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A FEDERAL OMBUDSMAN†

ROGER C. CRAMTON*

Big government in a welfare society has multiplied the contacts between governmental agencies and ordinary individuals, while at the same time the increased size and remoteness of agencies has made them much more impersonal. Meanwhile, citizens are no longer willing to accept passively whatever bureaucrats decide or provide. Governmental functions that have traditionally operated with largely unencumbered discretion—for example, the decisions of social workers regarding welfare recipients—are being asked to take heed of the views of those affected. A veritable revolution in citizen attitudes toward the exercise of delegated powers is underway, signified by such slogans as “citizen participation” and “civil accountability.”

The social demand for improved complaint-handling devices has its roots in relationships between democratic theory and administrative practice. Democratic theory requires the existence of satisfactory institutions for insuring that the exercise of administrative power remains accountable to the people.¹ Accountability has several facets: first, the elected representatives of the people must retain and exercise responsibility for the delegated authority of appointed officials; second, administrative agencies must establish effective machinery for insuring justice in individual cases and for handling complaints of injustice; and, finally, an external and impartial complaint-handling mechanism should be available to the citizen who has a grievance against government.²

Despite the generally high level of federal administrative performance, mistake and failure is an inevitable part of any human institu-

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* Chairman, Administrative Conference of the United States. The views expressed herein are not necessarily the views of the Administrative Conference.

1. For an illuminating general discussion of “accountability,” see R. DAHL, *AFTER THE REVOLUTION?* (1970).

THE FOLLOWING HEREINAFTER CITATION WILL BE USED IN THIS ARTICLE:

W. GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GREIVANCE PROCEDURE* (1966) [hereinafter cited as *WHEN AMERICANS COMPLAIN*].

2. See Reiss, *Servers and Served in Service*, in *FINANCING THE METROPOLIS* (J. CRECINE ed. 1970).

tion. Persistent bureaucratic maladies—arrogance, insensitivity, inflexibility, haste or carelessness, and incompetence—assure a steady stream of grievances and irritations that need airing and cleansing.³

The direction of social change is expanding the number of these grievances and accentuating the importance of dealing with them. Citizens are more affected by government's expanded activities and thus opportunities for collision are more frequent. Citizen expectations of the levels of service to which they are entitled are constantly rising. And the complexity and impersonality of modern life produce new irritations since the citizen no longer can meaningfully relate to or understand many of the forces which appear to control his destiny.

Better devices for handling citizen complaints provide the possibility of increasing the level of citizen satisfaction with government, raising the average level of governmental performance, and providing a powerful tool for searching out trouble spots and devising solutions before a crisis develops. Responsiveness to citizen complaints may help otherwise alienated individuals feel that they are participating in governmental decision-making, and alleviate the growing frustration of the "you can't fight city hall" syndrome.

Preoccupation with complaint-handling mechanisms, however, should not obscure the fact that those who complain are not a random sample of the whole population. We need to know more about the characteristics of those who complain as distinct from those who don't; the representativeness of the complaints that are filed of the total universe of aggrieved feelings; and the proportion of meritorious complaints in both segments of the population. Just as the consumer movement tends to be dominated by college-educated housewives of above-average income—precisely the group that is best able to cope with market conditions—the population of complainants is likely to be unrepresentative of the larger universe. Thus examination of complaints, while important, is not a substitute for systematic observation of the totality of administrative decisions.

3. This statement does not imply that "bureaucratic maladies" are the norm rather than the exception. In extremely large organizations, especially those carrying on a number of functions, instances of mistake, error or failure are bound to occur. This is as true of nongovernmental institutions (universities, corporations, unions) as it is of governmental institutions. Special concern with governmental functions, however, is justified because of the high expectations that are properly placed on governmental performance and because the citizen, unlike the consumer in the competitive market place, is dealing with a monopolist of services or functions when he is dealing with many governmental bodies.

