

## **STATE ETHICS REFORM: THE OKLAHOMA ETHICS COMMISSION**

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**On June 30, 2001**, the Ethics Commission of Oklahoma concluded its first decade of operations. The Ethics Commission (EC) was authorized in 1990 when the people voted by a sizable majority in favor of State Question No. 627, adding Article XXIX to the Oklahoma Constitution. It began work July 1, 1991, and has since become a significant component of state government. Oklahoma is not alone among the states in having such a body, but it is virtually alone in having created one with such extensive powers and such a carefully-designed structure. I offer the following study as an attempt to build a preliminary record about this major experiment in political reform. I aim to describe the powers and activities of the EC and the circumstances under which it originated. The latter are quite revealing about the political culture of the state, so I discuss in some detail the events and maneuvers which led to the creation of the agency as well as to the unfolding of its powers in the first several years of activity. In the latter part of this study, I comment on some of the broader issues of governmental ethics that are illuminated by the

work of the EC and consider some of the obstacles encountered in the project to enforce ethics within a system of constitutional democracy.

Ethics regulation and enforcement might seem to be a classic "good government" issue which it would be hard to oppose except for nefarious reasons. Yet the ethics enterprise is surprisingly controversial. Some see ethics agencies as intrusive or as certain to fail in pursuit of their objective (Reynolds 2000; Morgan and Reynolds 1997). Others are concerned that ethics regulations contribute to bureaucratic sclerosis through multiplying forms of supervision (Anechiarico and Jacobs 1996). Proponents, of course, regard them as vital in raising the level of confidence in the integrity of governmental operations (Thompson 1992). Despite the controversy, the fact is that we live in an era when there are more weapons targeted to the enforcement of ethics than at any prior time in our governmental history (Maletz and Herbel 2000). Oklahoma has made an important, even unique, contribution to this trend with its establishment of an unusually powerful constitutional Ethics Commission.

### CONSTITUTIONAL AUTHORITY AND POWERS

The most striking feature of the Ethics Commission of Oklahoma is the position of constitutional independence that it possesses. Unlike most agencies of state government, the EC was created not by statute but by an amendment to the state constitution. The fact that it is constitutionally mandated gives this body an unusual degree of permanence and autonomy and ensures that it cannot be easily eliminated by legislative hostility, inaction, or indifference. There are four other states which have created an ethics agency by means of a constitutional provision. They are Florida (1976), Hawaii (1968, made constitutional by a convention in 1978), Rhode Island (1986), and Texas (1991). Among these states, the Oklahoma example stands out because its authorizing amendment is clear, specific, and generous in the grant of powers.

The main provisions of Article XXIX specify the method of appointment and the terms of commissioners (§1); authorize employment of a staff (§2); specify the method for promulgating rules (§3); grant investigative and subpoena power and permit the levying of civil penalties for violations (§4); authorize the issuing of binding ethics interpretations (§5); confirm that Article XXIX does not prevent the enactment of

laws with criminal penalties nor laws dealing with local officials (§6); and, finally, specify the method by which an Ethics Commissioner may be removed from office (§7). The most remarkable provision authorizes the EC to "promulgate rules of ethical conduct for campaigns for elective state office and for campaigns for initiatives and referenda" and "rules of ethical conduct for state officers and employees." That is to say, the EC itself is constitutionally empowered to devise the ethics rules, a power making it almost unique among state ethics agencies. More typical is Texas where the legislators, i.e., those most affected by these issues, write the rules. While this rule-making power is significant, it does not mean the EC answers only to itself. The rules that it writes must be presented to the legislature on the second day of each legislative session. According to Article XXIX, the legislature may disapprove a rule or rules so submitted, but it is not authorized to write its own rules. Perhaps somewhat confusingly, another section permits the legislature to repeal or modify an EC rule already in effect, but evidently what is intended is modification in matters of detail, not modification of the rules taken as a whole (Rieger 2000, 283-87).

The result of Article XXIX is, then, that the Oklahoma Ethics Commission is a constitutionally authorized body, with its most important powers constitutionally specified, so that they seem to be beyond the reach of political forces who might be tempted to try to ignore or supplant them. Yet the most dramatic moment in the brief history of this agency came in 1992 when the legislature tried precisely to override those powers.

The EC set to work in July, 1991, and prepared an extensive set of "ethics rules." They were duly submitted to the legislature on the appointed day in February of the 1992 session. On the final day of the 1992 session, the legislature altogether rejected the rules devised by the commission, and substituted its own version of ethics rules. In a dramatic attempt to salvage its mandate, the EC promptly filed a state Supreme Court lawsuit challenging the legislative action as unconstitutional interference with its authority. The main issue concerned not the authority of the legislature to reject the rules, which is specifically allowed in Article XXIX, but the validity of its substitution of its own set of ethics regulations.<sup>1</sup>

The Ethics Commission won this battle decisively when the Oklahoma Supreme Court ruled on March 30, 1993, that the legislature's

action unconstitutionally violated the prerogatives of the EC.<sup>2</sup> The decision established that Article XXIX conferred on the EC the authority to devise rules and regulations with civil penalties, while leaving in the hands of the legislature both the right to reject or amend ethics rules, as provided in that Article, and also the well-established right to pass laws with criminal penalties. With this principle now clarified, the EC returned to its task and developed rules for submission to the 1994 legislative session. While *The Daily Oklahoman* claimed the set of rules actually submitted in early 1994 was a bit weaker than the earlier version, it still defended them as a "vast improvement" over what the legislators had wanted.<sup>3</sup>

Taken at face value, the outcome would seem to establish the clear supremacy of the EC in rule-making. In only one other state, Rhode Island, has the power to define the boundaries of ethics been so fully ceded to an agency independent of the elected branches of government (Rieger 2000; Zurier 1996). The Executive Director of the EC, Marilyn Hughes, later pointed out "the uniqueness" of the constitutional Ethics Commission. She maintained that the Ethics Commission is "independent of the political process" and that its rules are like the "canons of judicial ethics prescribed by the Supreme Court to govern judicial conduct."<sup>4</sup> These are claims perhaps overstated, but it is true that Article XXIX represents a significant experiment in constitutionalism: the creation of an independent agency that is empowered to supervise at least some aspects of the conduct of all other sectors of the government. One might compare it to what used to be called the "independent" regulatory commissions, except they were designed to regulate commercial conduct. The EC, on the other hand, is regulating the conduct of governmental officials themselves.

