

POLITICS OR POLITY? ETHICS REFORM FOR UTAH

Ethics reform is a gateway to the renewal of citizenship in Utah. It is primarily about restoring confidence in our public institutions.

INTRODUCTION

For some time, the Sutherland Institute has talked privately with Utah political leaders of both major parties and encouraged them to embrace sincere ethics reform. Before the 2008 legislative 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. The purpose of this paper is to set forth our recommendations and re-initiate that process.

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.

Now that the 2008 election season has brought ethics charges and counter-charges to the surface, perhaps we will see the 2009 State Legislature act swiftly to restore public confidence. Understanding that asking for complete confidence is a tall order for any public institution, the State Legislature would be wise to do something.

The Sutherland Institute's recommendations for ethics reform rest on two pillars of polity: first, preserve personal accountability for every state legislator; and second, establish a clear basis for the public to respect the integrity of the Legislature as an institution.

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ACCOUNTABILITY AND THE
INTEGRITY OF THE LEGISLATURE

PILLAR I 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 straightforward 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 seeking to curry the favor of more powerful legislators. Perhaps worse, the Legislature will have no way of preventing wrongdoing or weeding out such behavior when it occurs. There is safety for honest legislators when there are objective standards of behavior and accountability.

PILLAR II 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 an individual 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.

The Sutherland Institute is equally adamant about the need to distinguish between personal conduct – the acts of a legislator that fall within the scope of his or her personal, business and/or professional activities – and "official" conduct – acts that fall within the official duties and activities of a legislator. (There is a reason, for example, why the United States House of Representatives does not have an "ethics committee." Rather, it has a Committee on Standards of Official Conduct.) Utah has a part-time legislature, which fact necessarily dictates many of the terms we would use in a discussion about ethics reform. We must remember that a part-time legislator is also a full-time citizen and, very often, a full-time businessman or businesswoman – not everything a state legislator does falls under the purview of "official conduct." A private business deal can be entirely a personal matter. Then again, a private business deal that could not have occurred without the help of "official conduct" would be a proper matter for the body to address. There are real differences between personal conduct and official conduct and this fundamental view should be a centerpiece of any reform efforts.

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.

It is useful to note that the United States Congress follows the federal Code for Ethics in Government Service that stresses adherence to the highest moral principles, giving a full day's labor for a full day's pay, never discriminating unfairly by dispensing special favors, never accepting favors or benefits that might be construed as influencing the performance of government duties, making no private promises binding on the duties of the office, engaging in no business with the government inconsistent with official duties, never using in-

formation received confidentially in the performance of official duties for making a private profit, and upholding the Constitution of the United States.

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.

The Sutherland Institute is pleased to offer recommendations for a new ethics reform package. We urge the State Legislature to make this issue its highest priority for the 2009 legislative session.

RECOMMENDATIONS

CREATE A NEW JOINT COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

Traditionally, each chamber of a bi-cameral legislature has its own ethics committee. Sutherland recommends a different approach for Utah's Legislature – a single joint committee. Recent events have shown that ethical questions in either chamber greatly affect the public perception of the entire State Legislature. A joint committee would signal to Utah citizens that the State Legislature considers any single ethical violation as a mark against the integrity of the entire institution. It would also streamline inquiries and result in faster resolution of cases as they arise.

A Joint Committee on Standards of Official Conduct might have the following structure:

- A standing Joint Committee chair, from the majority party, and co-chair from the minority party (in cases of different majority parties in each chamber, the House majority party would chair)
1. Fourteen members of the Joint Committee, evenly divided by party: House, eight members (four Republicans, four Democrats) and Senate, six members (three Republicans, three Democrats).
 2. Once a serious complaint is received by the Joint Committee, all cases would be handled confidentially (not public information); thereafter, committee recommendations for action on cases would be brought to the floor by the Joint Committee in a combined session.

CREATE THE OFFICE OF ADVICE AND EDUCATION WITHIN THE JOINT COMMITTEE

This new Office of Advice and Education (OAE) would be staffed by non-partisan trained personnel who may, but need not, be attorneys. (These individuals could be either new hires or selected from current staff, but working solely for the new office.) They would serve three primary functions:

- Receive and review all complaints and pass serious complaints on to the Joint Committee Chairs
- Give pre-emptive advice and official counsel in response to legislators' inquiries about potential violations of official conduct
- Oversee continuing education programs for legislators in understanding ethical issues and the official rules of conduct

The OAE would receive all complaints filed at any time against a sitting legislator (with one exception, as noted in #6, below). Complaints could be filed by any Utah citizen under the following guidelines:

