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The Aftermath of Governor McDonnell’s Corruption Trial: Proposing Comprehensive Ethics Reform in Virginia

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The Aftermath of Governor McDonnell’s Corruption Trial: Proposing Comprehensive Ethics Reform in Virginia

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**ABSTRACT**

On September 4, 2014, a federal court convicted former governor of Virginia Bob McDonnell of eleven counts of corruption, bribery, and fraud for accepting over $165,000 worth of gifts and loans from the CEO of a local company. The egregious actions that led to these federal criminal convictions, however, were startlingly “legal” under Virginia’s ethics laws. The disparity between federal criminal standards and Virginia’s ethics standards illustrates the severe inadequacies that plague Virginia’s current system of ethics laws. Virginia’s absence of appropriate ethics laws and enforcement led to the state’s failing State Integrity Investigation grade, and the public acknowledgment by Governor McAuliffe that these glaring shortcomings in the commonwealth’s ethics laws cannot persist.

This Article proposes a comprehensive ethics reform that would address two particularly egregious failings in Virginia’s ethics laws. First, this Article proposes the adoption of a permanent and independent ethics commission to oversee and enforce the state’s ethics laws. To parse out the details of the proposed ethics commission, this Article draws upon examples of comprehensive and effective ethics commissions in states throughout the nation. Second, this Article proposes the adoption of stricter regulations on the type of gifts Virginia’s government officials may accept, citing the comprehensive federal ethics rules as a model.
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I. **INTRODUCTION**

Former Virginia Governor Bob McDonnell and his wife Maureen bowed their heads and wept as the word “guilty” poured from the court clerk’s mouth.\(^1\) A federal jury convicted the couple of twenty counts of corruption, fraud, and bribery for illegally accepting over $165,000 of gifts and loans from the CEO of a local company.\(^2\) This is not the only widely publicized political scandal in Virginia’s recent history. Last year, the Washington Post revealed that Virginia’s Attorney General Ken Cuccinelli also accepted $18,000 worth of gifts from the same CEO, including vacation getaways, family holidays at a luxurious estate, and an extravagant Thanksgiving dinner.\(^3\) In 2009, shortly before the Cuccinelli and McDonnell debacles, a federal Judge convicted Virginia Assemblymember Phil Hamilton of bribery and extortion for using his power as Vice Chairman of the House Appropriations Committee to channel funds to Old Dominion University (ODU) as a quid pro quo for securing a part-time teaching position there.\(^4\) Hamilton is currently serving a nine-and-a-half year prison sentence.\(^5\)

The most troubling aspect of these political scandals is that although the egregious conduct amounted to fraud, corruption, bribery, and extortion under federal criminal laws, the activities were all legal under Virginia’s ethics laws. The disparity between federal criminal laws and Virginia’s ethics laws sheds light on how desperately Virginia needs more-robust and

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\(^2\) O’Dell, supra note 1; Bob McDonnell’s Trial, supra note 1.


\(^5\) Galuszka, supra note 3.
Comprehensive ethics standards. Section II of this Article highlights two particularly problematic aspects of Virginia’s ethics laws that allowed these scandals to occur and uses comparisons to laws in other states and at the federal level to illustrate Virginia’s shortcomings. Section III proposes a comprehensive ethics reform for Virginia to undertake, which includes the creation of a robust oversight and enforcement body and the adoption of stricter regulations on gifts that Virginia’s state officials may accept. Section IV concludes with a brief warning about what Virginia’s political future could look like absent such a reform.

II. INADEQUACIES IN VIRGINIA’S CURRENT ETHICS LAWS

The breadth and depth of state ethics rules vary widely across jurisdictions, but all ethics laws share the common goal of promoting public trust in the government by regulating interactions with government officials that could lead to actual or apparent corruption. Every state in the nation codifies ethics standards that govern conduct of government officials in that particular state. Some states codify their ethics laws in statutes and others enshrine ethics standards in the state’s Constitution. Some states model their ethics laws on the federal government’s standards, and others tailor them to the particular state. Because of the variations between state ethics codes, some are more robust and effective than others. The State Integrity Investigation, for example, grades states from A to F according to which ethics laws most

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8 For example, in Oklahoma, ethics provisions are found in Article XXIX of the State Constitution. See Oklahoma Legislature’s Web site, http://www.oklegislature.gov/.
9 For links to the different state ethics laws throughout the nation, see National Conference of State Legislatures, supra note 7.
10 The State Integrity Investigation is a data-driven analysis of each state’s laws and practices that deter corruption and promote accountability and openness. Experienced journalists graded each state government on its corruption risk using 330 specific measures, and then ranked every state from 1 to 50. See State Integrity Investigation website, http://www.stateintegrity.org/about.
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effectively reduce abuses of power, corruption, and betrayal of public trust.11

The Hamilton, McDonnell, and Cucinelli scandals offer glimpses into Virginia’s ineffective ethics laws. The State Integrity Investigation gave Virginia’s ethics laws an “F” grade, remarking that “the state lacks the necessary oversight… [and w]hile other states have made efforts to ensure accuracy, often with the creation of an independent commission, Virginia’s legislators are mostly left to police themselves.”12 Virginia Governor McAuliffe recently cited the state’s failing State Integrity Investigation grade as “one of the many warnings the state has received on its mediocre record on accountability and transparency.”13 Local Newspapers and critics explain that “[a]ctivities illegal elsewhere are legal [in Virginia] simply because the law is silent or sieved with loopholes.”14 This Section provides an overview of two specific areas of Virginia’s ethics laws that are particularly problematic: the absence of an ethics enforcement and oversight body, and the absence of a comprehensive and effective set of rules to govern what type of gifts state officials may accept.