Nevertheless, it is an interesting question whether this formal scope of authority gives us the clearest picture of the real potential of this agency. The letter of Article XXIX might suggest the potential for the Ethics Commission to function like an ethics Czar, making rules and distributing penalties until the political culture of the state is fundamentally re-oriented toward the highest standards of probity. In what follows, I look at some of the events and circumstances surrounding the origination of the EC and its first several years of operation. This account will help to clarify whether explicit constitutional autonomy has some limits in practice, requiring a more collaborative interaction with the traditional political branches of government and with the traditional

political culture. Is complete independence for an ethics agency possible in spirit as well as in the letter? For an answer to this question, it is useful to look more closely at the history of the EC and the actual development of its rules and its powers.

### ORIGINS OF THE ETHICS COMMISSION

The comparative clarity and strength of the Oklahoma rules may well be due partly to the circumstances of their origin. Much of what is in Article XXIX was first proposed by a Governor's Commission on Ethics in Government, appointed by Governor George Nigh in 1985. The commission noted in its report that there had been extensive exposure of corruption in state and local government nationwide in the early 1980s, and that Oklahoma was particularly embarrassed by the indictment and conviction of more than 220 county commissioners from sixty of the seventy-seven counties in the state on charges of taking kickbacks (Holloway and Meyers 1993).

The special commission issued a report in October, 1985, that recommended many of the anti-corruption measures later adopted. The report emphasized that there were already in place both constitutional and legal prohibitions against conflicts of interest (Governor's Commission on Ethics in Government 1985, 17). The state had long had laws to ban conflicts of interest (see *Oklahoma Constitution*, Article V, sections §21, §23, and §24), and had recently begun to require that state officials file regular financial disclosure reports. But these laws were widely perceived as weak and ineffectual, largely because there was no effective means to enforce them.<sup>5</sup> For example, financial disclosure statements were to be filed with the State Election Board. But the requirements about what was to be disclosed were skimpy, and violation of the requirements was only a misdemeanor. Moreover, the Board was not required to do anything with the reports once filed. Throughout all the areas of ethics regulation the story was the same: meager regulations, and lack of a means of enforcement. A previous statutory Ethics Commission had been charged to watch over "self-dealing and other conflicts of interest by state employees," but it had no authority to supervise legislators, other elected officials, or the judiciary; it had no authority to levy penalties; and it had no budget for attorneys

or investigators (Governor's Commission on Ethics in Government 1985, 16). The ineffectiveness of this body was so evident that it was officially removed from the statutes in 1982 – in the midst of the scandal over the county commissioners.

In response to the Governor's Commission Report of 1985, a bill to create an Oklahoma Ethics Commission was filed in the 1986 legislature and it did finally pass after a considerable political struggle.<sup>6</sup> Legislators resorted to a number of devices both to argue against strong enforcement or directly to block it. A common argument in 1986 was that strong ethics rules would enable candidates to file charges in the midst of campaigns in order to blacken an opponent's reputation at a moment when it would be difficult to refute such charges promptly and effectively.<sup>7</sup> To hinder this possibility a provision was inserted into the proposed legislation to impose a \$10,000 fine for complaints judged to be frivolous. Advocates thought this measure was intended to deter the filing of complaints altogether, for an erroneous allegation, even if not intentional, could have costly results. Other means for weakening the effect of the Commission were found in the next several years after passage. Once the Commission was established, a provision mysteriously passed at the end of the 1987 legislative session so restricted the outside activities and memberships of Commissioners as to make service on the board very unattractive, if not nearly impossible, for anyone who was not a hermit.<sup>8</sup> There were attempts to block the hearing of complaints during election campaigns,<sup>9</sup> attempts to reduce funding to the bare minimum, and, according to the *The Daily Oklahoman*, appointments of weak Commissioners.<sup>10</sup>

There are many ways to weaken or undermine a government agency, and the Oklahoma legislature seems to have tried many of them when it comes to ethics. There are some legislators with reasoned objections to what ethics legislation attempts to do, but there is doubtless also a certain amount of protection of long-established privileges and customs. Partisan concerns are also a factor. Since Democrats have had a virtual monopoly of legislative power since statehood, ethics rules inevitably seem like an attack on their practices. *The Daily Oklahoman* has closely followed, and supported, the demand for ethics laws, presumably partly as a means of challenging the entrenched Democratic party control over the legislature. However, the *Tulsa World* has also been generally supportive of ethics reform. In an editorial on September

10, 1990, it argued vigorously on behalf of the initiative petition calling for an Ethics Commission. That paper has, on the other hand, shown some occasional sympathy with those who see the regulations as too severe.<sup>11</sup> Occasionally Republicans have joined the Democratic leadership in fighting the ethics movement. Jerry Pierce, R-Bartlesville, once joined the chorus seeking abolition of the earlier statutory commission.<sup>12</sup> While it seems safe to say that there is today a serious constituency for "ethics," at both the state and federal levels, the entanglement of ethics with enforcement means that questions of party maneuver and power can never be entirely excluded as motives (Ginsberg and Shefter 1999; Ginsberg and Shefter 1995).

