



## OFFICE OF THE LEGISLATIVE INSPECTOR GENERAL

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To: Honorable Members of the Illinois General Assembly

After a decade, my tenure as the Legislative Inspector General will be coming to an end on June 30.<sup>1</sup> I have enjoyed the opportunity to serve as the first Legislative Inspector General, having been initially appointed in July 2004, and feel honored by the confidence bestowed in me. I leave with a sense of appreciation for the hard work of the members of the General Assembly, the Legislative Ethics Commission, Executive Director Randy Erford, and of the respective ethics officers with whom I have had the privilege to associate, particularly those who represent the four legislative caucuses, Heather Wier Vaught, Andrew Freiheit, Jo Johnson, and Eric Madiar. The residents of Illinois are very fortunate to be served by such capable and honorable individuals.

During my 40 years of public service, as a prosecutor, legislator, appellate court judge, and now as Inspector General, I have been privileged to meet and interact with a great many honest and honorable public officials. Yet sadly many of our fellow Illinoisans, as well others, hold the view that Illinois is a corrupt state. A recent Gallup Poll ranked Illinois dead last when it comes to trusting state government. This unfortunate perception harms the reputations of all elected officials, including state legislators, most of whom I know to be dedicated public servants who often serve at a sacrifice to their family and personal financial interests.

While the General Assembly took a significant first step in enacting ethics reform with the passage of the State Officials and Employees Ethics Act in 2003, together with the amendments of 2009, the work is not done. To be effective, the Legislative Inspector General must be provided with the resources and the tools to do the job effectively. It is with these thoughts in mind that I make the following recommendations. These proposals were for the most part inspired by actual cases that I have investigated.<sup>2</sup>

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1. Last spring I announced my retirement effective June 30, 2013, the expiration of my second term. Subsequently, I agreed to the Commission's request that I stay on until a successor could be appointed. I recently advised the leaders and the Commission of my plans to resign from my interim appointment on June 30, 2014.
  2. These recommendations are mine and mine alone and do not necessarily reflect the views of the Commission, the ethics officers, or any other person.

## I. Enact Patronage Reform Measures

The recent University of Illinois admissions and Metra patronage scandals have understandably raised public concern about preferential treatment for those with political connections. Political patronage has long been a part of the political culture of this state. It is an anachronism. This once commonly accepted practice has been superseded by laws prohibiting political considerations in employment decisions by public agencies except for those limited positions expressly exempt from such considerations.

The U.S. Supreme Court articulated the following constitutional rule in a case involving the administration of Governor James Thompson and the Illinois Republican Party: “[P]olitical patronage practices—whether promotion, transfer, recall, [or] hiring decisions involving low-level public employees may [not] be constitutionally based on party affiliation and support.” Rutan v. Republican Party, 497 U.S. 62, 65 (1990). While political affiliation may be appropriate to consider for certain positions (such as those involving policy making decisions or access to confidential information) (Branti v. Finkel, 445 U.S. 507, 517 (1980); Elrod v. Burns, 427 U.S. 347, 367–68 (1976)), political affiliation is not a constitutionally permissible consideration for most public employment decisions. Rutan, 497 U.S. at 75. This rule protects politically neutral employees from being treated less favorably than employees who are politically aligned with those in public power. See Welch v. Ciampa, 542 F.3d 927, 939 & n. 3 (1st Cir. 2008); Gann v. Cline, 519 F.3d 1090, 1095 (10th Cir. 2008); Galli v. New Jersey Meadowlands Comm’n, 490 F.3d 265, 273 (3d Cir. 2007).<sup>3</sup> Extending the Rutan holding, the Elrod–Branti doctrine further prohibits discrimination based on support or loyalty to a particular candidate or public official. Jordan v. Ector County, 516 F.3d 290, 295–96 (5th Cir. 2008).

These court-imposed constitutional limitations on patronage are based on principles of fundamental fairness. When insiders can lay claim to political spoils, the powerless and disenfranchised are denied equal opportunities. Moreover, taxpayers lose when public funds are expended for expensive legal settlements, investigations and attorneys’ fees associated with scandals that arise from such activities.

While Rutan places legal limitations on hiring and promotion decisions by the various state agencies, it does not necessarily serve as a limitation on recommendations made by legislators to those agencies. To correct this anomaly, the General Assembly should take action to restore the public’s confidence in the fairness of the process. While they are not exclusive, I urge implementation of the following modest but necessary proposals to address this issue.

