Constitutional Law: *Ethics Commission v. Keating*: The Oklahoma Supreme Court Defies the Constitutional Mandate of the People and Clips the Commission's Wings

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NOTES

Constitutional Law: Ethics Commission v. Keating: The Oklahoma Supreme Court Defies the Constitutional Mandate of the People and Clips the Commission's Wings

I. Introduction

"A majority held in restraint by constitutional checks and limitations . . . is the only true sovereign of a free people."1 Abraham Lincoln spoke these words in his first inaugural address. Checks and limitations placed upon our government and its officials remain vitally important in today's politically charged democracy. The current political climate fosters a mentality among our elected leaders that they must exercise all available avenues of power to maintain their positions.

The State of Oklahoma has witnessed no shortage of abuses by elected officials in modern history.2 Many can recall the embarrassment of Okscam, a federal investigation that exposed political corruption among county commissioners and resulted in 220 felony convictions in more than sixty of the state's seventy-seven counties.3 In addition, the records of former Governors David Hall and David Walters4 demonstrate a poor sense of ethics in regard to Oklahoma's elected officials. Many national tragedies such as Watergate and the impeachment of President William Clinton indicate that the ethical void is present on the national level as well as the state level. Indeed, a review of modern history reveals a number of examples such as Teapot Dome, Iran-Contra, the Keating Five, Filegate, and Travelgate, and the list goes on and on. One can quickly see why Americans have grown weary of the ethical character of their government officials.

In 1990, Oklahoma voters set into motion a process designed to positively influence the ethical character of the state's government and its officials. The citizens chose to add a new article to the Oklahoma Constitution by way of initiative petition and state question. In Oklahoma, initiative petition is a method by

2. See David Dary, A Work in Progress: The Oklahoma Publishing Company Celebrates 95 Years, DAILY OKLAHOMAN (Oklahoma City), Nov. 8, 1998, at 1.
which the people act independently of the legislature in an effort to enact legislation.\textsuperscript{5} It is perhaps the purest example of democracy in the sense that it represents legislation directly by the people instead of through representation.

Newly created article 29 of the Oklahoma Constitution imposed a constitutional check or limitation in the form of a new Ethics Commission charged with the duty of promulgating and administering rules regarding the ethical conduct of state officers and employees.\textsuperscript{6} The constitutional addition set forth an Ethics Commission designed to act independently of the legislative and executive branches in an effort to eliminate the abuses found in our state government.

In 1998, the Oklahoma Supreme Court held that an Ethics Commission rule that barred the use of public funds or property for partisan political purposes did not apply to the Governor and his use of state transportation to attend partisan political rallies.\textsuperscript{7} In this action, Ethics Commission v. Keating, the court refused to enforce a clearly worded rule on the grounds that it conflicted with a legislative statute.\textsuperscript{8} As a result, Keating calls into question the authoritative boundaries among the courts, the Governor, the Oklahoma Legislature, and the Ethics Commission. Furthermore, Keating substantially weakens the expressed power and authority of the Ethics Commission and threatens to subvert the clear intent of article 29.

This note examines Keating and analyzes the Oklahoma Supreme Court's error in this decision. Part II.A of this note explores precedent concerning the Ethics Commission and its authority to promulgate rules. Part II.B analyzes precedent concerning the primary issue in Keating, the use of public funds for political partisan activity. Part III provides an in-depth look into Keating, including the court's findings and reasoning. Part IV.A compares and contrasts Keating with prior case law on point and offers a simple solution to the specific controversy involved in Keating. Finally, Part IV.B predicts the impact of Keating on the future ability of the Ethics Commission to police the ethical conduct of our elected state officials.

II. The Law Prior to Keating

A. The Oklahoma Ethics Commission

The Oklahoma Ethics Commission is a modified version of two former ethics committees. The Commission embodies a movement that began in the mid-1980s in the State of Oklahoma. After repeated scandals, the Oklahoma Legislature passed the Oklahoma Ethics Commission Act\textsuperscript{9} in 1986. In 1989, the Oklahoma Legislature amended and replaced the Oklahoma Ethics Commission Act with the Oklahoma Campaign Compliance and Ethical Standards Act.\textsuperscript{10} Both acts provided for an Ethics Commission that would investigate and expose ethical violations by state

\textsuperscript{5} See OKLA. CONST. art. V, §§ 1-8; see also Hughes v. Bryan, 425 P.2d 952, 952, 954 (Okla. 1967).
\textsuperscript{6} See OKLA. CONST. art. XXIX, § 3.
\textsuperscript{7} See Ethics Comm'n v. Keating, 958 P.2d 1250, 1257 (Okla. 1998).
\textsuperscript{8} See id. at 1255.
\textsuperscript{9} 74 OKLA. STAT. §§ 4200-4284.1 (Supp. 1986).
\textsuperscript{10} 74 OKLA. STAT. § 4200 (Supp. 1989).
officials. Both acts restricted the activity of political parties and organizations.