The strategies for delay and obfuscation meant that the Oklahoma Ethics Commission of 1986 (renamed the Oklahoma Council on Campaign Compliance and Ethical Standards in 1987) had little effect in changing behaviors and little presence in the public mind. It had been rendered "helpless" by the legislature, according to the *Tulsa World*.<sup>13</sup> The movement for a much stronger constitutional ethics commission came out of the Constitutional Revision Commission established by Governor Henry Bellmon in 1989 and led by Attorney General Robert Henry. An assistant to the Governor, Andrew Tevington, proposed the idea for an "ethics commission with teeth" to the Constitutional Revision Commission on June 1, 1989. His proposal included a mandatory funding device (the budget should be no less than 5% of the total contributed to state candidates for elective offices in the year of the most recent gubernatorial election), rule-making and investigatory authority, and the elimination of confirmation of appointments by the legislature (The Constitution Revision Study Commission 1991; Henry 1992). Not every element of his proposal was accepted, but the Revision Commission did make "ethics" one of its major areas of emphasis.

Governor Bellmon hoped to make constitutional revision a major part of his legacy. When his commission completed its work, it proposed three amendments to the state Constitution. The first two were oriented toward strengthening the executive branch of state government and revising the provisions applying to corporations. The third proposal, however, was to establish an Ethics Commission. The first two were removed from the ballot by court order, after each was judged to violate a requirement that proposed constitutional amendments cover only one subject.<sup>14</sup> But the ethics proposal remained on the ballot and became

Article XXIX of the Oklahoma Constitution after it was approved by a 2 to 1 margin in 1990.

The Commission began its work on July 17, 1991. Despite the strong endorsement by the voters, the role of the constitutional EC generated new controversy. One of the initial members of the five-member commission, the Rev. Michael Roethler, argued at the first meeting that the mission of the agency should be educational, not punitive, and that it must not set out to be a "hunter."<sup>15</sup> A similar point of view haunted the agency's entire first year of operations. In accordance with its constitutional mandate, the EC undertook in 1991 to prepare a set of ethics rules for submission to the Oklahoma legislature at the beginning of its 1992 session.<sup>16</sup> The initial set of rules covered 84 pages and was generally strong in requiring the meticulous reporting of gifts and donations from lobbyists, sources of income by state officials, and sources of campaign funds. But when the rules were adopted, after extensive public hearings, it was only by a 3-2 vote of the commissioners. The package of proposed rules was opposed by Commissioners Roethler and Patricia Wheeler Kilpatrick, and Kilpatrick felt so strongly that she resigned from the EC after failing to convince a majority of the commissioners to reject it. Kilpatrick argued that the proposed rules were excessively complex and failed to address "identifiable problems in Oklahoma."<sup>17</sup>

After the proposal was provided to the legislature, it naturally became the focus of extensive debate over several months. Kilpatrick continued her criticism. The *Tulsa World* gave her an opportunity to state her case in print near the end of the 1992 legislative session. In an editorial, she expressed doubt that there was a genuine need for an ethics agency and said that some feared that the EC could become a 4<sup>th</sup> branch, "with KGB powers and high budgetary requirements." She denounced the proposed rules, arguing that they were "boilerplate regulations" imported from the national Council on Government Ethics Laws and imposed by a willful staff director and chair. She argued that legislators should not be regarded as "inherently venal" and that it would be best for them to write the rules.<sup>18</sup> Somewhat earlier in the legislative session, the EC's Executive Director, Marilyn Hughes, had sought to defend the proposal. Hughes argued in a "fact vs. fiction" handout that the rules were designed to set a standard about what it is right to do. They were not meant to penalize inadvertent conduct but aimed only at



willful and knowing acts.<sup>19</sup> For her pains, she was criticized by Kilpatrick for making an inappropriate attack on the legislature and for being a "self-serving bureaucrat" attempting to aggrandize her agency.<sup>20</sup>

Though the legislature rejected the 1992 ethics rules, and tried to substitute its own version, the authority of the Ethics Commission was vindicated by the Oklahoma Supreme Court, as noted above. The EC returned to the task of rule-writing in late 1993 and early 1994, and the first comprehensive set of ethics rules was allowed by the legislature to go into effect at the end of the 1994 legislative session.

Argument about the ethics rules did not vanish. Within the first year under the new order, the personnel on the Ethics Commission had changed and complaints about the first set of rules had materialized. Amidst some internal and external controversy, the EC undertook the first revision of its rules. The proposed modifications were officially adopted, generally by a 3-2 majority of the commissioners, and were submitted to the legislature on February 7, 1995. The changes seemed designed chiefly to ease some of the reporting burdens on legislators and on candidates for office. The requirement that legislators report the gifts they received was dropped; henceforth, only the lobbyists needed to report what they gave. Anonymous campaign contributions were to be allowed if the sum given was under \$50. Members of state boards and commissions were to be permitted to do business with an agency on whose board they served, provided the offer to sell to the agency was publicly reported. Legislators were permitted to accept employment with an agency immediately after leaving the legislature. At the same time, the number of persons required to file annual financial disclosure reports was expanded, to cover more of those in a position to shape purchasing decisions. *The Daily Oklahoman* attacked these proposals as a drastic watering down of the rules, and Governor Frank Keating criticized them on similar grounds.<sup>21</sup> Nevertheless, the revisions were allowed to go into effect when the legislature took no action against them.

These adjustments were not literally forced on the Commission. Rather, they reflected recognition of some of the problems of implementation, plus changes in personnel appointed to the Commission. In the period 1994-1995, Commissioners William von Glahn, Tom Gruber, and John Luton were the ones pressing for, and supporting, the

modifications, over opposition from Gracie Montgomery and Dr. Jerald Walker.<sup>22</sup> In later years, there have been more modest adjustments to the rules and little overt conflict with the legislature about the regulations, except for one clear negative in 1998. In 1997 the EC began to require the electronic filing of reports. The rule applied to campaigns receiving or spending more than \$5,000, and to political action committees spending more than \$10,000. The advantage of electronic filing was not only the easier management of the voluminous reports coming in to the EC, but also the fact that the reports could be made instantly available for public scrutiny on the internet. But this provision was rejected in the 1998 legislature on the grounds that the software made technical demands that less well-funded organizations could not meet.<sup>23</sup> Current issues before the EC concern continued pursuit of required electronic filing, as well as modifications of the limits on campaign contributions and expenditures.

