

Do We Really Want Ethical Government?*

We are often told that we get the kind of government we deserve. Revelations of corrupt and self-interested conduct by public officials tell us something is wrong. Dean Feerick's article deserves the attention and thought of every New York lawyer interested in good government in our state.

The question I would like to address in this article arises out of my recent work with the New York State Commission on Government Integrity. As you may recall, the Commission was appointed by Governor Cuomo in 1987 following a series of corruption scandals in our State involving officials at all levels of government. It was a nonpartisan group comprised of a former Secretary of State, a former judge of the State's highest court, a prominent civil libertarian, a former federal prosecutor, and other prominent citizens of this State.¹ The Commission had a very broad mandate. It was directed to investigate weaknesses in existing laws, regulations and procedures relating to such areas as campaign financing, judicial selection, conflicts of interest, the solicitation of government business, and the use of public office for personal enrichment. It was directed to make recommendations to the Governor to remedy inadequacies in the law that permit corruption to exist. The Commission did so, issuing 20 reports prior to the completion of its work in September 1990.² The recommendations in these reports ranged from limiting the influence of political patronage to expanding the protections for public employees

who call attention to government impropriety.³

The question I would like to discuss is this: "Do we really want ethical government?" This answer is, to my mind, an easy one. Particularly when it is addressed to lawyers my question must seem to be entirely a rhetorical one, since lawyers take seriously the responsibility we have, as members of the bar, to strive to improve our legal system, including our system of government.

Of course we want ethical government. As taxpayers and citizens, we rely on public officials to act in our collective best interest, rather than in their own self-interest. Self-interested decision making by public officials is costly, leading to waste, mismanagement and abuse. It follows, as well, that we want laws and procedures that discourage corrupt and self-interested conduct by public officials. Experience shows that we cannot rely simply on the good faith of our officials, and that effective laws must be passed to promote ethical government. That was, of course, the Governor's premise when he appointed the Commission four years ago.

I nevertheless raise the question of whether we want ethical government because, while the answer

may seem obvious to us, as citizens, taxpayers, and attorneys, it seems less than obvious to those who have ultimate responsibility for acting on the Commission's recommendations by enacting laws guaranteeing ethical government. From 1988, when the Commission began issuing its recommendations, until today, the response of our State's legislators has been extraordinarily resistant, even with respect to proposed reforms which are, to my

* This article is adapted from a speech delivered at the annual meeting of the Putnam County Bar Association on May 16, 1991, on the occasion of the induction of its first woman president, Susan Bauer Brofman. I acknowledge the assistance of Professor Bruce Green of Fordham Law School with respect to that speech.

¹ The Commissioners were: Richard Emery, Patricia Hynes, James Magavern, Judge Bernard Meyer, Bishop Emerson Moore, Cyrus Vance, and me, as chair.

² The reports are reprinted in a recently published volume by the Fordham University Press, entitled, *Government Ethics Reform for the 1990s* (1991).

³ The Commission made additional recommendations on abolishing judicial elections for full-time trial courts; addressing inadequacies in the State's Open Meetings Law; closing loopholes in the State's Ethics in Government Act; reforming the contracting process in New York City; shedding light on the ways in which public authorities and government-sponsored not-for-profit corporations function in New York State; reforming the laws governing how candidates get on the ballot in state primaries; strengthening municipal ethical standards; establishing ethics training programs in State and local government; and changing New York's retirement system with respect to public officials who betray the public trust. In seven reports, the Commission presented a large number of recommendations concerning campaign financing in New York State.

mind, uncontroversial, and which command virtually unanimous support from civic groups and commentators throughout this state. The explanation officials sometimes give, at least in private, is that there is no popular support for ethics reform. In other words, they tell us, we don't really want ethical government.

Sadly, a look at the low level of citizen involvement in efforts to influence and reform government on all levels might seem to support the cynical view that ethics reform is unwanted. For example, the low level of voter participation in this country might be read as an indication of unconcern about the direction of government. Among the 23 major democracies, the United States has the lowest rate of voting in federal elections. According to a Harvard survey taken in 1983, a mere 53% of those eligible to vote in the federal election did so that year.

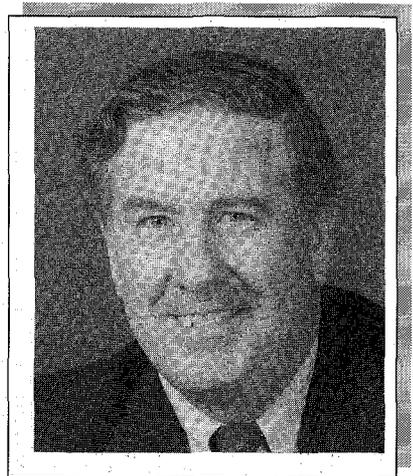
A lack of popular interest in the course of government might also seem to be reflected in the lack of competition for public office. Statistics recently circulated by New York State Common Cause are quite revealing. In 1988, nearly 30% of state legislators ran without major party opposition and more than 98% of incumbent state legislators were reelected.

