CONDUCT UNBECOMING: A CRITICAL VIEW OF THE "GOVERNMENT ETHICS REFORM" INITIATIVE

RESPONSIBLE CITIZEN SUMMARY

Background

- A citizen's group, Utahns for Ethical Government, is circulating a petition to place the "Government Ethics Reform" initiative on the November 2010 ballot
- This act would create a five-member "independent ethics commission," with perpetual funding and no oversight, to adjudicate "corrupt" legislators
- This act also would create a new "code of conduct" for legislators, dictate who could donate to candidates and how much, and place limits on citizenship to "keep honest people honest"

What's at stake?

- The Utah Constitution – the initiative would create, in effect, a new fourth branch of government unaccountable to the people
- The right of free speech – the initiative would place strict proscriptions (and prohibitions) on a person's right to influence public policy in a free society
- The personal accountability of legislators – the initiative would remove all personal accountability and place it in an "independent ethics commission"
- The integrity of the Legislature – the initiative would send a loud signal to citizens that they cannot trust their representatives

What's next?

- The initiative committee needs to gather approximately 95,000 signatures by April 15, 2010 to place the matter on the November ballot
- The 2010 session of the Legislature will address ethics reform
- Sutherland opposes the initiative as cynical, presumptuous, double-dealing, heavy-handed, punitive, self-righteous and, in nearly every way, unconstitutional
- Sutherland encourages the Legislature to adopt its recommendations for ethics reform to maintain the personal accountability of legislators and the integrity of the Legislature

Responsible Citizenship™

The "independent ethics commission" initiative is a mean-spirited and punitive attack on Utah's Legislature – a counter-productive effort for achieving honest ethics reform.

On December 10, 2008, Sutherland Institute released its recommendations for comprehensive legislative ethics reform. The document, *Politics or Polity? Ethics Reform for Utah*, recommended ethics reform centered on two pillars of polity: personal accountability and the integrity of the Legislature.

The Introduction of the Sutherland document includes these observations,

> Perhaps the most frequently expressed reason for doing nothing about ethics reform is the self-incriminating perception it might create – the thought that ethics reform is intended to address actual wrongdoing on the part of someone, somewhere. Many legislators seem to think that addressing ethics is tacit admission that they, especially legislative leaders, struggle personally with ethical problems – if they address it, they must be guilty of something. But in reality the opposite is true: real ethics reform can be accomplished only by honest legislators who seek to establish laws and regulations that promote good governance and full accountability in government at all levels…

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Ethical behavior must be tied to personal accountability for one's actions as measured against a clearly-defined set of standards. In the absence of clear standards and procedures for institutional review, the current mode of handling inquiries is to allow legislative leaders to judge the merits of a case and then, as they deem appropriate in their discretion, pass on their concerns to an ethics panel. This feels strangely like a quip commonly attributed to newsman Walter Cronkite: "The news is what I say it is." If ethics is what a few legislators say it is and there are no objective standards of measurement, then, at least in the area of ethics, our system is not a system of laws but rather a system of men. Honest legislators will have no safe harbors in the law if they are accused of wrongdoing and instead will find themselves currying the favor of more powerful legislators. Perhaps worse, the Legislature will have no way of weeding out wrongdoing when it occurs. There is safety for honest legislators when there are objective standards of behavior and accountability.

Standards of official conduct must be tied to the integrity of the institution. Ethics committees exist to handle specific cases of real or perceived violations of legislative standards, but the entire concept of official standards exists more to preserve the integrity of the legislative body in the eyes of the electorate. The individual actions of a single legislator, while important, are not the reason why the legislature should enact rules of ethical behavior. The paramount reason to do so is to instill in the public, confidence in their representative form of government. The citizens of Utah know that imperfections will exist in their elected officials. If they are to continue to trust in the integrity of the institution, they need to know that honest and impartial processes are in place to address individual acts that may call into question the integrity of the body…

There is a need for every member of the State Legislature to have standards of official conduct. These standards should be well-balanced – on the one hand, they need to be clear and explicit with nothing regarding "official conduct" left to the imagination; on the other hand, these standards need to be broad enough in wording, without verbosity, to cover every conceivable impropriety. Such general ethical standards might call on all members to:

- Conduct themselves at all times in a manner that reflects creditably on the State Legislature;
- Abide by the spirit as well as the letter of legislative rules; and
- Adhere to broad ethical standards as expressed in several codes of ethical conduct for government service…

Clear and explicit standards provide a solid basis upon which to assess alleged violations. The State Legislature must be allowed to reprove and punish its members who are found to be in violation of ethical standards.

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In this same document, Sutherland made several recommendations about how to encourage and ensure personal accountability as well as protect the integrity of the legislative institution. These recommendations involved creating a Joint Committee on Standards of Official Conduct, creating an Office of Advice and Education within the newly-formed Joint Committee, addressing conflicts of interest (e.g., allowing legislators to formally recuse themselves from votes on this ground), implementing a comprehensive gift ban, restricting the use of campaign funds, and various other remedies.

Interestingly, Sutherland **did not** recommend creating any kind of independent commission – and has opposed this idea in every form. Which brings us now to addressing the merits of the proposed *Government Ethics Reform* initiative (hereafter, the Initiative) – a line-by-line analysis of the Initiative put forth by the citizens group, Utahns for Ethical Government.

Sutherland's objective in providing this analysis is to compare and contrast the policies of the Initiative with Sutherland's proclaimed two-fold standard for ethics reform of: 1) personal accountability and 2) the integrity of the legislative institution.

Other critiques of the Initiative, such as those provided by State Senator Lyle Hillyard (http://www.senatesite.com/Documents/2009/EthicsDraftMemo.pdf) and State Representative Lorie Fowlke (http://utahpolicy.com/featured_article/rep-lori-fowlke-analyzes-ethics-initiative), are available for review by the public and Sutherland recommends them. Rebuttals to these critiques, as well as the Initiative, can be found on the web site of Utahns for Ethical Government at http://www.utahnsforethicalgovernment.org/.

The most productive action that a responsible citizen can do with respect to the Initiative is to read it – which the Sutherland Institute highly recommends.

THE INITIATIVE LINE-BY-LINE

The 21-page Initiative begins with standard legislative formatting including a *General Description* (*"This bill enacts provisions in the Legislative Code to establish an independent ethics commission to administer a legislative code of conduct."*), *Highlighted Provisions* (five of them), *Monies Appropriated in this Bill* ("none"), *Other Special Clauses* ("none"), *Utah Code Sections Affected* (enacts nine new sections of code), *Repeals* (repeals one section of code), and *Modifies* (modifies two sections of code).

The body of the Initiative begins with an *Intent Statement*. Intent statements are used to provide context for a proposal. It is a tool for its authors to explain their motivations, their worldview, their concerns, and their resolve to correct what they see as policy problems.

> *We the people of Utah, exercising our legislative power under the Utah Constitution to the fullest extent possible, insist that the people's business in the legislative branch be conducted upon principles of ethical*

governance, and that legislators, as trustees of our collective legislative power, serve us – the beneficia-ries of that trust – with fidelity, integrity, and selfless judgment.

The state constitutional authority for initiatives, such as the Government Ethics Reform initiative, is derived from the Utah Constitution, Article 1, Section 2 ("all political power is inherent in the people") and Article 4, Section 1 (1b and 2) ("The Legislative powers of the State shall be vested in…the people of the State of Utah…may initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote....).