### RULES AND ENFORCEMENT

The Ethics Commission is authorized by Article XXIX, §3, to “promulgate rules of ethical conduct for campaigns for elective state office and for campaigns for initiatives and referenda.” It also shall “promulgate rules of ethical conduct for state officers and employees.” It is notable that local government (city and county government, school boards) is not under the constitutional jurisdiction of the EC. Article XXIX gives no guidance about whether the rules are to be detailed or general, severe or light, nor is there specification of the scope of possible penalties, though the EC is authorized in general terms to provide for “civil penalties” for violations.

When the EC promulgates rules which are not disapproved by the legislature, they become effective and are “published in the official statutes of the State.” The Commission is entitled to repeal or modify its rules, but it does so by submitting such a repeal or modification to a subsequent legislature under the same procedure for review that applies to new rules. The legislature is also empowered to repeal or modify ethics rules already in effect by a “law passed by a majority vote of each House.”

The breadth and generality of the power granted to the Ethics Commission is impressive, but it has not meant in practice that the EC is literally autonomous. The Commission has the important advantage of the initiative in the ethics process. It devises and promulgates what the legislature only reviews. It can make use of the initial publicity that is always likely to favor those proposing what seems like reform. Moreover, a proposal coming from an "ethics" agency is likely to carry a distinct odor of sanctity that will impose political costs on those attempting to resist it. Yet the final say does in the last analysis rest with the legislature, and in that sense the elected branch has a real opportunity to exert its will. The most accurate description of the constitutional process might be to say that the EC and the legislature are invited to cooperate by virtue of a certain mutual dependence built into the rule-making method. If the EC proposes rules that are simply impractical, or that are opposed by a significant number of legislators, then it invites rejection of those rules; if the legislature rejects rules that have wide public support, it will pay the cost of having those rules brought up annually by the EC along with the attendant publicity showered on the sources of opposition. Another factor to consider in the rule-making process is that the EC's rules demanding the annual disclosure of personal finances apply to "state officers and employees," including members of the legislature. The EC thereby gains a certain watchdog function over the representatives and senators that may be a source of conflict.

In one of the earliest versions of its rules, the EC offered a specific formulation of its mission that was perhaps intended to suggest to public officials that it aimed for cooperation rather than conflict. The central function of the EC was said to be "to prevent, rather than punish, unethical conduct" and the EC committed itself to "providing an effective and comprehensive ethics education program which will provide the means and opportunity to learn and understand the rules and principles underlying the standards of conduct."<sup>24</sup>

## THE CONSTITUTIONAL ETHICS RULES

### Rules on Financial Disclosure

For state officers, the objective is to ensure impartiality and independence from private or personal interests in the conduct of state

business, to sustain an "appearance" of such qualities, and to promote public confidence in state officials. The objective is pursued by requiring disclosure. State officers and high-level state employees must report the source of all income for themselves and members of their family above \$5,000, any securities they hold worth more than \$5,000, and the names of clients represented before state agencies from whom they receive more than \$1,000. (Specific amounts of income or holdings are not required.) In addition, they are subject to a calendar year limit of \$300 on the receipt of things of value from lobbyists.

### Campaigns and Elections

In the area of campaigns and elections, the objective has been to regulate by mandating prompt, detailed disclosure of campaign contributions and campaign expenditures and by setting contribution limits. No person or family may give more than \$5,000 to a candidate for state office, and no more than \$1,000 to a candidate for local office, nor may candidates or committees knowingly accept gifts in excess of these amounts. There is no limit on the expenditure of personal funds. Reports are required from campaign organizations within 10 days after filing for election or receiving or expending \$500 in the pursuit of office. Since the initial set of rules there have been regular minor adjustments. One moved in the direction of greater leniency for campaigns: a modification adopted in 1995 permitted campaigns to receive anonymous contributions as long as the sums involved were under \$50. Another allowed an employer to raise the salary of an employee "with the understanding that he will make political contributions therefrom."<sup>25</sup> In more recent amendments, the rules seem to be becoming tighter. For example, new rules have banned transferring funds from federal to state campaign committees and taking personal loans from campaign funds, and have ended the reporting exemption for candidates who entirely fund their own campaigns. Responding to free speech issues, in some cases as mandated by court rulings, there have been some provisions for the benefit of non-profit "issue" corporations (allowing them to make contributions to campaigns) and independent advocacy entities (no longer required to state who paid for their expenditures). Supervision of local (county, municipal, and school board) campaigns and elections was not included in the constitutional duties of the EC, but the passage of the

Political Subdivisions Ethics Act in 1995 authorized the EC to require the reporting of contributions and expenditures in county elections and to collect personal financial disclosure statements, as well as lobbyist registrations and reports. The EC also provides forms for reporting in municipal and school board elections. Enforcement of the rules in these elections, however, is left to the mercy of local district attorneys.

### Lobbying Disclosure

Lobbyists must register with the Ethics Commission and must file reports twice a year on all gifts of things of value exceeding \$50. They may not give gifts to any one state employee worth more in the aggregate than \$300 annually. State officers and employees are prohibited from borrowing money from a lobbyist, or from an entity controlled by a lobbyist. Lobbyists' contributions to campaigns are reported by the candidate campaign committees.

### State Employee Political Activity

State employees, except elected officials, are not permitted to display campaign buttons, hats, badges or other campaign paraphernalia while officially at work for a government agency, nor may they use public resources for partisan purposes.

### Ethics Liaison

Every government agency is required to have a liaison, responsible for reporting a list of all those required to make financial disclosure and notifying each such person of this obligation. This provision imitates a mechanism found at the federal level, where each executive branch agency is required to have a Designated Agency Ethics Officer. The responsibility for making sure that ethics rules are made known and that officials file the appropriate disclosure statements falls on the ethics liaison. These persons become, in a sense, extensions of the EC.