Many perceived the statutorily created ethics committee to be underfunded and structurally ineffective.\textsuperscript{11} Thus, by 1990 the people of Oklahoma began to search for even greater control over the ethical conduct of our elected officials. By way of initiative petition, Oklahoma voters brought forth a state question\textsuperscript{12} to approve the addition of a constitutional amendment that would create a more powerful, constitutionally mandated, Ethics Commission. In 1990, the Oklahoma Supreme Court ruled upon the legitimacy of the proposed ballot, State Question No. 627, in \textit{In re Initiative Petition No. 341, State Question No. 627}.\textsuperscript{13} The court upheld the legality of the proposed amendment\textsuperscript{14} and noted several key points regarding the language of the amendment.

The court held that the petition did "not give the Commission unfettered discretion" as an independent rule-making body.\textsuperscript{15} In fact, the court found the Commission's rule-making procedures to be similar to those contained in the Administrative Procedures Act.\textsuperscript{16} The \textit{In re Petition No. 341} court detailed the numerous restrictions placed upon the Commission's authority.\textsuperscript{17} Specifically, the Commission may author "rules only after holding a public hearing."\textsuperscript{18} After a rule is promulgated, the Oklahoma Legislature can reject the rule by a joint resolution.\textsuperscript{19} The Governor may also veto the legislative joint resolution.\textsuperscript{20} Even after the adoption of a rule, the Oklahoma Legislature can still repeal or modify the rule.\textsuperscript{21} Consequently, "any rule promulgated by the Commission would not become

\textit{Id.}

\textit{Id.} at 270.

\textit{Id.} at 270 n.18. The Administrative Procedures Act is found under 75 OKLA. STAT. §§ 302-303 (Supp. 1999).

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}
effective without legislative ratification." In fact, after the rules are put through legislative review, they are published as a part of the Oklahoma Statutes.

The court also reinforced the position that the Commission fulfilled a legitimate state interest. The court cited from the Oklahoma Attorney General's brief, which stated the basis for establishing the Commission:

[The] Iran-Contra and County Commissioner scandals all remind us that not all public officials live up to their duty as public trustee. Indeed nearly [sic] a month goes by without news of a prominent public official being charged, indicted or convicted. To guard against such scandals, avoid conflict of interest, over reaching, and similar problems, many Oklahomans are looking to an administrative solution, such as the Ethics Commission . . . .

Furthermore, the In re Petition No. 341 court noted that the Oklahoma Campaigning Compliance and Ethical Standards Act confirmed the state's legitimate interest in establishing a commission. The Act puts forth the objective that government should be conducted in such a way that public officials are independent and impartial and that the office is not used for private gain. Also, the campaign process should operate to ensure that the people of this state elect their government in an informed and "equitable manner."

In a concurring opinion to In re Petition No. 341, Justice Wilson summarized the intent of the amendment. She wrote that the gist of the matter is that the Ethics Commission would "have legislative power to adopt rules; police power to enforce the rules; and adjudicatory power to determine and impose penalties for violation of the rules." Such legislative, executive, and judicial powers would apply to any person who serves as a state officer or employee.

Oklahoma voters approved the article 29 constitutional ballot and a new era of ethical accountability dawned. However, the powers of the newly formed Ethics Commission were soon tested in Ethics Commission v. Cullison. Cullison hinged upon the appropriate constitutional division of power between the Ethics Commission and the Oklahoma Legislature in regard to establishing ethical standards of conduct for state officials and employees.

Cullison came about as a result of the Ethics Commission's actions shortly after its inception in 1991. The Commission fulfilled its constitutionally required duty and created rules concerning the ethical conduct of state officials and employees.

