

## THE OKLAHOMA ETHICS COMMISSION

Don Maletz, *The University of Oklahoma*

Jerry Herbel, *The University of Oklahoma*

The Oklahoma Ethics Commission is a constitutionally established body whose five commissioners and seven staff are charged with duties in two broad areas. The Commission is authorized, first, to develop and enforce ethics rules in state elections, including both campaigns for elective office and campaigns on behalf of initiatives and referenda. Second, it is charged with promulgating rules of ethical conduct for state officers and employees. The current Ethics Commission holds a significantly stronger position than its predecessor agencies, in the sense that its authority is constitutional and not merely statutory. Its influence is felt quite directly by candidates for state office, and by proponents of state questions, who must all pay close attention to the extensive contribution and expenditure reporting that the Commission requires. Those who fail to comply can be subject to significant fines. Officeholders and state employees, too, cannot avoid its reach because they must now regularly submit documents disclosing their financial interests. Finally, those who lobby the legislature and the agencies are also subject to regular registration and disclosure requirements.

The main theme of the Commission's work is defining and promulgating rules and obtaining regular, timely disclosure on forms maintained as public records. Yet its enforcement powers are not negligible, as the Commission has shown in its recent dramatic conflict with Governor Frank Keating. The Commission is authorized to file civil complaints in court when it believes its rules have been violated. The first such complaint in the constitutional Commission's brief history was filed against Keating in Oklahoma County District Court on Monday, June 30, 1997. The Commission contends that Keating violated the ethics rules by his use of state vehicles for political fundraising trips; the original complaint specifies thirty-two separate violations, while an amended complaint on July 3 names four of these violations as willful and therefore subject to significantly increased fines.

The action is another step in a simmering dispute that began when legislators raised objections to Keating's use of state funds to purchase an airplane. Anticipating an Ethics Commission complaint, Keating himself recently appealed to the courts for a ruling. He argued that there are two conflicting rules in play. State law directs the Commissioner of Public Safety to provide security and transportation for the governor.

An Ethics Commission rule, on the other hand, forbids use of public property or funds for support of political activities. Keating's position is that the state law has priority, and his petition to the court sought a declaratory judgment to that effect. The Ethics Commission, on the other hand, contends that its rules take priority when it comes to partisan political activities. Until this highly-publicized dispute with the governor, the Commission's enforcement actions have been taken through its own internal processes, leading to settlements and the payment of sometimes substantial fines by violators of ethics rules. The only case that rivals the current conflict with Keating involved former Governor David Walters. Yet while most Oklahomans may tend to associate the enforcement of ethics with the issues surrounding Walters' 1990 campaign for the governorship (discussed below), the Ethics Commission actually played only a minor role in that famous affair.

The Oklahoma Ethics Commission owes its origin ultimately to a national wave of interest in reform that began in the 1960s and that was intensified by the Watergate investigation in the early 1970s. The Federal Election Campaign Act was passed in 1971 and significantly strengthened in 1974. Oklahoma has had legislation requiring reporting of campaign expenditures since 1908. In 1968 the state legislature required reports on campaign contributions. The 1974 "Campaign Contributions and Expenditures Act" strengthened the rules, limiting contributions to campaigns, requiring disclosure of contributions, and prohibiting anonymous campaign literature.

The state's first attempt to establish an ethics commission came in 1968, but that body's mission was quite limited. The Oklahoma Ethics Commission Act of 1986 linked a strengthened Commission with rules pertaining to campaign contributions and expenditure reporting. Dissatisfaction with the effects of this modest legislation mounted in the late 1980s. In 1989, Governor Henry Bellmon's Constitutional Revision Study Committee, fearing attempts by the Legislature to weaken ethics rules, proposed establishment of a constitutional ethics commission. The suggestion led to a successful petition drive in 1990 to amend the Oklahoma Constitution by adding an ethics measure to it. Passed with overwhelming support, Article XXIX established the "Ethics Commission." The Commission consists of five unpaid commissioners, each serving a term of five years. Each member owes appointment to a different source: the Governor, the Attorney General, the Speaker of the House, the President Pro Tempore of the Senate, and the Chief Justice of the Supreme Court. Current members (through December, 1997), in the same order as their appointing authority, are: Kenneth Elliott, Thomas W. Gruber (Chair), Mark D. Lyons, Sen. John DeWitt Luton, and Helen Cole.

The Ethics Commission is charged in the Constitution with promulgating "rules of ethical conduct for campaigns for elective state office and for campaigns for initiatives and referenda," and establishing "rules of ethical conduct for state officers and employees." The rules it devises are presented to the Legislature at the second day of the session. If not disapproved by joint resolution, they take effect at the beginning of the following July.