### A. *Report Ex Parte Communications*

First, the General Assembly should expand the kinds of communications required to be reported by State agencies to include *ex parte* communications made by legislators or members of their staffs related to university admissions, hiring or other State agency personnel decisions.<sup>4</sup> At present, our ethics laws require State agencies to report instances of legislator contact where the legislator “imparts or requests material information or makes a material argument regarding potential action concerning regulatory, quasi-adjudicatory, investment, or licensing matters

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<sup>3</sup> Of recent vintage are several cases involving political patronage in the administration of former Governor Rod Blagojevich. See e.g., Kiddy-Brown v. Blagojevich, 408 F.3d 346 (7th Cir. 2005); Riley v. Blagojevich, 425 F.3d 357 (7th Cir. 2005); and Whitlow v. Martin, 719 F.Supp.2d 983 (C.D. Ill. 2010).

<sup>4</sup> An *ex parte* communication is an oral or written “off the record” communication made without proper notice to all parties and not on the public record. See 5 U.C.S. Sec. 551(14).

pending before or under consideration by the agency.”<sup>5</sup> The same light should shine on admissions and personnel communications. If legislators are proud of their constituent advocacy, as they say that they are, they will not object to the public knowing of their efforts on behalf of their constituents. Currently, some state universities and governmental agencies have voluntarily undertaken to make public legislative communications. The time has come to make the reporting requirement uniform and mandatory for all state agencies and public universities.

### *B. Implement Uniform Rules for Casework*

Second, the General Assembly should adopt rules that govern and guide lawmakers in their desire to assist constituents and non-constituents in obtaining government employment or other favorable governmental action. To implement this proposal, the General Assembly should look to the Congressional House Ethics Manual provisions on “Casework” that place reasonable limitations on such communications by members of congress and their staffs. The General Assembly may well wish to modify these rules to address unique circumstances that may relate to state legislators. However, in the absence of such action by the General Assembly, Members are without adequate guidance in such matters, and as a result are exposed to public contempt and distrust. The Congressional House Ethics Manual recognizes that “[A]n important aspect of a House Member’s representative function is to act as a ‘go between’ or conduit between the Member’s constituents and administrative agencies of the federal government. Whether promoting projects that will benefit constituents or assisting in the resolution of the problems that are an inevitable by-product of government regulation, the Member is serving as a facilitator, or ombudsman.” Such activity, in the opinion expressed by the late Senator Paul H. Douglas, plays a useful role in the governmental process by helping legislators and administrators perform their respective jobs adequately.<sup>6</sup> However, the manual goes on to point out that in taking any such action, the Member must adhere to the ethical principle “that a Member’s obligations are to all constituents equally, and considerations such as political support, party affiliation, or one’s status as a campaign contributor should not affect the decision of a Member to provide assistance or the quality of help that is given to a constituent.”<sup>7</sup>

While it is not feasible in this letter to recite the Congressional guidelines verbatim, its general principles are as follows:

1. Employment recommendations should be in writing.
2. A Member’s responsibility is to all of his or her constituents equally, irrespective of political or other considerations.
3. Direct or implied suggestions to an agency of either favoritism or reprisal is an unwarranted abuse of the representative role.
4. When communicating with an agency on behalf of a constituent, Members and staff should only assert as fact that which they personally know to be true.
5. Requests from similarly situated constituents should be handled in comparable fashion, without regard to party affiliation, campaign support, or other such factors.

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<sup>5</sup> 5 ILCS 430/5-50(b).

<sup>6</sup> Paul H. Douglas, *Ethics in Government* 87 (1952).

<sup>7</sup> House Ethics Manual, Casework pg. 300.

6. A Member should make every effort to assure that communications made in his or her name conform to his instruction.
7. Members should consider consulting with their ethics officers if they have any question about the appropriateness of an action to be taken on behalf of a constituent or non-constituent.<sup>8</sup>

Enforcement of these provisions should lie with the Legislative Inspector General. The Legislative Ethics Commission should be empowered to impose fines, reprimand and censure for willful or repeated violations.

## II. Establish Transparency in Investigations by the Legislative Inspector General

*"It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business."*<sup>9</sup>

The confidentiality provisions of the State Officials and Employees Act were designed to maintain the anonymity of whistleblowers and to protect legislators and other state employees wrongly accused of misconduct.<sup>10</sup> However, the overreach of these provisions serves to block public access to the results of investigations in which misconduct has been found. The consequence is public cynicism toward elected officials and the authorities charged with ethics oversight responsibilities. When the Legislative Inspector General concludes that a violation has occurred, a founded report is filed with the Commission.<sup>11</sup> If the report resulted in the suspension of an employee for at least 3 days or termination, the Commission is required to publish the report.<sup>12</sup> Also, within 30 days after the issuance of a final administrative decision that concludes that a violation occurred, the Legislative Ethics Commission must make public the record of proceedings before the Commission.<sup>13</sup> However, in all other cases – which comprise the majority of the matters investigated by the Inspector General – it is entirely up to the Commission as to which reports are made public, if any. Since legislators are not subject to suspension or termination, this means that no reports finding legislator misconduct are subject to publication except for those authorized by at least five members of the eight-member bi-partisan Commission.