22. Id. (emphasis added).
23. Id. at 272.
26. 74 OKLA. STAT. § 4201(1).
27. Id. § 4201(3).
28. In re Petition No. 341, 796 P.2d at 275 (Wilson, J., concurring).
29. See id.
31. See id. at 1074.
32. The people of Oklahoma voted to adopt the constitutional amendment that created the Ethics
However, pursuant to the Oklahoma Legislature's authority under the constitutional amendment that created the Commission, the Oklahoma Legislature disapproved all of the Commission's rules in the 1992 legislative session. Instead, the legislature soon passed comprehensive statutory provisions concerning the same subject matter as existed in the disapproved Ethics Commission's rules. Consequently, in Cullison the Commission challenged the Oklahoma Legislature's authority to act in such a manner. The Commission alleged that the legislature "usurped the function of the Commission by unilaterally creating the Legislature's own" statutory version of the Commission rules. Numerous nonpartisan watchdog organizations appeared as amici curiae in support of the Ethics Commission's position, including Common Cause of Oklahoma, League of Women Voters, Consumer Watch Committee of Oklahoma, Inc., and Oklahomans for Integrity in Government.

The Oklahoma Supreme Court determined in Cullison that the constitutional power to create, modify, and repeal "Ethics Commission rules is shared between the Ethics Commission and the Oklahoma Legislature." However, the court held that the legislature cannot replace the rules set forth by the Ethics Commission with a comprehensive statutory plan seeking to regulate the ethical standards of state officials and employees. The court found that "the obvious meaning" of the constitutional amendment that created the Ethics Commission is that the people of Oklahoma intend for the ethical conduct of state officials to be regulated by rules promulgated by the Ethics Commission. The Cullison court noted that one constitutionally created branch or body of government cannot exercise a function that is expressly delegated to another branch. Consequently, the legislature cannot regulate the ethical conduct of state officials by legislative statutes that completely disregard the Commission's rule-making authority. The court defined the legislature's authority as the ability to disapprove proposed Ethics Commission rules, modify or repeal the rules, provide criminal penalties for conduct, determine conditions of employment, regulate local political officers, and regulate conduct of legislative members.

In a concurring opinion in Cullison, Justice Wilson further illuminated the distribution of power as it pertains to the regulation of ethical conduct. Justice Wilson explained that article 29, which created the Ethics Commission, must be read as a prohibition on the Oklahoma Legislature's power to confine, restrict, limit,
or otherwise infringe upon the rule-making powers of the Commission. Article 29 provided the Commission with the primary rule-making authority to determine, define, and delineate ethical conduct for state officers and state employees. Therefore, the legislature's power to develop ethical policy is now secondary and second in order of time to that of the Ethics Commission. Contrary to precedent, the distribution of policy-making power in article 29 overturns the well-settled principle that the legislature may delegate to state agencies the power to make rules of a subordinate character and implement policy created by the legislature.

Indeed, article 29 creates an Ethics Commission that is quite powerful as compared to other ethics commissions found throughout the country. Most states that have constitutionally created ethics commissions give the legislative body the duty to enact substantive ethics legislation. Only Rhode Island may claim to have a more authoritative ethics commission than does Oklahoma. For example, Rhode Island's Ethics Commission enjoys complete and unabridged authority to draft its own code of ethics, and the rules are not subject to approval or rejection by the legislature as they are in Oklahoma. With the exception of that distinction, the Rhode Island Ethics Commission and the Oklahoma Ethics Commission are quite similar. Both bodies are given the authority to write rules of ethical conduct and the power to enforce them.

The Rhode Island Supreme Court has been careful to protect the independence of the Commission. In In re Advisory Opinion to the Governor (Ethics Commission), the court held that the ethics amendment merely shifted the legislative power concerning ethics away from the Rhode Island legislative body. However, the General Assembly retained the right to establish ethics laws that are not in conflict with those enacted by the Commission. The Commission's power is not limitless in the area of ethics. The Commission could not set standards that seriously hamper the executive or legislative branches' ability to perform usual and ordinary duties, such as the appointment of officials to office.

Other states tend to have ethics commissions that are less independent because their commissions merely implement the ethical guidelines as set forth by the state's

42. See id. at 1085.
43. See id.
44. See id. at 1085 n.4.
45. See id.
47. See id.
49. See id. Of course, the rules are subject to judicial review to verify constitutional validity, as are the rules set forth by the Ethics Commission in Oklahoma.
50. See generally In re Advisory Opinion to the Governor (Ethics Comm'n), 612 A.2d 1 (R.I. 1992) (discussing in detail Rhode Island's Ethics Commission and its constitutional authority).
51. See id. at 19.
52. See id.
53. See id.
54. See id.
legislative body. In Florida, the legislature passed a Code of Ethics for public officers and employees of the state. Florida's Commission on Ethics is merely given the duty to receive and investigate sworn complaints concerning possible violations of the Code of Ethics as established by the legislature. In Hawaii, the state constitution requires the legislature and each political subdivision to adopt a code of ethics that will apply to elected officers and employees of the respective legislature or political subdivisions. Thereafter, separate and impartial ethics commissions administer each code of ethics. In Montana, the legislature is similarly charged with the duty of creating a code of ethics that prohibits conflict between public duty and private interest for legislative members, state officials, and state employees.

