



Holding Power Accountable

Common-tary

*Newsletter of Common Cause Oklahoma
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For the Record

The current issue of *Common-tary* includes five pieces: two by Lynn Howell (one on the status of the Oklahoma Ethics Commission and one on “redistricting”), two by the Oklahoma ACLU on efforts being made to reform the Oklahoma system of criminal justice, and one by Chadwick Cox on energy matters.

Howell, an attorney from Edmond, Oklahoma, who had been a member of the Board of Common Cause Oklahoma for many years before being forced to resign for professional reasons, is once again an active member. His background in helping develop the structure of the Commission over the years makes him particularly qualified to comment on its current status. His piece on “redistricting” is very much needed as we think about reforming our system of electing representatives.

The two pieces by the ACLU on reforming the Oklahoma system of criminal justice are not just well written, but also timely, because the Oklahoma Legislature is about to take up a number of bills dealing with the subject.

The piece by Cox on the “war” between Oklahoma’s Fossil Fuel Industry and the Renewable Energy Industry is worthy of serious consideration. Cox, a retired biochemist, is also a member of the Board of Common Cause Oklahoma.

The Board of Common Cause Oklahoma is once again grateful for the work of Bill Riggan in editing our newsletter. ■

R. E. Hilbert

Ethics Commission Update

By T.P. (Lynn) Howell

Common Cause Oklahoma has long given special attention to the workings of the Oklahoma Ethics Commission. As you may know, CCOK in fact played a big role in the creation of the Commission in 1991. Oklahomans recognized that in order to have an open, honest, and accountable government, a strong Ethics Commission is essential. Otherwise, the players in the game are making their own rules and acting as their own referees.

In 2014, the long-time executive director and most of the staff of the Ethics Commission retired. The Commission hired attorney Lee Slater as its new Executive Director and then started rewriting the ethics rules. As lawyer who had practiced before the Commission, Mr. Slater had come to believe that the rules were disorganized and hard for most people to understand.

In the amendment process, the Commission specifically invited various interested groups, including Common Cause Oklahoma, to participate. The biggest battles occurred when the lobbyist rules were discussed. The new rules raised the amount that a lobbyist could spend on meals for a particular public official from \$100 to \$500. (Meals and very minor gifts are the only things that lobbyists are permitted to give public officials.) We argued that \$100 was plenty, and that many people believed that lobbyists should not be able to give public officials anything of value at all. We did not prevail, however, and the \$500 limit remains in effect.

We were successful, though, in opposing a related revision that would have let lobbyists, in addition to meals, give each legislator a ticket to a football game or other athletic or cultural event. Now, that previously common practice is no longer permitted. CCOK was generally fine with the other proposed rule amendments circulated in 2014, and the entire package of rules became operative January 1, 2015.

Almost immediately, the Commission started hearing complaints about the financial disclosure rules. Those rules, like the previous rules, required all elected officials, candidates, and important non-elected officials such as agency heads, board members, and purchasing officers to file a form that disclosed their significant financial interests. The rationale was that

such disclosure would help prevent self-enrichment and other conflicts of interest. For instance, the public might want to know that a particular legislator who opposes caps on the price of prescription drugs owns a pharmacy.

During the rule revision process in 2014, many state officials—both elected and appointed—contended that the disclosure rules were too onerous and intrusive upon privacy. Despite the pressure, the Commission did not significantly change the rules at that time; but it did agree to continue reviewing the issue, and it received comments about the financial disclosure rules in almost every meeting during 2015. Ultimately, the rules were revised to require financial disclosures only from elected officials and judges. Candidates and non-elected officials no longer have to make the disclosures. CCOK is disappointed that this change was made, but we will see how it plays out. In addition to rewriting the rules, under Lee Slater the Ethics Commission finally got enough funding from the Legislature to replace its outdated computer system and software. The Commission's rules require candidates, PACs, and other entities to make periodic filings disclosing their income, donors, and expenditures. Lobbyists are also required to file reports showing how much they spent on meals and who the beneficiaries were. Those reports are then put online, so that the press and public can easily review them. Under the old system, however, any review of the reports was extremely tedious and difficult. The new system works much better and is a major advance toward promoting openness in government.