Characteristics of an Ideal Complaint-Handling Institution

The vast literature on the ombudsman⁴ and related problems has reached a point of sophistication that makes it possible to summarize some of the essential characteristics of an ideal complaint-handling institution. The ideal complaint-handling institution would be widely available; highly visible; client-centered; independent; expert within its sphere of competence; and capable of developing general recommendations for the improvement of complaint-producing situations.⁵

With the profusion of specialized agencies and services, there is need for an information, referral, and complaint service that can provide a citizen with a needed service or refer him without delay to an agency that can handle his problem effectively. Ideally, a local office in each community, easily accessible by mail, telephone or in person, should provide information concerning governmental and other services; refer citizens to appropriate agencies for help and action; assist citizens in formulating complaints against local, state or federal agencies; forward the complaint to an appropriate complaint-handling institution; and monitor the action taken on any referral or complaint.

Existence of a complaint-handling mechanism, of course, will not accomplish much if the citizenry is unaware of its existence. The information problem is a serious one, especially if people of lower income are to be adequately served. The difficulty of educating the public about multiple complaint-handling agencies suggests the desirability of concentrating on one, or a few, agencies that are highly visible, widely available, and well publicized. A single local office, operated jointly by federal and state governments, should be able to link citizen complaints to a variety of complaint-handling agencies.

An ideal complaint-handling device would also be "client-centered" in the sense that it would be organized to serve the convenience of the people for whom it is created rather than that of the professionals who staff it.

4. See especially *WHEN AMERICANS COMPLAIN*; W. GELLHORN, *OMBUDSMAN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1966). In addition see S. ANDERSON, *OMBUDSMAN FOR AMERICAN GOVERNMENT?* (1968); S. ANDERSON, *OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS* (1969) (including a selective bibliography on the ombudsman concept covering 25 pages); D. ROWAT, *THE OMBUDSMAN: CITIZEN'S DEFENDER* (1965).

5. See Reiss, *supra* note 2, for a good discussion of the characteristics of an ideal complaint-handling institution.

Such an agency should also be independent. Independence has at least two facets: the person to whom the complaint is made should be external and independent of the government agency against which the complaint is directed, and the complaint-handling institution should be independent of partisan politics.

A good complaint-handling institution must be expert within its sphere of competence. A complaint-handling institution must have personnel with highly specialized skills as well as intelligence and judgment to deal sensitively and prudently with a broad range of complaints against government. But it must also operate within limits set by accepted norms applicable to governmental administration. It must eschew controversial questions of momentous policy; its function is not that of the policy-maker, innovator or advocate of social change, but that of testing administration by accepted standards.⁶

Finally, an ideal complaint-handling institution must have the capability to develop general recommendations to ameliorate complaint-producing situations. The pursuit of "justice in the individual case" has sometimes blinded us to aggregative phenomena that are of far greater significance than discrete controversies.⁷ An ideal complaint-handling institution will utilize the systematic investigation of individual complaints as the basis for developing cumulative information for needed change. Patterns emerge from the analysis of complaints and this information can be used in order to change the system so that future complaints or injustices are less likely to occur. Presently, most complaint-handling institutions fail to make systematic use of complaints to develop recommendations for general change.⁸

Existing Federal Complaint-Handling Devices

There are a wide variety of existing federal devices by which dissatisfied persons may seek consideration of complaints of alleged governmental error—intra-agency appeal, judicial review, legislative

6. See *WHEN AMERICANS COMPLAIN* 47, where Professor Gellhorn states: "External criticism triumphs most easily when it concentrates on but a few lapses from customarily high standards of fairness and efficiency." See also *id.* at 224-31.

7. The argument for greater attention to the aggregative effects of legal rules and procedures is well made in Conard, *Macrojustice: A Systematic Approach to Conflict Resolution*, 5 *GA. L. REV.* 415, 419-20 (1971). See also Rosenberg, *Devising Procedures That are Civil to Promotive Justice That is Civilized*, 69 *MICH. L. REV.* 797 (1971).

8. This point has been made emphatically by Walter Gellhorn. *WHEN AMERICANS COMPLAIN* 89, 93, 218-23.

casework, and external scrutiny by executive and legislative budget and finance officers.⁹ Agency complaint-handling mechanisms, of course, are limited to the sphere of activity of the agency; hence they are bound to be specialized in terms of subject matter or geographic area or both. In this respect, agency complaint-handling differs from the ombudsman pattern and from congressional casework, which both offer a generalized and more universal remedy.