A. ETHICS OVERSIGHT AND ENFORCEMENT BODIES

Ethics enforcement bodies are the first line of defense in protecting the public’s trust in its government. An ethics enforcement body is not sufficient to combat corruption on its own—comprehensive ethics laws are also necessary—but the quality of ethics laws mean little without

11 See id.
12 Caitlin Ginley, States of Disclosure, Louisiana, Mississippi Movin’ Up; 20 States Still Flunk, CENTER FOR PUBLIC INTEGRITY (June 24, 2009), http://www.publicintegrity.org/investigations/states_of_disclosure/articles/entry/1428 #continue.
an independent entity that investigates and enforces them.\textsuperscript{15} Perhaps unsurprisingly, the state with the highest overall Center for Public Integrity grade in the nation is also the state with the most robust enforcement system; New Jersey.\textsuperscript{16} Part of the reason for New Jersey’s successful enforcement ranking is the state’s use of an independent ethics commission that possesses a variety of enforcement powers.\textsuperscript{17} Ethics commissions throughout the country vary significantly, but the mere presence of an ethics commission, regardless of its particular form, significantly bolsters ethics compliance due to its constant and authoritative presence.\textsuperscript{18}

Virginia is one of only ten states\textsuperscript{19} in the nation that does not have an independent ethics commission.\textsuperscript{20} Instead, Virginia has an ethics committee.\textsuperscript{21} The Phil Hamilton scandal\textsuperscript{22} illustrates the futility of Virginia’s ethics committee, because Hamilton was able to use his trusted role in Virginia’s House Appropriations Committee to channel funds to a private university to secure himself a job right in front of the ethics committee’s dormant eyes.\textsuperscript{23} This Section discusses the inadequacies of Virginia’s ethics committee, explains how ethics commissions and ethics committees differ, and overviews the variations of state ethics commissions throughout the country.

\textbf{1. Inadequacies in Virginia’s Current Ethics Oversight Bodies}

Instead of creating an independent ethics commission to enforce and oversee its ethics

\textsuperscript{16} \textit{States of Disclosure, supra note 12}.
\textsuperscript{17} \textit{Id}.
\textsuperscript{18} \textit{Id}.
\textsuperscript{21} Piper, \textit{supra} note 20 at 13.
\textsuperscript{22} See Section I.
\textsuperscript{23} \textit{Id}.; Lessig & Payne, \textit{supra} note 4.
standards as most states have done, Virginia has a partisan ethics committee composed of elected officials with a very limited investigatory mandate.\textsuperscript{24} One significant shortcoming of Virginia’s ethics committee is that it may only institute investigations against current members of the legislature.\textsuperscript{25} As such, any ethics violations that Virginia’s executive or judicial branch officials commit, or violations by legislators that have since left public office, fall outside the committee’s jurisdiction.\textsuperscript{26} Additionally, Virginia’s ethics committee may only begin an investigation upon receipt of a signed and sworn complaint by a citizen of the state;\textsuperscript{27} the committee may not initiate investigations \textit{sua sponte}.\textsuperscript{28}

Once Virginia’s ethics committee receives a complaint from a citizen and completes an investigation, the committee’s only options are to dismiss the claim, refer findings to a Privileges and Elections Committee with recommendations,\textsuperscript{29} or refer findings to the Attorney General.\textsuperscript{30} Although the Privileges and Elections Committee can remove the transgressor with a two-thirds majority vote, and the Attorney General can choose an “action he deems appropriate,” the ethics committee itself has no such power.\textsuperscript{31} The committee also does not have authority to offer advisory opinions on the law, which inhibits the dissemination of standards and norms beyond the precise fact patterns the committee investigates.\textsuperscript{32} In sum, Virginia’s ethics committee is significantly limited in its ability to oversee and enforce the state’s ethics rules.

State officials have made several unsuccessful attempts to strengthen the power of

\textsuperscript{24} Piper, \textit{supra} note 20 at 15.
\textsuperscript{25} VA. CODE ANN. § 30-116 (2009).
\textsuperscript{26} VA. CODE ANN. § 30-116 (2009). In the case of Hamilton, he resigned after losing his bid for reelection, after which he fell outside the Panel’s jurisdiction, and was therefore only subject to criminal extortion charges for his quid pro quo with ODU. See Piper, \textit{supra} note 20 at 15.
\textsuperscript{27} See VA. CODE ANN. § 30-114 (2009).
\textsuperscript{28} Meaning on its own initiative. See VA. CODE ANN. § 30-114 (2009).
\textsuperscript{29} VA. CODE ANN. § 30-116(2).
\textsuperscript{30} The committee refers to the Attorney General if the committee believes the legislator being investigated \textit{willfully} violated the law. See VA. CODE ANN. § 30-114-116(3).
\textsuperscript{31} Piper, \textit{supra} note 20 at 16.
\textsuperscript{32} VA. CODE ANN. § 30-114 (2009).
Virginia’s ethics enforcement bodies. After the Hamilton scandal, Virginia’s legislature proposed several bills to strengthen the power of the ethics committee, none of which made it into law.\(^3\)

Governor McDonnell attempted a reform effort when he used the promise of an independent ethics commission as a platform in his 2009 gubernatorial campaign.\(^4\) Once voters elected McDonnell, however, he decided against the commission, claiming it was redundant with his creation of a state inspector general’s (IG) office.\(^5\) The IG’s mandate, however, is primarily to root out fraud, waste, and abuse in government, and the IG may only investigate ethics violations of government officials if the governor, attorney general, or a grand jury makes a request.\(^6\) As recent events demonstrate, these limitations on the IG’s authority are particularly problematic when the individuals violating ethics requirements are the individuals who should be requesting IG investigations.\(^7\)

Most recently, Virginia’s legislature passed Senate Bill 649 and House Bill 1211\(^8\) in response to the McDonnell corruption scandal, in another attempt to strengthen Virginia’s ethics enforcement and oversight capabilities.\(^9\) These laws, amongst other things, created a panel to review disclosures from elected officials and advise them on the legality of their actions.\(^10\) Although useful, the panel merely responds to state officials’ self-initiated inquiries and cannot


\(^{35}\) See Id. This is ironic considering McDonnell committed bribery and fraud right under the IG’s nose.