This brings us to a problem that has consistently hampered the Commission since its beginning: inadequate funding from the Legislature. Lee Slater was solicitous of the Commission's relationship with the Legislature, though, and following years of drought, the Legislature increased the Commission's budget after he came on board. That enabled the Commission to upgrade its computer filing system, as noted above, and also to expand its enforcement staff. The Commission was then able to locate, fine, and even sue violators of its rules. For instance, in 2019 the Commission filed about 20 lawsuits against rules violators.

Unfortunately, in 2018 the Legislature reverted to form and again drastically cut funding to the Commission, from about \$2 million to about \$700K, and that \$700K was in a sense the Commission's own money, as it was already in the Commission's revolving account from filing fees and fines. The State

Legislature did this because it was angry about a rule the Ethics Commission had enacted that required a legislator to wait two years after leaving office to become a lobbyist. Advocates have argued that such "waiting periods" prevent special interests from promising to reward a legislator with a job if that legislator will do the entity a favor before he or she leaves office. Apparently, this hit a nerve, and the Legislature not only rejected the rule (which it has the right to do) but also cut the Commission's budget as punishment.

This is where things stand now. With your help, Common Cause Oklahoma plans to advocate toward restoration of the Commission's budget and will also stay involved in the Commission's rulemaking process. If our government is going to work well and for the benefit of all citizens, the Ethics Commission must also work well. ■

Redistricting in Oklahoma

By T.P. (Lynn) Howell

Common Cause was founded to promote honesty, openness, and accountability in government. One frequent governmental practice that frustrates the goal of accountability is gerrymandering. If a legislator's or congressperson's reelection will be automatic because his or her party has a huge majority in the district, that person has no accountability. For this reason, for decades the party in power in most states has drawn up electoral districts so that they will be as one-sided as possible, even if this results in districts that look like snakes or ink blots. Computer technology has made that process even easier and faster than it used to be.

The way to combat this is to have electoral districts drawn up by independent commissions. The same technology that can gerrymander districts can also design districts whose boundaries are based largely on objective criteria, such as precinct, town, city, and county boundaries (although this is not entirely possible, because each district must have close to the same number of people). Common Cause and other good-government groups have been pushing this idea for years, with some gradual success. Currently, fourteen states have some form of an independent redistricting commission.

As you may know, here in Oklahoma a group called People Not Politicians is promoting a plan that would create a nonpartisan independent agency to redraw Oklahoma's electoral districts in 2021, after the next census, when they are required to be redrawn anyway. People Not Politicians plans to circulate an initiative petition which would put this proposal on the ballot. However, the validity of the plan has been challenged in the Oklahoma Supreme Court, and so the petition is not actually circulating yet. Assuming that good sense prevails, we urge you to make every effort to sign the People Not Politicians petition when it begins circulating. ■

Civil Rights Groups File Federal Lawsuit Challenging Unjust Cash Bail System in Canadian County, OK

From the ACLU of Oklahoma

Oklahoma City, 12/11/2019 - The ACLU of Oklahoma, with national and local partners, filed a federal class-action lawsuit against court officials in Canadian County, Oklahoma, for violating the constitutional and disability rights of people who find their liberty denied at the whims of an arbitrary and unconstitutional pretrial detention system that centers release on wealth. The lawsuit seeks an overhaul of Canadian County's unconstitutional cash bail system which discriminates against poor people, locking them up simply because they cannot afford to pay for their freedom.

The ACLU of Oklahoma, the ACLU Criminal Law Reform Project, the ACLU Disability Rights Program, Covington & Burling LLP, and the Overman Legal Group filed the lawsuit on behalf of people incarcerated in the Canadian County jail. Claims include the absence of counsel when bail is set, the use of cash bail as a violation of the equal protection clause, failure to comply with disability rights laws, and an open courts First Amendment violation.

This case is the first of its kind to challenge the treatment of people with disabilities in the context of unconstitutional bail practices, further challenging the impact of this arbitrary, wealth-based system on people who need reasonable modifications mandated by the Constitution and the Americans with Disabili-

ties Act (ADA). "We are suing to end the unconstitutional, wealth-based system of pretrial detention in Canadian County," said Megan Lambert, staff attorney for the ACLU of Oklahoma. "A person's freedom should never depend on how much money they have. But right now people who are presumed innocent are sitting in the Canadian County jail for one simple reason—they cannot afford bail. People are locked up rather than allowed to return to their jobs and families while they await their day in court. This unjust pretrial system violates people's rights and holds people hostage because they cannot afford to pay for their freedom. It has a devastating impact on communities, especially communities of color, and must end."