### Enforcement

Enforcement is authorized by Article XXIX, but is limited to "civil penalties." In the case of suspected criminal violations, the EC refers the matter to a district attorney for possible prosecution. The most public enforcement actions of the EC to date have involved conflicts with governors.

The Ethics Commission was only marginally involved in the cases involving David Walters' fund-raising methods. In the midst of the 1986 primary election campaign for governor, candidate Mike Turpen called a press conference to denounce Walters' campaign finance practices and to claim that he was going to file an ethics complaint with the existing statutory Ethics Commission. During the contentious legislative battle to establish an Ethics Commission earlier in the legislative session of 1986, a recurring issue was whether ethics charges could be used as a political tool. Turpen's press conference led one of the Commission's early defenders, Sen. Rodger Randle, to denounce Turpen's use of ethics charges for political purposes. Subsequently, there were attempts by the legislature to forbid the acceptance of ethics complaints during election campaigns. The grand jury investigation of Walters' fund-raising practices in his successful 1990 gubernatorial campaign was due to the initiative first of the FBI and then of the Oklahoma Attorney General, Susan Loving. The constitutional EC played only a bystander's role. It did benefit handsomely when Walters' eventual guilty plea to misdemeanor charges led to a court-imposed fine. He was required to pay over to the EC the balance of unencumbered funds from his campaign, a total of \$135,000 (Maletz and Herbel 1999).

A more recent issue, with direct EC involvement, occurred when Governor Frank Keating was accused in an ethics complaint of using a state airplane for political fund-raising trips. A rule of the EC forbids use of state property or resources for partisan purposes. Procedurally, ethics complaints are to be handled confidentially until a fine or a reprimand is issued. But Governor Keating got wind of the investigation and filed a lawsuit asking that it be halted by the courts. His argument was that state law required that transportation be provided to governors for security reasons and that his use of the plane was therefore not against the law, nor should it be regarded as in violation of ethics rules.<sup>26</sup> His quest for a declaratory judgment brought the issue out into the open and garnered considerable public attention.<sup>27</sup> By the early fall, an

agreement was reached between the Governor and the Ethics Commission to ask jointly for a Supreme Court ruling on the dispute.<sup>28</sup> The Supreme Court did eventually rule that the law permitted the use of the state plane for gubernatorial travel, even to partisan meetings.<sup>29</sup> But in the meantime, the legislature had passed a law prohibiting this use of state vehicles, and Governor Keating had signed it, thus rendering the issue moot.<sup>30</sup>

In the latest contretemps, Governor Keating may be again embroiled in an ethics controversy. Allegations are that he accepted a fishing trip to Alaska sponsored by an oil company. The *Tulsa World* reported that the matter is under investigation, but the Executive Director of the EC refused even to confirm that point, since, again, procedure requires that all investigations be confidential until resolved.<sup>31</sup> As of this writing, the matter has not been settled.

### ETHICS AGENCIES IN A CONSTITUTIONAL SYSTEM

The Ethics Commission, after ten years of work, has established itself as a significant component of Oklahoma state government. At a minimum it has developed and enforced reasonably clear rules about campaign finances and expenditures (both what the limits are and how they are to be reported), it has a workable system for public officials to disclose the broad outlines of their personal finances, and it registers and monitors lobbyists. The comparative autonomy of the agency gives it a degree of leeway in formulating rules and enforcing them that has brought some visibility to ethics issues. The reports that it collects are public documents, available for consultation by those who want to find out where money is being applied in state government and politics. The data expose to public view the financial aspects of campaigns, lobbying, and office-holding. To this extent, the work of the EC has made ethics issues a component of public life, as is similarly the case in other states and at the federal level.

A larger question worth asking might be: has the effort reduced "corruption"? A definitive answer to this question, however, seems unlikely to be available. As a perceptive study of corruption and reform in New York has noted, it is extremely difficult, if not impossible, to measure the actual amount of corruption in a political system, either

before or after reform (Anechiarico and Jacobs 1996, xiv). It seems plausible to suppose that the long-term effect of regular reporting by campaigns and lobbyists, and the instructive example of the occasional successful prosecution, may generally be salutary, especially if local journalists pay attention to such matters.<sup>32</sup> But it seems unlikely that crooked behavior can be suppressed altogether.

### CONSTITUTIONAL AUTHORITY AND PRACTICAL CONSTRAINTS

One of the issues that the creation of the EC might help us to understand concerns the relationship between an abstract constitutional grant of power and actual governmental result. This is an interesting problem in the case of the EC because it was equipped by the voters with such broad constitutional authority. A look at the written text of Article XXIX might have led some to expect that it would be thoroughly insulated from normal political constraints. But we see from the history of the EC how much the exercise of constitutional authority takes place within a context that shapes and limits what can be achieved. When Commissioner Gracie Montgomery finished her term on the EC in 1996, she asserted that the Commission is "still ultimately under the control of the politicians it is supposed to govern."<sup>33</sup> Montgomery's opinion resulted from her frustration with the alleged "dilution" of ethics rules in 1995, but her language is, I think, stronger than is warranted on two counts. The EC is not really empowered in any realistic sense to "govern" the politicians, and yet it is at the same time questionable whether the politicians "control" the agency in the strong sense of that term. The relations between the EC and the politicians are better conceived as complex and flexible, with various forms of mutual influence on each other, illustrating the complexity of agency independence in a constitutional system.

