Report for Recommendation 90-2

Ombudsmen in Federal Agencies: The Theory and the Practice

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"THE MOUSE THAT HATH BUT ONE HOLE IS EASILY TAKEN"

- - Old English Proverb

I. INTRODUCTION

There are ombudsmen sprinkled here and there throughout the federal government. The Taxpayer Ombudsman in the Internal Revenue Service (IRS) is probably the best known. Least well known, perhaps, is the ombudsman in the Army Materiel Command (AMC), which is part of the Department of the Army. In between, one finds the Resource Conservation and Recovery Act (RCRA) Hazardous Waste ombudsman in the Environmental Protection Agency (EPA) (which also has an ombudsman for small business matters and asbestos questions), the tattered remnants of an ombudsman program in the Department of Commerce, and another at the Interstate Commerce Commission. There is a flourishing band of ombudsmen in the long term health care field, mandated by Congress, funded with federal grants, and administered by state governments. At one time or another all but one of these programs achieved remarkable results; many still do, particularly those in the IRS and AMC.

Over the years since public officials and political scientists began asking whether the ombudsman concept, a Scandinavian innovation, could be successfully grafted onto American government, the Administrative Conference of the United States (the Administrative Conference or Conference) has been concerned with the debate and analysis of that question. It commissioned this report to help it determine whether it should recommend more systematic use of the ombudsman as a means of improving the administration of government programs by the executive branch.

The report considers the record of six ombudsmen, those in the IRS, AMC, RCRA program, the ICC, the Commerce Department and the federally supported long term health care ombudsmen at the state level. By talking to the people who run and use these programs, we hoped to learn what makes an ombudsman's office work, what makes it fail, and when and under what circumstances establishing an ombudsman makes sense. The report does not deal, except in passing, with ombudsman programs that address employee grievances. It deals only with those programs set up to help the public solve the problems encountered in dealing with the government: problems of misadministration, negligence, human error and omission, and the sleights and oversights that can complicate dealings with the bureaucracy.

The ombudsman idea is not new. The first one set up shop in Sweden in 1809. The first one in this country, at least at the federal level, came into

being in 1971. Twenty years, as government institutions go, is not a long time. Nevertheless, there is an adequate record for at least a preliminary assessment of the value of federal ombudsmen programs; enough to go on to support the view that, as a rule, federal departments and agencies administering programs that serve or directly affect large numbers of the public, should have an effective ombudsman program.

We are not writing on a clean slate. There is both a fair amount of experience here and elsewhere in the world and a wealth of literature on the subject. The first major section of the report summarizes the history of American interest in the ombudsman as an institution of government. The next section of the report presents the six case studies. The third section raises some of the underlying issues presented when the creation of an ombudsman is under consideration. In the last section, some of the federal programs and agencies, such as the Social Security Administration, that would appear to benefit by establishing an ombudsman are identified and recommendations are set forth.

II. GROWTH OF AMERICAN INTEREST IN THE OMBUDSMAN

A. The American Ombudsman Movement

The ombudsman has been defined as "an independent government official who receives complaints against government agencies and their officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints."[1] Trouble shooting and proposing ways to improve the delivery of government services have been the primary functions of American ombudsmen. Both functions are aided by the powers of investigation and report, the major tools (apart from persuasion) used by the ombudsman, who otherwise lacks the authority to compel compliance with decisions or to make policy. The ombudsman is intended to serve as the option of last resort, rather than as a substitute for existing grievance handling procedures.

Until quite recently, there were no public officials with that title, that status, or that mission in American government. In fact, the Office of

[1] Stieber, Carolyn, *Government Ombudsman Share Global Complaints: Notes from Canberra,* THE ARBITRATION JOURNAL, Vol. 44, No. 2, p. 42 (June 1989).

Personnel Management does not even have a classification for the ombudsman position. Given the general expectation that government be prompt, fair and responsive, one may well ask why.

Before World War II, Americans had less occasion to seek out a neutral go-between to cut red tape and solve problems when their local and state governments got bogged down in normal channels. In the New England town meeting, for example, each voter had a convenient forum at which to call the town manager and the selectmen to account for open pot holes and late school buses. The ward organizations of the city political machines that held sway at that time gave urban residents access to city hall. It was not until the New Deal that citizens began to look to the federal government for unemployment, retirement, health care and educational benefits on anything like the scale we know today. One reason, then, that there were no ombudsmen as such until the late 1960's or 1970's is that there was less need for such an official to help us deal with government problems.

Because elected officials and party organizations viewed the go-between function as an incident of the political process, it has not been an easy matter to persuade them to share this duty with politically independent officials, or, more aptly, to persuade them that the ombudsman function is separate. As one mayor is reputed to have said when the question was put to him: "(here) ombudsman is spelled M A Y O R."[2] Indeed, the response most often heard when you propose setting up an ombudsman is "we do not need one." The response comes not only from elected officials who are reluctant to share credit for having a traffic light installed, but also from the public employees who install the light. They argue that the ombudsman would hinder them by adding an additional level of supervision.

The writings and lobbying efforts of a small group of inquisitive and perceptive lawyers and political scientists established the beachhead from which interest in the concept spread overland. What is remarkable, in retrospect, is not that the ombudsman idea took so long to gain acceptance here; it is the extent to which it took hold at all.[3]

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[2]Interview with Bernard Frank, Esq., Allentown, PA, Thursday August 10, 1989.

[3]*cf.*, Zagoria, Sam, *The Ombudsman: How Good Governments Handle Citizen's Grievances*, Cabin John, MD: Seven Locks Press, 1988, p.65 (Hereafter, Zagoria, *The Ombudsman*.)

1. The First Settlers

Ten years ago, Stanley V. Anderson[4] canvassed the early American literature on the nature and likely applications of ombudsmen service in this country.[5] Anderson credits Professor Henry Abraham with publishing the first article ("A People's Watchdog Against Abuse of Power") in 1960. Abraham, who studied in Denmark as a Fulbright scholar, wrote about the then new Danish ombudsman program. Subsequent articles by Kenneth Culp Davis and Donald C. Rowat, Rowat's 1965 book, *The Ombudsman*, and two definitive works by Walter Gellhorn[6], *Ombudsmen and Others* (1966) and *When Americans Complain* (1966), all made significant contributions to our knowledge of the nature and workings of ombudsmen.

These observers found much of interest in the European experience. Sweden, the first country to establish a national ombudsman, did so in 1809. Provision for the Swedish ombudsman is found in its constitution.[7] The legislature appoints the ombudsman for four-year terms. The office has authority to review both executive and judicial actions and, in appropriate cases, may bring or recommend prosecution of public officials for malfeasance in office. The Swedish law requires that the complaint be kept confidential and gives the ombudsmen audit authority which is used as the basis for departmental investigations. To a greater or lesser degree, all the ombudsmen

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[4]Professor Anderson taught in the Political Science Department at the University of California at Santa Barbara and served as the Director of the affiliated Ombudsman Activities Project. He was also the author of *Canadian Ombudsman Proposals* (1966), the editor for *Ombudsman for American Government?* (1968), published by the AMERICAN ASSEMBLY, and wrote *Ombudsman Papers: American Experience & Proposals* (1969) published by the INSTITUTE FOR GOVERNMENTAL STUDIES at the University of California at Berkeley.

[5]For these references and other works in the early literature see Anderson, Stanley V., *Ombudsman Readings*, INTERNATIONAL OMBUDSMAN INSTITUTE, 1980, Chapter 1, pp. 1-19. (Hereafter referred to by author's name, e.g., Anderson, Chapter 8.)

[6]Professor Gellhorn, a founding member of the Administrative Conference, and a member of its Council, is also the author of the Model Ombudsman Statute which has been used as the basis for laws and ordinances creating state (e.g., Nebraska) and local (e.g., Seattle-King County, WA) ombudsmen.