The research is clear. With each day in jail, the chance for a fair trial diminishes, as it is tougher to mount a defense when behind bars. Pretrial detention is the single greatest predictor of a conviction and a sentence to jail or prison time. It is also more likely that a person will plead guilty, even when innocent, merely to go home. Just three days behind bars puts a person at risk of losing his or her job, home, and custody of his or her children. People with disabilities who are in jail often experience worsening symptoms and decompensation, further eroding their chance to participate equally in the criminal legal system.

"Canadian County's pretrial detention system shows the need for comprehensive reforms beyond our country's broken system of money bail. Every person accused of a crime in Canadian County has the right to be represented by a qualified defense attorney whenever a judge sets bail. A skilled lawyer is critical to ensuring that people are given the individualized considerations necessary for substantive due process," said Twyla Carter, senior staff attorney with the ACLU's Criminal Law Reform Project. "The problem is exacerbated by the fact that people who have a public defender in Canadian County and manage to pay their bond amount, lose that public defender after they are released. It is wrong to force people to choose between a constitutional right to freedom and a constitutional right to counsel."

"Oklahoma has the ignominious distinction of being one of the most incarcerated jurisdictions on the planet. This is in no small part because of an unconstitutional pretrial detention scheme that locks up thousands of people who have not yet been tried—let alone convicted—of any crimes, simply because they

cannot afford an arbitrary cash-bail amount,” said Blake Johnson, attorney for Overman Legal Group. “Bail orders in Canadian County regularly are issued in closed-door proceedings, inside of a judge’s chambers and without any members of the public or press present, despite the Constitution’s guarantee of open access to the courts. The result is a disturbingly unequal administration of justice, where indigent defendants are incarcerated for long periods of time, without access to counsel and unable to participate in preparing their own defense, and the people of Oklahoma are denied their important right to oversee this critical stage in the criminal justice process.”

Research also shows that people with psychiatric disabilities are vastly overrepresented in jails. Federal government reports estimate that 40 to 68 percent of people in jail have psychiatric disabilities, far exceeding rates in the general population. Once in jail, people with mental disabilities stay there two and a half to eight times longer than people without mental disabilities, often because they do not have accommodations required by disability rights laws. “People with disabilities are subjected to a cruel combination of disability discrimination, poverty, and unconstitutional pretrial practices,” said Zoe Brennan-Krohn, staff attorney at the ACLU’s Disability Rights Program. “In the first case of its kind in the country, we are attacking this unjust system by bringing disability rights claims along with constitutional claims. It is time to hold the criminal legal system accountable for its failures to accommodate people with disabilities, and for the untold suffering this is causing poor disabled people.”

Stay informed. ■

Statement on the Release of the RESTORE Task Force Report

ACLU of Oklahoma

Oklahoma City, 01/11/2020 - The RESTORE Task Force was created with a foundational belief in the need for urgent, bold ideas to tackle the carceral crisis in Oklahoma. [*Ed. Note: The task force’s name is an acronym for Restore, Supervision, Treatment, and Opportunity Reform.*] The governor’s executive order

suggested the individuals appointed find solutions for those directly impacted by crime, by the criminal legal system, and by an outdated tough-on-crime mentality that continues to create criminal charges and sentences without regard for best practices, public safety, or long-term impact. However, beyond the foundational notes, the report released by the task force yesterday lacks any actual steps or visions for moving forward in the urgent manner our incarceration crisis calls for.

In a state that has long been an outlier for our rate of incarceration of women and Black people and sees an increasing rate of incarceration of indigenous folks, not once does this report address these disparities. The time for suggesting more task forces and more studies has passed. Time and time again, Oklahomans have been promised this will be the session for meaningful criminal justice reform, and 2020 must be that year.