Certainly, there has been no outcry of public demand for the specific reforms recommended by the Commission on Government Integrity. For example, the Commission issued seven reports on campaign financing which demonstrated the corrupting influence of the current system of financing elections in New York State. The current system provides an enormous advantage to incumbent officials, all but guaranteeing their reelection. Businesses and individuals doing business with government are allowed to make sizeable contributions, directly and indirectly, to political campaigns. They customarily do so, not out of ideological support for incumbent officials, but

to ensure themselves access to government business. Those doing business with government are the major contributors to campaigns in this state. The advantage that incumbent politicians enjoy as a consequence cannot be overstated. In the most recent state campaigns, incumbent candidates for statewide office raised close to \$30 million. This was approximately six times what their challengers raised.

Who ultimately pays the bill for the current system of privately financed elections? We, the taxpayers. Businesses pass the cost of contributions on to the state in the form of higher prices for goods and services, and we, the taxpayers, pick up the tab. This is, one might say, a perverse form of public financing. We taxpayers ultimately finance elections through our tax dollars, but without any choice about whether or to whom contributions are made. Yet, as some of our elected representatives in Albany have pointed out to me, there is no groundswell of popular support for changes in the current system, whether those changes involve real public financing or more modest reforms, such as the imposition of meaningful limits on amounts that may be contributed, or the prohibition of contributions by those doing business with the state.

Although the low rate of voter participation, the lack of competition for public office, and the lack of vocal support for ethics reform are disappointing, in the end I do not see them as an indication of a lack of desire for ethical government. To the contrary, I believe that there is a significant desire for honest, ethical government, as well as for laws that will better assure ethical government. One thing that confirms me in this view is the extraordinary amount of attention given to the question of government ethics in the media. Not a week goes by without new questions being raised about the propriety of official conduct on the federal, state or local level. Concern over whether public officials have been exploiting their



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position for personal gain lies at the heart of the savings and loan crisis and the scandal at the Department of Housing and Urban Development, as well as at the heart of events that seem less important by comparison, such as the alleged use of aircraft for personal business by the White House chief of staff, or the making of private investments by the U.S. Comptroller of Currency while holding high fiduciary office. I believe that the amount of attention paid to issues such as these is, in large part, a response to public concern about ethical government.

If the public has not been sufficiently involved in pressing specific ethics reforms on government officials, I believe the explanation lies elsewhere than in a lack of public desire for ethical government. Let me suggest two partial explanations. The first is that the specifics of ethics reform are often quite technical. For example, one of the Commission's reports criticized the current process for nominating candidates for public office in New York State. Our

state's laws place more hurdles in the way of potential candidates than those of any other state, with the result that many potential candidates are discouraged from running, others are knocked off the ballot for trivial reasons, and others are forced to waste enormous amounts of time and resources defending against challenges to their nomination.⁴ But it is not easy for lay people to understand the Byzantine structure of the current law that interferes with their choice among potential candidates and, therefore, necessitates reform.

The second explanation for the absence of strong public support for ethics reform is the lack of aggressive leadership on this issue from public officials. Few in Albany appear willing to take the lead on ethics reform, although the Governor's pledge in his 1991 state of the state

message to hold up the redistricting process until an ethics reform package is enacted by the State Legislature is an extremely promising development.⁵ History tells us that unless pressed by the backlash from scandal, political leaders will almost invariably ignore proposals for ethics reform. The reason for this is simple. Defects in the current laws greatly favor incumbents. Ethics reform would remove the unfair advantages that incumbents currently enjoy. It therefore takes a rare form of political courage for an incumbent to press such reform vigorously. Yet, as John C. Calhoun noted, the very essence of a free government consists in considering public office as a public trust, bestowed for the good of the country, and not for the benefit of an individual or party.

Because the specifics of ethics reform are complicated, and there is insufficient leadership on this issue within government itself, ethics reform cannot be achieved without leadership from outside government. At the same time, however, I strongly believe that with leadership from outside government, ethics reform can be achieved. The history of this country is filled with examples of how government responds, as it must, to popular demands for reform which are spearheaded, not by government officials, but by concerned individuals and groups outside government. The election of women as leaders of the bar is testimony to one of the most dramatic examples of such a reform movement: the movement in this state and nation for equality for women. It was in New York that the struggle to win passage of the 19th Amendment began. The leaders of that struggle

were women such as Susan Anthony and Elizabeth Stanton who did not hold public office—who, indeed, were denied the right to vote for those men who did hold office—but who possessed the vision, energy and talent to press for and achieve reform. Through their efforts—efforts such as Elizabeth Stanton's famous address to the New York State Senate in 1854—women attained the right to vote and many other impediments to equality for women were eliminated.

If ethics reform, like women's rights, can and must be achieved with leadership outside government, where should that leadership come from? The answer, I think, is from groups who have the expertise to understand the deficiencies in our laws and are committed to improving them. It must come, for example, from bar associations throughout this State. Bar associations can be tremendously effective both in galvanizing popular support for law reform and in promoting reform within the highest reaches of State government. While the bar has many worthwhile causes to promote in the years to come, can there be any more important cause to include among them than ethics reform?

⁴ The New York State Bar Association has reported that more than one half of the ballot litigation in the United States occurs in New York.

⁵ The Governor also has placed before the Legislature in his program bills most of the recommendations of the Commission.

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