The constitutional Ethics Commission opened for business in July, 1991. Its path had been prepared by the Ethics Commission Act passed by the Legislature in its 1991

session. This Act set out definitions, procedures, and guidelines and seemed to express a clear legislative commitment to the operations of the Commission. Yet when the Commission presented its first set of rules to the Legislature in early 1992, they were rejected. Evidently determined to reassert some control, the legislators passed a substitute consisting of ethics rules of their own devising.

The action of the Legislature, in the view of the Ethics Commission, gutted the constitutional authority found in Article XXIX. The Commission therefore filed suit and achieved a thorough vindication in 1993. The Oklahoma Supreme Court ruled that the action by the Legislature unconstitutionally encroached on the powers of the Ethics Commission (*Ethics Commission v. Cullison et al.* [850 P. 2d 1069 Oklahoma 1993]). Its decision made quite clear that Article XXIX established the authority of the Ethics Commission to develop and promulgate rules.

Bowing to this decision, and influenced by the ongoing controversies involving ethics issues arising from the Walters campaign, the Legislature yielded. When the Ethics Commission proposed its ethics rules at the beginning of the 1994 session, they were allowed to go into effect on July 1, 1994. One commentator noted that Oklahoma thereby gained “the most comprehensive and thorough campaign contributions and finance regulation in its history.”<sup>1</sup> Amendments to the rules were proposed to the Legislature in 1995, 1996, and 1997, and these too were allowed to go into effect. Ongoing controversies about the rules have concerned permitting anonymous contributions to campaigns (they are now allowed if under \$50), requirements that legislators report gifts received from lobbyists (at present, the lobbyists report, while the legislators do not), banning public officials from contracting with agencies they serve, and prohibiting legislators from contracting with the state for two years after leaving office.

The Ethics Commission has carried out its mandate by developing explicit rules on campaign contributions and campaign expenditures with stringent reporting requirements; by establishing financial disclosure rules for state officials, requiring annual reports due April 30; by defining and prohibiting conflicts of interest; and by requiring disclosure of lobbying activities. The Commission is also required to develop “ethics interpretations” in response to specific questions submitted to it. These interpretations are binding on the Commission. In an annual report issued in December, 1995, the Commission noted that it had developed 14 ethics interpretations. It had also received and investigated 23 complaints and informations. Of the latter group, more than half were dismissed, one was settled by conciliation, none were prosecuted, and several were carried over to the next year. By the end of 1995, the Commission had received more than 12,000 campaign contribution reports, and more than 5,700 financial disclosure statements.

There are some serious constraints on the work of the Commission. For one, the constitutional authorization for the Ethics Commission gives jurisdiction over state campaigns, officials, and employees but does not extend jurisdiction to local elections or municipal officials. The Political Subdivisions Ethics Act, passed in 1995 to replace the Ethics Act of 1991, authorizes the Ethics Commission at least to provide appropriate

reporting forms to municipalities and school boards. But the reports themselves, when completed by local candidates, are to be submitted only to municipal and school board clerks, not to the Ethics Commission. Enforcement of ethics rules in local elections is left strictly to local district attorneys.

Second, the scope of the Commission's prosecuting authority is limited. The Political Subdivisions Ethics Act reaffirms that the Ethics Commission has "no jurisdiction to enforce criminal penalties. . . ." Third, recent legislation emphasizes that the central function of the Commission should be preventive and educational, rather than punitive. The Commission is newly charged to become active in presenting lectures and public programs designed to educate the public about the ethics rules. Finally, the agency's budget cannot support extensive investigatory activities. In 1996-97, the agency's budget was \$363,584; there were 7 staff, including an Executive Director (Marilyn Hughes), two attorneys, one part-time investigator, and three additional support personnel. An important item for current development is computerization and software to enable electronic reporting. Some of the funds for this expensive undertaking came from an unexpected source. As part of the plea-bargain to resolve charges of illegal fundraising, the Walters campaign was required to "donate" more than \$135,000 to the Ethics Commission. Much of this income went toward the computerization project. The Commission now maintains a web page, and makes some information about its activities available electronically ([www.state.ok.us/~ethics/](http://www.state.ok.us/~ethics/)). It is developing the means to receive campaign reports and personal financial disclosure statements, as well as lobbying disclosure statements, electronically, and invites but does not yet require electronic submission.

The Commission routinely publishes an *Ethics Manual for State Officers and State Employees*, with guidelines and forms pertaining to financial disclosure, conflicts of interest, restrictions on political activity, and lobbying disclosure. Candidates should consult the *Instruction Manual for Campaign Reporting and Financial Disclosure*, while lobbyists will find the necessary information in *Lobbyist Registration and Regulation*. Those who must report should pay attention to the deadlines. Penalties for lateness are automatic and, at \$100 per day, can mount up to a maximum of \$1,000. (Fines totaling more than \$42,400 were assessed through the end of 1995, though fines may be appealed and this total was eventually reduced by more than \$10,900 after appeals.)