[7]"Ombudsman" is a Swedish word meaning "agent" or "representative," according to Reuss, Henry S. & Anderson, Stanley V, *The Ombudsman: Tribune of the People*, in THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE, Vol. 363 (January, 1966), p. 45. The term "ombudsman" is now used widely and often rather loosely to describe any functionary with responsibility to consider a grievance. The classic Scandinavian ombudsman, by contrast, is a constitutional officer appointed by parliament to conduct "dispassionate inquiries into problems of which an individual's complaint might be merely a symptom of a general condition rather than a self-contained whole." Letter, Walter Gelhorn, Professor Columbia University School of Law to Charles Pou, Esq., Administrative Conference of the U.S., March 16, 1990.

created since Sweden pioneered the concept owe much to the Swedish experience.

Finland in 1919 became the second country to establish an ombudsman. It is also appointed by the legislature and is empowered to review judicial decisions for fairness as well as those of the executive branch.[8]

Two of the next three countries to adopt ombudsman programs were also in Scandinavia: Denmark in 1955 and Norway in 1962. New Zealand also established an ombudsman in 1962. The post war ombudsmen, like the early models, had power to review executive branch decisions, but they were not given authority over the judicial branch, and may not institute prosecutions of public officials. They have discretion, in some cases, to issue public reports of their findings. Indeed, the power of report as it is sometimes called, is the power by which the ombudsman's findings and recommendations gain credence. Appendix A contains a brief description of some of the ombudsman programs established in other foreign countries.

2. Spread of American Interest in Ombudsmen

The first ombudsman, that established in Sweden, came into being 150 years before Americans first took serious notice of the concept. There are several reasons for the long delay. The relative isolation of the two countries, an isolation enforced by distance and by cultural, lingual, and political differences, was largely responsible. Indeed, the idea was slow to spread to any other part of the world, and it was not until the Danish adaptation of the Swedish institution in the mid-1950's that use of the concept spread substantially. This was due in large part to the efforts of the first Danish ombudsman, Professor Stephan Hurwitz. Hurwitz wrote extensively on the subject, travelled to other countries to spread the word, and gave frequent talks to academic and political audiences. It was at this time that he became acquainted with three Americans who did much to import the concept to the United States: Professors Gellhorn, Davis and Abraham.

In 1967 the thirty-second meeting of the American Assembly adopted a statement by general agreement urging "the prompt enactment of laws to create the special office required to handle citizens' complaints, the Ombudsman."[9] The following year the Western American Assembly on the Ombudsman, made up of sixty-six members with university, government and private sector backgrounds expanded on the previous year's work by the parent American

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[8]Rowat, Donald C., *The Ombudsman Plan: The Worldwide Spread of the Idea*, Lanham, Md.: University Press of America, 1985, p. 7. (Hereafter cited as Rowat, *The Ombudsman Plan*.

[9]*The Ombudsman*, Report of the Thirty-second American Assembly, Columbia University, 1967, p.8.

Assembly. The Assembly's findings sum up the case for the creation of ombudsmen and explain the interest in the concept:

> a. All citizens do not enjoy equal access to existing mechanisms for redress of grievances. Voices do not speak with similar clarity nor do they fall on equally receptive ears.
>
> b. Elected officials in responding to selected complaints often provide solutions for specific cases, but may not solve the underlying causes of the problem itself. The result is often to provide a special service for some constituents rather than to bring equity among all citizens.
>
> c. Where complaint mechanisms exist in administrative agencies, their operation may tend to reinforce current procedures and to condone employee actions rather than to meet the problems causing the grievances.
>
> d. Judicial resolution of citizen grievances is an important but limited and costly remedy.[10]

The fourth finding reflects what citizens often discover to their dismay, if not their peril, that is that the provision of full and fair procedures--notice and trial-type hearings, internal review procedures, access to the courts for judicial review--may be of little value in many situations. Indeed, many grievances are wholly unjusticiable. Walter Gellhorn offers, as an example, the whistle blower who is simply ignored rather than punished and thus has no grievance that entitles him to a hearing. But he may have a tale that would interest an ombudsman, not only in the merits of wrong reported by the whistle blower, but also because of the manner in which the matter was considered.[11]

On the strength of its factual findings, the Assembly made a number of recommendations. Of those, the most relevant to this study urged that "the concept of the Ombudsman be introduced at the federal level . . . . Because of the vast size and diversity of federal operations, we do not recommend the establishment of a single office of Ombudsman."[12]

The Administrative Law Section of the American Bar Association (ABA) formed a committee to consider the ombudsman concept in 1967. In 1969 the

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[10]*Report, Western American Assembly on the Ombudsman*, Stanley Scott, Editor, INSTITUTE OF GOVERNMENTAL STUDIES, University of California, Berkeley, September, 1968, p. 26 (hereafter cited as W.A.A. Report).

[11]We are indebted to Walter Gellhorn both for this example and the observation that not all grievances can be addressed effectively in trial-type hearings. Letter, Walter Gelhorn to Charles Pou, March 16, 1990.

[12]Ibid., p.27. (Emphasis in original.)

ABA House of Delegates passed a resolution urging adoption of ombudsman in the United States. At the federal level the ABA initially proposed that the Administrative Conference of the United States serve as a central ombudsman for the federal government and that it sponsor research and experiments with the concept in specific agencies.[13] The ABA modified this proposal in 1971 when it proposed a program limited to a particular geographical area, government agency, or program.[14] The ABA's interest continues to the present. In August 1989 the ABA House of Delegates adopted a resolution recommending that the Secretary of Labor establish an office of ombudsman/advisor in some states to provide counselling in unemployment insurance claims for those who could not afford adequate representation.[15]

B. The Early Federal Legislative Proposals

Legislation reflecting the interest in the ombudsman concept followed (if, indeed, it did not help stimulate and further) the surge of interest in the 1960's. These bills took two forms. One called for the creation of a Congressional Ombudsman to assist members with constituent case work. The other called for the creation of an ombudsman in selected executive branch departments and agencies.

1. The Ombudsman for Congress

In 1963 Rep. Henry S. Reuss (D.-Wis.) introduced a bill to establish an Ombudsman for Congress.[16] Reuss' goal was to centralize constituent case

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[13]Section 3 of an American Bar Association Resolution dealing with the establishment of an Ombudmsan adopted during the Midyear Meeting of the House of Delegates in 1969. See also; Rowat, *The Ombudsman Plan*, p. 86.

[14]ABA Administrative Law Section Ombudsman committee revised Ombudsman Resolution dated April 15, 1971. See also; Rowat, *The Ombudsman Plan*, p. 86.

[15]ABA Resolution adopted upon recommendation of the Section of Labor & Employment law on August 9, 1989, Report #108-A. Letter, from Walter H. Beckham, Jr. Secretary ABA to Marshall J Breger, Chairman, Administrative Conference of the U.S., dated Sept. 19, 1989.

[16]"Administrative Counsel" was the name given to the ombudsman in the July 16, 1963 Reuss bill, H.R. 7593. *See CONGRESSIONAL RECORD*, (88th Cong. 1st Sess.), July 16, 1963, p. 12069 for text and Congressman Reuss' remarks when he introduced the bill. Rep. Reuss reintroduced the bill in each of the following Congresses, as H.R. 4273 in 1965, as H.R. 3388 in 1967 and H.R. 8017 in 1969. Rep. Owens introduced similar legislation H.R. 7680 on May 9, 1973. A similar Senate proposal was introduced by Sen. Hartke, S. 2134 (92nd Cong., 1st Sess.) in 1971 and reintroduced along with Sen. Gravel as S. 2500 on September 28, 1973.

work in a single office on the Hill. He argued that the economies of scale gained by centralizing the case work function would permit the development of staff experts in the various case work subject areas.