Even more important, since the agency will be passing on complaints against itself, agency complaint handling lacks the degree of independence that an ombudsman or other outside critic will have. Independence, of course, is a matter of degree; internal separation of functions and a tradition of autonomous, high-level agency review may be more important than the mere appearance of agency domination. Only a small number of federal agencies, however, have created high-level complaint-handling offices that operate with a considerable degree of autonomy and independence. In most agencies complaints are handled by the same persons who were responsible for making the decisions complained of. There is good reason under such circumstances to be suspicious of the objectivity of the agency complaint-handling process.¹⁰

Further information is also needed concerning the difference in the handling of a complaint depending upon its source. It is generally accepted that complaints forwarded from Congress or the White House receive much more careful and expeditious treatment than complaints sent directly to the agency. If so, the result is a curious one since it discriminates against the person who proceeds through ordinary channels. Other significant differences in agency complaint handling may depend upon the nature of the source of a complaint, the official to whom it is addressed—inside or outside the agency—or the form in which the complaint is cast.

Agency complaint-handling is important in itself and in relation to congressional and White House complaint handling since the latter devices largely depend upon referrals to the agencies. Whether or not proposals for an ombudsman at the federal level are accepted, the improvement of agency complaint-handling mechanisms is desirable.

9. The general manner of operation of these remedies is well known; and their application of citizen complaints is usefully surveyed in Walter Gellhorn's excellent book. *Id.* at 57-130.

10. See Taylor, *The Culture of Bureaucracy: Chronic Epistilitis*, THE WASHINGTON MONTHLY, vol. 3, no. 7, Sept. 1971.

Perhaps a general improvement could be accomplished by having certain types of complaints handled or reviewed by a high-level office independent of the bureau complained of. This office might also generate proposals for organizational or procedural change that would reduce complaint-producing incidents.

Aside from judicial review and the oversight provided by fiscal and budget offices—Office of Management and Budget, General Accounting Office—the only general complaint-handling mechanisms at the federal level are the result of the special treatment given to complaints addressed respectively to the President or to a member of Congress.

The President receives about 40,000 letters a year which seek assistance in matters involving federal activities. These letters are referred to various federal agencies for handling. The subject matter of these letters runs the gamut of federal activities, with the proportion largely dependent upon the number of persons that a program affects: thus social security is at the top of the list, followed by military and draft problems, taxes, and veterans' benefits. The subject matter breakdown of the White House letters is highly suggestive of the types of letters that a federal ombudsman would be likely to receive.¹¹

The Civil Service Commission and the General Services Administration have experimented with methods of providing information to

11. The material in this paragraph is based on a survey of letters requesting the President's help on a personal problem received by the White House during a 16-day period in 1969. A total of 1,589 letters fell into the "personal problem" category during that short period.

The subject matter of the letters and the agencies to which they were referred for answer are indicated in the following tabulation:

<i>Referral Agency and Subject</i>	<i>Number</i>	<i>Percentage of Total</i>
HEW (social security, welfare, etc.)	540	43%
Defense (military transfer, promotion, records, etc.)	355	22%
Selective Service (draft deferment)	203	13%
Veterans' Administration (VA benefits)	105	7%
Treasury (tax refund or problem)	83	5%
Justice (pardon, parole, legal aid, citizenship)	72	5%
All others	231	14%
	<hr/> 1,589	<hr/> 100%

citizens about federal programs and activities. A complaint-handling experiment known as "The President's Listening Post" was set up in Philadelphia as a means of facilitating communications from citizens to the President. Letters were referred to federal agencies which had functional responsibilities with respect to the matters dealt with in the letters. The program is being phased out because, even though it was highly publicized in the Philadelphia area, it did not produce many letters. The "Listening Post" approach has been replaced by what seems like a much better idea: centers located in federal office buildings throughout the country which provide information to citizens and refer them to the proper agency to handle their problem.

Complaint handling by members of Congress, Walter Gellhorn states, speeds agency action and produces an outcome more favorable to the complainant in about 10 percent of the cases than complaints sent directly to the agency.¹² The favorable results include many cases in which a better—more correct—result was reached; in these cases, the efforts of congressional staff have "humanized" the administrative process by overcoming the unimaginativeness or inflexibility of bureaucrats. But in other cases, the favorable outcome is merely preferential treatment that citizens not utilizing the congressional approach will not get.