The differences between the few states that have created constitutionally anchored ethics commissions are notable. The majority of states with ethics commissions have commissions that administer the ethical standards as set forth by the legislative branch. However, Rhode Island and Oklahoma have placed the power to establish ethical standards within the realm of the ethics commission. Such an arrangement denotes an attempt to isolate the powers of the respective ethics commissions from the influences of the politically charged legislature.

B. Public Funds used for Partisan Political Activity

The specific point of controversy in Keating, and the focus of the Ethics Commission Rule 257, 10-1-3, involved the Governor's use of state transportation to attend partisan political activities. The Ethics Commission charged that the Governor's activities violated not only the Commission's rule, but also the state constitution because they involved the use of public funds for partisan political purposes. The point is certainly not without a track record, as prior law demonstrates.

The Oklahoma Constitution addresses the issue in several passages. Article 10, section 14 provides that taxes shall be collected for public purposes only. Article 10, section 15 provides that the state cannot make a donation by gift or otherwise to any company, association, or corporation. Article 10, section 17 provides that

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57. See Haw. Const. art. XIV.
58. See id.
61. See id. at 1262.
62. See Okla. Const. art. X, § 14 ("Taxes shall be levied and collected by general laws, and for public purposes only . . .").
63. See Okla. Const. art. X, § 15(A). The section provides:
   Except as provided by this section, the credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State, nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax, or otherwise, to any company, association,
the Oklahoma Legislature cannot appropriate any money to any corporation, association, or individual. Article 10, section 19 provides that every act enacted by the legislature that levies a tax shall distinctly specify the purpose of the tax and the purpose shall not be changed. The message put forth by the various sections of article 10 is that public money is not to be arbitrarily used for the purposes of any private association. However, the provisions do not specifically address political activity by an officer of the state.

Oklahoma authority is sparse in this area; however, other states have spoken on the issue. In Stanson v. Mott, the California Supreme Court held that the director of the parks department lacked the necessary authority to expend public funds to promote the virtues of a bond issue. In Stanson, the Department of Parks and Recreation had spent thousands of dollars in public funds to promote the passage of a facilities bond act. The Department had produced written materials that were not merely informative, but rather were promotional and openly supported the bond proposal. The Department also expended state funds on a three person staff, speaking engagements, and travel expenses all in an effort to promote the passage of the bond issue.

In Stanson, the court began its analysis with the principle that expenditures by an administrative official are proper only when they are authorized by a legislative enactment. The court emphasized that executive officials are not free to choose to spend public funds for any purpose, even if a public one. Instead, they are bound to utilize the funds in accordance with the legislative purpose as it is specified.

The Stanson court also determined that the public funds entrusted to the board belonged equally to the proponents and the opponents of the bond issue. Furthermore, the court's research demonstrated that every court that had addressed the issue

Id.

64. See OKLA. CONST. art. X, § 17. The section reads: "The Legislature shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or levy any tax for, or to loan its credit to any corporation, association, or individual." Id.

65. See OKLA. CONST. art. X, § 19. Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.

Id.

67. See id. at 16.
68. See id. at 4.
69. See id.
70. See id. at 6.
71. See id.
72. See id.
73. See id. at 8.
had found the use of public funds for partisan political activity to be improper.\textsuperscript{74} Specifically, the court found:

A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions . . . A principal danger feared by our country's founders lay in the possibility that the holders of government authority would use official power improperly to perpetuate themselves, or their allies, in office.\textsuperscript{75}

The court cited Thomas Jefferson's statement that "[t]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."\textsuperscript{76} The selective use of public funds for partisan election campaigns invokes just such an inappropriate distortion of the democratic electoral process.\textsuperscript{77}

The \textit{Stanson} court also reiterated that the First Amendment to the United States Constitution disallows the government to make public facilities available only to particular political factions.\textsuperscript{78} The court found that once a public forum is opened, equal access must be given to all of the separate competing factions.\textsuperscript{79}