The proposal made little headway. Opposition came from members of Congress who were unwilling to give up any control over the constituent case work function, an objection that Reuss attempted to meet by requiring that the Congressional Ombudsman work only on cases referred to it from members and that the ombudsman report the results to the member rather than directly to the constituent. Others argued that the central ombudsman might not be zealous enough in advocating the constituent's position. The ABA argued that the plan went too far too fast.[17] The high water mark for the Reuss legislation was a hearing on the companion measure introduced in the Senate by Claiborne Pell (D.-R.I.) in 1965.[18]

2. Ombudsmen for Executive Agencies

The other type of legislation introduced in the 1960's and early 1970's proposed creation of ombudsmen in selected executive departments and agencies mainly to deal with problems encountered by citizens eligible for benefits from federal entitlement programs. These bills did not pass but probably did help build interest in the inspector general laws that were passed in the 1970's to deal with fraud, waste and abuse.[19]

In 1967, Senator Edward Long (D.-Mo.) introduced legislation to establish an Ombudsman at the Administrative Conference to deal with the Social Security Administration, the Veterans Administration, the Internal Revenue Service and the Bureau of Prisons.[20] Long added the Selective Service System to his list of covered agencies in 1968.[21] The Long bill permitted the ombudsman to deal directly with the complainant. The agencies which were

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[17]Anderson, Stanley V., *Ombudsman Papers: American Experience & Proposals*, INSTITUTE FOR GOVERNMENTAL STUDIES: University of California at Berkeley, 1969, p. 17. (Hereafter referred to as *Ombudsman Papers*).

[18]S.984 was introduced on Feb. 3, 1965. Hearing before Senate Committee on the Judiciary, Subcommittee on Administrative Practice & Procedure, (89th Cong. 2nd Sess.), March 7, 1966.

[19]Interview with Bernard Frank, Esq., Allentown, PA, Thursday August 10, 1989.

[20]S. 1195, March 7, 1967. See *CONGRESSIONAL RECORD*, (90th Cong. 1st Sess.), March 7, 1967, pp. S. 3201-3203, for discussion and text. The Subcommittee on Administrative Practice & Procedure of the Senate Judiciary Committee held a hearing on Senator Long's proposal to create administrative ombudsmen for the federal agencies specified in his bill on January 16, 1968.

[21]Anderson, *Ombudsman Papers*, p.20

covered objected to the proposal on the ground that the oversight was not necessary and would add another layer of bureaucracy.[22]

In 1971, Sen. Jacob Javits (R.-N.Y.) introduced the Administrative Ombudsman Experimentation Act.[23] The Javits bill proposed ombudsman projects in three regions to provide services to low income groups in their dealings with the Health, Education and Welfare, Housing and Urban Development, and Labor Departments and the Office of Economic Opportunity. The bill also proposed a foundation to conduct ombudsman research and demonstration projects.

Rep. Cornelius Ryan (D.-Cal.) introduced legislation in 1972 to provide federal grants in aid to states which established corrections ombudsmen for prisoners, parolees and probationers.[24] In 1973, Rep. Kenneth Keating (R.-N.Y.) and Rep. Lee Metcalfe (D.-Mont.) introduced bills to establish an ombudsman for the federal Bureau of Prisons and the Board of Parole.[25] Senator Charles L. Percy (R.-Ill.) introduced a bill in 1973 to establish an ombudsman for the federal criminal justice system.[26] Senator Gaylord Nelson (D.-Wis.) introduced a bill in 1974 to create Federal Citizens' Advisory Boards in the ten federal judicial circuits to review complaints against agency actions.[27] In its report the Senate Watergate Committee proposed the establishment of the Office of Public Attorney to act as a special prosecutor and ombudsman to investigate conflict of interest matters in the executive branch.[28]

3. Outcome

None of these bills became law. Indeed, none of them were reported out of committee. Everard Munsey, administrative assistant to Congressman Reuss for much of the period in question, thought that part of the reason lay in the difficulty of transplanting a uniquely European tool of government to American political soil.[29] For all of their good intentions, some of the bills

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[22]Ibid, at pp.20-21.

[23]S. 2200 92nd Cong. 1st. Sess. (1971). A similar bill, H.R. 9562, was introduced in the House By Rep. Steiger and Rep. Reuss. See Rowat, pp. 86-87.

[24]Rowat, *The Ombudsman Plan*, p. 87.

[25]Rep. Keating introduced H.R. 11,146 on Oct. 19, 1973. Rep. Metcalfe introduced H.R. 8848 (June 20, 1973), H.R. 9270 (July 12, 1973), H.R. 9543 (July 24, 1973), and H.R. 10,216 (Sept. 12, 1973. (All 93rd Cong. 1st Sess.)

[26]S. 2160 introduced on July 12, 1973. (93rd Cong. 1st Sess.)

[27]S. 3043 introduced on February 21, 1974. (93rd Cong. 2nd Sess.)

[28]Report, Senate Watergate Committee, July 13, 1974.

[29]Munsey interview, November 9, 1989. President Lyndon B. Johnson, who is recalled as saying "I don't like the term and I can't spell it," reflects some of the difficulty Munsey referred

had serious flaws. The Reuss bill, by requiring the ombudsman to work through the congressional office involved, added a layer of organization that makes the process seem top heavy. There was also (and still is) the turf argument. Congressmen are, after all, the "ombudsmen" of first resort for many constituent problems. Many members viewed the proposals as likely to reduce the credit they receive for helping to handle, if not always resolve, the problems constituents have with the federal government.

Finally, the initial proposals were made at the moment when Congress was enacting the social programs that made up the 'great society' vision of President Johnson and the post-Kennedy Congresses. These programs were enacted with a view toward solving problems, not creating them. In that climate, the notion that the government needed ombudsmen to function efficiently may have seemed incongruous. By the time that the bureaucratic tanglements created by these programs became apparent, the country was more inclined to look for ways to cut the federal budget than increase it.

C. The Legacy of the Early Interest and Legislation

Although none of the bills introduced in this period became law, ombudsman programs gradually became established at all three levels of American government.

1. Federal Ombudsmen

The earliest ombudsman established in the federal government was set up in the Department of Commerce in 1971 by then Secretary Maurice Stans. That office, which is one of six studied for this report, is described and its history analyzed below. It started with a bang and ended with a whimper. But, in the 25 months or so that it was at its top form, it showed the value of establishing an executive department ombudsman. Other early federal experiments were conducted in the Social Security Administration, which tried a Beneficiary Ombudsman for a year or so; and by the Internal Revenue Service, a step which led to the establishment of what is by many measures the most successful of the present federal ombudsman programs.[30] Appendix B briefly discusses other federal ombudsman programs that have been attempted over the years.

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to. President Johnson's remarks were passed on to us by Benny Kass, Esq. in an interview September 26,1989.

[30]The Taxpayer Ombudsman is discussed and analyzed below.

2. State Ombudsmen

The first state ombudsmen projects were inaugurated with assistance from grants in aid provided by the Office of Economic Opportunity (OEO).[31] The University of California also provided assistance for these early state programs. Hawaii in 1967 was the first state to pass legislation creating an ombudsman to help its citizens cope with problems stemming from their dealings with state government agencies.[32] Nebraska followed suit in 1969,[33] Iowa in 1970 and Alaska in 1975.[34] The District of Columbia, Puerto Rico and Guam also have ombudsman, although the former, set up to deal mainly with conflict of interest questions, is essentially moribund.