“This report, while created by folks whose intentions are good, starts with the idea we should be focusing on punishment, and how we change our punishment, rather than how we address the social issues we’ve criminalized over decades of tough on crime policy,” said Nicole McAfee, Director of Policy and Advocacy for the ACLU of Oklahoma. “From start to finish, our criminal legal system disproportionately harms Black people, indigenous people, people who are undocumented, LGBTQ+ people, women, people with disabilities, and people in poverty. What we have now is a system that from your first interaction with police holds you for ransom in the clutches of a predatory lending-based bail model and tries to leverage you into a plea rather than granting you a day in court, one that falls short of our Constitutional standards and needs bold policy fixes in place urgently. The people being harmed by our years of studies and inaction cannot wait.”

RESTORE included in the report a request for another year to continue its work. RESTORE members met over 37 times since the task force was created by Governor Stitt. While we should always look to data and best practices, we do not need another round of meetings and reports, but rather action based on the cumulation of decades of data by local and national experts in the field of criminal legal reform. Oklahoma now teeters between the title of first or second highest per-capita incarceration rate in the nation, and

it seems in its recommendations RESTORE is looking to the state that most closely mirrors us in that dubious distinction, Louisiana, for inspiration, citing the need for a Bible college modeled after Angola prison as the cultural standard we should strive for, rather than looking to any of the 48 other states that don't lead the world in rate of incarceration as models.

The ACLU of Oklahoma joins criminal justice reform-focused organizations, thought partners, and people directly impacted by incarceration, from across the aisle and across Oklahoma, in urging the Legislature this session to take action on legislation that has the power to critically relieve the suffering endured by too many at the hands of a broken criminal legal system. In moving forward with meaningful reform, priorities that should be considered this session include:

- Expanding access to alternatives to incarceration, outside of punishment-reliant models, and decriminalizing people who use drugs or suffer from substance use disorders.
- Bringing our pretrial system in line with the Constitution to make sure that the process is time-bound, includes zealous defense from your first day in court, considers the ability to pay in the limited situations when money bail is set, and presumes release with as few conditions as possible.
- Shifting the burden of funding the criminal justice system away from those who can least afford it by changing our fines and fees structure.
- Funding public defenders and indigent defense, the court system, and district attorneys' offices from the general revenue fund.
- Reducing sentence lengths, and shifting away from bad practices like mandatory minimum sentences and sentence enhancements.
- Empowering juries by giving people a full range of sentencing options, including alternatives to incarceration, and a chance to hear aggravating and mitigating circumstances.
- Centering the role of primary caretakers when setting conditions of release and during sentencing.
- Repealing failure-to-protect laws and similar practices which punish survivors of domestic violence for their inability to escape the perpetrators of abuse.

When we take action on meaningful criminal legal reform, we not only see a shift towards justice and public safety and restoration of communities, we also see significant financial savings that can be diverted to address the root causes of so much of what we have criminalized. This is just a short list of the numerous options available to Oklahoma legislators this session when considering meaningful reform.

The ACLU of Oklahoma hopes that the lack of legislative options included in the RESTORE report does not hinder legislators when considering their responsibility to the tens of thousands of Oklahoma constituents who know the unintended consequences of our punitive criminal justice system. Oklahomans have been and remain ready for real reform. Let's not make them wait through another election cycle to see if the people in power will respond to their demand for justice. ■

Oklahoma's War of the Fossil Fuel Industry Against the Renewable Energy Industry

By Chadwick Cox

The response to the recent report from the NOAA and NASA is a testament to collective human greed. The decade between 2010 and the end of 2019 was the hottest since preindustrial times. The last five years were five of the hottest years ever, and the period 2000-2009 was also a very hot decade. The acceleration of global warming accounts for the United in Science report stating that all the goals previously promised need to be tripled in order to counter a catastrophic event. That report was written to inform the 2019 Climate Action Summit of the real need to act accordingly. This did not happen, because the fossil fuel energy industry has more influence over the governments than does our collective intelligence.