3. A complaint must be in writing, dated, properly verified, and submitted under oath.
4. A complaint must set forth in simple, concise, and direct statements: the name and legal Utah address of the party filing the complaint; the name and position or title of the respondent (i.e., legislator); the nature of the alleged violation of the Code of Official Conduct or of other law, rule, regulation, or other standard of conduct applicable to the performance of official duties or discharge of official responsibilities (if known); and the facts alleged to give rise to the violation.
5. A complaint shall not contain innuendo, speculative assertions, or conclusory statements.
6. A complaint filed by a state legislator against a fellow legislator may be transmitted directly to the Joint Committee chairs; a complaint filed by a Utah citizen, not a state legislator, is automatically routed to the OAE.
7. A complaint must be accompanied by a certification, which may be unsworn, that the complainant has provided an exact copy of the filed complaint and all attachments to the respondent (legislator).
8. The Joint Committee shall not accept, and shall return to the complainant, any complaint submitted within the 60 days prior to an election (including primaries) in which the subject of the complaint is a candidate.
9. On a serious complaint passed along, in a "timely manner," from the OAE to the Joint Committee chairs for consideration, the respondent shall have 30 days to reply to the complaint; the Joint Committee will have 30 days to meet and begin consideration of the complaint – no time limit shall be placed on the Joint Committee to resolve the complaint. Failure to meet the time deadlines shall be considered a violation of rules and subject to punishment, not less than censure, for respondent and Joint Committee chairs.
10. If the OAE determines that the complaint either does not comply to form or does not merit serious attention by the Joint Committee, the OAE will notify the complainant of its rejection and reasons for the rejection.

The OAE will be available for consultation and pre-emptive advice and official counsel in response to legislators' inquiries about potential violations of official conduct.

This is viewed as a matter of protection for legislators who are sensitive to the ethical standards and who would appreciate an opportunity to discuss proposed acts in light of such standards. This process can create a documentary record in the event questions arise about official conduct.

A legislator should be able to obtain an advisory opinion for any matter in question regarding his or her official duties – from dealing with constituents to conflicts of interest to recusal on votes. At least three rules should apply in these advisory relationships:

11. No legislator may be put in jeopardy by making a request for advice.
12. Due to the pre-emptive nature of this process, a legislator who acts in good faith, in accordance with the recommendations of an advisory opinion, may not then be investigated by the Joint Committee based on the conduct addressed in the opinion.
13. All inquiries and their responses will be kept confidential by the Joint Committee.

The OAE would oversee continuing education programs for legislators in understanding ethical issues and the official rules of conduct. Legislators would be required to:

14. Attend at least one OAE-conducted, or OAE-approved, seminar, lecture, or training on “official conduct” or general ethical behavior (including honesty and integrity). The OAE should consider offering online courses as well.

ADDRESS CONFLICTS OF INTEREST

A part-time state legislature inherently exposes its members to conflicts within the exercise of official duties. Such conflicts can take many forms – so many forms, in fact, that appropriately addressing them, arguably, has been at the heart of most of the recent negative public perceptions regarding legislators, and should be the Utah Legislature’s highest priority.

Sutherland recommends the following steps to mitigate unwarranted public perceptions, as well as actual violations, of conflicts of interest:

- Acknowledge that conflicts can be direct or indirect
- Require reporting of all actual and anticipated conflicts
- Change legislative rules to permit recusal on votes

Conflicts of interest can be direct or indirect and their status could serve to determine appropriate, case-by-case responses. *Indirect* cases of conflict might include a legislator whose full-time job is, for example, working as an insurance agent and a bill under consideration deals with insurance issues. A *direct* conflict of interest might include a legislator who is employed as a public school teacher and a bill under consideration deals with teacher pay, or a legislator who is an attorney and a bill under consideration would benefit a client, or a legislator who works for or owns an interest in a company that contracts with the government and will benefit directly from a bill under consideration.

Sutherland has looked seriously into rules imposing limitations on committee assignments, committee votes, and floor votes as a result of actual or potential conflicts, but has returned to the fundamental policy of personal accountability as the basis for true reform.

The spirit of personal accountability, as well as the letter, must allow ethics processes to naturally unfold – resting squarely on the personal decisions of individual members, knowing each member has the support of the Joint Committee, and its Office of Advice and Education, for requested assistance. Each legislator must be permitted to live with the consequences of his or her own official actions – and the Joint Committee must be permitted to appropriately, freely, even aggressively, pursue any improper conduct by legislators.

The first step in addressing conflicts of interest, and respecting the personal accountability of legislators, is reporting these conflicts.

15. No later than 14 days prior to an upcoming session, legislators should be required to report all potential conflicts to the Joint Committee. During the session legislators should also provide updated information about potential conflicts as soon as they become aware that they might have an interest in bills that are introduced.