The main tool of direct influence and limitation on the EC is, of course, the annual budget. The EC cannot succeed solely by issuing public pronouncements on ethics issues. Its mission requires on-going, detailed supervision of reports on the funds coming in and out of campaigns, lobbyist registration and expenditures, and the personal finances of public officials. These activities presuppose a considerable



amount of staff effort and, these days, extensive computerization, with all that that implies in terms of data and software maintenance and regular up-grading of hardware. The mission also requires regular review and revision of the ethics rules themselves, as well as on-going responses to those who ask for ethics interpretations or file ethics complaints. These parts of the task require a capable legal staff and some investigative capacity. A tight budget therefore inevitably constrains the Commission's activity significantly. It is, of course, easy to discern the harmful consequences of a limited budget, and some have seen such budgets as indicators of a conscious legislative choice against providing the funds for effective surveillance and regulation (Herrmann 1997; Mahtesian 1999). In cases where legislators create an ethics agency and design its rules, it is easy to suppose that their goal may be more to make a popular gesture than to inflict serious limits on their own activities. In the Oklahoma case, the existence of the agency and its broad mandate is constitutional and therefore not so easily limited. Even so, enforcement remains a serious problem because of resource limitations, especially staff and investigative funding.<sup>34</sup>

Similarly limiting is the fact that the EC is directly controlled by those persons who serve as the Commissioners. The pattern of appointments suggests a preference for naming those who have some experience in politics. Of the fifteen persons who have served as Commissioners from 1992 through 2000, many have been attorneys with experience holding elective office or serving as an appointed member of a board. Two have been from a profession on the periphery of politics, journalism (Hammer, Montgomery), and only two (Walker and Roethler, both heads of local universities or colleges) have been from careers outside the politics-law-journalism orbit. In the case of Commissioners who are in mid-career (Gruber, for example), there is a possibility that conduct on the Commission could open or close doors for the future; a former district attorney for Woodward County, Gruber left the EC before his term expired to become an Assistant Attorney General in the office of Attorney General Drew Edmonson. I do not at all mean to suggest that his work on the EC was shaped by hope for future appointments, but one could see the potential for mid-career commissioners to defer to those whose work the EC is to regulate. Either the habits gained from years in politics, or the hope for future positions elsewhere, might

incline the Commissioners to minimize confrontation and severity in their actions.

Moreover, even the seemingly unlimited authority to propose the ethics rules is more constrained by the practicalities of approval than one might at first anticipate. The legislature is, of course, constitutionally entitled to disapprove a rule and so far (after the initial conflict settled by the state's Supreme Court) has once done so. If such events were to become frequent, there would be political costs for both the EC and the legislature. Legislators will find it risky to be seen as opponents of ethics, naturally, and so the veto of a rule must be weighed in terms of its political effects. But there are similar risks for the EC. If it were to take an aggressive line, regularly offering rules that the legislature rejected, it might well lose the intangible but important clout that comes from appearing to represent the common sense of the community about what the standards of political behavior ought to be. There seems no immediate danger of this happening. Yet the charges of ethical "puritanism" once levelled against the EC must have stung, and they could recur if it aims at a level of control beyond what the public generally assumes to be appropriate.

Finally, another limitation is the need to bow to higher authority from outside the state. Like similar bodies around the country the EC has long been forced to allow candidates unlimited expenditure of their own money on campaigns, a principle required on free speech grounds in a case decided by the U.S. Supreme Court in 1976 (*Buckley v. Valeo* [424 U.S.1]). Recently it has also been forced to suspend enforcement of limits on contributions by political parties to candidates because the U.S. Supreme Court ruled in a Colorado case that "independent expenditures by parties cannot be limited under the First Amendment."<sup>35</sup>

Taking into account all the factors at work, it appears that the EC has developed its role while adapting to the political culture within which it must work. The selection of commissioners, the need for legislative acceptance of rules, the limitation rather than the prohibition of gifts from lobbyists, and the relatively unaggressive enforcement of fines – all reflect not puritanism but a rather cautious awareness of what is practicable. On the whole I would argue that the standards put in place were not especially severe or extreme. The record suggests that the rules have brought Oklahoma into broad conformity with an emerging national practice of setting contribution limits and mandating disclosure.

## ETHICS REGULATION AND THE DEMOCRATIC PROCESS

All reforms have costs, and it is clear that there are some appreciable costs associated with ethics enforcement. These are first of all financial, but they are not only financial. To support the EC, the taxpayers must now provide more than \$.5 million per year in direct budgetary support. In addition, there are costs associated with compliance. Every state agency must now assign an employee to serve as an "ethics liaison," with the duty to register the names of all persons who are required to fill out personal financial disclosure forms. Moreover, all political campaigns, including those involved with ballot referenda and initiatives, must now organize themselves in a more formal manner, registering with the EC and filing regular reports about contributions and expenditures. For larger campaigns, there will be significant costs associated with maintaining adequate records and complying with reporting requirements. Ethics regulations will make it more expensive to mount a campaign. Furthermore, the increasing development of the ethics regulations has the consequence of making them more precise, detailed, and law-like, and at the same time the body of official "ethics interpretations" (developed in response to inquiries and regarded as binding on the Commission) expands. The result is an inevitable "legalization" of ethics. Correspondingly inevitable is the emergence of a legal specialization in "ethics" rules and in practice before the Ethics Commission. Candidates and campaigns who need such legal representation will find it another source of increased expense associated with political activity.

Perhaps equally worth noting is a possible indirect cost, namely a deterrent effect on persons considering whether to run for office or to serve in some other public capacity. From the beginning, one of the charges frequently made against ethics legislation was that it would discourage worthy persons from participating in public life, either because they would not wish their personal finances to be subject to public scrutiny or because they feared that some unanticipated controversy might throw them open to "ethics" accusations. I know of no evidence that this effect has occurred in Oklahoma, but there is also no evidence to show that it has not occurred. At the federal level, however, there have long been suggestions that strict ethics laws have made it difficult to enlist the service of senior executive branch personnel (Norton 1989; Rohr

1981).<sup>36</sup> The federal ethics laws require much more detailed exposure of personal and family finances, and they require some appointees either to recuse themselves from specific decisions in their agency if there is a potential conflict of interest, to divest assets if the potential for such conflicts is sufficiently broad, or in some cases to put assets into a blind trust. Are these effects on the democratic process fatal? Probably not, but they are factors to be weighed.