Sutherland agrees that state legislators and all public servants (elected and unelected) should serve "with fidel-ity, integrity, and selfless judgment." The word "fidelity" means, in the legislative context, a strict observance of promises and duties – for instance, each state legislator is required to take an oath of office (Article 4, Section 10: "I do solemnly swear (or affirm) that I support, obey and defend the Constitution of the United States and the Constitution of this State, and that I will discharge the duties of my office with fidelity"). Likewise, all employees of the Executive and Judicial Branches of state government are required to abide by a code of conduct.

It has become evident over the years that the legislature has been unwilling to enact enforceable ethical standards of conduct or a workable process for enforcing its own rules.

Historically, this statement may be true, even if obviously subjective. In recent years, this statement would not be true. For example, the Legislature can and will disciple its own members. During the 2009 legislative session, Senator Chris Buttars was disciplined for official actions thought by majority party leadership as a breach of of-ficial conduct. Senator Buttars lost his chairmanship of the Senate Judiciary Committee. And, as Representative Lorie Fowlke has pointed out, the State Legislature passed five ethics-reform bills in the 2009 session.

Has the State Legislature been "unwilling" to enact reforms without some sort of additional motivation? Perhaps. Sutherland's *Politics or Polity?* policy report's opening paragraph begins with,

> For some time, the Sutherland Institute has talked privately with Utah's political leaders of both major parties and encouraged them to embrace sincere ethics reform. Before the 2008 leg-islative session, we met with the majority leadership of both chambers and recommended that ethics reform be given high priority. For a variety of reasons, leadership was resistant to our recommendations at that time.

Sutherland's past concern about inaction to embrace real reform is no longer a concern – the State Legislature, in both parties, is committed to real ethics reform in the 2010 legislative session.

Forty states have some form of independent ethics commission; Utah does not.

While factual, it's placement in the *Intent Statement* is meant to imply that something must be innately good about "independent ethics commissions" and that Utah has yet to take advantage of this legislative wisdom. Of course, in

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this context, the statement is a presumptive fallacy – as every mother has ever pointed out to her child, "Would you jump off of a building just because your friends do?" Majorities often do unwise and/or needless things.

Among states with "part-time" legislatures, roughly equivalent with Utah, nine have "independent commissions" and eight do not (with Utah among the latter). Part-time legislatures are particularly sensitive to conflicts of interest, which is a major concern of the Initiative's authors. Full-time legislatures are less sensitive to conflicts of interest simply because "full-time" means a state legislator does not have outside employment to conflict with official legislative duties. If we are being asked as citizens by the Initiative's authors to accept the "wisdom of majorities," then the wisdom of "independent ethics commissions" among part-time legislatures is in question with roughly half in favor and roughly half opposed.

Speaking broadly, without distinguishing between full-time or part-time legislative service, the Initiative's statement is correct. Ten states do not have "independent ethics commissions," although each of these ten states has internal ethics committees, including Utah.

> *A troubling, parallel development is that lobbyists and special interests are free to inject unlimited amounts of corporate money into Utah's political system, often by invitation from legislators who, again and again, go back to the same contributors for more and more donations to personal projects, committees, caucuses, and leadership campaigns. These donors are often the very people and companies who regularly have matters of significant private profit requiring legislative action, and it is contrary to human nature to expect that such transactions are nothing more than friends helping friends in the grand cause of better government. Indeed, lobbyists have every reason to agree to every legislator's request for money, no matter how dubious.*

Every cause, it seems, needs its demons. In this language we see that the Initiative's authors call its demons "lobbyists" and "special interests" and corrupt legislators who, with insatiable appetite – *"again and again"* and *"more and more"* – call on these corrupting influences to make law based solely upon "human nature" and never in the public interest (someone else's "human nature" being the ultimate demon).

Of course, Sutherland doesn't regard "special interests" too highly either. Sutherland counts among many of its key staff "lobbyists" – though its lobbyists are the "noble" kind who only lobby in behalf of its own *Governing Principles* and not *"matters of significant private profit."*

The answer to real or perceived undue or disproportionate influence isn't to limit the influence of a person who has a constitutional right of free speech, but to limit the opportunity for influence by reducing the size and scope of government. If the Initiative's authors are concerned about direct monetary conflicts of interest between legislators and Utah's business community, the answer is to limit opportunities for the business community to make money from government regulations that only serve to give one business advantage over a competitor.

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It is unreasonable and wholly against human nature to, on the one hand, *encourage* influence peddlers to leverage government regulations and open access to tax dollars for their selfish benefit (as defenders of greater government spending do typically) and then, on the other hand, ask legislators to carry the sole burden to stand in their way. As soon as a courageous legislator does so she is branded as "out of touch with her constituents" who want special treatment. It is inconsistent to criticize legislators who simply reflect "the voice of the people" in accepting a broad and seemingly entrenched culture of "legal plunder" (i.e., the idea that government can be, or worse, should be, used by "the people" to get gain) without first working to get rid of that culture.

The Initiative's authors insinuate that legislators are the primary cause and driving force of influence peddling ("lobbyists have every reason to agree to every legislator's request for money") and that heavy-handed ethics reform will solve the problem. Sutherland disagrees – the driving force is Utah's thriving culture of "legal plunder" that encourages everyone to look to state and local governments to get gain.

> *Utah's financial disclosure laws have been ranked 47th worst in the nation. Forty-four states limit financial contributions to legislators; Utah does not. Eighty-one percent of all money funding legislative campaigns in Utah comes from special interests; $2.45 million in 2008 came from corporations, which cannot by law contribute to federal election campaigns. It is axiomatic that, "He who pays the piper calls the tune."*

"Axiomatic" means obvious or self-evident. What it *does not* mean is that the Utah Legislature is corrupt. None of the factoids cited mean that Utah legislators or our laws are for sale. There is no correlation, let alone causation, between the substance of any of these factoids (accurate or not) and the integrity of any single Utah Legislator. Let's be clear that the Initiative's authors are not arguing for limited government when they argue for their reform. They are not arguing that government should be smaller and spend less of taxpayers' money or that their Initiative will save taxpayers money. They are arguing that the Utah Legislature is inherently corrupt. They are arguing that the system of ethics and campaign finance in Utah is corrupting and that an "independent ethics commission" can solve these alleged problems.

They also are arguing for a very narrow and negative meaning of human reciprocity as inherently corrupting. Reciprocity is a matter of human nature. We do scratch each other's backs. When someone does something helpful for you it is entirely human to look to do something helpful for them – and we do this consciously and unconsciously. Even so, the natural act of reciprocity is not corrupt. What makes any act of reciprocity corrupt is the intent of the parties – both parties – and the substance of the exchange.

What makes a corporate campaign contribution any more corrupting in principle than an individual campaign contribution? A constituent might donate to a candidate because she believes in the candidate's stand on certain issues. So, too, might a corporation. Neither donation is a corrupting influence in principle. But both donations could be corrupting if the constituent is a public school teacher looking for her candidate to increase teacher salaries or the corporation makes most of its money from government contracts and is looking for the

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candidate to continue channeling tax dollars to his particular business projects. The Initiative seems to presume ill-intent for every corporate contribution but not for every constituent's contribution.