3. County and Municipal Ombudsmen

It appears that the first municipal ombudsman in this country was the "public protector" appointed by the Nassau County, Long Island, county executive in 1967.[35] Jackson County, Missouri established an ombudsman in 1970 to deal with racial conflicts.[36] The city of Seattle and King County, Washington, combined to set up an ombudsman in 1970. The office was separated into its constituent parts in 1979, and in 1982 the city closed its ombudsman office. The county ombudsman is currently operating. The city of Dayton, Ohio, and Montgomery County, Ohio established a joint ombudsman with OEO and Kettering Foundation assistance in 1971. There are municipal ombudsmen in Buffalo and Jamestown, New York, and in Detroit and Flint, Michigan, among other cities.[37]

4. Other Ombudsmen

The ombudsman movement spread to quasi-public and private institutions, as well as state and local governments. Many businesses, hospitals, universities, and newspapers set up ombudsmen to deal with customer, patient,

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[31] By 1968 ombudsman legislation had been introduced in a majority of states. To date, however, no other state or territory has established an ombudsman. Rowat, *The Ombudsman Plan*, 1985, p. 87.

[32] 2 Hawaii Rev. Stat. sec. 96-2 to 96-8 (Supp. 1974).

[33] 5 Neb. Rev. Stat. Sec. 81-8, 240 to 81-8, 254 (1971).

[34] Alaska, Statutes, Title 24, Chapter 55.

[35] Rowat, *The Ombudsman Plan*, p. 83.

[36] Zagoria, *The Ombudsman*, p. 29.

[37] Zagoria, *The Ombudsman*, p. 71, 74. See also, Rowat, The Ombudsman Plan, p. 90-92.

student and reader complaints.[38] While there is no accurate census of the number of public and private ombudsmen in the United States, there are, according to one source, several thousand "counsellors, investigators, mediators and shuttle diplomats" with complaint handling functions working in this country.[39]

D. The ACUS Role in the American Ombudsman Movement

The 1964 law creating the Administrative Conference of the United States[40] directs it to recommend ways of improving the operations of the government. The American interest in the ombudsman movement, moreover, coincided with the creation of the Conference. Given its mission and the nature of the ombudsman function, it is probably not surprising that proposals were made to designate the Conference as the nation's ombudsman for matters involving the federal government. As noted earlier, both Senator Long and the ABA put forward such plans. They were abandoned, however, in the face of budget and logistical difficulties. Nonetheless, the Administrative Conference has engaged in and supported a considerable amount of research on the subject.

An early Administrative Conference study by consultant Arthur E. Bonfield led to a recommendation to provide a "people's counsel" to represent the poor in federal rulemaking proceedings.[41] Professor Victor G. Rosenblum's Conference study on federal agency complaint handling mechanisms,[42] concluded that a single federal ombudsman would not be practical because agency complaint handling procedures were not uniform. More recently, a study by Mark H. Grunewald led to an Conference statement advocating a federal ombudsman to deal with Freedom of Information Act matters.[43] Administrative Conference member Kenneth Culp Davis chaired

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[38] Article, *Ombuds Jobs Are Proliferating, And Characterized by Diversity*, 2 BNA ADR REPORT 198 (May 25, 1988).

[39] Rowe, Mary & Simon, Mary, *Ombudsman Dilemmas: Confidentiality, Neutrality, Testifying, Record-Keeping*, unpublished report presented at the annual Society of Professionals in Dispute Resolution Conference, Washington, D.C., October 1989.

[40] Administrative Conference Act, 5 U.S.C. 552, 571-576 (1970)

[41] ACUS Recommendation 68-5, *Representation of the Poor in Federal Rulemaking of Direct Consequence to Them*, 1 CFR Section 305.68-5.

[42] *Handling Citizen Initiated Complaints: An Introductory Study of Federal Agency Procedures and Practices*, 26 Ad. Law Rev. 1 (Winter 1974).

[43] *See Recommendations & Reports*, Administrative Conference of the United States, Vol. II, pp. 71 & 1341 (1987).

the Administrative Law Section Committee of the ABA which sponsored that group's initial resolution supporting the use of ombudsmen. Jerre Williams, the first Conference chairman, advocated the use of ombudsmen at the 1968 Western American Assembly Conference at Berkeley which was convened to consider the desirability of using ombudsmen at the various levels of government. A 1974 article by the Conference's second Chairman, Roger Cramton, also advocated using federal ombudsmen.[44] Walter Gellhorn, of course, gave the concept currency with the publication of his two works on ombudsmen.[45]

In 1966, Professor Gellhorn concluded his study of governmental grievance handling mechanisms[46] with the proposal that American governments try the ombudsman system:

> "But even though a grievance bureau, no matter how well qualified, could not blow away the citizenry's irritations, it would support a thoroughly reasonable expectation of improvement."

He went on to say that it is a relatively simple and inexpensive matter to experiment with the idea, one that can be tried "without committing its proponents so deeply that they can never afterward bear to admit failure."[47] To succeed, he said, one needed topnotch personnel, understanding supporters, and public servants who are not actively antagonistic.[48] As he pointed out, these "are not forbidding conditions."[49]

III. CASE STUDIES

In 1971, the first federal ombudsman (that we have identified) was established in the Department of Commerce. Others have followed, some started on an experimental basis and abandoned, several made permanent after a trial; still others seem to have been set up with the idea that they would be permanent. There is now enough experience with the use of ombudsmen at the

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[44]Cramton, Roger C., *A Federal Ombudsman*, DUKE LAW JOURNAL, Vol. 1972 No. 1, April 1972, p. 1

[45]Gellhorn, Walter, *When Americans Complain: Governmental Grievance Procedures*, and *Ombudsman & Others: Citizens' Protectors in Nine Countries*, Cambridge, MA: Harvard University Press, 1966. Also see fn. 6, *supra*.

[46]*Gellhorn, When Americans Complain*, pp. 231-232.

[47]Ibid.

[48]Ibid.

[49]Ibid.

federal level to begin evaluation of their utility and to make recommendations for expanding their use.

Six federal ombudsman programs are considered in some detail in this section of the report. The first four, those in the IRS, Army Materiel Command, the long term health care field and EPA, are all in operation today. Each says something about what works (or does not work), and each tends to bear out Gellhorn's view that topnotch personnel, informed support and a receptive bureaucracy are necessary. The other two programs, those set up in the Department of Commerce and at the Interstate Commerce Commission, are no longer functioning as ombudsmen programs. But their histories, like those of the programs now in operation, provide useful measures of what makes for a good program. These six programs are considered in turn.

A. The Taxpayer Ombudsman

TYPE: Mixed Executive/Legislative. Originally established by agency order in 1980. Congress subsequently gave the office certain powers and responsibilities in the 1988 Omnibus Taxpayer Bill of Rights.

THUMBNAIL DESCRIPTION: Responds to individual taxpayer complaints after regular channels fail; represents taxpayer viewpoints in IRS policymaking matters; identifies and proposes solutions to systemic problem. Has statutory power to suspend enforcement actions pending investigation and resolution of complaints. National headquarter staff (of 20) oversees work of approximately 225 district, service center and region office Problem Resolution Program staff members who do the casework. Well regarded by taxpayers and tax preparers; efficiently handles large volume of cases (over 400,000 a year); understaffed, underfunded; needs greater exposure to public.

CURRENT HOLDER: Damon O. Holmes.

DUTIES/POWERS: Typical cases include: late and missing refunds; faulty billings; Social Security number mixups; taxpayer errors; and hardship relief.

STATUS IN ORGANIZATION: Adjunct of commissioner's office; independent of operating bureaus. Ombudsman's rank, access to commissioner contribute to authority of office and programs.

1. THE TAXPAYER OMBUDSMAN

Taxpayers and tax collectors, if not natural enemies, are often combatants. Because the levy and collection of taxes is dispute prone, the Internal Revenue Service offers a likely setting for an ombudsman, some one to hear taxpayer

gripes and who is empowered by law and a sense of fair play to intervene with the tax collector before the harm done to the taxpayer is magnified by neglect, indifference, or by a bureaucratic affront.