### ETHICS: REDUCED AND EXPANDED

Finding a place for governmental effort targeted to "ethics" has always been a problematic task for modern constitutional democracies. To some extent these democracies are more at home with protecting private rights than with prescribing qualitative standards of conduct. In the 20<sup>th</sup> century, they have built vast programs of administrative regulation, of course. Much of this regulation is targeted toward commercial conduct, but it has expanded in recent decades to cover less overtly economic matters: racial attitudes and feelings, treatment of the disabled, suppression of harmful personal habits (smoking), and so forth. Yet even in the era of expansive regulatory activity, "ethics" has remained, for many, a sphere shot through with special difficulties. Ethics in the full sense requires prescribing standards of aspiration and excellence, as well as forbidding vices. Any serious version of this activity would have to mean defending the prescribed standards as based in something more solid than mere whim. The very idea raises questions about the cherished separation allegedly existing between law and morality, and calls into doubt the belief that an appropriately designed liberal state could be "neutral" when it comes to the choice of a way of life, personal standards of conduct, beliefs, and so forth.

Does the enforcement of governmental ethics undermine the quest for neutrality? We can see a partial answer to this problem by understanding exactly what the new ethics enforcement agencies represent. I suggest that they are a specifically "liberal" response to a problem. They are designed in such a way that they will bring about an improvement in standards of conduct on the part of government officials without infringing on personal beliefs or requiring that officials elevate their sights very far.

The story told above suggests that the "effectual truth" of "ethics in government" has come to mean something considerably less than what "ethics" suggests in ordinary discourse. The very word "ethics" suggests a high idea of personal integrity; it reminds us of devotion to principle and disinterested, not self-interested, activity in the public service; it concentrates on the purification of character, not the accommodation of pressures. In actual practice, however, the enforcement of ethics by government agencies has been reduced to something on a smaller scale. The issues attacked by ethics agencies are essentially issues of conflicts of *financial* interest. These conflicts occur when the decisions of elected officials appear to be influenced by those who donate to their campaigns, when they receive expensive gifts from lobbyists, or when they have business or financial interests that will be affected by decisions made while in office. Ethics, in the sense defined by ethics agencies, means essentially hindering such conflicts of interest by such methods as tracking financial commitments, regulating the flow of money in elections by means of regular disclosures, and developing a set of law-like rules to codify the means by which these goals are pursued. These measures, if effective, may limit the ability of money to command access or influence. At the least, they will enable those inclined to do so to examine the sources and extent of electoral financing.

One might well argue that these rules will have a deeper longer-term influence than seems likely at first glance. Beyond obstructing outright corruption, they may well also be character-forming. They may accustom participants in government to know that they are being watched and to fear that overt influence-buying may be detected and exposed. There would be lessons here for those made so aware. If they reason about what such restrictions mean, they might come closer to internalizing the view that public office is for the sake of service, not for the sake of achieving wealth. In this sense, the observance of the rules may in the long run form habits of mind as well as actual behaviors.

Nevertheless, it remains true that there is an aspect of ethics that is readily lost to view in the midst of a project to control for conflicts of interest. To repeat what is said above, there is a larger sense of ethics that is connected with high ideals of personal integrity and character.<sup>37</sup> The appropriation of the term by enforcement agencies is a

governmentalization of ethics that renders the concept of ethics more legalistic and bureaucratic. Ethics is narrowed to a set of rules pertaining to money and open disclosure. It is beyond the competence of a mechanism of this kind to engage in the development of a program dealing with issues of integrity, character, leadership, professionalism, and so forth. The embarrassment is illustrated by the difficulty of designing educational or training programs in ethics that go beyond conflict of interest matters. In my view, the work of the EC, when examined closely, reveals an implicit accommodation not only of political constraints but of a reduced sphere for "ethics" that will comport with the characteristic insistence within liberalism on a certain ethical neutrality. This orientation is not, however, specific to Oklahoma but characteristic of our still-evolving state and national understanding about the enforcement of ethics.

What remains to be seen in the longer run is an answer to a question I can best put by borrowing a term from the great sociologist Max Weber. Is the current ethics "project," as I have called it, a case study in the "routinization" of virtue (Weber 1978, 246-254, 1121-23)? As such, it would be an example of a depersonalized and bureaucratized ethics, ethics turned into a legalistic process that virtually eliminates from view the higher aspirations we associate with the more comprehensive sense of ethics. Some seem to regard the ethics project today in a quasi-Weberian light – an imposition of lifeless rules, mechanically applied, and turning ethics into a routine of paperwork and one-hour per year training sessions (Thompson 1992).

There is no doubt some force to this complaint. But if we take a longer view, it might be possible to expect that even somewhat "routinized" rules could have an educative effect. Rules shape habits and expectations, and over time establish an understanding about what is customary and proper. The reporting and disclosure rules seem likely to have this effect. They deal with aspects of personal behavior involving finances where temptation will always be strong, and so there will surely be cases where the character-forming effects fail. But let us assume for the moment that the ethics rules come to be seen as normal and customary, that they are reasonably effective in diminishing the likelihood of corruption, and that they are administered effectively. What then? We might anticipate that they could gradually affect the expectations

brought to public office. This is not a trivial benefit, even if it does little to advance the greater issues having to do with promoting true excellence in public leadership.

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## NOTES

<sup>1</sup>The main issues in the lawsuit are clearly described in *The Daily Oklahoman*, July 1, 1992 (p. 1), and the *Tulsa World*, July 5 (p. D8) & 18 (p. A8), 1992. Throughout this account, I have relied on the reporting of *The Daily Oklahoman* and the *Tulsa World*. Both papers have followed the development of the ethics controversy and the activities of the EC closely.

<sup>2</sup>*Oklahoma Ethics Commission v. Cullison et al.* (850 P. 2d 1069 Oklahoma 1993). See also *The Daily Oklahoman*, March 31, 1993 (p. 1).