The great deficiency of congressional casework is its preoccupation with the single instance rather than with the general problem. One of the major benefits of a good complaint-handling system—its use to generate changes that will improve the routine performance of the system—is almost entirely lost.

Congressional casework also may undermine administrative responsibility and fairness by giving favored treatment to those who complain through political channels. Finally, the quality of congressional casework is markedly uneven. Some is excellent, but too often it consists only of a perfunctory reference to the agency involved without any specialized competence or independent judgment being brought to bear.

The Case For and Against a Federal Ombudsman

Does the United States need a new, all-purpose complaint-handling institution? Should the ombudsman concept be applied to the federal government?

12. WHEN AMERICANS COMPLAIN 79-82.

An ombudsman is an independent, impartial, and easily accessible expert in government who receives and investigates individual complaints of alleged governmental error. He reports on them, and may publicize his findings, but has no power to change administrative decisions.

The beneficial aspects of the ombudsman in other countries are said to be: *first*, cases of maladministration have been detected and put right; *second*, recommendations arising out of complaint investigation have changed governmental organization, procedure or policy so that error is less likely to occur in the future; and *third*, the possibility of independent scrutiny of governmental actions has resulted in increased citizen confidence in government and has had a "tonic effect on administration."

Actual statistics of ombudsman activity do not overwhelm the objective critic. A very high proportion of complaints are rejected on jurisdictional grounds or found to be unjustified after investigation.¹³ The number of instances of maladministration that are put right in any given year tends to be quite small—infinitesimal when compared to the total volume of administrative actions. Only a modest number of general changes in administration can be traced to recommendations of the ombudsman. Thus it is not surprising that enthusiasts of the institution tend to emphasize its "tonic effect on administration"—a somewhat subjective quality that is difficult to assess but nevertheless may be very real.

There is also a tendency in discussions of the ombudsman to omit any consideration of possible negative features of the institution. On the debit side, however, there is something to be said.

The cost of the ombudsman operation, although relatively slight—in Hawaii about \$100 for each complaint filed with the ombudsman—must be balanced against the expected benefits. In terms of relative costs, however, an ombudsman may be far cheaper than alternative grievance-handling devices that involve lawyers and formal legal proceedings.

13. Professor Schwartz reports that during the first three years of experience in Great Britain, the Parliamentary Commissioner handled 2,820 complaints. Only 105, or less than 4 percent, were found to be justified and within his jurisdiction. Schwartz, *The Parliamentary Commissioner and His Office: The British Ombudsman in Operation*, 45 N.Y.U.L. REV. 963, 976-77 (1970). The lowness of the figure is perhaps due in part to the fact that the Parliamentary Commissioner, unlike other ombudsmen, cannot consider the correctness of administrative actions but only whether they resulted from "maladministration."

Investigation of complaints imposes extra work on administrative agencies and, more seriously, may dilute their responsibility and result in cautious, insipid administrative action. This problem is accentuated, of course, if the ombudsman undertakes to second-guess administrators on issues of substantive policy or priority for scarce agency resources.¹⁴ Despite these negative features, the general experience in other countries has been thought to be very good indeed.¹⁵

Proposals to apply the ombudsman concept to the federal government have been objected to on several grounds. The statement is frequently made that the federal government is too large and complex to support the ombudsman concept. It is true that an ombudsman at the federal level, if his existence was well-known, would receive a large volume of complaints. This suggests the relevance of the British experience, where the requirement that the ombudsman act only on complaints forwarded by members of Parliament operates to filter out matters less deserving of consideration. Nevertheless, a federal ombudsman would almost certainly require a large and specialized staff to handle with sufficient expertise complaints concerning the broad range of governmental activities. Whether such bureaucratization would somehow impair the operation of the institution is an open question. At the least, some compromise with the ideal of the ombudsman as a personalized institution would be required.

It is also true that many complaint-handling institutions already exist in the federal government. Formal remedies, however, whether administrative or judicial, are more expensive and time-consuming than the ombudsman; while others, such as congressional casework and letters to the President rely for the most part on the agencies involved to handle and review the forwarded complaint. Also, these devices have not been effectively used to generate proposals for general improvement of the administrative process.