The second step in addressing conflicts of interest is permitting legislators to recuse themselves from any vote that presents a conflict.

16. Legislative rules should be changed to permit recusal from committee and floor votes.

ADDRESS “GIFTS” IN THE COURSE OF OFFICIAL DUTIES

The unwritten, but very real, “law of obligation” creates perceptions that a gift given to a legislator in the course of official duties, especially from registered lobbyists, is an attempt to influence legislators, legislation, or legislative processes. This is true even when the giver and the receiver are both individuals of impeccable integrity and reputation.

After thorough consideration of all aspects of gift-giving to legislators, Sutherland concludes that, public perceptions alone should dictate the State Legislature’s policy on gifts. If gifts are meaningless, as most legislators have verbalized, then banning gifts should not be controversial. Hence, Sutherland recommends a comprehensive gift ban which would

- Ban all tangible gifts, including any travel-related expenses – for legislators, their spouses, and family members – from registered lobbyists, as well as any gift passed through another person from a registered lobbyist
- Permit a “reasonable” meal exception – wherein (1) all one-on-one and small group meal-meetings involving a registered lobbyist would be allowed but reported; and (2) the acceptance of meals (and educational materials such as publications) at charitable and educational, “open or well-attended,” events, would be exempt from reporting
- Permit receipt of “ceremonial” awards – non-cash and lacking market value due to the personal and ceremonial nature of the award (e.g., an engraved plaque)

A “gift” might include a gratuity, honorarium, favor, discount, entertainment, hospitality, loan, forbearance, or any other item having monetary value. Any effective gift ban must include a ban on gifts to spouses and family members of legislators. There are inconveniences that must be considered with a policy that bans all gifts with few exceptions. For instance, sometimes legislators are genuine friends with registered lobbyists and gift exchanges for special occasions would be otherwise appropriate. A gift ban as recommended would preclude these otherwise justifiable opportunities.

The difficulty in writing a gift-ban policy is that exceptions for reasonable and commonly-accepted exchanges of gifts could create a Byzantine labyrinth of acceptable and non-acceptable standards. For instance, using the previous example, how would the Joint Committee define a “friend”? The United States House of Representatives provides a good case study. It allows gifts from friends but describes its complex rule thusly,

The word “friend” may be used in different ways, and at times this provision of the gift rule has been mischaracterized as requiring Members and staff to decide who is, and who is not, a “friend.” Instead, when a Member or staff person wishes to rely on this provision of the rule, the individual must consider each gift individually – whether the gift is a meal, tickets to a game, or anything else – and the individual must determine whether that particular gift was offered “on the basis of personal friendship.”

(House Ethics Manual, Committee on Standards of Official Conduct, 110th Congress, 2nd Session; 2008 Edition, p. 39)

Sutherland recommends that the State Legislature avoid this sort of subjective burden. It also recommends certain exceptions involving meals and attendance at charitable or educational events, as described above.

Reasonable people understand that there is only so much time during a day and that a typical day involves eating a meal or two. Acknowledging that meal times are well-suited for additional meetings and conversations, and likewise acknowledging that citizens have real concerns over undue legislative influence, should motivate the State Legislature to require specific reporting measures.

17. One-on-one and small group meals where a legislator and a registered lobbyist are present should be an allowable, but reportable, meal – the legislator reporting to the OAE and the registered lobbyist reporting to the Lieutenant Governor’s office in their regularly-required reports. The State Legislature should consider a monetary cap on the cost of a meal.

Sutherland believes that Utah’s elected officials and community leaders should be deeply involved in charitable and educational activities, encouraging and participating in them. Typically, legislators are so involved in a variety of charitable and educational events that it would be unreasonable to also require of them to purchase their own meals.

18. Permit the acceptance of meals (and educational materials) at charitable and educational, “open or well-attended,” events without reporting.

Commonly, charitable events honor legislators for giving their time and encouragement to worthy causes, and often an award is presented. Sutherland encourages this practice.

19. Permit the acceptance of “ceremonial” awards – non-cash and lacking market value due to the personal and ceremonial nature of the award.

ADDRESS CAMPAIGN CONTRIBUTIONS

Citizens are justifiably concerned about the use of campaign funds. While there seems to be a broad consensus that campaign funds should not be expended for personal use, there has been wide disagreement about other uses. Sutherland believes that a single, overriding, philosophy should govern this issue:

- A campaign contribution is private money but with direct, public intent and, therefore, should be restricted in use

The “public interest” is served by many private institutions. Charitable organizations such as the United Way, Red Cross, even the Sutherland Institute are required to serve the public interest within strict proscriptions on how these organizations can use the money they receive through donations. While campaign contributions are not tax-deductible as are contributions to traditional not-for-profit organizations, both types of contributions serve a public purpose. It is this common public purpose that should dictate policy.

