CHAPTER ONE

Introduction

For young William O. Douglas, who later served for more than three decades on the U.S. Supreme Court, the call changed his life. It came from his friend Joseph P. Kennedy, who had left his post at the Securities and Exchange Commission (SEC) in September 1935. "When there was a vacancy on the commission later that year, Joe Kennedy told me he wanted to get 'the Boss' to name me to the office. So he took me over to see FDR, who greeted me warmly and said, 'You're my man.' I was confirmed on January 23, 1936."[1]

It is hard to imagine an agency more fraught with temptation for those who had larceny in their hearts than the Securities and Exchange Commission. What brilliant investment decisions one could make knowing what one learns at the SEC. But no investigation of Douglas's ethics was held before he took this job. No background investigation. No grueling interviews in the White House. No intrusive questionnaires and lengthy forms to complete. No vetting. No financial disclosure. No duplicative Senate investigations. It was enough that the president wanted him and the Senate approved him. That exercise of collective political judgment, following the Constitution, was the only vetting that William O. Douglas—or any other public official of the time—was required to endure.

The appointment process had been that way since the beginning of the Republic and would stay that way for another generation. For most political nominees, getting into government was simple and quick. Serving in government may have required a financial sacrifice, but it was a minor

inconvenience to most of those whose primary career was in the private sector. Barriers to entry were low; discomforts of service were few. Public officials routinely maintained other jobs and professions during their government service. Many made daily decisions that affected corporations and other enterprises in which they had a personal financial interest. In the two world wars, the country turned to its most experienced business leaders to manage key elements of the mobilization effort. They retained status and salary in the corporations they headed and became government advisers known as "dollar-a-year men."

Where private and public interests clashed, there was widespread faith that the latter would prevail. It was a faith based on an optimistic view of human nature and a confidence that the political leaders who chose and approved administrators and judges would make honesty a key criterion of what Alexander Hamilton had called "fitness" for public service. As Hamilton wrote:

> To what purpose then require the co-operation of the Senate [in approving nominations]? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.
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> . . . A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate, to rest satisfied, not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate.[2]

Hamilton's faith was sometimes tested. Some widely accepted practices in earlier times would not pass muster today. For example, public officials were paid retainers by corporations, and public officials were provided generous gifts and services from those whose interests they regulated. And sometimes the faith that the public interest would prevail was seriously abused by government employees who knowingly violated their public trust for personal enrichment.

But the country prospered and grew, the American people came to rely more on their national government for programs and protections, and the occasional scandal did little to thwart a pattern of broad public trust in government. Even during the Gilded Age in the second half of the nineteenth century, when large economic interests shamelessly promoted their own purposes through largesse to government officials and when many cities and some states were run by party machines fueled by what one of their bosses called "honest graft," efforts at reform found only sporadic and shallow support from most Americans. For much of American history, though it was a common topic of conversation and the stimulus for an occasional muckraking wingding, corruption in government was not a matter that kept many Americans awake at night.

No surprise that. Until after World War II, most Americans found that their lives intersected rarely and only marginally with government. The national government provided few goods or services to its people and imposed no taxes on all but a handful of them. In 1939 less than 3 percent of the American people paid any income taxes. The federal budget on the eve of World War II was less than $10 billion, and the government in Washington, D.C., performed few of the functions that today consume more than a fifth of the American gross domestic product. If some government officials occasionally trespassed the boundaries of propriety, it was a matter of some entertainment but little consequence to most Americans whose lives were no more affected by corruption in Washington than in Bolivia or Bombay.

However, the ethics of public officials were not unregulated. The historical pattern of reform has been for occasional, highly visible public scandals to yield calls for regulation, which often resulted in new laws or rules. A post office scandal during Andrew Jackson's presidency inspired Postmaster General Amos Kendall to produce the first code of ethics for any government agency in 1829. When government officials were caught accepting money to lobby for the fraudulent claims of some veterans after the Mexican-American War, Congress in 1853 enacted legislation to prohibit the practice. After revelations of significant profiteering during the Civil War, a new statute prohibited federal officials from accepting compensation in exchange for aid to private citizens in matters in which the United States was a party.

The Progressive Era also yielded some new ethics regulations, most in response to corruption that took place during World War I. A law signed in 1917 prohibited any supplementation of the salaries of federal employees. In 1919 Congress banned War Department procurement officials from

engaging in any private business dealings with the federal government for two years after leaving federal service.

But nothing in U.S. history matched the impetus for change that emerged in the middle decades of the twentieth century. Government was growing; the New Deal and especially the Second World War were powerful stimuli to that growth. The national government took on social welfare functions that had never before been public responsibilities. And the Second World War and the cold war that followed brought permanent changes to America's self-perception and to its role in the world. Big government arrived in mid-century, and it never left.

And as government grew, the American people came to be stakeholders as they had never been before. The federal government began to provide pensions for the elderly. It started to provide health care insurance for the poor and the aged. It began to subsidize local education, to build a grid of federal highways, and to shoot rockets into space. It constructed a vast network of support for its military veterans and a safety net for its disadvantaged citizens. And it became the greatest military power the world had ever known, with attendant peacekeeping responsibilities around the globe.

As the federal government took on all these new roles, its tentacles reached more deeply into American life, especially American economic life. More and more corporations, and more and more citizens, came to depend on government contracting decisions for their livelihood. A relatively small government expenditure—a few hundred million dollars, for example—could mean life or death for a company that received or failed to receive the contract that directed that expenditure.

As the stakes grew, the stakeholders and the stake-seekers got better organized. They mastered the intricacies of the appropriations and procurement processes. They learned who the key decisionmakers were, and they sought out ever more ingenious ways of communicating with them and influencing their decisions: advertising, campaign contributions, lobbying, and so on.

Most of these activities were entirely legal. A few were not. When the line was crossed, the federal government often responded by drawing the line more clearly and by imposing new laws and rules to fortify it. "There ought to be a law," the critics would declare. And, invariably, a new law soon appeared.

Those efforts accumulated and grew into the most elaborate system of ethics regulation ever devised by any national government. Some of the

foundation of that system came into place early in U.S. history, but most of the edifice has been constructed in the past forty years.

These changes have occurred without much broad scrutiny or assessment. Potential critics found difficulty sailing into the prevailing wind of Washington opinion that anything that promised "more ethics" was undoubtedly good and anyone who opposed new ethics regulations was undoubtedly standing in the way of "more ethics." Ethics regulation has been the motherhood issue of recent times—too politically costly to oppose even when the direct benefits were uncertain or broader consequences troublesome.

The modern momentum for ethics regulation began in 1961 when a distinguished committee of legal scholars called for a review of all ethics laws. Its great landmark, the Ethics in Government Act of 1978, was constructed nearly a quarter century ago. In all of that time, the steady tightening of restrictions on the behavior of federal employees has been the subject of too little study and too little balanced evaluation. The time for a comprehensive assessment is long overdue.