The effect of this dichotomy is that reports finding legislator misconduct are unlikely to ever see the light of day. This is not fair to other legislative employees, nor is it in the public interest. I am unaware of any other inspector general who is required to operate under such secretive guidelines. For example, my congressional counterpart in the Office of Congressional Ethics (OCE) publishes all referrals to the House Committee on Ethics along with his/her recommendations.<sup>14</sup>

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<sup>8</sup> Members and employees may in good faith rely upon the advice of their ethics officer. 5 ILCS 430/25-23(3)

<sup>9</sup> Preamble to the Illinois Open Meetings Act (5 ILCS 120/1)

<sup>10</sup> 5 ILCS 430/25-90

<sup>11</sup> 5 ILCS 430/25-50

<sup>12</sup> 5 ILCS 430/25-52

<sup>13</sup> 5 ILCS 430/25-51(l)

<sup>14</sup> Rules for the Conduct of Investigations, Appendix A, adopted by the House of Representatives January 25, 2013

### III. Enact Conflict of Interest Prohibitions

In 2011, I wrote to the members of the General Assembly urging them to strengthen the 1967 Illinois Governmental Ethics Act<sup>15</sup> to prohibit members from voting or taking other official actions when they have conflicts of interest. I pointed out that efforts to prevent potential conflicts have been exacerbated by the fact most of the provisions of the 1967 Ethics Act are "intended only as guides" and "not as rules meant to be enforced[.]"<sup>16</sup>

Meaningful reform of that Act will help to prevent both actual and perceived conflicts of interest in State government. To accomplish this end, compliance with the Code of Conduct should be made mandatory with violations punishable by fines, public reporting and censure. These rules should not be merely aspirational goals as is currently the law. In addition, disclosures required in the annual Statements of Economic Interest should be expanded to mirror the enhanced level of disclosure currently required for judges. Legislators should be precluded from profiting financially from their votes and legislative initiatives. Strong new ethics laws and effective enforcement provisions will help to restore public confidence in state government.

Accordingly, I renew my call for the passage of a few simple and practical amendments I feel are necessary to bring meaningful legislative ethics reform to Illinois. To summarize, I recommend the following:

- Expand the jurisdiction of the Legislative Ethics Commission to include enforcement of the major provisions of the Illinois Governmental Ethics Act (5 ILCS 420/1-101 et seq.), including Article 2 (Restricted Activities) and Article 3, Part 1 (Rules of Conduct for Legislators) and to add censure and administrative penalties for violations of these provisions.
- Prohibit legislators from voting or taking official action on matters involving personal, family, or client legislative interests.<sup>17</sup>
- Require members of and candidates for the General Assembly to provide more comprehensive annual economic statements, similar to those required for judges and judicial candidates, so there will be more transparency and disclosure to the public of potential conflicts.

The General Assembly should act swiftly to enact these provisions. The current inability of the Legislative Inspector General to address alleged and recurring conflicts of interest, due to weak or non-existent laws, threatens to undermine our ability to curb abuses and of the General Assembly to win vital public support for important legislative initiatives.

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<sup>15</sup> 5 ILCS 420/1-101 et seq.

<sup>16</sup> See 5 ILCS 420/3-206 (Part 2 "intended only as guides to legislator conduct, and not as rules meant to be enforced by disciplinary action"); 5 ILCS 420/3-304 (Part 3 "intended only as guides to conduct, and not as rules meant to be enforced by penalties").

<sup>17</sup> Current law requires only that the member "consider the possibility of abstaining from such official action" 5 ILCS 420/3-202.

Conclusion

In conclusion, I believe that implementation of the foregoing proposals are not only sound public policy but will help restore public confidence and trust. They will also serve to strengthen the hand of elected officials by giving them the mandate they need to solve the difficult problems facing our state.

Thank you for your consideration of these important ethics proposals. Illinoisans look forward to the day when the Land of Lincoln will reclaim its rightful place in the moral and ethical leadership of our nation.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Homer', with a long horizontal line extending to the left and right.

Thomas J. Homer  
Legislative Inspector General