Additional authorities have questioned the validity of using public funds to the advantage of one partisan group. In \textit{Anderson v. City of Boston},\textsuperscript{80} the Supreme Judicial Court of Massachusetts expounded that "[s]urely, the Constitution of the United States does not authorize the expenditure of public funds to promote the reelection of . . . State and local officials [to the exclusion of their opponents]."\textsuperscript{81} Government domination of the medium of ideas and political self-perpetuation is repugnant to a system of a constitutional and republican government.\textsuperscript{82} In \textit{Schulz v. State},\textsuperscript{83} the New York Court of Appeals held that a state agency may conduct election activities and disseminate literature to educate, inform, advocate, or promote voting, so long as such activities did not intend to persuade either side of the issue.\textsuperscript{84}

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\textsuperscript{75} Stanson, 551 P.2d at 9.
\textsuperscript{76} Id.
\textsuperscript{77} See id.
\textsuperscript{78} See id. at 10.
\textsuperscript{79} See id.
\textsuperscript{80} 380 N.E.2d 628 (Mass. 1978).
\textsuperscript{81} Id. at 637 n.14.
\textsuperscript{82} See id.
\textsuperscript{83} 654 N.E.2d 1226 (N.Y. 1995).
\textsuperscript{84} See id. See generally James A. Gardner, \textit{The Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power}, 60 \textit{Fordham L. Rev.} 217 (1991) (finding when government uses powers to improve or obstruct fortunes of particular candidates, it deprives people of free choice among candidates that belongs to people alone).
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III. Ethics Commission v. Keating

A. Background

In Keating, the Ethics Commission claimed that Oklahoma Governor Frank Keating violated the Commission's Rule 257, 10-1-3(a), which states:

A person shall not use or authorize the use of public funds, property, or time, to participate or assist in the organization of or preparation for a fundraiser for a campaign or in any solicitation of funds for or against a candidate for state office or a ballot measure.85

The Governor allegedly violated the rule by using state owned and operated vehicles and aircraft to attend meetings held for the purpose of raising funds for entities with political party affiliations.86 The Governor also used the transportation to attend meetings to raise funds for individuals campaigning for various public offices.87 Five instances involved fundraisers for political committees for the Republican Party.88 Twenty-nine instances involved fundraisers for individuals seeking public office.89

The Governor claimed that he was authorized to use state-owned vehicles to attend such functions by way of title 47, section 2-101(b) of the Oklahoma Statutes.90 The Governor argued that the statute mandated the Oklahoma Department of Public Safety (DPS) to provide him with transportation: "The Commissioner of Public Safety shall provide personal security and protection, transportation, and communications capabilities for the Governor, the Governor's immediate family, and the Lieutenant Governor."91 The Governor contended that the statute controlled over the Ethics Commission rule, and thus allowed him to use state provided transportation to attend partisan political rallies.92

B. Issues Presented

Two issues form the heart of the decision in Keating. The first is whether an Ethics Commission rule controls when a legislative statute purportedly conflicts with the rule. The second is whether the Governor's use of state owned and operated transportation to attend partisan political rallies is unconstitutional because it utilizes public funds for a private political purpose.

85. 74 OKLA. STAT. § 62 (Supp. 1995).
87. See id. at 1255.
88. See id.
89. See id.
90. See id. at 1254-55.
91. See id. (citing 47 OKLA. STAT. § 2-101(b) (Supp. 1992)).
92. See id. at 1255.
C. The Court's Decision and Reasoning

In Keating, the court first examined the language of the Ethics Commission Rule 257, 10-1-3 and compared it to the language of the statute that authorizes the DPS to provide the Governor with transportation. The court recognized that the Commission's rule applies on its face when the Governor is transported to a fundraiser. Specifically, the court agreed that the vehicles were state property and that they were used to directly assist the Governor in participating in the political fundraisers. However, the court noted that the rule has an exception, contained in a subsection, which states that the rule does not apply to "activities that are a part of the ordinary conduct of the governmental entity." The court determined that the DPS could be deemed a governmental entity as provided under the rule's exception. Consequently, the court found the controlling issue to be whether the Governor's use of DPS transportation to partisan political rallies is a part of the ordinary conduct of the DPS.

Upon close examination of the statute that provides DPS transportation to the Governor, the Keating court found no express limitations on such use. Furthermore, the court cited authority to suggest that the legislature's lack of express limitations upon the Governor's use of DPS transportation may imply that the legislature intended for there to be no limitations. Therefore, the court found that the statute's language and the legislature's discernable intent placed no limitations upon the Governor's use of DPS transportation to attend political rallies. Accordingly, the court concluded that the DPS-provided transportation to partisan political events is an activity that constitutes ordinary conduct of the DPS.