In the minds of many citizens, the decisive ethics issue in recent years (at least until the conflict with Keating) involved the campaign finance controversies surrounding the Walters' campaigns for more than seven years. Beginning with charges of illegal campaign loans in his unsuccessful 1986 bid for the governorship and ending with his plea of guilty to a campaign-related misdemeanor charge in 1993, the ethics issue took shape in the public's mind through the repeated investigations of Walters' fundraising.

In 1986, Walters took out \$162,000 in personal loans to pay for a media blitz just before the August 26 Democratic primary, which he won over State Attorney General Mike Turpen. The current Commission's predecessor agency chose by unanimous

vote in October 1986 to refer the case to Oklahoma County District Attorney Bob Macy. Eventually, Special Prosecutor Lou Bullock, appointed by Governor Henry Bellmon, reviewed the loans, and ruled in September, 1988, that they violated provisions of the ethics legislation of 1986. Since the law counted loans as campaign contributions, Bullock explained that the loans were subject to the same \$5,000 limit applicable to contributions. But in the same opinion Bullock indicated that this provision would not withstand a legal challenge on constitutional grounds in accordance with the U.S. Supreme Court ruling in *Buckley v. Valeo* (1976). In that case the Court held that limitations on the amount of money a candidate can loan his own campaign unduly restrict freedom of speech.

Much more serious charges, including bribery, perjury, and election fraud, emerged from Walters' successful 1990 campaign for governor. The campaign raised more than \$2.7 million, a record for a gubernatorial campaign in Oklahoma; more than 10% of the total was paid by donors in cash. The first charges of illegal fundraising activity were levied by J.B. Bennett, a Walters' fund-raiser and later the new governor's choice for State Tourism Director. The relationship between the two men was stormy. Though he appointed Bennett to the post in January, 1991, Walters fired him only three months later, and a disgruntled Bennett began to outline to the FBI what he knew about fundraising in the Walters' campaign. Included in his accusations were charges that the governor promised jobs in exchange for contributions, and that he received many contributions which exceeded by a wide margin the \$5,000 per donor maximum allowed by law. The FBI began an investigation of the campaign in June, 1991, but dropped it in December because of insufficient evidence. Significantly, however, the FBI in March, 1992, provided the investigation files to State Attorney General Susan Loving, a Walters' appointee.

Loving formed a multicounty grand jury, with the assistance of Oklahoma City District Attorney, Robert Macy, to look into the matter further. The first two indictments were issued in August. By the second week of October, 1993, the grand jury had issued a total of 20 indictments, including one multiple-count indictment against Walters himself. The indictment against Walters included eight felony counts and one misdemeanor count. Negotiations between Loving, Macy, and attorneys for Walters began immediately.

They reached a plea agreement, and on October 21, 1993, Governor Walters pleaded guilty to the misdemeanor charge of accepting a contribution exceeding the \$5,000 limit. He also promised not to claim innocence in subsequent public speeches, agreed to pay a \$1,000 fine, received a one-year deferred sentence, and consented to "contribute" \$135,000 to the Ethics Commission, effectively wiping out his 1994 reelection fund. Walters later decided not to seek reelection.

The Ethics Commission's official role in the affair was limited to a single act — a friend of the court brief sent to the State Supreme Court when Walters challenged the grand jury probe just after it began. Attorneys for Walters had contested the Attorney General's investigation on the grounds that the amendment to the Oklahoma Constitution creating the Ethics Commission placed sole power to investigate campaign

irregularities in the hands of the Commission. If successful, Walters' challenge would have seriously weakened the enforcement of campaign finance rules. The Commission admitted as much when it recommended the high court rule against Walters, citing its staff of only one investigator and one attorney, and its lack of access to the resources of the Oklahoma State Bureau of Investigation. Numerous attorneys as well as investigators from the Attorney General's office, Oklahoma County District Attorney's office, and Oklahoma State Bureau of Investigation had been assigned to the case. These resources would likely have been unavailable to the Ethics Commission. The Commission in effect conceded that it had insufficient resources of its own to conduct an investigation of this scope. In October, 1992, the state Supreme Court cleared the way for the grand jury to proceed by ruling against Walters, noting that the grand jury's power to investigate and indict was "independent of the authority of the Ethics Commission."

This legal challenge by Walters seemed aimed at squashing the probe, yet the arguments his side presented suggested that high ethical standards in campaigns were best ensured by the unrestricted efforts of a vibrant ethics commission. While that may be true, the case vividly portrayed the Ethics Commission as largely deficient in the resources and independent political clout necessary to carry out an important, large-scale investigation. In its present condition, it can play an advisory and educational role, and it can collect information in pursuit of disclosure requirements, but it will be limited as an investigative agency. This may be the role preferred by many state officials all along, and it is certainly a common pattern in many other states and at the federal level as well.