Furthermore, political corruption through reciprocity requires the complicity of *both* the contributor and the legislator. The political art of "back-scratching" only works when both giver and receiver are complicit. Sutherland, like all not-for-profit organizations, receives money from many sources. It has its own "conflict of interest" policy – Sutherland does not do contract work (i.e., it does not produce "studies" for hire). And yet, Sutherland has no policy about prohibiting receipt of any charitable donation because donors know that Sutherland does not "scratch backs" – it does not provide services for "special interests." If a donor gives to Sutherland, she gives because of what Sutherland independently represents. Likewise might a corporate contributor donate to a legislator or candidate. Unfortunately, the narrow and cynical view of the Initiative's authors prevents them from drawing any such distinctions.

This is not to say that corporate campaign contributions (or any campaign contributions) aren't intended to buy influence. Sutherland is saying, again, that the answer to mitigating influence-peddling is to reduce the size and scope of government and not assume that Utah legislators are corrupt, discoverable only through the cynical eye of a modern-day witch hunt.

> *Over the years, concerned legislators have sponsored bill after bill to strengthen Utah's laws on legislative ethics. All but cosmetic gestures towards reform have withered and died. Scandals are forgotten until next time, and then forgotten again. A citizen's commission formed by the governor to study and make recommendations for ethics reforms had the subject stricken from its agenda as a result of pressure from legislative leaders. If we, the people, are ever to get comprehensive and meaningful ethics reform, we will have to write and pass the law ourselves.*

This paragraph is certainly laden with opinions. It is reasonable for the Utah Legislature to reject bill after bill proposed by "concerned legislators" if those bills lack merit or, as this Initiative shows once again, if the intent behind proposals is steeped in cynicism and exaggerated claims. If all but "cosmetic gestures" have withered and died, it is incumbent on reformers to propose policies that could be accepted in the mainstream of the Legislature.

Perhaps one reason that these proposals by "concerned legislators" don't seem to make progress is because those same "concerned legislators" are often the very ones making frivolous accusations about their colleagues and, in turn, their colleagues question the intent of these bill sponsors.

Governor Gary Herbert's Commission on Strengthening Utah's Democracy pulled legislative ethics reform from its agenda because of constitutional separation-of-powers concerns – important concerns that should not be lost on the Initiative's authors and its supporters in their desire to create an "independent ethics commission" or unconstitutional *fourth* branch of government.

Is it true that *"scandals are forgotten until next time, and then forgotten again"*? In other words, is it true that constituent voters simply forget when their state representatives are guilty of scandal? Is this why they keep re-electing their representatives? They simply forget? Repeatedly so? Sutherland believes a more accurate answer is that the report of "scandals" is exaggerated and that voters know it.

The Initiative process seems to have kindled a fire under the State Legislature. This perception alone should feel satisfying and gratifying for its authors. Perhaps political prudence should allow this lit fire to now run its course through the 2010 session and then voters will see if the cynical opinions of the Initiative's authors are justified.

> *Good government requires that ethical and wise citizens stand for election as legislators, and such citizens have done so frequently, to our collective benefit. It is the nature of power to corrupt, and common experience and* The Federalist Papers *teach us that unchecked power and unlimited money create circumstances where a clear vision of the public interest becomes blurred by self-interest, favoritism, and a sense of entitlement.*

The Federalist Papers also provides a wonderful lesson in separation-of-powers doctrine that can explain why an "independent ethics commission" is unconstitutional in concept. While the Initiative's authors might appeal that the State Legislature appoints the members of the "independent ethics commission," and as such is only a subsidiary of the Legislature, the whole concept of the commission belies that explanation – it is designed to be an "independent" commission in practice and function: its budget cannot be reduced, it has no oversight, and its members cannot be legislators. These characteristics, it seems, are the epitome of "unlimited money" and "unchecked power." Under these circumstances, the authors' words seem to apply to their own proposed work-product: a body "where a clear vision of the public interest becomes blurred by self-interest, favoritism, and a sense of entitlement."

Importantly, Sutherland believes this constitutional concern also applies to any other form of "independent" commission possibly created by the Legislature. Several recommendations have been proposed by legislators to create their own version of the Initiative. The chief justification for these proposals is that legislators don't like to stand in judgment of their peers. Unfortunately, to do otherwise is to abandon the integrity of the body. While this sentiment (i.e., to avoid hurting the feelings of someone with whom you work) goes a long way toward explaining why state government has grown needlessly in size and scope over the past five years, it is hardly a mature justification to avoid accountability and reasonable stewardship over the official conduct of the Legislature.

It *is* the nature of power to corrupt and there would be no more incentive to corrupt a process than to create an "independent ethics commission" with "unlimited money" and "unchecked power" answerable to no one.

> *The purpose of this law, therefore, is three-fold: (1) To establish clear standards of ethical and fiduciary conduct; (2) To keep honest people honest; and (3) To provide a fair, nonpartisan, and transparent process for reviewing complaints of ethical violations by legislators.*

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"Fiduciary" means a person to whom property or power is entrusted for the benefit of another. As an adjective it means the nature of trust or confidence as in a "fiduciary obligation." In legislative terms, the word is vague and perhaps altogether meaningless because a legislator's constituents would define "fiduciary" through electoral processes alone. The word is not defined in the Initiative.

A more curious concern is how the Initiative will "keep honest people honest." The Initiative's authors might well have moved to create a law that "will keep a law-abiding citizen law-abiding." It is unclear how a law can keep people honest.

Even more curious is how a five-member commission accountable to nobody, with unlimited funds and a process that invites frivolous and unsubstantiated claims against state legislators, can be "fair."

The term "nonpartisan" might be a misnomer. If "nonpartisan" means not appointed or identified by political party, it is innocuous. But if "nonpartisan" means "no ax to grind," the intent of the initiative belies such a meaning. The Initiative clearly has an ax to grind against the current legislative system for handling ethics cases – as well as any recent or future reforms which the Initiative describes in frustration as an "unwillingness" to really take care of this perceived problem.

Sutherland has long encouraged transparency in government and surely would resonate with any solid proposal to further this cause. In this case, the Initiative's authors assume that an open and public conversation about alleged ethical violations of legislators is a matter of transparency. Sutherland disagrees.

For Sutherland, the overriding concern is maintaining the integrity of the Legislature in the minds of citizens. The potential for public disclosure of every allegation against a legislator does not do that. A clear internal process of personal accountability on the part of legislators would do that. Transparency in government is a very worthy goal. Transparency in "criminal" proceedings has its appropriate limits. A judge might issue a "gag order" when she feels that the court proceedings are becoming politicized or played out in the media – a judge seeks justice, not politics. An "independent ethics commission," as constructed by the Initiative, is a highly-politicized process.

Allegations should not be the concern of the public. Actual wrongdoing – a breach of official conduct – by a legislator should be a concern of the public, but only if we're more interested in maintaining the integrity of state government than we are in witch hunts. A transparent process *"for reviewing complaints of ethical violations by legislators"* can only lead to witch hunts.

THE BODY OF THE INITIATIVE

After the typical legislative format of placing "Definitions" at the beginning of a bill, the Initiative's statutory text begins on Page 6 with a new section of code, 36-27-201 (1), that reads,

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There is created the Utah Independent Ethics Commission to administer, implement, and apply the code of conduct provided for in this Act, and to exercise all other powers and perform all other duties specified in this Act.

For purposes of efficiency and brevity, from this point forward, Sutherland will review the Initiative language by its component parts: the creation, administration, implementation, and application of the "independent ethics commission."