The principal reasons for the failure to apply the ombudsman concept to the federal government, however, are first, the reluctance of Congress to jeopardize an activity—handling requests by constitu-

14. According to Gellhorn, *WHEN AMERICANS COMPLAIN* 54, instances of overreaching on the part of ombudsmen include a request by the New Zealand ombudsman that officials create a civil defense organization although they believed that other tasks were more important; and consideration of personnel security and tax expenditure matters by the Danish ombudsman.

15. This is the conclusion reached by virtually all students of the subject. See the materials cited *supra* note 4.

tents—that aids reelection, and second, fear on the part of administrators that an ombudsman would impair their powers. The former concern, whether appropriate or not, must be taken as a political fact of life. It again suggests the desirability of following the British approach. The second concern raises again the principal defect of the ombudsman concept: that it may detract from the responsibility of agency officials, especially if the ombudsman is not careful to limit his concern to accepted norms of administration or matters of procedure.

Recent proposals for an ombudsman at the federal level have taken two forms: experimentation with the ombudsman concept in particular subject-matter or geographic areas; and creation of a legislative office to handle complaints at the request of members of Congress.

A current bill sponsored by Senator Javits is illustrative of an experimental federal ombudsman of limited nature and duration.¹⁶ The bill provides for an Administrative Ombudsman who is authorized for a three-year period to conduct demonstration projects in three geographic areas in the United States, one of which is to be the District of Columbia. Appointed jointly by the President Pro Tempore of the Senate and the Speaker of the House, the Administrative Ombudsman would investigate written complaints of any person that any administrative action was improper or erroneous. This broad scope of review would be applied, however, only to actions of four federal agencies—HEW, HUD, Labor, and OEO—involving health, education, antipoverty programs, and employment and manpower training programs.¹⁷ The ombudsman is authorized to make recommendations but cannot require agency compliance. The bill also provides for an American Ombudsman Foundation to perform studies

16. S. 2200, 92d Cong., 1st Sess. (1971).

17. The limited subject-matter coverage of the experimental approach may be confusing to citizens who may be unable to understand why the ombudsman may handle social security disability matters but not veterans' disability. Some jurisdictional problems are inevitable, but they should be kept to a minimum. A great advantage of the single ombudsman in the Scandinavian and other countries is his simplicity, visibility and broad availability.

One also wonders whether the "experiment," like so many others, is not likely to be permanent whether or not its design is ideal. Since the experimental ombudsman would be working primarily in fields in which poor people are involved, he may tend to view himself as an advocate of a class rather than as an impartial governmental critic. An advocacy role, while it may be useful or desirable, would depart from the ombudsman model.

and evaluate the ombudsman concept at the federal, state, and local level.

A second type of proposal would create a congressional ombudsman to help congressmen handle their casework. For a number of years, Representative Reuss was the proponent of a series of bills which were designed to establish a congressional ombudsman. The new official, appointed jointly by the Speaker of the House and the President Pro Tempore of the Senate "without reference to political affiliations and solely on the basis of his fitness to perform the duties of his office," would "review the case of any person who alleges that . . . he has been subjected to any improper penalty, or that he has been denied any right or benefit to which he is entitled . . . or that the determination or award of any such right or benefit has been . . . unreasonably delayed, as a result of any action or failure to act on the part of any officer or employee of the United States." This review would be undertaken only at the request of a member of Congress; and the findings and recommendations would be reported to the member who referred the matter to the congressional ombudsman.¹⁸

The major feature of the congressional ombudsman is that, like the British counterpart, complaints must be funneled through a legislator's office. This limitation may be defended on grounds of expediency—Congress may be more willing to create an instrumentality which does not displace its role in handling constituents' complaints—and of practicality—screening by congressional offices may remove any frivolous complaints and limit the total number of matters that must be handled.