\(^{37}\) See, e.g., O’Dell, supra note 1.

\(^{38}\) The Bill summaries are contained in the Legislation Tracking website, http://leg1.state.va.us/cgi-bin/legp504.exe?141+sum+HB1211.


\(^{40}\) See id.
investigate or enforce any ethics violations independently. Thus, as it stands today, Virginia’s ethics oversight and enforcement system is one of the weakest in the nation.

2. Strengths and Variations Amongst State Ethics Commissions Across the Nation

It is important to examine the various types of ethics commissions states use throughout the country before proposing an effective ethics commission for Virginia to create. Ethics commissions vary across jurisdictions, but all commissions generally meet monthly to undertake investigations, hold hearings regarding alleged ethics violations, issue advisory opinions, and impose punishments for ethics violations. Regardless of variations between ethics commissions, ethics commissions in general pose several benefits over ethics committees. Ethics commissions are more independent because they consist of members of the public and gubernatorial appointees, whereas ethics committee members are partisan-elected officials. Ethics commissions also have a wide range of enforcement tools at their disposal, whereas ethics committees are merely investigatory and refer their findings to another body for adjudication. Most importantly, ethics commissions have a more-effective and intimidating presence because they conduct routine checks and *sua sponte* investigations, as opposed to merely meeting to respond to complaints.

In addition to ethics commissions differing significantly from ethics committees, ethics commissions vary widely amongst themselves in terms of composition, appointment procedures, etc.

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41 See id. In fact, the panel cannot even respond if an official goes against the panel’s recommendation. See id.
42 See *State Integrity Investigation* website, http://www.stateintegrity.org/about.
43 See Crider & Milyo, supra note 19 at 721.
44 See id. at 721; Piper, supra note 20 at 14; *National Conference of State Legislatures*, supra note 7.
45 *National Conference of State Legislatures*, supra note 7; Piper, supra note 20 at 14-15.
46 See infra next paragraph.
47 See Section II.A.1 (discussing the shortcomings inherent in Virginia’s ethics commission); Piper, supra note 20 at 16.
48 *National Conference of State Legislatures*, supra note 7; Piper, supra note 20 at 14-15.
49 See Section II.A.1; *National Conference of State Legislatures*, supra note 7; Piper, supra note 20 at 14-15.
term lengths, jurisdiction, and enforcement power. Some state ethics commissions have a combination of partisan members and members of the public, others have only members of the public, and still others have only partisan members with varying restrictions on how to split the membership down party lines. Twenty-eight states forbid their commissioners from holding other public office, office in a political party or campaign committee, or employment by lobbyist groups until their term on the commission ends. Some states bar commissioners from holding public office anywhere from one to five years before their commission term begins, and other states prohibit commissioners from assuming public office anywhere from one to three years after their commission term ends as well.

Another important variation between state ethics commissions is who appoints each commissioner, and how long each commissioner serves on the commission. In Delaware, for example, the governor appoints the members of the commission and the Senate confirms each appointee. In Oregon, the governor appoints three of the commission’s members, and Democratic and Republican leaders of the House and Senate recommend the other four members. Most states also stagger the terms of their commissioners to ensure retention of institutional knowledge. These staggered terms range from three years in Maine and

50 Mullen, supra note 15.
51 For example, commissions in Iowa, Missouri, Ohio, and Tennessee are evenly split between the two major parties. However, Colorado, Maine, Nevada, New Jersey, North Carolina, Oregon, and Texas merely require that no single party hold a majority of commission seats. See Crider & Milyo, supra note 19 at 721.
52 See Crider & Milyo, supra note 19 at 721.
53 For example, the Georgia State Ethics Commission eligibility requirements prohibit the appointment of anyone who has held federal, state, or local public office within the five-year period prior to appointment. GA. CODE ANN. § 21-5-4(d) (2003). Other states with such pre-appointment requirements include Connecticut, Maine, and Pennsylvania, with periods ranging from one to five years. CONN. GEN. STAT. ANN. § 1-80(b) (West 2000); ME. REV. STAT. ANN. TIT. 1, § 1002(2) (1989); 65 PA. CONS. STAT. ANN. § 1106(a) (West 2000).
54 For example, Missouri and Arizona. See MO. ANN. STAT. § 105.955 (West 1997); ARIZ. REV. STAT. ANN. § 38-504 (2001).
55 DEL. CODE ANN. TIT. 29, § 5808(b) (2003).
56 OR. REV. STAT. ANN. § 244.250 (West 2003).
57 See Crider & Milyo, supra note 19 at 721.
58 ME. REV. STAT. ANN. TIT. 1, § 1002 (Supp. 2004).
Pennsylvania,\textsuperscript{59} to six years in Iowa,\textsuperscript{60} Montana,\textsuperscript{61} and Ohio.\textsuperscript{62}