Sutherland would like to acknowledge that in describing the administration, implementation, and application of the "independent ethics commission" it does not imply the validity of any representation made by the Initiative's authors – Sutherland does not subscribe to any remedy or reform within the context of the Initiative. Sutherland's purpose in providing this detailed description of the Initiative, beyond offering the general public a disinterested view, is only to reveal how inconsistent the Initiative is with Sutherland's ethics reform recommendations based on the personal accountability of legislators, the integrity of the legislative institution, good government, fairness, and common sense.

Its Creation

"The commission shall consist of 5 individuals" who shall meet the following eligibility requirements:

- *Each member* [of the commission] *shall be a citizen and, throughout the duration of service, shall reside and be domiciled in the state of Utah.*
- *Each member shall be 25 years of age or older.*
- *Each member shall have demonstrated integrity through leadership and service.*
- *Each member shall be educated and experienced broadly in ethical matters.*
- *Each member, even where formally affiliated with a particular party, shall be ready, willing, and able impartially to require ethical conduct from all legislators of whatever political persuasion.*
- *No member may have been a lobbyist for a period of 5 years preceding appointment to the commission.*
- *No member may have been a legislator or the holder of any other elected public office or a candidate for election to the legislature or any other public office for a period of 5 years preceding appointment to the commission.*
- *No member may have held an office of any kind (other than the office of voting district officer or delegate to a county or state convention) in a political party for a period of 5 years preceding appointment to the commission.*
- *No member may become a lobbyist, legislator, holder of any other elected public office, or holder of an office of any kind in a political party while serving as a member of the commission.*

Note, again, the presumptive fallacy expressed within the eligibility criteria: a lobbyist, a legislator, a political party official, or an elected official of any kind is conflicted – as if the very act of becoming a lobbyist, a legislator, a

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political party official, or an elected official of any kind turns an otherwise person-of-integrity into an unethical person. The criteria allow any person in any one of these roles eligibility after five years away from these roles – as if there is a magic day when a person is "healed" from conflict or wrongdoing.

This is apparently how the Initiative's authors think: they objectify fellow human beings as "political" and, hence, more easily susceptible to corruption than any other sort of fellow human being. Pervasive throughout the Initiative is a "guilty until proven innocent" mentality. Its thinking is prejudiced and unjustified in the face of the countless elected officials who serve with integrity. The reasonable opinion that power and money are corrupting influences is far from the unreasonable opinion that any person with power or money has been corrupted or behaves in an unethical manner and deserves to be treated as a second-class public servant.

Its thinking is also elitist. Note how each candidate for membership on the commission must show ***"demonstrated integrity through leadership and service"*** and must be ***"educated and experienced broadly in ethical matters."*** What are the standards of "integrity" and "leadership" and "service" referred to here? The Definitions section of the Initiative does not mention "integrity" or "service." It does define "leadership" and limits this word to the roles of four individuals in legislative leadership – certainly that cannot be what the Initiative's authors mean by "leadership." But, if not, what do they mean? And if these three words are not defined clearly within the Initiative, and yet represent such crucial criteria, then how is any reasonable person to determine anyone's eligibility for service on the commission?

Only elitist thinking could produce the idea that being ***"educated and experienced broadly in ethical matters"*** – whatever that means – is related to the actual ethical choices of human beings. Sutherland believes in ethics education, not because it believes that this sort of education will assure ethical behavior, but because it produces added layers of personal accountability for the educated. But that's not what the Initiative says. It says, by the omission of clear definitions, that such criteria assure ethical behavior in service of the commission.

The Initiative's creation language continues that ***"No later than June 1, 2011, the leadership*** [i.e., the Speaker of the House and its Minority Leader along with the Senate President and its Minority Leader] ***unanimously shall agree upon 20 individuals"*** whose names would be ***"placed in a hat"*** whereupon the names would be drawn ***"blindly from the hat"*** by any member of the House (first) and Senate (second), alternating, until the ***"first five names so drawn from the hat shall serve as members of the commission."***

If the "leadership" cannot decide unanimously on 20 names to be placed in the hat, the Initiative's "sponsors" will select the names of 20 candidates to be placed in the hat. These "sponsors," in perpetuity, are individuals named Chase Peterson, Karl Snow, Cassie Dippo, Jordan Tanner, and Carole Peterson – there is no mention of whether these individuals meet the eligibility criteria for member on the commission nor, if they could, how that determination would be evaluated.

Sutherland and the Initiative's authors agree on at least one thing about this process: there exists a very strong likelihood that "leadership" will never agree on 20 eligible candidates. How could they with such vague eligibility

criteria and the prospects of philosophically-divergent (not partisan) views among possible candidates? And yet it is very interesting that there is no alternative provision for when both "leadership" and the Initiative's "sponsors" cannot agree on 20 eligible candidates. It is assumed that the "sponsors" will agree on 20 candidates, but not "leadership." Why?

Perhaps the answer is that the eligibility criteria have little to do with the selection process. Perhaps the Initiative assumes the "sponsors" will agree because the "sponsors" know what they're looking for in commission candidates, independent of the stated eligibility requirements. Either way, this selection process is flawed by definition.

In its defense, on its web site, Utahns for Ethical Government responds to such concerns by stating, "*The sponsors have no incentive to be partisan because it would undermine the purpose of the initiative and destroy the reputation of the Commission*." Sutherland has two thoughts in this regard. First, based on those standards, neither does the Legislature have an incentive to be partisan. Second, what is it about the Initiative's authors that make them think they are immune from corruption? Is the public to preclude the thought that a commissioner might take money, or otherwise benefit, from a partisan complainant seeking to besmirch a legislator? Or simply wield the unchecked power of the commission simply because he doesn't care for a particular legislator?

Sutherland believes the Initiative would undermine the purpose of the legislative process and destroy the reputation of the Legislature.

Its Administration

Once created the commission has its assignments,

- *The commission shall receive, investigate, and process complaints against legislators….*
- *Upon request by a legislator or a committee of the legislature, the commission shall issue advisory opinions concerning the code of conduct.*
- *The commission shall create and administer a training program for ethical responsibility for all legislators and for all departments and staff of the legislature.*
- *The commission shall insure that disclosure statements from each legislator are filed and supplemented as required….*
- *The commission shall study, investigate, and make recommendations to the legislature for the improvement of ethics in connection with the conduct of legislative business.*
- *In addition to the foregoing, and within 2 years of its establishment, the commission shall report to the legislature upon the relationship of money, gifts, contributions, lobbying, and campaign finance to the integrity and effectiveness of the lawmaking process, and upon the advisability of pay enhancements for legislative service as a possible antidote for the corrupting influence of money interests in this regard, making specific recommendations for reform in these areas.*

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This "independent ethics commission" is effectively the oversight committee of the Legislature. It is both judge and jury of the Legislature as well as its executioner in the court of public opinion, in so far as the commission's investigations into alleged legislative wrongdoing are public. The commission also would be the Legislature's employer in that the commission would "advise" on appropriate salaries and per diems of legislators and legislative staff.