There is a war going on that pits the fossil fuel industry (FFI) against the renewable energy industry (REI), a war that stretches from the White House down to communities all across the U.S. President Trump nominated Bernard McNamee, a former member of the Texas Public Policy Foundation (a Koch-associated think tank), to the Federal Energy Regulatory Commission, and McNamee was confirmed by a party-line vote in the Senate. The Koch brothers have from the beginning of renewable energy used their organizations such as ALEC—which provides model bills for state legislatures—to hamper REI. Harold Hamm did step down as CEO of Continental Resources but has hardly become less effective as the executive director of CR's board. He is an adviser to the President on energy resources, and Trump has referred to him as the "king of energy." Continental Resources had a profit of \$713.7 million in 2017, primarily as the result of Trump's tax reform.

Let us, however, concentrate on what is occurring in Oklahoma. One of the most significant blows to wind-energy promotion in Oklahoma was when Harold Hamm

started his campaign against the incentives for wind-power development. His effort resulted in the passage of a bill which curtailed the zero-emissions tax credit in 2017. He encouraged lawmakers to pass legislation which capped the cumulative amount of tax credits that all existing wind farms can claim each year to no more than \$18 million, a reduction of over 80% from the \$74 million claimed in 2016. The REI has said this will encourage wind-farm development to move to other states that offer better incentives.

Despite that complaint by REI, several wind developers are still actively trying to start farms here now. The reason is that the federal incentives, Production Tax Credits (PTC), are still in place, although they too will be eliminated. The 2020 year is the last with 100% of the PTC in place, and each subsequent year will see a decrease of 20% until the PTC ends in 2024. Consequently, several wind farms are scheduled to be completed before the end of 2020. This does make those farms more susceptible to delay efforts by the FFI, as will be seen below.

In Oklahoma there are organizations that are active in lobbying on behalf of FFI. Hamm started the Windfall Coalition, a collection of corporations from FFI, largely for lobbying against REI. The National Wind Watch operates here as well. The largest advocacy group, Americans for Prosperity Oklahoma (APO), funded by Koch Brothers Industries, has continually attacked REI investments. A smaller version here is the Oklahoma Council of Public Affairs (OCPA), another Koch-supported advocacy organization. Even the Oklahoma Legislature, Governor, and Attorney General, and to some extent the Oklahoma Corporation Commission (OCC), the regulatory agency here, have been partial to the FFI, which is better entrenched in Oklahoma. Locally, several landowner groups have been formed to fight against specific wind-farm developments.

Kingfisher wind farm. The \$450 million Kingfisher wind farm is a 300-megawatt facility developed by Apex Clean Energy that covers 11,000 acres in Canadian and Kingfisher counties between Piedmont and Okarche. The project became fully operational in March of 2015. The Kingfisher project was opposed by FFI and a group called the Central Oklahoma Property Rights Association. That ended with an agreement between the two after a series of bitter hearings before the Piedmont City Council and Canadian County commissioners. The Kingfisher wind farm was also sued by seven landowners and the Oklahoma Wind Action Association based on a claim of anticipatory nuisance, but the group also asked for a permanent injunction against the farm. The trial was held before U.S. District Judge Timothy DeGiusti, who found that the evidence presented did not support the OWAA's claims for the nuisance charge and even more so for the injunction. Likewise, the association wanted a setback of 1.7 miles of the turbines

from all houses whose owners had no agreement with the farm owners; but the turbine setback called for is 2000 feet, and all the houses mentioned were farther than that from any turbine. This ended the Kingfisher wind farm's problems at that time, and the farm is still operating as of this writing.

Craig County wind farm. The Oklahoma Property Rights Association (OPRA), a collection of about fifty landowners led by Claremore businessman Frank Robson, wanted to stop a planned Craig County wind farm from being developed by EDP Renewables. They referred to their organization as David v. Goliath. They were, however, able to get a bill introduced in 2014, SB1559, to amend the Oklahoma Wind Energy Development Act, adding regulations that would have made obtaining approval for wind-farm development more difficult. Additionally, Sen. Bingman and Rep. Sears introduced SB1440, which would have placed a moratorium on wind development in eastern Oklahoma until 2017. Neither bill passed in the House. The next year Bingman and Sears, plus three other legislators, did pass SB808, which amended the Oklahoma Wind Energy Development Act to require forms related to funding of the decommissioning of the turbines be backed by deposits and also 1.5-mile setbacks of the turbines from specific facilities. OPRA did say their members were pleased with the bill but still complained that it did not have setbacks for residential homes and did not cut back any incentives. The consequences of the bill led to EDP Renewables abandoning its Craig County plan.