The suggested conflict between the Ethics Commission's rule and title 47, section 2-101(b) of the Oklahoma Statutes moved the Keating court to discuss the power and authority of the Ethics Commission. The Governor alleged that provisions concerning the Governor are within the lawmaking power of the Oklahoma Legislature and not the rule-making power of the Commission. Based upon article 29, section 3 of the Oklahoma Constitution, the Commission is empowered to promulgate rules of ethical conduct for state officials. Due to the "constitutional underpinning" of the rules, the court determined that the rules "have

93. See id.
94. See id.
95. Id.
96. See id. at 1256.
97. See id.
98. See id.
99. See id.; see also City of Duncan v. Bingham, 394 P.2d 456, 459-60 (Okla. 1964) (explaining that legislative silence, when it has authority to speak, may be considered an implication of legislative intent).
100. See Keating, 958 P.2d at 1257.
101. See id.
102. See id. at 1259.
103. See id.
no less weight than statutes."104 Furthermore, the rules are subject to rejection by the legislature and veto by the Governor.105 However, the court also found that the Commission cannot usurp the legislature's powers on issues over which the Commission has no constitutional authority.106 The court determined that the statute providing transportation to the Governor fulfilled a security purpose over which the Commission had no authority.107 Therefore, the court held that the statute trumps the rule and renders it ineffective in terms of the Governor's use of DPS transportation for partisan political events.108

After reaching the conclusion that the Governor had statutory authority to use DPS transportation to attend political rallies, the Keating court turned to a constitutional analysis. The Oklahoma Constitution contains several provisions to limit the expenditure of public funds to activities that are for a public purpose.109 The Commission argued that the Governor did not fulfill any public purpose by attending political fundraisers.110 However, the court took a different approach and likened the Governor's use of DPS-provided transportation to that of a law enforcement officer taking his patrol car home at night.111 The officers do not travel to their residences to fulfill any official duty. However, the court noted that an officer does respond to emergencies from his residence, and the availability of immediate transportation fulfills the requisite public purpose.112 Specifically, the public receives a benefit by providing the officers with the ability to respond quickly to emergencies.113 The court determined that the same benefit applies to the Governor's use of DPS transportation by providing him with the ability to respond to emergencies and perform the duties of Governor regardless of his location.114 Therefore, the court concluded that the Governor's use of DPS transportation did not violate the Oklahoma Constitution in terms of using public funds for a private purpose.115

104. Id.
105. See id.
106. See id.
107. See id. at 1261.
108. See id.
109. See id. at 1257. The court referenced three sections of the Oklahoma Constitution, which state in pertinent part as follows:
110. See Keating, 958 P.2d at 1257.
111. See id. at 1258.
112. See id.
113. See id.
114. See id.
115. See id. at 1259.
V. Analysis of the Keating Decision

A. Usurping the Ethics Commission's Authority

The Oklahoma Supreme Court's decision in *Keating* demonstrates a profound error in light of precedent and the constitutional intent of the people of Oklahoma. The Oklahoma Supreme Court has backpedaled from its prior decisions concerning the newly formed Ethics Commission. In fact, the court directly contradicts its prior findings concerning the authority of the Ethics Commission.

Ethics Commission Rule 257, 10-1-3 became binding upon all officers of the state government by way of methods that are distinctly set forth by the Oklahoma constitutional amendment that created the Commission. Neither the Commission nor the legislature deviated from the expressed path designed to implement new ethics rules.

In *Keating*, the court relied heavily upon the fact that the statute authorizing DPS transportation for the Governor includes no limitations upon the use of such transportation. The court determined that the absence of express statutory limitations is indicative of legislative intent that there should be no limitations on DPS-provided transportation. However, the court failed to reconcile its logic with the fact that the Ethics Commission presented Rule 257, 10-1-3 to the legislature for approval or rejection after the passage of the statute authorizing DPS transportation. The legislature took no action to reject the rule. Therefore, by the same logic that the Supreme Court used to demonstrate legislative intent for the lack of limitations on the DPS transportation, the court must also find a legislative intent for the ethics rule to be valid and authoritative for all subjects under its control.

The legislature passed the statute authorizing DPS transportation for the Governor in 1961 and has not modified it since 1986. The Ethics Commission implemented its rule banning the use of state property and funds for partisan political purposes in 1994. The Commission has presented the rule to the Oklahoma Legislature in 1994, 1995, 1996, and 1997. On each occasion, as provided by article 29 of the Oklahoma Constitution, the legislature had the opportunity and authority to disapprove, repeal, or modify the rule. On each of the four occasions, the legislature did not exercise its authority and let the rule stand without modification. Surely the legislature's lack of action in regard to the rule satisfies the Supreme Court's persuasive test of legislative intent for the rule to be valid and enforceable.