While the origins of the taxpayer ombudsman are a bit murky, it appears that there was a move afoot in Congress in the mid to late 1970's to establish an office outside of the IRS to handle the mounting number of complaints about the IRS. The idea was that the office needed to be independent of the IRS to work effectively. Jerry Kurtz, IRS Commissioner from 1977 to 1980, sought a means to meet the concerns expressed by Congress. Against this background, Kurz proposed and strongly supported the creation of an internal ombudsman as an adjunct to the Commissioner's office to deal with taxpayer complaints.

Before the Ombudsman's office was established, a program to deal with taxpayer grievances, known as the Problems Resolution Program (PRP), was initiated on an experimental basis in four Districts (Detroit, Milwaukee, Dallas and Austin) in 1976.[50] A year later, in 1977, the program was implemented on a national basis on the strength of the 1976 test run and the evaluation of the test results in September 1976 at a conference of Regional Commissioners and national office officials.[51] The evidence showed that the program not only helped taxpayers with their immediate problems (its basic objective), but also "provided a highly effective indicator of new, persistent or systematic problems and, if properly structured, could function as an early warning system to detect, measure and focus attention on major problems soon after they arose."[52]

The goals of the PRP are spelled out in "Operation Link," a pamphlet distributed to tax preparers and interested members of the public as part of the effort to inform the public about the existence and nature of the ombudsman service:

> 1. To assure that individual taxpayers are afforded an independent, monitored system for the resolution of problems that have not been resolved through regular organizational channels.

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[50] To test which organizational arrangement worked better, the Problem Resolution Office (PRO) was located in the Taxpayer Service Division in Austin and Milwaukee and in the immediate office of the District Director in Dallas and Detroit. The test showed that the PRO staff was more likely to intervene on behalf of taxpayers in examination and collection proceedings when located in the Director's office. On that basis, it was decided to place the PRO in the Director's office when the program was instituted nationally the following year. IRS paper (no author given), *Problem Resolution Program*, (1986 ?).

[51] Id. p. 5.

[52] Ibid.

2. To . . . identify recurring internal systemic and procedural problems . .

3. To serve as an advocate for taxpayers within the IRS . . .[53]

A. Organization/Place in Agency Structure

The Taxpayer Ombudsman reports to the Commissioner of the Internal Revenue Service.[54] He is a member of the Senior Executive Service, a high ranking career official who directs a national office staff of some 20 persons, including two teams of program analysts.

The current holder of the office is Damon O. Holmes, appointed in December 1987. He and his staff are responsible for the development and operation of the national PRP. They wrote and now maintain the PRP operating manual,[55] review the reports of the problems encountered in the field to identify those that recur or emerge as a result of the constantly changing nature of the Internal Revenue Code, seek solutions, and stand as the advocate of the interests of the taxpayers as the IRS develops new rules, forms and procedures for the imposition and collection of taxes.

The 300 or so persons who make up the national PRP staff are located in the 10 Service Center, 63 District, 7 Regional offices and the Washington office of the IRS. Each District Office has at least one person in the PRP function, although in some of the smaller offices (e.g., Burlington, Vermont and Portsmouth, New Hampshire) the PRP person may also serve as the public information officer.

Each PRP office throughout the country "is organized as an operational part of the Director's office" to assure its "independence from operational activities."[56] The separation allows the PRP staff to review the office's action on a particular problem without first having to persuade the head of the function that an error was made in a particular case. Field staff members look to the regional and national office staffs for guidance, moral support, and advice on uniform application of program procedures.

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[53] *Operation Link*, IRS Publication 1320 (Rev. 12/87), p.1.

[54] See the IRS Organization Chart, Appendix D.

[55] The basic PRP Manual, is Internal Revenue Manual 1279, *Problem Resolution Program Handbook*. It was first issued in 1979 and hs been updated periodically. It provides detailed instructions for dealing with all of the ordinary and many of the more esoteric problems the PRO staff is likely to encounter.

[56] *Internal Revenue Manual*, op. cit. *supra*, fn. 55, Chapter 200.

B. Scope of the Taxpayer Ombudsman's Authority

The Taxpayer Ombudsman is unique in at least one important respect: originally created by order of the Commissioner, i.e., as an executive ombudsman, the ombudsman and some of the duties and powers of the office have been recognized by the recent Omnibus Taxpayer Bill of Rights.[57] As a result, the office is now, at least in part, a creature of Congress as well.

The Subcommittee on Oversight of the Committee on Ways and Means of the House of Representatives conducted a study of the Problem Resolution Program in 1978. At that time the national office functions of the program were conducted by the Taxpayer Communications Branch of the Taxpayer Service Division under the direction of a Coordinator, an official four levels beneath the Office of the Commissioner, "a level too low to even report directly to the Director of the Taxpayer Service Division."[58] The Subcommittee also noted its doubts that the Taxpayer Communications Branch had sufficient management experience to carry out the program.[59] These concerns contributed to the decision made in 1980 to appoint a Taxpayer Ombudsman who would report directly to the Commissioner and to the decision to move the national office into the Commissioner's office.

Once the Taxpayer Ombudsman and his staff were in place, questions arose as to the nature and extent of the program's authority to stay decisions by the collection, examination and other enforcement functions while a complaint was being investigated and mediated. Indeed, many complaints grew out of the taxpayer's inability to maintain the status quo pending the outcome of the dispute. PRP was empowered by the Commissioner to order the status quo be maintained, if, in the opinion of the PR officer on the case, that step was justified. This was accomplished by issuing a Taxpayer Assistance Action (TAA) directing the enforcement office to stay further enforcement pending the outcome of the complaint. A weakness in the program, from the taxpayers' point of view, was the power of the enforcement officer to countermand the TAA. When that happened, it was up to the PR officer to persuade the director that the TAA should be reinstated. The 1988 Omnibus Taxpayers Bill of Rights reversed that burden by giving the Ombudsman and the PRO's the authority to issue Taxpayer Assistance Orders (TAO's). Under the law as it

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[57] *Techical and Miscellaneous Revenue Act*, Pub. L. No. 100-647, Title VI, Subtitle J, Nov. 10, 1988.

[58] *Report on IRS Problem Resolution Program for Handling Taxpayer Complaints*, Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, Committee Print 95-74, p.36, 95th Cong. 2nd Sess., April 26, 1978. (Hereafter *Committee Print*.)

[59] *Committee Print*, op. cit. supra, pp.32-36.

now stands, it is the enforcement officer who must appeal to the director to lift the stay provided by the TAO .

The 1988 law created additional powers for the ombudsman and rights for the taxpayer. The law provides that taxpayers may apply to the ombudsman for a TAO, and authorizes the ombudsman to issue it if he determines that "the taxpayer is suffering or about to suffer a significant hardship as a result of the manner" in which the tax laws are being administered.[60] The TAO may be used to release property subject to a levy or to stop or set aside a collection action. The Omnibus Taxpayer Bill of Rights also requires the Taxpayer Ombudsman to make an annual report to Senate Finance Committee and the House Ways and Means Committee "regarding the quality of taxpayer services provided," a report filed jointly with the Assistant Commissioner for Taxpayer Services.[61]

C. Modus Operandi

The PRP operates much in the manner of a traditional European ombudsman. The PR officer does not work on the underlying tax problem, but investigates to determine the facts and then, on the basis of the facts (and applicable tax law), makes a recommendation on how to deal with the complaint. Damon Holmes, the current ombudsman, emphasizes the importance of getting the facts right as a predicate for the PRP recommendation. Usually, the PR officer's decision will be determinative, at least in those cases where the result is favorable to the taxpayer. While a result adverse to the taxpayer does not foreclose the taxpayer from other forms of review provided by the tax laws, it may be taken as dispositive, particularly in those cases where the PRP officer has gained the taxpayer's confidence.