Wind Catcher wind farm. At \$4.5 billion, the Wind Catcher wind farm was promoted as the biggest renewable energy project in the U.S. and, as such, was plagued with the most aggressive counterattack by the FFI. The wind farm was to be developed by Invenergy and American Electric Power (AEP) as a series of turbines stretched across the last two counties in the panhandle, Cimarron and Texas, and would deliver 2000 megawatts. The plan also called for a 350-mile transmission line from the wind farm to Tulsa, where the electricity would be distributed to Oklahoma, Arkansas, Louisiana, and Texas. This would require approval of all four states, and Arkansas and Louisiana readily agreed, since they were not affected by the infrastructure on the farms or by the power line. Oklahoma was heavily affected, all the more so since FFI entities immediately went on the attack. OCC arranged an open public forum for comments, which turned into a bitter affair. The more contentious complaints were from landowners who did not want the power line across their land. OCC took more time to consider how the commissioners would vote, long enough that it became moot when the Texas Utility Commission denied the project approval on July 25, 2018. AEP and its subsidiary, Power Service Co. of Oklahoma, the next day said the project would end.

The FFI advocacy groups, including Windfall Coalition and APO and essentially the Oklahoma government, took advantage of the state's budget woes and harped on the price of the incentives used for the Wind Catcher project. This led to the aforementioned action that ended Oklahoma incentives for zero emissions and reduced other tax credits in 2017. The loss of these incentives played a major role in ending the project. Interestingly, the budget problems, continuing even now, are due to the low prices for natural gas and oil caused by the glut of these fuels brought on by aggressive horizontal drilling. Comments from some of the defenders of FFI were mainly hypocritical, in that they all contained some statement indicating the problem was not wind but something else. APO called it a boondoggle from the beginning; Jonathan Small of OCPA said it was not a level playing field; A.G. Mike Hunter said he was just doing his job protecting Oklahoma ratepayers; and Harold Hamm said they still have federal incentives. In truth, they all just wanted this wind farm to die.

Disappointed about the failure of Wind Catcher but well educated by it, AEP is purchasing three separate wind farms that Invenergy was developing in Oklahoma. The one north of Weatherford that will produce 999 megawatts will be completed in 2020 to obtain 100 percent of the PTC. The other two, a 287-megawatt farm southwest of Enid and a 199-megawatt farm south of Alva, will be completed in 2021 and receive 80% of PTC. More importantly, although starting with the same four state purchasers of the electricity as before, only those that have been approved will be added, but any other approved utility could be added as well. Wind Catcher, with four separate approvals needed, was too easy a target for FFI.

The Oklahoma wind industry is a player with the Southwest Power Pool Grid. The wind industry has grown fast over the years, starting with the incentives offered by the federal and state governments. These are still being developed, even after the state eliminated its incentives. The recent OCC report on renewable energy growth spells out that growth. For example, \$14.7 billion was spent here on wind developments from 2009 to the end of 2019. Some \$2.3 billion was spent on additions to the transmission grid. The wind industry produced \$235 million in state and local taxes and another \$200 million in lease payments. There were also 7,000 good jobs created. The wind industry is now an important player. This growth can be attributed in large measure to the growth in the regional grid run by the Southwest Power Pool (SPP). This regional grid is composed of parts of several states, including portions of Texas and North Dakota and including parts of states in between, but all of Oklahoma. All the money spent on transmission has tied the wind farms to the grid. SPP minimizes its costs for electricity by selecting purchases based on the lowest priced electricity available. That policy has made this grid the fourth lowest retail-priced electricity in the U.S. Since wind-generated electricity is cheaper to make, the grid buys it preferentially. More transmissions are still being added, and SPP can now sell the excess electricity from its grid to other regional grids.

On a final note, the wind industry here is a real blessing, because the new money coming into the state coffers is revenue that is steady in comparison to the volatile revenue from the fossil fuel industry. It is also a blessing for our nation and the world for being part of what it will take to overcome the widely accepted climate crisis. ■

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This issue of Common-tary was edited and prepared for publication by William Riggan.

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