The jurisdiction of state ethics commissions vary as well. Although some states only permit their ethics commission to investigate and penalize transgressors who currently hold public office, other states allow their commission to proceed against transgressors even after they have left state service.\textsuperscript{63} For example, in New York, state employees remain subject to the jurisdiction of the ethics commission after leaving state service, so long as the commission's investigation begins within one year after the employee leaves public service.\textsuperscript{64} Although slower to follow suit, other jurisdictions lament the enforcement difficulties that occur when the commission’s jurisdiction ends after the government official leaves office.\textsuperscript{65}

Ethics commissions throughout the country also differ in enforcement capabilities. Common ethics commission enforcement powers include the ability to remove transgressors from office, disqualify them from future elections, impose future employment bans upon them, and require them to pay hefty fines or serve prison sentences.\textsuperscript{66} The range of civil and criminal penalties that state commissions impose range from $100 fines with no prison term in Wisconsin,\textsuperscript{67} to $10,000 fines with a maximum five-year term of imprisonment in Pennsylvania,\textsuperscript{68} to a $50,000 maximum fine in Oklahoma.\textsuperscript{69} In addition, unjust enrichment penalties include treble damages in Pennsylvania,\textsuperscript{70} and fines based on a percentage of the

\textsuperscript{60} \textsc{Iowa Code Ann.} § 68B.32(2) (West 1999).
\textsuperscript{62} \textsc{Ohio Rev. Code Ann.} § 102.05.
\textsuperscript{63} See \textsc{Crider \\& Milyo, supra} note 19 at 721.
\textsuperscript{65} See \textsc{Crider \\& Milyo, supra} note 19 at 721.
\textsuperscript{66} For example, in Ohio, a conviction based on a violation of ethics laws can result in disqualification from holding public office or employment for up to seven years. \textsc{See Ohio Rev. Code Ann.} § 2921.43(E).
\textsuperscript{67} \textsc{Wis. Stat. Ann.} § 19.58; 65
\textsuperscript{68} \textsc{Pa. Cons. Stat. Ann.} § 1109(a) (West 2000).
\textsuperscript{70} \textsc{Pa. Cons. Stat. Ann.} § 1109(c).
amount of unjust enrichment in Nebraska. Commissions that monitor financial disclosure forms also have penalty schemes for late filers, ranging from a one-time fee to a per-day fine. Lastly, ethics commissioners often have the power to impose punishments on fellow commissioners that violate their pre or post-commission employment bans. Regardless of these commission variations, the efficacy of ethics commissions tends to depend on the presence of at least some significant enforcement capability.

A brief look at New Jersey, which the State Integrity Investigation gave the highest “Ethics Enforcement” rank to, provides a valuable illustration of an effective ethics commission. New Jersey got its “A” State Integrity Investigation grade because of the state’s independent ethics agency with broad powers of investigation and a rigorous structure that prevents outside interference. New Jersey’s ethics commission consists of seven commissioners; four members of the public (not more than two of whom are of the same political party) that serve four-year staggered terms until the appointment of their successors, and three executive branch gubernatorial appointees, who serve until the governor appoints a successor. The Governor also picks which two public members will serve as chairman and vice-chairman of the commission. New Jersey’s ethics commission also has a unique toll-free hotline for

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71 NEB. REV. STAT. ANN. § 32-1612
72 The Ohio Ethics Commission imposes a $10 per-day late fine, up to a maximum of $250. OHIO REV. CODE ANN. § 102.02(F). Knowingly failing to file a financial disclosure form carries potential penalties of up to $1,000 and six months' jail time. Id. § 102.99. The Louisiana Ethics Administration Program imposes a $50 per-day fine, up to $1,500. LA. REV. STAT. ANN. § 42.1157(A)(5)(b) (Supp. 2005). The Hawaii State Ethics Commission imposes an initial fine of $50, plus a $10 per-day fine, with no maximum limit. HAW. REV. STAT. ANN. § 84.17(i).
73 Generally these punishments take the form of fines. $10,000 maximum per infraction is the national trend. See Piper, supra note 20 at 16.
74 See generally, Mullen, supra note 15.
75 Id.
76 Id.
77 State of New Jersey, State Ethics Commission, http://www.state.nj.us/ethics/about/.
78 Id.
79 Id.
anonymous complaints, which the commission only dismisses if “patently frivolous.”

This combination of independent commissioners, staggered terms, and anonymous complaints procedures plays a big role in New Jersey’s outstanding reputation in the area of ethics oversight and enforcement. Although a robust enforcement commission is vital to a functioning system of ethics laws, the substantive ethics laws that the state charges their commission with enforcing are similarly crucial.

B. ETHICS RULES GOVERNING GIFTS TO GOVERNMENT OFFICIALS

Stringent gift rules to ensure government officials do notwrongfully use their public positions for private gain are of particular importance to any state ethics laws, because the majority of public corruption cases involve government officials receiving extravagant gifts, meals, or entertainment. The Washington Post’s incessant coverage of streams of expensive gifts between the CEO of a prominent local company and former Virginia Governor McDonnell and his family illustrate the significant gaps in Virginia’s gift caps and disclosure rules. Until last year, Virginia had no cap on the value of gifts elected officials may receive; there was merely a reporting requirement for gifts over $50. Moreover, Virginia did not require

