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# Legislators in Black Robes: Unelected Lawmaking by the Oklahoma Supreme Court - Summary\*

***“The Oklahoma constitution is an attempt to grasp from the judiciary the power which it has either usurped or been permitted to absorb through the combined weakness and venality of the legislative branches.”***

- Frederick Upham Adams, *The Saturday Evening Post* (1906).

The Oklahoma Supreme Court frequently acts like a super legislature making public policy for the state rather than interpreting and applying the law as written. Too often the Court does not say what the law is, but rather what the *justices think it should be*. Such judicial activism is destructive of the rule of law, the separation of powers, and Oklahomans' right to self-government.

Oklahoma's brand of judicial activism is worse than the activism seen in the federal courts because the Oklahoma Constitution dictates vastly more judicial restraint than does the US constitution. Oklahoma's constitutional paradigm inverts the federal model: the federal legislature can act *only* if it is given the power to do so in the constitution, whereas the state legislature can act in *any manner not denied to it* by the state and federal constitutions.

Given this broad sweep of legislative authority—and extensive Court precedent acknowledging the extreme deference owed to legislative enactments—it should be a rare occasion that the Oklahoma Supreme Court undertakes the drastic action of striking down a state law as unconstitutional. Unfortunately, such action has become all too common in Oklahoma.

Rather than serving as neutral interpreters of the law, the justices on the Oklahoma Supreme Court act as though they are lawmakers. The irony of the situation is striking: while lawyers in the state defend the Court from structural reforms with pious lectures about judicial independence from politics, the Court gets busy injecting itself into the very political process it's supposed to be removed from.

## The Four Horsemen of Judicial Overreach

These Four Horsemen of judicial overreach...

- 1 Single Subject
- 2 Special Laws
- 3 Ambiguity
- 4 Public Interest Standing

...have been weaponized to produce an extra-constitutional state of affairs in Oklahoma government.

Most prolifically in recent years, the Court misuses the Oklahoma Constitution's Single Subject Rule and bans on Special Laws. Additionally, the Court declares a law “ambiguous,” and effectively re-writes the legislation in a way the Court finds more palatable. It casts this as a search for the *intent* of the statute rather than applying the *actual* words it contains. Finally, the Court has radically altered the concepts of standing and justiciability to include an amorphous “public interest standing,” allowing it to review the constitutionality of virtually *any* law the legislature passes at the Court's discretion.

The Court is also highly selective in applying these doctrines. This leads to the impression that the justices first determine a political or policy agenda with the legal reasoning worked out second to justify the pre-ordained outcome.

The Oklahoma Supreme Court's activism is more destabilizing than federal court activism because it can strike at any time on any topic. The Court abets its expansive activism by using *procedural* rather than *substantive* provisions of the constitution to achieve policymaking goals. The justices can apply procedural devices to virtually any legislation on any topic, greatly expanding the Court's power and effectively crowning itself the final arbiter of any public policy debate it chooses.

## Of, By, And For Lawyers: Oklahoma's Unsound Method of Judicial Selection

The regretful condition of Oklahoma's legal system is due in large measure to the state's flawed system for selecting judges and justices. Oklahoma's judicial selection method hands outsized influence to the Oklahoma Bar Association, which primarily serves

to ensure that trial lawyers can select the judges and justices they want hearing their cases. Given the liability-expanding decisions of the Oklahoma Supreme Court, it has been remarkably successful at achieving this inappropriate result in its five decades of existence.

## Recommendations

The elected branches of Oklahoma government can, and should, reign in the Supreme Court.

### 1 Appoint Non-Activists & Give Written Guidance to Appointees

- The governor should fill judicial and JNC vacancies with individuals who have a modest, not activist, view of the courts.
- The governor's office can educate members of the JNC on the proper role of the judicial branch and the role of the JNC itself, with written guidance.

### 2 Make Changes by Statute

- 1889 Institute's publication, *Taming Judicial Overreach: 12 Actions the Legislature Can Take Immediately* (forthcoming October 2019) provides a menu of reforms that can be enacted by statute instead of constitutional amendment.
- Significantly, the legislature can eliminate merit-selection for all courts below the Supreme Court and Court of Criminal Appeals. It should do so.

### 3 Reform the JNC by Statute

- Remove or alter the Oklahoma Bar Association's role in JNC appointments.

- Make the JNC subject to the Open Meetings Act, with a narrow exception to candidly deliberate about the candidates behind closed doors. All other business, especially voting, should be done on the record.
- Require JNC to develop written ethical and procedural rules (or impose them by statute). Members should have to disclose conflicts of interest and recuse from participating in filling any vacancy where they have such a conflict.

### 4 Eliminate the JNC by Constitutional Amendment

- Elimination of the JNC would require a constitutional amendment, but would permit the state to adopt a judicial selection system akin to the federal model or to elections.
- The federal system is superior, but elections are often popular with the electorate. Either is better than the status quo.

## Conclusion

It is incumbent on elected officials, lawyers, the press, political observers, and the people themselves, to robustly criticize the Oklahoma Supreme Court. As United States Chief Justice Harlan Stone put it many years ago, "I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."