The systematic collection of data from the field about the types of problems that recur or which are created by a change in the tax law is essential to the ombudsman's efforts to help reduce the bugs in the tax collection process. Because the field PRP staff hears daily what those problems are, the reports from the field provide the ombudsman, and through the ombudsman, the Commissioner and the Commissioner's senior staff, the information they need to identify and ultimately rectify problems. Feedback from the District PR officers offers the Commissioner direct access to the front line experience, and provides information that is often more meaningful than that which filters up through the functional division bureaucracies.

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[60] *Technical and Miscellaneous Revenue Act*, Pub. L. No. 100-647, Section 7811, Nov. 10, 1988..

[61] *Id.* at Section 6236.

The relationship between the Commissioner and the ombudsman varies somewhat according to the management style and backgrounds of the persons involved. When it works best, the Commissioner has at hand a ready and steady source of information and insight about the workings of the agency, and about the places where trouble shooting or broader reforms are needed. The ombudsman's office is across the hall from the Commissioner's office. This is important not only for what it says about the ombudsman's status, but also because it makes it possible for the two to consult easily.

2. CASE WORK

A. Clients/Users

The taxpayers and their representatives (one estimate is that just under 50% of all tax returns are prepared by professional tax return preparers),[62] are the primary users of the PRP. Members of Congress refer cases to PRP on behalf of their constituents.

B. Nature of Cases

The most common problems handled by the PRP "involve missing refunds, mixed-up Social Security numbers, incorrect billings by IRS, and mistakes made by the taxpayers."[63] Many problems start with mistakes taxpayers make in reporting their income, filling out their returns and in meeting filing deadlines. In FY 1989, in nearly 65% of the cases handled by PRP, the taxpapyers had made some type of mistake that lead to the problem. However, if IRS failed to resolve these problems or compounded them by making other errors, the cases became eligible for PRP assistance. IRS errors that led to the need for PRP intervention were commonly made during processing of items or payments, or failing to answer mail from taxpayers.

The enactment of the Omnibus Taxpayers Bill of Rights has led to a high volume of requests for Taxpayer Assistance Orders.

C. Acceptance Criteria

The IRS holds out PRP as the avenue of last resort for a taxpayer with problems. Direct appeal to the program in the first instance would bypass the functional offices and put unreasonable demands on the limited PRP staff. To

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[62]Interview with Patricia Burton, EA, of the National Association of Enrolled Agents, September 12, 1989.

[63]IRS News Release 89-N1.

deal with this problem the program has developed the following set of case acceptance criteria to qualify a matter for PRP control:

1. Refunds. PRP intercedes if refund has not been made within 90 days after the refund claim was submitted and the taxpayer has made two or more inquiries about its status after 90 days.

2. Requests for Information or Assistance. PRP steps in after 45 days elapse without a response.

3. Notices. PRP handles notice cases[64] after taxpayer fails to obtain satisfaction from his or her response to the first two notices on the subject.

4. Access to Higher Authority. The taxpayer is entitled to ask that a superior review a position taken by the staff member on the case. PRP steps in where access to that person is blocked.

5. Other Problems. PRP retains discretion to take other cases if to do so is necessary to unclog a bottleneck or it is otherwise considered to be in the interest of the IRS to do so.

Cases excluded from PRP include those subject to an established administrative or formal appeal; those in which an appropriate response has already been provided; those within the jurisdiction of another agency of government; matters subject to the jurisdiction of the Criminal Investigation Division; matters involving a tax protest or a refusal to pay a tax due; and those cases which do not involve tax administration (e.g., personnel matters, disclosure and inspection questions).

D. Case Load

PRP currently handles approximately 400,000 cases a year, down somewhat from the 500,000 cases taken on in 1985, a year when delays in making refunds increased taxpayer frustrations and the case load. When a case meeting the PRP acceptance criteria is identified, it is assigned to a PRP caseworker in a District or Service Center office who handles it to its conclusion. That person contacts the taxpayer and becomes the taxpayer's contact for the duration of the complaint. This not only cuts the red tape and

64 "Notice case" is short hand for a matter in which the taxpayer has received a written notice from the IRS calling on the taxpayer to file additional information or take some other step in connection with the tax return in question.

the need to explain the matter again each time the taxpayer calls, but also assures that at least one person at the IRS office knows what is going on with the complaint. Moreover, the PRP caseworker assigned to the case works with the enforcement or other IRS staff member to make sure that the case is handled within the program's processing guidelines.

Passage of the Omnibus Taxpayer Bill of Rights led to an increase in the number of requests for Taxpayer Assistance Orders from 50 per week to 300 per week. By the end of February, 1990, PRP had handled 17,700 cases involving requests based on hardship factors.

E. Settlement Rate

Of the 17,700 applications for TAO's received, only 9,900 were hardship cases. Of these, PRP was able to provide relief to the taxpayer in 73% of the cases. Enforcement issues comprised 48% of the cases with significant hardship. The remaining 52% were accelerated refund requests or other requests. Of the 7800 applications that did not show significant hardship, 71% were worked as PRP cases or were forwarded to a function that could help the taxpayer.[65]

The objective of the Problem Resolution program is to close 70% to 80% of its cases within 30 days of receipt. A case is regarded as over age if it is still open after 30 days. The program collects data on the 7-day settlement rate and the 30-day settlement rate.[66]

3. OUTREACH MECHANISMS

A. Printed Materials/Hotlines

"Operation Link" is the name given by PRP to its effort to improve communications between the IRS and tax practioners. It is described in program handouts.[67] It contains the addresses of the Problem Resolution Offices in each of the Service Center and District offices where practitioners may send information alerting PRP to a chronic problem or a case that cannot be resolved through normal channels. The phone number of each PRP District office is also listed in local telephone directory. The Problem Resolution

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[65]Figures furnished by the Taxpayer Ombudsman.

[66]In FY 1989, 38.6 % of cases were closed in 1-7 days and 89.5% were closed in 1-30 days. Figures furnished by Taxpayer Ombudsman.

[67]Appendix C contains a copy of the *Operation Link* pamphlet published and distributed by PRP.

program is described in the booklet of instructions the IRS sends out with tax return forms.

B. Meetings with Users

PRP meets with practitioner groups around the country to explain the program and to take suggestions for making it more effective and more accessible.

C. Referral Mechanisms

Referrals come from the functional offices of the IRS, from state and local government agencies, and from members of Congress and other elected officials.

4. SPECIAL PROBLEMS

A. Lack of Authority over Budget

As an adjunct of the Commissioner's office, PRP is included in the Commissioner's budget, a constraint that works against adequate funding according to some of the staff. For example, the PRP data collection program is outdated and needs to be overhauled and upgraded. As a result, many professionals on the program's data processing staff have left the agency for more challenging and better paying jobs elsewhere. These problems deprive the IRS and the nation's taxpayers of the advantages of an up-to-date data collection and processing system.[68]

B. Career Advancement

Service as the ombudsman has advanced, not blocked, the attainment of career objectives by the earlier holders. Each of the first three occupants of the post subsequently was named to head an office which they regarded as attractive.

In the abstract, some PRP professionals worry that resentments formed by co-workers who are on the receiving end when PRP intervenes on behalf of a

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[68]The problem is not limited to PRP. On January 10, 1990, *The Washington Post* reported that a year-long investigation by the House Ways and Means Committee found that the self-enforcing system of collecting taxes is in jeopardy for lack of funds. The IRS, according to the news account, is "unable to modernize its aging computers and [is] suffering severe shortages of such office supplies as pens and pencils." Article, *Hill Report Depicts IRS As a Hobbled Behemoth*, *The Washington Post*, January 10, 1990, p. A17.

taxpayer will work against them if, as many do, they return to a job in one of the operating functions of the IRS. It may be that this happens now and then. However, it seems to be the case is that such resentments, if any are formed, are muted by the reputation PRP personnel have developed for fairness and the quiet, we-are-all-in-this-together approach they are encouraged to take in handling errors when they find them.