80 Meaning the complaint, without a doubt, has no value. See Mullen, supra note 15 (citing New Jersey ethics commission’s executive director, Peter Tober).
81 Id.
83 Star Scientific, which is a Richmond-based dietary supplement company.
84 See Helderman & Zapotosky, supra note 82.
85 This disclosure requirement was very vague. For example, the nature of the gift and the date of transactions were not required. See Helderman & Zapotosky, supra note 82; Piper, supra note 20 at 15.
state officials to disclose gifts given to their immediate family, regardless of the value.\footnote{86}{This is the loophole that is probably the largest contributor to covering up the McDonnell scandal, as most gifts were given to McDonnell’s wife. \textit{See id.}} When assessing the effectiveness of gift caps and disclosure rules, the State Integrity Investigation ranked Virginia 47th out of 50 and gave Virginia a grade of “F.”\footnote{87}{\textit{See Kusnetz, supra} note 13.} Although the legislature recently attempted to address this glaring issue in Virginia’s ethics laws with Senate Bill 649 and House Bill 1211, Governor McAuliffe tacitly acknowledged the inadequacy of the reform efforts.\footnote{88}{In fact, he created a bipartisan panel to formulate proposals for fix the glaring inadequacies of both bills. \textit{See Kusnetz, supra} note 13.} This Section discusses the shortcomings of Virginia’s gift rules and employs a comparison to the U.S. federal government gift rules to illustrate particularly troublesome aspects of Virginia’s current standards.

1. Inadequacies in Virginia’s Laws Regulating Gifts to State Officials

Virginia’s current laws that regulate gift giving to state officials are sieved with loopholes. Senate Bill 649 and House Bill 1211, which the Virginia legislature passed last year, set a $250 cap on individual \textit{tangible} gifts state officials may receive from lobbyists and other related sources.\footnote{89}{These additional prohibited sources include a lobbyist’s principal; or a person, business, or organization who is a party to, or seeking to become a party to, certain governmental contracts \textit{See id.}; Nolan, \textit{Lawmakers Reach Agreement, supra} note 39.} The new laws also require disclosure of such gifts when given to state officials’ immediate family members.\footnote{90}{Rachel Weiner, \textit{Virginia Lawmakers Detail Ethics Reform Idea}, WASH. POST (Jan 7, 2014), http://www.washingtonpost.com/local/virginia-politics/virginia-lawmakers-detail-ethics-reform-plans/2014/01/07/3ad5c6ac-7734-11e3-8963-b4b654bce9b2_story.html. Governor McAuliffe signed an executive order upon entering office which restricts all of Virginia’s executive branch employees from accepting gifts over $100 from any single source (which includes gifts to their family members), however this limitation does not apply to the other branches. Jim Nolan, \textit{McAuliffe’s Ethics Panel Recommends Changes On Gift, Disclosure, Conflict Rules}, RICHMOND TIMES DISPATCH (Nov 14, 2014), http://www.timesdispatch.com/news/state-regional/mcauliffe-s-ethics-panel-recommends-changes-on-gift-disclosure-conflict/article_c344f081-fb86-5feb-89b9-899c461fd0f6.html?mode=jqm.} Although a welcome step in the right direction, local newspapers characterize these new laws as “a handful of watered-down reforms, stripped of meaningful changes to the rules governing gifts and disclosure, which are among the weakest in the
nation.” The Washington Post went as far as to call these new laws “so slack it would be disingenuous to refer to it as ‘reform.’”

The gravest concern about this new reform effort centers on the insufficiency of the gift cap. In addition to $250 being an extremely high cap, the cap only applies to individual gifts; there is no cumulative cap on how many gifts valued under $250 a state official may receive in a given year. Another, even graver concern is that this $250 cap only applies to tangible gifts; the laws place no limitation on the value of intangible gifts elected officials may accept. Lawmakers defend these laws, however, by explaining it is difficult to codify which meals, trips, or other intangibles constitute an ethical breach without “risking criminalizing the legitimate byproducts of a citizen legislature doing the people’s business.” One legislator contended that “[b]eing treated to a meal by a big bad corporation was impossible to distinguish from a legislator going to have dinner at their local Farm Bureau meeting.” Thus, as it stands today, lawmakers in Virginia may accept an unlimited supply of tangible gifts valued under $250, and a completely unfettered stream of intangible gifts, no matter the source or value.

Lastly, Virginia’s ethics reform efforts fail to address a glaring loophole that permits

93 Jessica Tillipman, Gifts, Hospitality, and The Government Contractor, 14-7 BRIEFING PAPERS 1, 6 (June 2014). So as it stands, a lobbyist may give a state official a series of $249 gifts and avoids running afoul of these new ethics standards.
94 Such as hospitality, tickets to an event or sports game, air miles, vacations, and fancy meals.
95 See Tillipman, supra note 93 at 6; Nolan, Lawmakers Reach Agreement, supra note 39.
96 Nolan, Lawmakers Reach Agreement, supra note 39.
97 Id. (citing Todd Gilbert, a representative for Shenandoah county).
unfettered gift giving from state officials’ personal “friends.” 98 Under Virginia’s current gift rules, there are neither caps on nor disclosure requirements for gifts that government officials may receive on account of friendship. 99 The state also has no oversight body in place to determine when a purported friendship is legitimate, which paves the way for unencumbered exploitation of this loophole. 100 Thus, gift caps and disclosure rules in Virginia remain ill equipped to end the stream of political scandals permeating the state.

2. Federal Gift Caps and Disclosure Laws As a Successful Model for Virginia

A comparison to the strict and comprehensive laws governing gift giving to U.S. federal government officials illuminates the shortcomings of Virginia’s current standards. 101 The general rule that applies to federal government employees is that they may not receive gifts over $50 102 from any outside source that is not family or a close friend. 103 The federal government designed its comprehensive and detailed gift regulations to protect the integrity of the federal government by ensuring government officials “act impartially and do not give preferential treatment to any private organization or individual.” 104 The federal rules clearly define from whom government officials may receive gifts, and broadly define “gift,” including detailed exceptions and exclusions.