Centralizing congressional casework has much to be said in its favor. Wasteful duplication of effort arising from constituent letters to more than one Congressman would be eliminated. A specialized, expert staff would do a more uniform and better job of investigating and handling complaints. Congressional staff, relieved from routine casework—but only at the option of the individual Congressman—would be able to devote more energy to general legislation. Finally, and most important, the centralization of the casework function in a single office would enable it to recommend the elimination of the conditions and practices that produce meritorious complaints. This feedback and generalization function, which should be a prime

18. H.R. 8017, 91st Cong., 1st Sess. (1969). A similar proposal is sponsored currently by Senator Hartke. S. 2134, 92d Cong., 1st Sess. (1971).

objective of any good complaint-handling system, would give rise to general improvement in government organization and procedure.

A further advantage of the congressional ombudsman approach is that it builds on an existing institution—congressional case-handling—which is well established and fairly well known. If wide publicity were to be given to the device, it might receive even greater use. It should not be necessary, for example, for a citizen to know his Congressman's name in order to voice a complaint; arrangements should be made so that letters or telephone calls to "Congress" or "Congressional Ombudsman" or other simple designation would be communicated to the member of the House in whose district the constituent is situated. Since the device would be available for all complaints against the federal government, with very limited exceptions, the educational task of acquainting the citizenry with the availability and potential of the device should be fairly easy. Its availability could also be included in the service provided by information centers in all major federal office buildings, which should in any event provide an adequate information and referral service with respect to all federal agencies and activities.

Role of the Administrative Conference

A final issue involves the role that should be played in this area by the Administrative Conference of the United States. The Conference has undertaken studies to provide greater understanding of an improved performance by existing complaint-handling institutions. Should the Conference go further, as some have urged, and constitute itself an ombudsman on an experimental or permanent basis?

The authority of the Conference to undertake a limited ombudsman function can easily be deduced from its general powers. The Conference has broad authority under the Administrative Conference Act to concern itself with the adequacy and fairness of the means used in effectuating federal programs.¹⁹ The Conference may look at "any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later review;" but the Conference is not to address itself to the statutory scope of an agency's substantive

19. Administrative Conference Act, 5 U.S.C. §§ 571-76 (1970).

powers or to policy matters that have been committed to its judgment. Information needed by the Conference in connection with its work "shall be supplied [by federal agencies] to the extent permitted by law." The Chairman is empowered, among other things, to "make inquiries into matters he deems important for Conference consideration, including matters proposed by persons inside or outside the Federal Government." Thus the Administrative Conference, as an independent, impartial and expert critic of administrative procedure, which relies on persuasion and publicity in order to effectuate its recommendations, has many of the attributes of the classic ombudsman.

In other respects, however, it differs from the classic ombudsman in ways that may reflect on its ability to handle citizen complaints. As a new agency, the Administrative Conference is not well known, except to administrative lawyers, and lacks visibility as a federal complaint-handling device. The Conference's concern with procedural matters means that it probably could not perform the broader ombudsman function of inquiring into the wrongness of administrative decisions, but only the narrower function of inquiring into maladministration. Unlike ombudsmen in other countries, the Conference lacks subpoena powers. And the limited funds available to the Conference under its existing appropriation place severe restraints on the manpower and energy that could be devoted to the handling and investigation of citizen complaints. Indeed, the Conference, in order to undertake a significant ombudsman function, would need to obtain additional appropriations from Congress for that purpose.

If the Administrative Conference were to undertake an ombudsman function, probably it should do so on an experimental basis. Its lack of visibility and its concern only with procedural matters relating to federal functions suggest an experiment in which complaints received by other bodies might be considered by the Conference. This approach would also serve to limit the total volume of complaints and thereby reduce the fiscal commitment. Two methods of doing this are: offer to handle procedural complaints which are received by members of Congress; and offer to handle procedural complaints relating to federal activities that are received by a well-established state ombudsman, such as the one in Hawaii.

Conclusion

The time has come for experimentation with the ombudsman concept at the federal level. At this time, it would be preferable to build it on the congressional experience along the lines of the Reuss proposal. But however constituted, the creation of such an office must give adequate emphasis to the utilization of complaints as a source of ideas for needed change in administrative organization or procedure. Reconsideration of administrative procedure is an activity in which the Administrative Conference has a unique capability and interest. Accordingly, the Conference should have a close relationship to any new institution so that it can make systematic use of citizen complaints as a source of general studies and recommendations.