5. ASSESSMENT OF PRP

A. Within Agency

Our interviews were conducted with members of the PRP staff in Washington and in the New York regional office, and with the Senior Deputy Commissioner of the IRS, Michael J. Murphy. The people who work in the program, at least in its upper levels, hold the program in high regard. They consider their mission extremely important to the creation and maintenance of taxpayer acceptance of the federal tax collection system. If high morale and love of task are any indication, the program is well regarded by those who run it. Deputy Commissioner Murphy stated that the PRP program generates most of the favorable mail the IRS receives.[69]

B. At Other Government Agencies

The General Accounting Office reviewed PRP in 1987 in response to a request by three members of the United States Senate.[69] By and large, GAO found that the program worked well in providing special assistance to taxpayers, but less well in identifying taxpayers who were qualified for special assistance in the first place.[70] The effect of this shortcoming was to increase the number of taxpayers who are not satisfied by the IRS handling of their complaints. The GAO report shows that 62% of taxpayers who receive special assistance are satisfied with the handling of their complaint compared with 23% who did not receive special assistance.

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[69]The report, *Tax Administration: IRS Can Improve on the Success of its Problem Resolution Program*, Report to Congressional Requesters, GAO/GGD-88-12, December 1987, was requested by Senators John Heinz (R.-Pa.), Bob Packwood (R.-Or.) and William V. Roth (R.-De.).

[70]*Report, supra*, p.31.

C. By Users

The user assessment we received indicates the program works the way it was intended. The fact that there is a trained, available PRP officer in every IRS office provides practitioners and the public with a means to question a troublesome decision by operating staff. As a result, in many, although probably not all, offices the operational people have an incentive to meet the objection before the PRP is called in to assist the taxpayer. If there is a reservation, it is that the program is still not widely enough known to be available in all the cases in which it might legitimately be used.

D. By Congress

PRP is, as indicated at the outset, at least in part, a creature of congressional concern about the way taxpayers are treated by the IRS. The Oversight Subcommittee of the House Ways and Means Committee is the principal PRP watchdog on the Hill. Of all the persons we talked to about the program, the Subcommittee staff expressed the most reservations. The reservations concern what might be (but is not) achieved by the program, rather than the quality of current PRP operations. The staff favors an expanded program, reflecting tension between executive and legislative budget priorities.[71]

6. CONCLUSION

The Taxpayer Ombudsman and the PRP staff demonstrate that a system as complicated as the levy and collection of federal taxes can be significantly improved by the establishment of a grievance bureau to address the legitimate complaints of the taxpayers arising out of their dealings with the agency.

B. The Army Materiel Command Ombudsman

TYPE: Executive. Created by agency order in 1984.

THUMBNAIL DESCRIPTION: Responds to and investigates complaints arising out of the Command's procurement functions for the Army; also has whistle blower jurisdiction. Object: to cut red tape; provide central complaint handling mechanism. Office has one secretary. Ombudsman makes up work parties for each case, as necessary, drawing on technical, legal and contract/procurement staff members to work with him. High success rate.

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[71] See [fn. __, *supra*], which may explain, at least in part, the problem.

Small staff (even with tasking authority as needed for particular cases) probably cuts down on the number of cases office can handle.

CURRENT HOLDER: Lewis J. Ashley.

DUTIES/POWERS: Cases include unfair exclusions or limitations; murky or out-of-date bid specifications; appeals from subcommand procurements. Handles about 80 cases a year.

STATUS IN ORGANIZATION: Adjunct of commanding general's office; speaks for him on matters considered by ombudsman.

1. THE AMC OMBUDSMAN'S OFFICE

The Army Materiel Command (AMC) is one of the five major commands that make up the Army.[72] It is responsible for supplying the Army, that is, with obtaining the weapons, vehicles and other equipment the Army uses. AMC spends approximately 60 percent of the Army's budget. It has 114,000 personnel stationed at posts in 43 states and some foreign countries. Its operations bring it into daily contact with hundreds of concerns that do business with the Army. Inevitably, snags occur in the process.

In 1984, at the time he took office as Commanding General, General Richard H. Thompson proposed using an ombudsman to handle problems arising out of the Command's dealings with industry. When he put this proposal to his senior staff they voiced objections. They thought it would duplicate existing trouble shooting mechanisms, be unduly intrusive, and create overlapping responsibilities. General Thompson was not dissuaded, however, and elected to try it. His judgment has been vindicated. The AMC ombudsman has won the respect of the command and the businesses with which it deals. The accomplishments of the AMC ombudsman provide a convincing demonstration of the utility of establishing an ombudsman in any case where a government agency has extensive dealings with the public.

A. Organization/Place in Agency Structure

General Thompson began by finding the person he wanted to be his ombudsman. From a field of some 40 candidates, he selected Lewis J. Ashley, a person with an extensive background in defense acquisition matters gained from stints on the Senate Armed Services and Budget Committees, and prior Pentagon and Department of Energy jobs. He joined AMC in 1982 as leader of the Ground Combat Systems Team and Manpower and Force Structure Teams. As ombudsman, Ashley's first task was to prepare the charter for the

[72]There are also two commands for overseas operations, a training command and the forces command which is responsible for assigning trained personnel to the units in which they will serve.

new office and a plan to implement it. Both were accepted by General Thompson and the charter has served to define the mission ever since.[73] The ombudsman reports directly to the Commanding General, and speaks for him on matters within his domain.[74]

The original plan contemplated the addition of an assistant as the case load grew. When that occurred, Ashley declined the assistant on the ground that he had better know first hand everything that was going on in his shop. Today, as then, he operates by himself with the assistance of one secretary. Rather than create a staff of his own, he has delegated to him the Commanding General's tasking authority. With it, Ashley may draw on the specialists he needs to help him work up a case. A typical working party includes a lawyer, and procurement, quality assurance and production section specialists, with others as circumstances may require.

B. Authority/Scope of Duties/Limits on Power

The goal of the office is to help the command's numerous suppliers cut through the layers of red tape characteristic of a large government organization, by providing a fixed point of contact at the top level of the command.[75] The ombudsman concentrates on external complaints about the workings of the command: e.g., confusing procurement documents, ineffective or unfair contract administration, delays in dealing with requests for clarification or relief. He acts as a confidential intermediary in cases where a contractor is worried about offending a customer, and oversees the command's whistle blower program. One of the more important facets of the office is to keep the Commanding General informed of the major complaints lodged with his office (what Ashley calls providing "heads up" reports to keep the CG up to date on the status of hot potatoes). The AMC ombudsman also has responsibility to review and evaluate the effectiveness of the command's programs and to recommend changes as needed. As a matter of practice, he stays out of areas where other systems have been set up to handle internal problems. For example, he does not deal with internal personnel complaints.

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[73] *AMC Ombudsman Charter*, February 20, 1985. [See Appendix E for text.] The Charter spells out the authority and responsibilities of the ombudsman, defines the mission, staff, location, chain of command and the operating concept for the office, and provides for the ombudsman's access to records and information.

[74] Ibid. The Charter provides that "the Ombudsman will report and be accountable only to the Commanding General." *Charter*, Section I.

[75] In the press release announcing the creation of the Ombudsman, General Thompson was quoted as saying "The Ombudsman's objectives are to cut through organizational red tape and to . . . actively promote AMC's capability to be open, responsive and fair, and to aid in improving the command's problem solving process." Release No. PR-5, April 11, 1985.