The federal gift rules clearly delineate who federal employees may and may not accept gifts from. First, government employees cannot accept any gifts, directly or indirectly, from a

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98 A category of acquaintance that tends to be very loosely construed in politics.
99 See Nolan, Va. Ethics Measure, supra note 91. The only limitation is that lobbyists cannot be considered a friend. Id.
100 See id.
101 Tillipman, note 93 at 1.
102 This is a cumulative total. The individual gift cap is $20. See 5 C.F.R. § 2635.202.
A “prohibited source” includes people or organizations conducting business (or seeking business) with the federal employee's agency, people that the employee’s agency regulates, and people who have an interest in the performance or nonperformance of the federal employee's official duties. Second, government employees cannot accept any gifts given on account of their “official position.” The federal rules also carve out a clearly defined exception for gifts from family members and personal friends to ensure such legitimate gift-giving practices persist. To qualify as a gift due to a personal relationship, however, the origin of the friendship, the history of gift giving between the parties, and the nature and value of the gift must all indicate that this gift had no basis in a business relationship. The Office of Government Ethics (OGE) extends particular scrutiny to “friendships” that develop on the job, to prevent any unethical manipulation of this exception.

The federal ethics rules also provide a comprehensive and nuanced definition of what constitutes a “gift” for purposes of these regulations. The term “gift” applies to anything of monetary value, and specifically includes “transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.” The federal rules also enumerate several exclusions from the definition of “gift,” including modest refreshments, plaques, discounts available to the public,

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105 See 5 C.F.R. § 2635.202(a), (d) and (e); id.
106 5 C.F.R. § 2635.203(d).
107 Meaning any gift that would not have been offered had the employee not been working for the government. See 5 C.F.R. § 2635.203(a)(2).
108 See 5 C.F.R. § 2635.204 (b); Tillipman, supra note 93 at 3.
109 See Tillipman, supra note 93 at 3.
110 A centralized federal agency that coordinates ethics interpretations and standards for all three branches of government. See United States Office of Government Ethics website [OGE website], http://www.oge.gov.
111 Id. at 4.
113 See 5 C.F.R. § 2635.203(b)(1) through (9) for a list of all exclusions.
honorory degrees, and items valued at $20 or less.\textsuperscript{114} Lastly, the term “gift” does not apply items given to the employee in connection with certain political activities, and grants of free attendance at certain widely attended gatherings, if attendance at the event is in the interest of the agency.\textsuperscript{115} The value of this all-encompassing federal definition of “gifts” with specific exclusions is that if the item does not fall within one of the enumerated exceptions, it is presumed to be a gift.\textsuperscript{116}

In addition to having nuanced and comprehensive rules governing gift giving to government employees, the federal government also effectively disseminates these standards through the OGE’s user-friendly website, which provides detailed guidance and training materials about the restrictions applicable to Government officials.\textsuperscript{117} This combination of detailed parameters for gifts to federal government employees, and the effective dissemination and enforcement of those standards, minimizes the opportunity for loopholes.

III. \textbf{Proposal For Comprehensive Ethics Code Reform in Virginia}

Despite recent efforts to reform ethics laws in Virginia, the patchwork of bodies that the state charges with ethics oversight responsibility are still fraught with limitations, and the state’s recent attempt at gift caps and gift disclosure requirements are still sieved with loopholes. The inadequacies in Virginia’s ethics laws, which have and will continue to tempt political scandal, are in dire need of a comprehensive reform. Virginia’s ethics law reform should include the creation of a powerful, nonpartisan, permanent ethics enforcement commission made up of members of the public, and the adoption of stringent rules regulating the types of gifts

\textsuperscript{114} However a government official may not receive more than $50 worth of these sub $20 items in a calendar year from the same source. \textit{See 5 C.F.R. § 2635.203 See 5 C.F.R. § 2635.203(b)(1) through (9) (listing all exclusions). See also, OGE Website, Gifts from Outside Sources, http://www.oge.gov/Topics/Gifts-and-Payments/Gifts-from-Outside-Sources/.

\textsuperscript{115} This exclusion is an attempt to protect legitimate, beneficial political activity in situations where the chances of corruption are slim. \textit{See, OGE Website, Gifts from Outside Sources, http://www.oge.gov/Topics/Gifts-and-Payments/Gifts-from-Outside-Sources/.

\textsuperscript{116} \textit{See Tillipman, supra note 93 at 3.}

government officials may receive. This Section details both aspects of the reform proposal.

A. CREATING A PERMANENT, INDEPENDENT, AND POWERFUL ETHICS COMMISSION

Virginia’s legislature should replace the state’s ethics committee with an independent state ethics commission that incorporates strengths from successful commissions throughout the nation.\(^{118}\) Unlike Virginia’s current ethics committee, which is partisan and relatively powerless,\(^{119}\) the proposed ethics commission would be independent, perform meaningful ethics audits, impose stringent penalties for transgressions, and conduct mandatory ethics training for all state officials and employees. In addition, the proposed commission would hold monthly meetings to undertake investigations, hear allegations of ethics violations, and issue advisory opinions on the law.

The composition of Virginia’s ethics commission should take into account the need for political independence, expertise, and a diversity of perspectives. To ensure maximum independence, the commission should be bipartisan, with a combination of members of the public and gubernatorial appointees, and no single political party should hold a majority of seats.\(^{120}\) Moreover, Virginia should prohibit its ethics commissioners from holding public office two years before and after their role on the commission, to ensure absolute independence and protect against Hamilton-like quid pro quos.\(^{121}\) Each commissioner should serve staggered four-year terms, to ensure that the commission retains a level of institutional knowledge as

\(^{118}\) This is one proposal McAuliffe’s reform panel is already contemplating. See Kusnetz, supra note 13.

