nothing but the general good, have proven obnoxious to this objection, so that in England it was long ago found necessary to restrict them in their powers of acquiring real estate. Freed, as such bodies are, from the sure bounds to the schemes of individuals -- the grave -- they are able to add field to field, and power to power, until they become entirely too strong for that society which is made up of those whose plans are limited to a single life . . .

Without awareness and action by people in our communities and states, such lofty statements of principle -- and the alleged laws of the land -- are nothing but empty words.

There is still an opportunity here. But without intentional preparation and intervention, future efforts for justice in New Mexico will be made more difficult by the freedom given to corporations to amend your constitution and erect great bureaucratic barriers against democracy and self-governance.

Notes

- * House Joint Resolution 16, 42nd Legislature - State of New Mexico - Second Session, 1996. Introduced by Robert A. Perls. A Joint Resolution Proposing to amend Article 11 of the constitution of New Mexico by abolishing the state Corporation Commission and creating a single regulatory agency for corporations, public utilities, transportation companies, transmission and pipeline companies, insurance companies and other public services as provided by law. HJR16 Title: SINGLE REGULATORY AGENCY, CA, PDF copy.
- 1. Kolko, Gabriel. *The Triumph of Conservatism: A Re-interpretation of American History, 1900-1916*. New York, N.Y.: Free Press of Glencoe, 1963. See also Weinstein, James. *The Corporate Ideal in the Liberal State, 1900-1918*. Boston, Mass.: Beacon Press, 1968.
- 2. For examples of "modernization" efforts in other states, see "Wrong Turn in Ohio: A Wake-up Call for Other States" and "The Corporate Crunch In Vermont: Taking Care of Business" in this volume. --Ed.
- 3. Article XI section 11 of the 1912 New Mexico Constitution.
- 4. Article XI section 9 of the 1912 New Mexico Constitution.
- 5. Section 3 or the proposed amendment.
- 6. Article II, section 6 of the 1912 New Mexico Constitution.
- 7. See endnote 5 (Editorial from *The Nation*, December 1, 1997, p.4) of "Some Lessons Learned" in this volume. --Ed.