The Initiative's authors respond to such criticism that the commission has no real power – that is, it has no executioner's ax; it would only recommend actions to the Legislature. The commission would be required, in the Initiative, to recommend the following:

> *Any conduct which violates the code of conduct shall be deemed in every instance to be one or more of the following: (i) a felony; (ii) a breach of the peace; (iii) an action outside the ordinary course of legislative business; (iv) an action beyond the scope of a legislator's official duties.*

Additionally,

> *In every case where the commission's decision implicates misconduct which may offend any criminal statute, the commission promptly shall forward its decisions to the applicable authorities, state and federal, with jurisdiction to investigate and prosecute any such crime. The commission shall cooperate with such prosecutorial authorities in providing files, documents, information, and the like which have been developed by the commission in the course of the case in question.*

And,

> *The commission may gather information by any appropriate means, including the issuance of subpoenas in order to compel the production of documents and the attendance and testimony of witnesses, and for any purpose under this Act…Subpoenas shall be enforced in the manner provided under title 36, chapter 14, of the Utah Code, provided, however, that the commission shall be the party in interest which is authorized and empowered to seek such enforcement of any such subpoena.*

And, finally,

> *…the commission nevertheless shall have the powers and shall adopt the procedures of the Utah Administrative Rulemaking Act.*

Title 36, chapter 14, of the Utah Code, relating to the issuance and enforcement of legislative subpoenas states, in part,

> (1) If any person disobeys or fails to comply with a legislative subpoena, or if a person appears before a legislative body pursuant to a subpoena and refuses to testify to a matter upon which he may be lawfully interrogated, that person is in contempt of the Legislature.

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> (2)(a) When the subject of a legislative subpoena disobeys or fails to comply with the legislative subpoena, or if a person appears before a legislative body pursuant to a subpoena and refuses to testify to a matter upon which the person may be lawfully interrogated, the issuer may:
> (i) file a motion for an order to compel obedience to the subpoena with the district court;
> (ii) file, with the district court, a motion for an order to show cause why the penalties established in Title 78B, Chapter 6, Part 3, Contempt, should not be imposed upon the person named in the subpoena for contempt of the Legislature; or
> (iii) pursue other remedies against persons in contempt of the Legislature.

The powers of the Utah Administrative Rulemaking Act include, Title 63, Chapter 46a, Section 3.5,

> An agency's written statement that is made as a rule in accordance with the requirements of this chapter is enforceable and has the effect of law.

Perhaps the Initiative's authors might consider renaming its effort "The Independent Prosecutors Office of Utah Legislators"? Again, Sutherland views this "independent ethics commission" as a gross violation of the constitutional separation of powers in that the Initiative implicitly creates a new *fourth* branch of government.

The Initiative contains veiled language to mitigate fears that it does not bestow undue power to the commission or that its existence does not violate the separation of powers – *"the commission serves the legislature and is not an agency within the executive branch"* – but the Legislature (or no entity, including "the people") has no authority or control over the commission. If it did, the commission wouldn't be independent, would it?

In fact, the Initiative states explicitly,

> *The commission shall meet, allocate its budget, marshal its resources, prioritize its work, and conduct its business as it deems appropriate, and its independence in this regard shall not be abridged, impaired, or threatened by the legislature, any committee of the legislature, or any legislator.*

An explanation of the commission's administration continues,

> *The commission shall employ an executive director…the executive director must be an attorney…the commission may employ such additional staff (upon such terms and conditions as the commission deems appropriate)…may employ volunteers, including a volunteer executive director…*[and] *may request assistance from the Office of Legislative Research and General Counsel, the Office of Legislative Fiscal Analyst, or the Office of Legislative Auditor, and those departments shall give such assistance promptly, completely, and on a confidential basis to the commission.*

These players represent the universe of staff available to the commission – 100 full-time employees currently (54 FTEs with the Office of Legislative Research and General Counsel, 20 FTEs with the Office of Legislative Fiscal

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Analyst, 25 FTEs with the Office of Legislative Auditor, and the Executive Director of the commission).

Add to this team minimum mandatory funding – *"The legislature adequately shall fund the salary of the executive director, additional staff, and operations of the commission with an annual appropriation…this annual appropriation shall be no less than $472,000.00"* – and with absolutely no outside oversight – *"there shall be no judicial review or agency review of any commission action…The Utah Administrative Procedure Act shall not apply to the commission"* – and this "independent ethics commission" becomes more than independent; it becomes, in effect, an independent *fourth* branch of government.

Furthermore, the Initiative permits the "independent ethics commission" to appropriate key legislative staff from legislators at any time,

> *…the Office of Legislative Research and General Counsel shall not represent any legislator, any committee of the legislature, or the legislature in proceedings before the commission or in challenges to the constitutionality of this Act…any such legislator* [under investigation] *desiring counsel must retain counsel other than through the Office of Legislative Research and General Counsel. Any such legislator who desires to retain counsel may select any attorney or law firm. The reasonable fees of any such attorney or law firm, including other costs of such representation, shall be paid out of funds allocated to the Office of Legislative Research and General Counsel, and this payment shall be made whether or not the legislator is acquitted of the charges of misconduct.*

Not only can the commission prevent legislative staff from working for legislators and the Legislature, it can appropriate staff funding which would place a chilling effect on the willingness of legislators (with the support and permission of legislative leaders) to seek defense counsel.

Its Implementation

The complaint process proscribed in the Initiative can begin with *"any three persons"* other than anyone serving on the commission team, filing a written complaint with the executive director of the commission. The executive director has three days to share the complaint with the members of the commission and the legislator in question. The accusers have full participation rights in the "development of evidence." The accused legislator does not.

There is no punishment for accusers found to have brought forth unsubstantiated or frivolous charges – and no mention in the Initiative about how to handle "serial" accusers who repeat in bringing forth baseless charges.

The executive director has 60 days to recommend dismissal or advance of the complaint. During those 60 days, the executive director is permitted to invoke subpoena power in the development of evidence. There is no date by which or deadline within which the commission is required to act on the recommendation of the executive director. An order of dismissal would be made in writing and delivered to both the complainants and the accused legislator.

> *If the commission does not dismiss the complaint, the commission shall order the complainants to prepare a formal complaint, pursuant to section 36-27-402, against the legislator…After the commission orders the preparation of a formal complaint and throughout the remainder of the proceedings respecting that complaint, the complainants may continue to investigate the subject matter of the complaint….*

Imagine this process in a real court of law: the accusers go before a tribunal, the tribunal sees merit in their complaint, the tribunal empowers the accusers to write the formal complaint against the accused, the tribunal also empowers the accusers to 1) *"continue to investigate the subject matter of the complaint,"* and 2) during the investigative phase of the proceeding, the accusers *"may fully participate in the development of evidence,"* including the subpoena power of the commission exercised by its executive director, and the final report of the accusers is delivered by the accusers, not the tribunal, to the accused. From the web site of Utahns for Ethical Government, it reads, "*The persons bringing the complaint have the initial burden of establishing all the elements of the misconduct.*"

It is no small piece of irony that in the Initiative's desire to bring true accountability to Utah's "corrupt" Legislature – to have our elected representatives treated no differently than a regular citizen – its authors move quickly to get rid of due process afforded every person regardless of class or status. In Sutherland's opinion, a lack of due process equals a kangaroo court, or worse.

The complainants have 30 days to submit a formal complaint, although the 30 days *"may be altered…for good cause by the commission."* The Initiative's Title 36, chapter 27, section 2, allows a majority of the commission (three votes) to allow submission and delivery of a formal complaint *"within 30 days before a primary or general election"* in which the accused legislator is a candidate for public office.

The accused legislator has 20 days to respond to the charges. There is no number of days or specific deadline for the commission to stop hearing a case. The commission is required to rule on a case within 60 days after the final arguments have been submitted (though that deadline can be amended with good cause). There are no formal rules of evidence for the commission to follow.