\(^{119}\) See Section II.A.1 (discussing the inadequacies of Virginia’s current ethics commission).

\(^{120}\) See Section II.A.2 (discussing the differing compositions of ethics commissions throughout the country). These composition rules are consistent with the national trend toward depoliticized independent ethics commissions. Of 39 states with statewide ethics commissions, almost all are bipartisan, and 28 are composed entirely of public members. See Crider & Milyo, supra note 19 at 721.

\(^{121}\) Two years falls within the middle of the range used by other states. See section II.A.2 (discussing the pre and post employment limitations states place on ethics commissioners).
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experienced commissioners leave and new, potentially inexperienced commissioners join.\textsuperscript{122} The commissioners should also elect their own Chair and Vice-Chair for two-year terms, but only public members should fill these leadership positions to ensure the governor appointees do not exert undue influence on the commission.\textsuperscript{123} This composition will ensure the ethics commission is impartial, rich with institutional knowledge, and representative of a variety of perspectives.

Virginia’s ethics commission should also have innovative enforcement powers and broad jurisdiction. The commission’s enforcement tools should include removing or suspending the transgressor from office, demoting the transgressor, publicizing the transgressor’s wrongdoing, attaining restitution from the transgressor for any inappropriate financial benefits, and instituting a variety of fines against the transgressor.\textsuperscript{124} The commission should also be able to enforce up to a $10,000 fine when incoming or former commissioners violate their pre or post-commission employment restrictions.\textsuperscript{125} The commission's jurisdiction should also include government officials who committed an ethics violation while holding public office, but have since left state service—provided that the Commission's investigation begins within one year from the date the transgressor committed the alleged violation.\textsuperscript{126} This expanded jurisdiction would prevent state employees from escaping liability for ethics breaches simply by leaving office, yet the one-year requirement ensures some limitation on this power.\textsuperscript{127} The combination of broad jurisdiction and robust enforcement powers will ensure Virginia’s ethics commission retains a conspicuous and authoritative presence.

\textsuperscript{122} See Section II.A.2 (discussing the term limits other states adopt for their commissioners).
\textsuperscript{123} Having public members hold leadership positions may be (or at least appear) more democratic and fair than having the governor’s appointees running the meetings.
\textsuperscript{124} For example, an automatic fine of up to $50 per day for failing to file required disclosure and authorization forms in a timely manner. See Section II.A.2 (discussing the range of enforcement tools states empower their state commissions with).
\textsuperscript{125} See Section II.A.2; Piper, supra note 20 at 16.
\textsuperscript{126} See Section II.A.2 (discussing the jurisdictional limitations states place on ethics commissions).
\textsuperscript{127} See Piper, supra note 20 at 15.
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In addition to the composition, jurisdiction, and enforcement powers of Virginia’s ethics commission, the commission’s core mandate must include the dissemination of the ethics standards throughout the state. Specifically, the commissioners should brief and train every state employee—either in person or online—on ethics requirements applicable to their position.\textsuperscript{128} Moreover, the commission should require each employee to sign a document that certifies he or she has undergone ethics training, and understands and vows to uphold the state ethics rules.\textsuperscript{129} Ensuring the commission provides comprehensive ethics training is essential for widespread adherence to these newly-created standards.

Critics of the proposal for an ethics commission may raise the concern that Virginia’s state officials would never vote for, create, nor consent to the creation of a commission charged with such far-reaching powers, because the commission would place significant burdens on their own lives. Such a concern, however, is inapposite in Virginia’s case due to the recent national attention the state’s lax ethics standards garnered.\textsuperscript{130} The incessant airing of Virginia’s political scandals in the Washington Post, the national attention on the McDonnells’ criminal corruption trial,\textsuperscript{131} the internal calls for reform by the new Governor himself,\textsuperscript{132} and the widespread ridicule of the current absence of ethics enforcement over state officials,\textsuperscript{133} all puts Virginia legislators under an powerful spotlight to address these inadequacies, regardless of the consequences to their individual lives. The establishment of this independent, powerful, and multidimensional ethics commission would be a significant step towards ensuring Virginia’s elected officials exhibit greater ethics compliance in the future.

\textsuperscript{128} See Section II.B.2 (discussing the OGE’s dissemination of ethics standards and training materials to federal government employees).
\textsuperscript{129} See id.
\textsuperscript{130} See, e.g., See Bob McDonnell’s Trial Comes To Merciful End, supra note 1.
\textsuperscript{131} Id.
\textsuperscript{132} See Kusnetz, supra note 13.
\textsuperscript{133} See Ginley, supra note 12 (emphasizing that Virginia legislators are effectively left to police themselves).
B. ADOPTING STRICHER GIFT CAPS AND GIFT DISCLOSURE REQUIREMENTS

In addition to establishing an ethics commission, the Virginia legislature should adopt more-stringent rules regulating the types of gifts government officials may receive, which the commission can then enforce. Although Virginia’s legislature recently attempted to reform the state’s gift caps and disclosure requirements, additional legislation must address the gaping holes that this prior attempt failed to patch. First, Virginia’s legislature should adopt a lower gift cap. Although $250 is better than no gift cap at all, it is one of the highest gift caps in the country, and is significantly higher than the federal cumulative gift cap total of $50. A more-appropriate and widely-accepted gift cap is $100.

