

DRAFT

MEMO

To: Utah State Senators
From: Lyle Hillyard
Subject: Constitutional Issues with Government Ethics Reform Initiative
Date: Tuesday, September 15, 2009

This document identifies some of the constitutional issues that seem to be raised by the Government Ethics Reform Initiative. It is not exhaustive: further analysis and research could disclose additional issues or establish that some of these identified issues have less credibility.

Unconstitutional Delegations of Power Problems

- The power to judge "the election and qualifications of its members, and . . . punish them for disorderly conduct, . . ." is vested in each house of the Legislature. The initiative cannot interfere with this plenary legislative constitutional power by delegating responsibility for legislative ethics to an Ethics Commission, by defining a "Code of Conduct" for legislators in statute, or by imposing time and procedural requirements on the Legislature. Those powers are reserved to the Legislature.
- Allowing the Ethics Commission to supplement the code of conduct by making rules violates the constitutional independence of the Legislature.
- The initiative provides that the top five "sponsors" who submitted the initiative may select nominees for the proposed Ethics Commission. Delegating government power to a self-selected citizen group is unconstitutional.
- Allowing any three persons (as opposed to three members of the accused legislator's house) to file an ethics complaint unconstitutionally delegates the Legislature's power to judge the election and qualification of its members and punish them for disorderly conduct.

Unconstitutional Interference with Legislative Powers Generally

- Imposing a "fiduciary" relationship between legislators and constituents unconstitutionally restricts legislators exercising the plenary powers of the legislative branch.
- Prohibiting the Legislature's attorneys from representing legislators or challenging the constitutionality of the initiative violates the constitutional provision authorizing the Legislature to appoint legal counsel.
- The constitution allows each house of the legislature to choose its own officers and employees. Requiring legislative staff -- who are employees of the Legislature -- to report confidentially to the Ethics Commission interferes with the Legislature's relationship with its employees.
- Establishing a minimum required appropriation for the Commission violates the Legislature's plenary power to appropriate monies.

Unconstitutional Vagueness and Overbreadth Violations

- Generally, punitive and criminal statutes require that the conduct to which a person may be held accountable is clear. If the initiative passes, it will be difficult for a legislator to know what conduct is prohibited. For example, the definition of "personal interest" includes "potential or actual partisan political benefit to a person or insider of such person." The proposed initiative does not define "partisan political benefit." Arguably, any conduct performed by a legislator could be construed as "partisan political benefit," so it would be unclear to a legislator what would or would not be conduct subject to sanction. Also, legislators are prohibited from attempting to "unduly or unconstitutionally . . . influence the outcome of any matter to be decided by a public body or public official." Because the Utah Legislature is a "public body" and Utah legislators are "public officials," legislators would be unable to seek to persuade their colleagues to vote for or against legislation pending before the House or Senate. It is also unclear what conduct would amount to "unduly or unconstitutionally" influencing a matter. Under existing constitutional interpretations, such broad language would be struck down as overbroad or "void for vagueness."
- Mandating that each violation of the code of conduct is a felony or breach of peace makes the provisions of the code of conduct unconstitutionally overbroad.

Violations of the Constitutional Rights of Individual Legislators

- Restricting a legislator's ability to serve as a "control person" (officer or director) of a corporation may unconstitutionally restrict a legislator's ability to earn a livelihood and unconstitutionally imposes, by statute, an

additional "qualification" on a legislator beyond those established in the constitution.

- The scope of the financial disclosure may unconstitutionally invade a legislator's privacy.
- Prohibiting legislators from using monies in their personal campaign accounts to make political contributions to others violates the legislator's First Amendment Free Speech rights.
- Requiring leftover campaign monies to be deposited in a state government account may be an unconstitutional taking by the government.
- Defining violations of the code of conduct as outside the ordinary course of legislative business and beyond the scope of a legislator's official duties destroys legislative immunity principles established by the constitution and courts, seeks to unconstitutionally modify a legislator's speech and debate immunity, and makes a legislator personally liable in damages for harm caused by the violation.

Substantive and Procedural Due Process Violations

- Rejecting the fundamental "innocent until proven guilty" standard that is a cornerstone of American law, the initiative's requirement that the legislator must show by a preponderance of evidence that the legislator did not commit the violation unconstitutionally violates substantive and procedural due process rights.
- Requiring a legislator to answer for conduct that may have occurred six or more years ago may violate substantive and procedural due process. Because the initiative lacks a transition provision, current legislators could be held accountable for conduct that occurred within the six years before the effective date of the initiative: making such conduct illegal violates the prohibition against ex post facto laws.
- Allowing the complainants to "participate fully" in the investigation (while specifically mandating that the accused legislator "shall have no formal rights of participation" in the investigation) and allowing the complainants to have continuing investigative powers during the entire proceeding, unconstitutionally violates a legislator's substantive and procedural due process rights.
- Requiring a legislator to hire private legal counsel and then requiring state government to pay the costs of that counsel violates substantive and

procedural due process standards and unconstitutionally interferes with the Legislature's plenary power to appropriate monies.

- Granting the "sponsors" of the initiative petition an absolute right to intervene in any lawsuit challenging the constitutionality of the initiative violates substantive and procedural due process provisions and unconstitutionally delegates government powers to non-government persons.

Unconstitutional Violation of Open Courts Provision

- Prohibiting judicial review of agency action violates the "open courts" provision of Utah's constitution and violates a legislator's substantive and procedural due process rights.

Unconstitutional Violation of the Single Subject Rule

- This initiative violates the "single subject rule" of the Utah constitution by attempting to amend the Government Records Access and Management Act, which relates to government records, in an act purportedly governing legislative ethics.