> *The commission is not required to but nevertheless may use, as standards, the Utah Rules of Evidence, provided, however, that the commission may not base any findings of fact solely upon evidence that would not be admissible under the Utah Rules of Evidence.*

Perhaps most unsettling for anyone concerned about due process is the Initiative's guilty-until-proven-innocent approach to justice.

> *The complainants shall have the burden of going forward and presenting the case against the accused legislator. Once a prima facie case has been established against an accused legislator, however, then as with fiduciary standards in the law of partnerships and corporations, the burden of proof and risk of non-persuasion in relation to such case shall shift to such legislator, and such legislator must show by*

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> *a preponderance of evidence that the legislator did not commit the violation or violations charged in the formal complaint.*

This is, perhaps, the first time anyone has suggested that an accuser has a "burden" in charging the accused. "Prima facie" means at first glance or easily viewed by all parties as obvious – actually not a high standard of proof (e.g., a dead body in the room and *not* that Professor Plum murdered that body in the Billiard Room with a pipe wrench).

This section of the Initiative is really the first chance we have to understand why the Initiative's authors embraced the idea of the legislator as a "*fiduciary*": it justifies the Initiative's authors in shifting the burden of proof to the accused to prove his innocence, rather than requiring the accusers to prove his guilt.

A preponderance of evidence means that a proposition is more likely to be true than not true, the lowest standard of proof – perhaps an oversight in an otherwise punitive Initiative – but not much solace for a legislator carrying any burden of proof when his accusers carry no weight of accusation.

> *If the committee determines that a legislator has violated any part of the code of conduct or applicable civil or criminal statute, the commission, as part of its written decision, shall recommend whether disciplinary action (including expulsion) should be taken, and, if so, on what basis, terms, and conditions, setting forth its reasoning in this regard.*

The respective chamber of the Legislature must conduct a vote on the recommendation *"at the earliest possible occasion"* and no later than the 30th day of the next general session. The Initiative does not describe any punishment, other than the negative publicity that would come from inaction, for either chamber of the Legislature ignoring the commission's recommendations completely – an interesting bit of political cat-and-mouse from the Initiative's authors that shields them from any absolute claim of violating separation of powers and yet throws the accusations into the court of public opinion where they can be thoroughly politicized.

What about privacy and confidentiality throughout these processes?

> *Every conference involving members of the commission respecting proceedings…every conference involving members of the commission respecting deliberations and decision-making…and every investigative aspect of a case, whether conducted by commission staff or involving commission members, at any stage of the proceedings…shall be kept confidential and closed to the public.*

This set of prohibitions applies only to commission members and their staff and only during "conferences" which is not defined in the Initiative.

There are no confidentiality proscriptions or prohibitions on accusers throughout this process, except wherever their investigations include commission staff or members – accusers, those persons tasked with building

the case against a legislator, are free to talk about the case in public – a prescription for politicizing the life of a legislator.

Its Application

Direct application of the Initiative to individual legislators is primarily through its section on "Code of Conduct." In this analysis, Sutherland will include a "Reasonable" or "Unreasonable" comment to each of the Initiative's recommendations. A notation of "Reasonable" does not represent Sutherland's endorsement, however, simply a recommendation whereupon Sutherland feels that reasonable people could agree.

Likewise, the status of "Unreasonable" does not necessarily represent Sutherland's complete disapproval, though it may. Every citizen should understand that the Initiative was written as a punitive law and, as such, vague language only invites accusations against legislators. Where Sutherland finds the Initiative's recommendations vague, and therefore giving encouragement to accusers to attack legislators, it will find those recommendations "Unreasonable."

This section of the Initiative begins with a provision about "advisory opinions." In its paper, *Politics or Polity?*, Sutherland recommended the creation of an Office of Advice and Education which would permit legislators to query legal staff about potential conflicts of interest and other ethical matters. The Initiative has something similar, though not really what Sutherland had in mind and, though reasonable as a free-standing idea, Sutherland certainly opposes this particular recommendation within the context of an "independent ethics commission."

> *An opinion by the commission which determines that the relationship or transaction under review does not violate the code of conduct shall give the legislator absolute immunity from any complaint… Such an opinion, however, shall not immunize a legislator from a complaint…unless (i) such opinion is sought and obtained prior to entering a relationship or doing the transaction which is the subject of review by the commission, (ii) the opinion has been rendered on no less than 30 days' notice from the legislator so that the opinion might be a well-prepared and wisely-considered ruling, (iii) the opinion is issued in writing and sets forth, in reasonable detail, the application of the code of conduct to the statement of facts which has been supplied by the legislator, and (iv) the complaint asserts claims which involve the identical circumstances covered by the commission's opinion.*

Once again, you can sense the adversarial, even prosecutorial, attitude of the Initiative's authors – this language is not helpful and welcoming for legislators, as it should be, but suspicious and over-protective of the commission's ability to capture wrongdoing.

The Initiative lists many recommendations in creating this "code" for legislators:

- *No legislator, while serving in office, may be a control person of any corporation where (A) status as a legislator was a contributing factor in such selection as a control person and (B) being a control person in such corporation furthers any personal interest of the legislation.*

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This Initiative recommendation is: Unreasonable.

This language, even with definitions provided for "control person" and "personal interest," is so vague that it would encourage a disgruntled citizen to file charges against a legislator. How would a legislator in these circumstances defend herself against charges that being a legislator had no affect in the workplace or any other place where her status in known? The reality of this dilemma is why the Initiative rests on "prima facie" standards to move forward with a complaint – "public" figure has meaning – being a public figure impacts every professional relationship of the public figure. It is unavoidable. This fact of "human nature" cannot be controlled by law and yet this is how the Initiative's authors view the role of human nature – that one human being having influence over another human being is an inherent crime.

Perhaps the most interesting aspect of this view of the Initiative's authors is that they seem unable to understand that the very same "problem" exists for members of their commission. Members of the commission would be very high-profile public figures. Using their theory of human behavior, they, too, would be placed in the same position where every professional relationship would be jaded by the broad knowledge that they sit on the commission and wield power over people.

What is very peculiar is how the Initiative's authors see the "human nature" of *other people* as corrupt, but see their own "human nature" as noble, impervious to weakness, and elevated. To wit, the commission has no oversight (none, zero, nada).

The term "control person" is defined in the Initiative as *"(i) any person with a control status or actual control within a corporation, including any member of a board of directors, any officer, any managing member, any general partner, any equity holder having more than 10 percent ownership in such corporation, or (ii) any person who, under any set of circumstances, has power to direct or materially influence the affairs of another person."* "Corporation" would include a not-for-profit.

The term "personal interest" is defined by the Initiative as *"(i) potential or actual profit or benefit to a person or an insider of such person, and (ii) potential or actual partisan political benefit to a person or an insider of such person."*

Curiously, exempted from this definition is *"any interest resulting in profit or benefit derived from a state contract or the use of state monies solely on account of regular employment by a public body in the ordinary course of business of that public body, and does not include any profit or benefit which is available to the public at large on the same and conditions."*

Sutherland calls that exemption the "government employee exemption" and feels strongly that such blatant partisanship is wrong. This exemption means that a public school teacher or an agency bureaucrat is permitted to hold a legislative seat, but an employee of a traditional business could not, using the same criteria. Not only is this recommendation unfair and unethical, it is partisan – it says that being a government employee has no

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inherent conflict of interest in both holding an elected office and deriving a personal benefit from tax dollars and, furthermore, this language is implicit that being a government employee is somehow only a benefit to the public, and not a private benefit for the employee, and that being a traditional businessperson is of no benefit to the public and only a private benefit to the employee.