Virginia’s legislature should also adopt a more comprehensive and detailed definition of “gifts,” similar to the definition that the U.S. federal government employs. Specifically, the gift caps and disclosure rules should also apply to intangible gifts such as dinners and events, as opposed to only tangible gifts. This change would be significant because, in addition to intangible gifts being the majority of what legislators receive, they are often “experiences” as opposed to “things,” which provide a greater opportunity for gift-givers to exert influence over

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134 See Section II.B.1 (discussing Senate Bill 649 and House Bill 1211).
135 See Section II.B.1 (discussing the gaps and criticisms of Senate Bill 649 and House Bill 1211).
136 See Section II.B.2.
137 A $100 gift cap is already being applied to the executive branch employees due to McAuliffe’s executive order, but the cap does not apply to the other branches. Nolan, McAuliffe’s Ethics Panel, supra note 90.
138 See Section II.B.2 (discussing the comprehensive and nuanced federal law definitions of a “gift”).
139 See Section II.B.1 (discussing Virginia’s current gift cap rules).
the recipient. Virginia legislators’ concerns about where to draw the line between inappropriate lavish dinners with lobbyists versus legitimate public interest functions with local farmers hold some merit, but adopting laws that ignore intangible gifts completely is not the answer. A better solution is to adopt a broad and comprehensive definition of “gift,” including tangible and intangible items, followed by an enumeration of specific exceptions for legitimate public interest functions. The federal ethics rules do exactly this to ensure legitimate public functions enjoy the separate treatment from lobbyist extravaganzas that they deserve.

Adopting this all-encompassing definition of “gifts” that incorporates detailed exclusions and exceptions will ensure that whenever a specific exclusion does not apply, the law presumes the item is a prohibited gift.

Moreover, the Virginia legislature should adopt stricter and more-comprehensive rules to govern whom state officials may receive gifts from, similar to those of the federal government. The federal rules include a provision barring gifts over the gift cap amount from “prohibited sources,” which is similar to what Virginia has in place, however the federal rules also include the catchall provision that bars all government employees from receiving gifts on account of their official position, which Virginia does not have in place. Adding this catchall will limit the potential for exploitation of the rules by someone who is not a prohibited source, but is nonetheless interested in influencing the actions of Virginia’s state officials.

Relatedly, Virginia needs stricter and clearer rules defining the strictures of permissible

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140 For example, intangible gifts could include lobbyists taking legislators to baseball games, or bringing them along on expensive vacations. See Nolan, Va. Ethics Measure, supra note 91.

141 See Section II.B.1 (discussing Virginia legislators’ struggles in finding a way to create limits on intangible gifts).

142 See Section II.B.2. (discussing the exception for items given to the employee in connection with certain political activities, and grants of free attendance at certain widely attended gatherings).

143 See Section II.B.2.

144 See Section II.B.2. (discussing the definitions the federal government uses in gift regulations).

145 Meaning the individual may not be a lobbyist or someone seeking business with the government.
gift giving between friends/family and state officials. As it stands now, Virginia’s gift laws provide no suitable parameters defining the very loose terms of “personal friendship,” and there is no oversight body checking whether the characterization of the relationship as a personal friendship is legitimate. Like the federal rules, Virginia’s ethics laws should outline factors that must be met to prove that the source gave a state official a gift based on their personal friendship rather than their business relationship, including a history of personal gift giving that existed prior to the commencement of any business relationship. The proposed ethics commission, like the federal government’s Office of Government Ethics, should extend exceptional scrutiny to these “friendship” transactions to ensure that state employees do not exploit this prospective loophole in the state’s ethics laws. The benefit of adopting these comprehensive and detailed exclusions to the gift rules is that when items given to state officials do not squarely fall within the well-defined exceptions, the law presumes they are gifts.

Critics of this reform proposal may argue that even if Virginia’s legislature passes these comprehensive reforms to the state’s gift caps and disclosure requirements, state officials may still decline to follow the rules. To support this concern, critics may cite ethical failures and egregious scandals in other states, despite the states’ near-perfect ethics standards on paper. The proposed gift-law reform, however, uses the federal laws as a model to avoid the weaknesses of current gift caps and disclosure laws in other states, thereby decreasing the

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146 A category exempt from regulation in Virginia’s current law, which leads interested parties to try to characterize their relationship with state officials as a “friendship” to escape facing any gift caps.  
147 See Section II.B.1.  
148 See Section II.B.2. (discussing federal rule 5 C.F.R. § 2635.204 (b) which outlines these factors).  
149 See Section III.A.  
150 See Section II.B.2. (discussing the close scrutiny the OGE pays to such transactions).  
possibility that ethics issues afflicting other states would occur in Virginia after this reform.\textsuperscript{152} Moreover, the concern that state officials will not follow a law is a feeble justification for the avoidance of making the law in the first place. Once a law is made, it will create new norms, place state officials under a brighter spotlight, and make standards legally enforceable. Even if this comprehensive reform does not eradicate Virginia’s pattern of corruption, the reform will at a minimum result in \textit{less} corruption than is currently escaping adjudication under the Commonwealth’s weak ethics laws.

\textbf{IV. CONCLUSION}

Virginia’s current ethics laws are sieved with loopholes and in dire need of reform. The two most troubling aspects of Virginia’s ethics laws are the absence of an independent ethics commission to oversee and enforce ethics laws, and the absence of a comprehensive and effective set of rules to govern what type of gifts state officials may accept. Examples of other, more-robust ethics rules in states throughout the nation and at the federal level provide valuable and well-tested models of the type of reform Virginia needs to undertake. It is crucial for Virginia’s legislature to put aside their ideological differences and formulate a bipartisan proposal to systematically reform the commonwealth’s ethics laws. Absent comprehensive reform, the people of Virginia will continue to lose trust in their government and the Washington Post will continue to stream stories of the egregious scandals that Virginia’s broken system of ethics laws engenders.

\footnotesize{\textsuperscript{152} See Section II.A.2.}