In fact, the Oklahoma Supreme Court has previously supported the same conclusion. The *In re Petition No. 341* decision determined that "any rule promulgated by the Commission would not become effective without legislative ratification" because the legislature maintains the ability to repeal or modify the Commission's rules. Therefore, in *Keating*, the Oklahoma Supreme Court

116. See OKLA. CONST. art. XXIX, § 3.
117. See *Keating*, 958 P.2d at 1256.
118. See id.
119. See id. at 1268 n.17 (Opala, J., dissenting).
120. In re Initiative Petition No. 341, State Question No. 627, 796 P.2d 267, 270 (Okla. 1990)
directly contradicted itself by finding that the legislature did not intend for the rule to be effective upon the Governor's use of transportation to partisan political events. The constitutional amendment that allows for the Ethics Commission and its rule-making ability also provides the Governor with the power to veto any rule put forth by the Commission. The Governor did not exercise his option in the case of Rule 257, 10-1-3. Perhaps by the court's same logic of "intent," one could equally determine that the Governor himself intended that the rule be valid and enforceable.

The Keating court simply interpreted the legislative statute providing transportation for the Governor too broadly. Under the canons of statutory interpretation, the court should determine the plain and unambiguous intent of the statute.\(^\text{121}\) Certainly, the plain meaning of the statute is to provide the Governor and others with state provided transportation. However, it also is apparent that the plain meaning of the statute is to direct the actions of the "Commissioner of Public Safety" and not the actions of the Governor, particularly in regard to ethics.\(^\text{122}\) A fundamental canon of interpretation is that a statute cannot go beyond its text.\(^\text{123}\) Yet, the Keating court seems to suggest that the statute's blanket authorization of state owned transportation for the Governor's ordinary use impliedly excludes the application of any limitations.\(^\text{124}\) In Public Service Co. v. State Corp. Commis-

\section*{About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401 (1950).}


\(^\text{123.}^\) See Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons

\(^\text{124.}^\) See Keating, 958 P.2d at 1257.

\(^\text{125.}^\) 842 P.2d 750 (Okla. 1992).

\(^\text{126.}^\) See id. at 752.

\(^\text{127.}^\) See Keating, 958 P.2d at 1255.

\(^\text{128.}^\) See id. at 1261.
court shifted the boundary away from its carefully placed constitutional moorings. Recall that the court in Cullison found that the "obvious meaning" of the constitutional amendment is that the people of Oklahoma intend for the ethical conduct of state officials to be regulated by the Commission. 129 Yet, in the Keating opinion, the court placed great weight on its conclusion that the legislature did not intend for the Governor's DPS-provided transportation to have any ethical limitations because the legislative statutes do not indicate any restrictions. But in light of Cullison, the legislature has no authority to place ethical restrictions upon the Governor's transportation. Therefore, in Keating, the court substantially overstated the significance of the lack of expressed limitations. The people of Oklahoma shifted the power to promulgate ethics rules to the Commission. Unfortunately, the court continues to look to the legislature as the source for ethics legislation. Not only is this against the court's precedent, but it also entices the legislature to encroach upon the Commission's sole authority to promulgate ethical rules of conduct.

The Keating decision also missed the constitutional mark on the issue of using public funds for a partisan political purpose. The court erroneously distinguished the Governor's use of state transportation as an activity that supports a public purpose by way of comparing the Governor's use of state aircraft to attend Republican Party fundraisers with the act of a law enforcement officer taking his patrol car home at night. 130 The comparison might as well be between the President's use of Air Force One to that of an Army Private's use of his assigned all-purpose vehicle. Certainly both vehicles are owned by the taxpayers and both are needed for public purposes. But when an Army Private misuses his personally assigned vehicle the potential negative impact to the taxpaying public is most likely minimal. Perhaps the misuse could result in a tort claim for damages resulting from reckless activity. When the President or a Governor misuses a state provided vehicle for private political gain, the potential impact on the taxpaying public is the outcome of a democratic election. Elections often turn on the amount of money spent in a campaign. Free transportation to and from political events or parties, which raise funds, provides an enormous advantage to the party or candidate receiving the free ride. Such a substantial monetary shift in an election can easily turn the result into a foregone conclusion and the voter's decision into an illusory exercise of free will.