Sutherland is only left to presume that the Initiative's authors have a reverential and idolized view of government employment and a contempt for the private sector.

The "human nature" of unelected public officials, including every state and local government employee, is no different than the "human nature" of legislators. This unjust recommendation alone, if adopted, would give government employees an advantage to run for the Legislature because every private-sector candidate would be threatened with punitive oversight not imposed on a government employee – a prospect that Sutherland believes would bring an end to good government in Utah.

This bias is why Sutherland has previously recommended state enforcement of the federal Hatch Act which would prohibit state and local government employees from running for partisan elective offices.

- *No legislator, while serving in office, may act as a lobbyist.*

This Initiative recommendation is: Reasonable.

This is reasonable based on public perceptions, not any inherent conflict of interest or any circumstantial conflict of interest at which point a legislator could recuse herself from a vote.

- *No legislator may act as a lobbyist for two years from after the date of such legislator's resignation.*

This Initiative recommendation is: Reasonable.

This is reasonable based on public perceptions, not on any inherent conflict of interest.

- *A legislator, while serving in office, shall not accept new employment or engagement, whether as a consultant, advisor, attorney, or employee, with a lobbyist.*

This Initiative recommendation is: Reasonable.

This is reasonable based on public perceptions, not on any inherent conflict of interest.

- *A legislator, while serving in office, shall not accept a gift from a lobbyist.*

This Initiative recommendation is: Reasonable.

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This is reasonable based on public perceptions, not on any inherent conflict of interest.

- *A legislator, while serving in office, may not accept a campaign contribution where such contribution has been promised or was intended as a quid pro quo, explicitly or implicitly, to induce specific action by a legislator which is favorable to the person making the contribution.*

This Initiative recommendation is: Unreasonable.

This recommendation does not control for campaign contributions favorable to the contributor, especially a constituent's campaign contribution, and is generally favorable for "every" Utahn. If the purpose of this recommendation is to prohibit "payola," the authors should have stated that explicitly.

- *A legislator, while serving in office, and in exchange for money or money's worth, shall neither offer to give nor give consultations respecting the passage of legislation or any legislative action.*

This Initiative recommendation is: Unreasonable.

This recommendation is unreasonable because it is vague (what are "consultations"?) and such a punitive law, as this Initiative is, cannot afford to be vague in the name of ethical conduct.

- *A legislator, while serving in office, shall demonstrate exemplary obedience to law and shall not engage in any conduct violative of any civil or criminal statute relating to or having a bearing upon legislative service or a legislator's fitness to serve.*

This Initiative recommendation is: Unreasonable.

This recommendation is unreasonable because it is vague ("exemplary obedience to the law" is not defined) and such a punitive law, as this Initiative is, cannot afford to be vague in the name of ethical conduct.

- *A legislator, while serving in office, shall not use or threaten to use the legislator's office, including the legislator's power to sponsor legislation, control or influence outcomes in committees, or vote on bills, in furtherance of any personal interest.*

This Initiative recommendation is: Reasonable.

A legislator should only serve the public interest.

- *A legislator, while serving in office, shall not threaten retribution against any person, public official, or public body for failure to comply with a request by the legislator.*

This Initiative recommendation is: Unreasonable.

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If a request by a legislator of a public official or public body is to comply with the Utah Constitution and Utah Code, a legislator is well within her bounds to "threaten" that official or body with bringing the non-compliance to light or working to de-fund that official or body through appropriate legislative channels. This recommendation fails to distinguish among "requests."

- *A legislator, while serving in office, shall not communicate with any public official or public body in order to discourage the investigation or prosecution of any matter, civil or criminal.*

This Initiative recommendation is: Unreasonable.

Generally speaking, a legislator ought to be permitted to communicate with any public official or public body at any time for any reason – to prohibit otherwise would be to limit a legislator's ability to represent her constituents and live up to her Oath of Office in matters pertaining to the preservation of the United States and Utah Constitutions. This recommendation fails to distinguish between the broad workings of a democracy and any legal nuances within the Judiciary that might prohibit certain forms and types of communications under court order.

- *A legislator, while serving in office, shall not use government facilities or employees in furtherance of a personal interest.*

This Initiative recommendation is: Reasonable.

- *A legislator, while serving in office, shall not interfere with or attempt to influence the preparation of any document, analysis, opinion, or audit to be prepared by the Office of Legislative Research and General Counsel, the Office of the Legislative Fiscal Analyst, the Office of the Legislative Auditor, the Governor's Office of Planning and Budget, or any other public body or public official in conjunction with any issue which is or is proposed to be the subject of a statewide initiative or referendum.*

This Initiative recommendation is: Unreasonable.

A legislator ought to be permitted access to any information conducted under the auspices of the Legislature and not otherwise proscribed or prohibited under legislative rules as created by the Legislature. While initiatives or referenda are intended, appropriately so, to circumnavigate the Legislature, to prohibit a legislator access to the work product of the Legislature is to limit his ability to represent his constituents. Sutherland also finds it questionable that authors of an initiative or referendum should have any access to the named staff – but the authors of this Initiative, obviously, believe that the staff in the offices mentioned in their recommendation ultimately work for the commission. In this regard, the Initiative's recommendation is as unsurprising as it is unreasonable.

- *No legislator, while serving in office, shall attempt unduly or unconstitutionally to influence the outcome of any matter to be decided by a public body or public official. In determining whether a legisla-*

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tor has exercised any improper influence in this regard, the commission shall consider all the facts and circumstances of the case, including (A) whether the legislator has any personal interest in the matter; (B) whether the legislator acted officiously; (C) whether the legislator acted ultra vires; (D) whether the legislator communicated on an ex parte basis; and (E) whether the legislator employed inappropriate means, including the use of foul language, the making of threats of reprisal, or the creating of an impression that the legislator is acting for the legislature or other legislators when, in fact, the legislator is not authorized formally to do so.

This Initiative recommendation is: Unreasonable.

"Ultra vires" means beyond the scope of one's authority and "ex parte" means communicating with one side only.

Sutherland does not condone anyone acting "unduly or unconstitutionally." Nor does Sutherland condone a legislator using foul language, making threats, or misrepresenting himself or his office. The language in this recommendation insinuates that items A-D are acting "unduly or unconstitutionally." That insinuation might not always be accurate.

Again, a legislator should have wide latitude in representing her constituents before any public body or public official. If her constituents deem her behavior inappropriate, they will remove her from office. If her behavior reflects poorly on the Legislature, it can discipline her to the point of unseating her.

The punitive nature of the Initiative does not permit a legislator (or any freedom-loving Utahn for that matter) to have any reasonable perspective outside of extreme caution in giving a commission any arbitrary power to judge a legislator's conduct on the basis of vague terms such as "inappropriate means" or "acted officiously" or even "unduly or unconstitutionally."

- *A legislator, while serving in office, shall not attempt to influence the contractual relationship between a lobbyist and the principal of such lobbyist in furtherance of a personal interest.*

This Initiative recommendation is: Reasonable.