Not-for-profit organizations are allowed to use donated funds for a variety of purposes within the context of corporate mission and the execution of corporate ob-

jectives. Seen in this light, rules on campaign contributions might have more clarity. For instance, a not-for-profit can use donations for the day-to-day operations of its organization. It is not unreasonable to expect that a candidate’s political campaign should be permitted to use donated funds to do the same thing.

There are “best practices” for not-for-profits. Generally, donations are not used for more personal items like paying for employee wardrobes. Employees are allowed to receive reimbursement for mileage in the exercise of official duties. Cell phones may or may not be included in reimbursable employee expenses. Likewise, there is great merit in encouraging “best practices” where the expenditure of campaign contributions is involved.

In the case of campaign contributions, Sutherland recommends that:

20. 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.
21. 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.
22. Contributions from political action committees (and other collectives such as 527 organizations) involving individual donors with a Utah residence

may not be aggregated for reporting purposes – each donor with a Utah residence contributing to a PAC’s aggregate donation must be individually specified in the candidate’s official reports to the Lieutenant Governor’s office.

ADDRESS OTHER ETHICAL CONCERNS IN THE PUBLIC INTEREST

As the State Legislature moves aggressively to address these specific, and much-discussed, issues surrounding ethics reform, there remain many other policies that would encourage confidence in our public institutions. Sutherland recommends that these additional concerns be incorporated into an ethics-reform package:

23. Registered lobbyists should lose their status if found to have knowingly deceived a public official and for working off of contingency fees.
24. The federal Hatch Act, as currently applied to state and local governments, should be strictly enforced – state and local government employees should be prohibited from running for partisan elective offices.
25. State and local government employees should be prohibited from lobbying for specific legislation during regular work hours. (If called upon to testify before the Legislature regarding their official duties, that testimony would not be considered lobbying.) They should be required to disclose their employment during lobbying activities.
26. Retired legislators should be held to a two-year moratorium from participating as lobbyists.

CREATE A POCKET-SIZE ETHICS MANUAL THAT INCLUDES GENERAL ETHICAL STANDARDS, VIOLATIONS OF ETHICAL STANDARDS, AND COMMITTEE PROCEDURES

There is a need for every member of the State Legislature to have standards of official conduct at their immediate disposal. 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, 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 determine violations. The State Legislature must be allowed to reprove and punish its members who are found to be in violation of ethical standards. Sutherland recommends a simple categorical approach: reprimand, censure, or expulsion. Taking each incidence on a case-by-case basis, and using a standard of clear and convincing evidence, the body would subjectively determine an appropriate punishment. For example, a *reprimand* could be associated with a breach in deco-

rum; a *censure* could be associated with violation of an obvious conflict of interest; and, an *expulsion* could be associated with criminal conduct or a gross violation of any one standard.

A FINAL THOUGHT

Sutherland staff and colleagues have had the great pleasure of working closely with members of the State Legislature on a variety of issues and legislation. We find them to be people of integrity. Politics and political power can inflame even the best of us to behave in ways that can breach decorum, and can coax good people to do things they otherwise would not even think about doing.

As a conservative organization, Sutherland understands and believes in the nature and necessity of rules. Families, voluntary organizations, businesses, and even the

free market have rules we are expected to live by. No reasonable person believes otherwise when it comes to standards of official conduct in our most sacred public institutions.

If indeed we hold our public institutions sacred, we also will afford those we entrust with this power to govern themselves within a process of proper checks and balances. The citizens of Utah must have confidence in their representative form of government and this confidence cannot fully manifest itself if the only checks and balances on political power come from political partisans and media skeptics – certainly they have their role, but theirs is not the only influence, nor should it even be the primary influence, determining the integrity and credibility of our government. That task should fall primarily on those good people whom we trust with the public interest.

A BLUEPRINT FOR ETHICS REFORM

CREATE A NEW JOINT COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

- Create a standing Joint Committee. Appoint a chair, from the majority party, and co-chair from the minority party (in cases of different majority parties in each chamber, the House majority party would chair)
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CREATE THE OFFICE OF ADVICE AND EDUCATION WITHIN THE JOINT COMMITTEE

- Receive and review all complaints and pass serious complaints on to the Joint Committee chairs
 - Give pre-emptive advice and official counsel in response to legislators' inquiries about potential violations of official conduct
 - Oversee continuing education programs for legislators in understanding ethical issues and the official rules of conduct
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- Every legislator should have quick access to official standards of conduct. These standards serve as a reminder that legislators are expected 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
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