The court also placed too much importance upon the benefit to the public of the Governor's ability to respond immediately to emergencies when he may be hundreds of miles away from the Capital at a partisan political fundraiser. The court suggests that the DPS-provided transportation is essential for the Governor to respond quickly. The court seems to disregard the possibility that such a benefit could easily be provided to the public through alternative measures that comport with the Commission's Rule 257, 10-1-3. The Governor could utilize privately provided transportation to attend the fundraisers. Simultaneously, the DPS could provide an

130. See Keating, 958 P.2d at 1258.
escort at all times that would be capable of immediately transporting the Governor away from the event and to the emergency. In fact, the Governor is already continuously provided with security escorts wherever he travels. Consequently, there would be no additional cost to the taxpaying public for providing the escort.

The Governor argues that such a plan is "lacking in common sense" because it requires the Governor to use private transportation when the DPS-provided security transport is required to go anyway.\(^{131}\) It is true that the plan requires two vehicles to attend an event when only one vehicle could serve the purpose. But in either case the taxpayers only foot the bill for one vehicle. The only additional expense is the cost applied to the Governor due to his need for private transportation to attend the partisan political event.

B. The Future of Oklahoma Ethics Law after Keating

Keating marks a significant setback in the Oklahoma voters' efforts to reclaim the ethical high ground of their state government. The court's decision to place the legislature's presumed intent over the express intent of the Ethics Commission may serve over the long term to reduce the authority of the Commission. The constitutional amendment that created the Commission established a carefully designed method for promulgating and administering rules of ethical conduct. The steps allowed for the legislature's involvement in the process of legislating ethics. But the legislature's involvement was intended to be secondary to the Commission on any issue concerning ethics. Unfortunately, Keating turns that vitally important characteristic 180 degrees. Keating now holds that the Commission must take a backseat to the legislature if the proposed ethics rule conflicts in any manner with an existing statute, even if the existing statute in no way intended to address ethical matters. Furthermore, the legislature may take little notice of its responsibility to review newly promulgated Commission ethics rules. Keating demonstrates that the courts will not interpret the legislature's inaction as an approval of the rule.

In regard to the specific controversy involved in Keating, the legislature recently passed new legislation that now prohibits state officials, including the Governor, from using state owned transportation to attend partisan political functions.\(^{132}\) The irony of the new legislation is that it focuses upon the ethics concerning the use of state owned property for a partisan political purpose, which is the same issue specifically dealt with in Keating and Rule 257, 10-1-3.

In Cullison, the Oklahoma Supreme Court held that the legislature cannot replace rules set forth by the Commission with statutory provisions that regulate the ethical conduct of state officials.\(^{133}\) Now, only five years later, the legislature is forced to violate the court's ruling in Cullison in order to apply ethical standards on the use of state owned transportation by the Governor and other state officials. Consequently, in light of Cullison the new statute should be overturned as unconstitutionnal.

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\(^{131}\) See id. at 1261.
\(^{132}\) See 74 OKLA. STAT. § 500.6A (Supp. 1998).
\(^{133}\) See Cullison, 850 P.2d at 1075.
Furthermore, the legislature's action now takes the specific issue of the Governor's use of state provided transportation for partisan political events to the opposite extreme. The practical solution to the specific controversy in Keating should be to allow the Governor and other state officials to use their state provided transportation to attend political fundraisers, and then require the official to compensate the state treasury for the fair market value of the use of such transportation. Such solution would level the political playing field and prevent an incumbent from simply taking taxpayers for a free ride to a politically one-sided fundraiser, and a potentially one-sided election.

On the federal level, such a plan already governs the President, whereby any expenses incurred during campaigns are reimbursed, and expenses are pro-rated when personal, political, and official appearances are intermingled. The Oklahoma legislature could easily implement a similar statutory solution to accommodate the Governor and other state officials.

VI. Conclusion

Simple legislation can solve the specific controversy in Keating concerning the Governor and his transportation. However, the damage done to the authority and power of the Ethics Commission may not be so readily remedied. The people of Oklahoma took a large step by establishing a constitutionally empowered Ethics Commission by way of initiative petition and state question. The mandate was clear in creating an independent Commission provided with the necessary tools to promulgate and enforce ethics rules. Unfortunately, the Oklahoma Supreme Court has now placed the Commission in the perilous position of having to answer to the Oklahoma Legislature and its lawmaking powers. Such an arrangement clearly defies the intent of the amendment and the will of the people as set forth in article 29.

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