<sup>3</sup>*The Daily Oklahoman*, January 30, 1994 (p. 8). In a subsequent controversy that perhaps worked to strengthen the legislature's hand, Attorney General Susan Loving ruled that it was entitled to reject specific provisions of proposed rules. The EC had claimed that the legislature was entitled only to "accept the rules in their entirety, or reject the whole package." *Tulsa World*, May 5, 1994 (p. N5); see also *Tulsa World*, May 3, 1994 (p. N1).

<sup>4</sup>Hughes is reported to have said that the ethics rules from the EC, like the canons of judicial ethics, take precedence over statutes. *Tulsa World*, July 27, 1997 (p. A1).

<sup>5</sup>*The Daily Oklahoman*, February 23, 1986 (p. A17).

<sup>6</sup>The *Tulsa World*, July 27, 1997 (p. A1), gave a useful overview of the entire ethics struggle from 1986 on, emphasizing the important role in 1986 of Governor Nigh and particularly of Senator Rodger Randle (President pro tem of the Senate at that time) who supported the ethics proposal in the Senate at a crucial moment and saved it from defeat.

<sup>7</sup>*The Daily Oklahoman*, September 4, 1986 (p. 30). The evidence tends to lend some weight to this fear. In an interview with the *Tulsa World*, the campaign manager for Henry Bellmon, Walters' eventual opponent in 1986, conceded that his candidate might have lost the race for the governorship had it not been for the ethics complaint brought against Walters during the Democratic primary race. *Tulsa World*, July 27, 1997 (p. A1).

<sup>8</sup>*The Daily Oklahoman*, December 13, 1987 (p. 20).

<sup>9</sup>*The Daily Oklahoman*, May 29, 1988 (p. 10).

<sup>10</sup> The allegedly weakening changes in the law are summarized by *The Daily Oklahoman* on May 31, 1992 (p. 10).

<sup>11</sup> For example the *Tulsa World*, on July 31, 1992 (p. A14), called Ethics Commission Executive Director Marilyn Hughes an "outspoken puritan on ethics rules." An editorial by Ken Neal on June 19, 1994 (p. O1), asked "Ethics Laws: Are We Trying to Make Politics Too Pure?"

<sup>12</sup>*The Daily Oklahoman*, May 7, 1987 (p. 20).

<sup>13</sup> September 10, 1990 (p. 8A).

<sup>14</sup>*Tulsa World*, June 20 (p. 1A) & 24 (p. A2), 1990.

<sup>15</sup>*The Daily Oklahoman*, July 18, 1991 (p. 8).

<sup>16</sup> For accounts of the public hearings concerning the initial set of rules, see a series of articles in the *Tulsa World* on December 16, 18, 19, 22, 23, and 31, 1991.

<sup>17</sup>*The Daily Oklahoman*, January 31, 1992 (p. 1).

<sup>18</sup>*Tulsa World*, June 17, 1992 (p. 15A).

<sup>19</sup>*The Daily Oklahoman*, March 16, 1992 (p. 1).

<sup>20</sup>*Tulsa World*, June 17, 1992 (p. 15A).

<sup>21</sup>*The Daily Oklahoman*, January 18 (p. 1) and 27 (p. 1), 1995; see also January 22, 1996 (p. 6); cf. *Tulsa World*, January 27, 1995 (p. N6).

<sup>22</sup>*The Daily Oklahoman*, January 27, 1995 (p. 1), and *The Daily Oklahoman*, February 5, 1996 (p. 6). William von Glahn was an attorney for the Williams Companies; Tom Gruber was a former district attorney for Woodward County, and would soon resign to take a position in the office of Attorney General Drew Edmondson; and John Luton was a former state senator from Muskogee.

<sup>23</sup>*The Daily Oklahoman*, June 20, 1998 (p. 7); see also *The Daily Oklahoman*, August 2, 1998 (p. 17).

<sup>24</sup>*Oklahoma Statutes*, 74, Ch. 63, App. Title 257:1-1-1 (a)2.

<sup>25</sup>*The Daily Oklahoman*, June 4, 1996 (p. 1). Rebecca Adams, General Counsel for the EC, is quoted in this article as explaining the decision in the following terms. It is not permissible to give direct reimbursement or pay bonuses on the basis of actual contributions; but the ruling permits raising a salary to a level that "permits participation in political campaigns" while



allowing the employee free choice about candidates, parties, or causes to support.

<sup>26</sup>*The Daily Oklahoman*, June 29, 1997 (p. 21).

<sup>27</sup>When the matter first became public, Governor Keating spoke very disdainfully of the EC. For an article ridiculing Governor Keating for first supporting the EC, then turning against it, see *Tulsa World*, July 4, 1997 (p.A13).

<sup>28</sup>*The Daily Oklahoman*, September 7, 1997 (p. 10).

<sup>29</sup>For a full, if highly critical, account of the Court's ruling, see Rieger (2000).

<sup>30</sup>*Tulsa World*, May 7 (p. 16) & 8 (p. 20), 1998.

<sup>31</sup>*Tulsa World*, January 10, 2001.

<sup>32</sup>The most systematic use of this information for Oklahoma has been in *The Almanac of Oklahoma Politics* (1999).

<sup>33</sup>*The Daily Oklahoman*, July 20, 1996 (p. 4).

<sup>34</sup>For example, at the time of this writing, the EC has only one full-time investigator. Furthermore, though it leveled fines totaling \$73,625 (reduced on appeal to \$61,590) in FY00, it was able to collect only \$10,459 (Ethics Commission 2000).

<sup>35</sup>*The Daily Oklahoman* (p. 4-A) and *Tulsa World*, June 9, 2000. See *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996).

<sup>36</sup>For a recent report on the effects of ethics regulations on appointments at the federal level, see Tom Hamburger, "Bush's Appointees Are Facing Headaches Over Divestiture Law," *The Wall Street Journal*, September 10, 2001 (p. A20).

<sup>37</sup>For a wide-ranging set of essays about this larger sense of ethics, see Thompson (2000).

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