- *A legislator, while serving in office, shall not suggest to any lobbyist that such lobbyist make any arrangement which might further the personal interest of such legislator including a suggestion that the lobbyist hire the legislator or an insider of the legislator, and no legislator, while serving in office, shall arrange for or accept any employment from and through a lobbyist, whether for the legislator or an insider of the legislator.*

This Initiative recommendation is: Reasonable.

In relation to disclosure, the Initiative requires legislators to,

> *Not later than January 15 of each year, each legislator shall file a conflict of interest disclosure statement with the commission. The disclosure statement shall be in a form prepared by the commission and shall include, at a minimum, the following information: (i) the full names of the legislator and the legislator's spouse; (ii)…compensation or benefits of any kind of a value in excess of $3,000…; (iii)…positions of any nature, whether compensated or uncompensated…; (iv)…an agency relationship, including any client of a legislator, and from which…the legislator has received amounts in excess of $10,000; (v)…any property, real or personal, tangible or intangible…; (vi)…any insider of the legislator where such insider holds or seeks contracts for services with any public body; (vii) the amount and nature of any loans… forgiven or compromised by or through any insider of the legislator or spouse or by or through any lobbyist…; (viii)…all insiders of the legislator which are lobbyists; and (ix)…all transfers received from any lobbyist…or any insider of the legislator….*

This Initiative recommendation is: Reasonable (with an exception).

The Initiative's authors, like most reasonable people, would like to know as much as possible about legislators. Sutherland much prefers full-disclosure statements to the Initiative's punitive oversight and encourages the Legislature, in the 2010 session, to address more fully this approach.

The Initiative defines an "insider" as "(i) any relative of the legislator, (ii) any person in relation to whom the legislator is a control person, (iii) any person who is a controlling person in relation to the legislator, and (iv) any client of the legislator."

State Senator Lyle Hillyard argues that the inclusion of a client list would preclude any attorney from serving in the Legislature. "In a debate before the Hinckley Institute of Politics at the University of Utah, Sen. Lyle Hillyard, R-Logan, an attorney, said his law partners have examined the Utahns for Ethical Government initiative and have told him: 'You are out of the Senate' if the initiative becomes law." (*Deseret News*, Wednesday, November 4, 2009) Senator Hillyard's concern is valid.

The final part of the "Code of Conduct" in the Initiative regards the campaign money of legislators and candidates for public office. *"Legislators and legislative candidates shall not:"*

> *Solicit or accept contributions from a lobbyist for any political action committee, political issues committee, political party, political caucus, or any personal campaign committee other than the legislator's or legislative candidate's own personal campaign committee.*

This Initiative recommendation is: Unreasonable.

Beyond its obvious and well-known definition, a "lobbyist" is defined in the Initiative as *"any person who retains and pays a lobbyist…where the person retaining and paying a lobbyist is a corporation, any control person of that corporation…where communication is solely to a public official or a public body, lobbyist shall not include*

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a licensed attorney or a licensed accountant during the ordinary course of representing a client or any expert witness during the ordinary course of giving testimony."

This recommendation is intended to end the ability of corporations to donate to candidates and campaigns – a major policy change for Utah. The Initiative is distinctly anti-business without cause. If self-interest is to be condemned, America is over. Not to mention the ever-present double-standard in this Initiative – the Initiative's authors are blind to their own partisan self-interest.

Again, corruption is a two-way relationship. While corporate contributors may have self-interested reasons to donate – which impulse can hardly be condemned in a truly corrupting climate of "public-private partnerships" – the interests of a corporation are meaningless when confronted by a legislator with integrity. The key to public integrity is personal accountability from legislators which disappears with the creation of an "independent ethics commission."

> *Give monies taken from the legislator's or legislative candidate's personal campaign committee to another legislator or legislative candidate, a political action committee, political issues committee, political party, or political caucus.*

This Initiative recommendation is: Unreasonable.

One legislator donating personal campaign funds to another legislator's campaign, or political campaign of any sort, keeps the money involved for the public interest – campaigns and elections in a democracy are essential parts of the public interest in a free society.

> *Accept contributions from the personal campaign committee of another legislator or legislative candidate.*

This Initiative recommendation is: Unreasonable.

> *Accept campaign contributions from corporations.*

This Initiative recommendation is: Unreasonable.

> *Solicit or accept campaign contributions which exceed $2500 per individual or $5000 per political action committee during each two-year period preceding a general election.*

This Initiative recommendation is: Unreasonable.

> *Use of any funds from their personal campaign committee for non-campaign personal expenditures.*

This Initiative recommendation is: Reasonable.

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Sutherland's stated position is that "the use of campaign contributions should be restricted to direct campaign expenses – personal uses such as paying for personal bills, wardrobes, and household or private business expenses should be prohibited."

Campaign monies are held for the public trust. Personal expenses are personal, not public.

> *Funds remaining in the campaign account of a legislator or legislative candidate 5 years from the date of such individual's defeat, resignation, or expiration of the term of office shall be deemed transferred to the school fund…unless the legislator earmarks such funds for transfer to one or more charitable organizations.*

This Initiative recommendation is: Reasonable.

Sutherland's stated position is that "unused campaign contributions may be held for personal campaign purposes as long as the legislator remains in office or intends to run for office in a future campaign. Retired (or defeated) legislators may hold unused campaign contributions for up to six years only for future personal campaign use. At the end of six years, the legislator must donate his or her remaining unused funds to a legal charity."

CONCLUSION

The Initiative's authors receive polite praise, even from those Utahns who disagree with their recommendations, in respect of the effort to make something happen within the Legislature regarding ethics reform. Those polite expressions are evidence of how serious, important, and obvious the need is for the Legislature to address this public concern.

After a thorough review, Sutherland stands opposed to the Government Ethics Reform initiative. Even with only a cursory review, the average citizen can see the language it utilizes to create an "independent ethics commission" is cynical, presumptuous, double-dealing, heavy-handed, punitive, self-righteous and, in nearly every way, unconstitutional.

If the desire of its authors is to encourage Legislators to increase personal accountability and to preserve the integrity of the Legislature in the eyes of the public, there couldn't be a worse way to go about these objectives. Because of the Initiative's cynical and punitive nature – not to mention its complete ignoring of constitutional law – any reasonable observer would be led to question the true intent of its authors. The authors sound like adversaries looking to prosecute legislators, not responsible citizens weighing in to influence sound policy and good government.

Be that as it may, the Initiative is a bad idea. In fact, Sutherland maintains that *any* establishment of an "independent ethics commission," whether created by the Legislature or others, is a bad idea and diminishes the trust that citizens will have in legislators. An "independent ethics commission" sends one signal and one signal only

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from legislators to citizens: "you are right not to trust us." It says to citizens that legislators can't take care of their own business as the Utah Constitution proscribes. It only serves to reinforce the idea, argued ad nauseum by the Initiative's authors, that being a "legislator" or a "lobbyist" or a corporate leader is an inherently-corrupt act of service – and that there exists a group of "enlightened" people whom the public can trust with their government when their own elected officials cannot be trusted. To which Sutherland replies: Then why not simply elect them?

Sutherland trusts that legislators can be safely held accountable for their service and that the Legislature will act united to preserve the integrity of the institution. Sutherland is not cynical about democracy or citizenship.

Lastly, Sutherland reaffirms the true answer to many of the concerns posed by the Initiative's authors: the answer to real or perceived undue or disproportionate influence in the Legislature is not to limit the influence of a person who has a constitutional right of free speech, but to limit the opportunity for influence by reducing the size and scope of government.

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