C. Modus Operandi

Ashley takes a hands on approach to the problems he accepts. He acts as a mediator between the contractor and the command office involved, seeking an outcome that is satisfactory to all concerned. The ombudsman's work party begins by assembling the facts.[76] If the work party decides that the command was out of line, Ashley proposes a solution that corrects the mistake or oversight. The Charter directs him to remain involved "until every reasonable attempt has been made to resolve the issue."[77] Where he finds that the command has acted properly, he lays out the pertinent facts and seeks to persuade the complainant that the proper result was reached. Ashley has the authority to hold up a procurement pending his investigation, and may require that the procurement be readvertised if the initial effort was flawed.[78] He is empowered to"(d)irect corrective action in the name of the CG, AMC when [he] determines it to be necessary."[79]

Once the ombudsman decides to take a case, he assembles the work party (ad hoc group) which will conduct the investigation and recommend the steps, if any, to correct the problem. The process may take a few hours in a simple case, but is more likely to take several days over the course of a few weeks depending on deadlines, case load, the time required to collect and examine essential information and other time constraints. The work party talks with the procurement officer involved, examines the procurement documents, reviews the procedure followed for fairness and compliance with procurement regulations, and may talk with the complainant's representatives before reaching a result. In one case, a large business that regularly supplied a certain item complained that the small business set aside announced for a new five-year, $700 million reprocurement effectively precluded the established supplier

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[76]The Charter gives him unlimited access to the command's records (within specified limits on access to classified material) and to make unannounced visits to any organization or staff within the command. *Charter*, Section VII.

[77]*Charter*, Section IV.B.1.c.

[78]In one case, for example, a new bidder complained that the specification for an item of equipment was so out of date that it restricted competition by favoring a type of product that had not kept pace with market advances. The ombudsman's investigation substantiated the complaint, the solicitation was cancelled, and the specifications for the item changed to incorporate current technology in subsequent procurements. This is a summary of a case history reported in the *Ombudsman Corner* of the November, 1988, issue of PERSPECTIVES, a quarterly publication of the AMC Public Affairs Office.

[79]*Charter*, Section IV.B.1.f. On its face, this provision appears to empower the ombudsman to substiute his judgment for that of the line official whose decision is being considered, authority not normally placed in an ombudsman. In fact, the power is rarely utilized, and then only to maintain the status quo pending further investigation and/or action by the Commanding General. Telephone interview with Lewis J. Ashley, April 18, 1990.

from competing. After an investigation, the work party agreed and the Request for Procurement (RFP) was changed to expand the competition.

2. CASE WORK

A. Clients/Users

The Charter provides that members of the general public, Government agencies, industry and the private sector may apply to the ombudsman for assistance.[80] Currently, large businesses account for 43% of the requests for assistance the ombudsman receives, small businesses for 57%.

B. Nature of Cases

Most of the cases deal with complaints that the AMC has failed to exercise proper judgment or to follow federal procurement regulations or practices. Examples include cases where a procurement specified unnecessarily restrictive specifications or where a procurement contract was alleged to have been improperly awarded, cases where the technical data or other bidding information is flawed in some way and cases where actions appeared arbitrary, or involved inordinate delay. The ombudsman also handles complaints about the manner in which parties were dealt with by AMC, such as situations where contractors have asked for and been refused clarification or explanations, or have been treated discourteously.

The AMC ombudsman also has jurisdiction to hear complaints from "whistle blowers."[81] These cases involve allegations of waste of funds, mismanagement, rule violations, and instances where there may be a substantial or specific danger to the public health or safety. The ombudsman may set up an ad hoc group to deal with a whistle blower matter or refer it to the appropriate inspector general's office.

C. Acceptance Criteria

Any case which has been considered by the appropriate authorities in the 10 subcommands in which the complainant considers the outcome is

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[80] *Charter*, Section IV.B.1.a.

[81] *Charter*, Section IV. B. 1. e. This section provides that the ombudsman will serve as the AMC point of contact on whistle blower actions, and "refer such matters to the appropriate organization, monitor their progress and take other action as he determines to be necessary and appropriate."

unsatisfactory and which is not the subject of a General Accounting Office or court action is eligible for the ombudsman's attention.

D. Case Load

The office handles about 80 cases a year. As Ashley defines it, a case is a request or complaint that takes substantial effort and time to resolve. Ashley says it usually takes a week or more to work through a case, and may take longer depending on the complexity of the case and the time required to investigate. Requests for information and the like are classified as "contacts" and are not included in the case load.

E. Settlement Rate

At the time he talked to us, Ashley stated that no party to a matter his office had handled had seen fit to take the matter to higher authority after the matter had been resolved by the ombudsman.[82]

3. OUTREACH

General Thompson announced the establishment of the ombudsman in meetings with industry groups, by press release and in letters to the chief executive officers of major defense contractors. The letter invited them to contact the Ombudsman "in the event you have any areas of concern which need my attention."[83] In addition, Ashley has used press releases, the Ombudsman Corner column in Perspectives, a newsletter distributed to industry, [84] and talks at trade association meetings to describe the office and invite those with problems to use it. He has prepared a talk illustrated with transparent slides to describe his office and the functions it performs. Referrals from companies that have used the office, and from Defense Department and other government staff persons familiar with it, also account for part of the case load. Up to now, there has not been a toll free hot line to the ombudsman, but, according to Ashley, this does not seem to have reduced the number of calls on the services of the office.

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[82]Interview with Lewis J. Ashley, August 23, 1989.

[83]Letter, April 12, 1985. The one furnished to us is addressed to John R. Opel, the Chief Executive Officer of International Business Machine Company.

[84]See footnote 79, *supra*.

4. SPECIAL PROBLEMS

The AMC ombudsman, like the former Ombudsman for Business in the Commerce Department, was created by agency order. It can be dismantled in the same way, and just as quickly. That means that the ombudsman must re-establish the need for the office every time the command changes at AMC.[85] The respect with which the office is held has so far been sufficient to assure its continuity. Whether the next ombudsman will be held in the same regard as the present one, and whether future commanding generals will elect to continue the program in its present form are open questions.

One reason for Ashley's success appears to be his demanding work habits. He tends to work 12-hour days and often takes active case files home with him for weekend and holiday work. It is his view that he should be available when needed. This degree of dedication is bound to be wearing and hard to duplicate in future appointments. The accomplishments of the office are such that it would appear appropriate to consider expanding the staff, not only to train others in the event Ashley is spread too thin or otherwise becomes unavailable at any particular moment, but to make sure that all of those who wish to make use of the service find it available. As matters now stand, Ashley appears to have his hands full without actively encouraging greater demand for the service.

As pointed out in the next section, action is underway to replicate the ombudsman function at each of the 10 AMC subcommands. Once these subcommand level ombudsman are in place, there will be the means to increase the case load, and to train potential headquarters staff. With the addition of the new officials, it seems likely that the headquarters case load will continue to expand as the defense budget contracts and the competition for the reduced business increases.

5. ASSESSMENT

A. Within Agency

If, as we are fond of saying, imitation is the purest form of flattery, there is evidence that the AMC ombudsman has won acceptance in an agency where all the senior staff were initially skeptical. Two of the 10 AMC subcommands have established ombudsmen at that level because the commanding officers there wanted to duplicate the headquarters program. If these trials work out,

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[85]There have been two changes of command at AMC since the ombudsman was created. The most recent occurred in October, 1989. Neither successor to General Thompson has made any changes in the Ombudsman Charter or in any other aspect of the operation.

the AMC's plan is to put an ombudsman in each of the other eight subcommands.

B. At Other Government Agencies

Both the Air Force and the Navy have materiel commands. At the time Ashley was interviewed for this study, the Air Force was considering establishing an ombudsman. The Navy was not.[86] Today, the Air Force is experimenting with an ombudsman program at each of its subcommands.

C. Among Users

Apart from the success rate data discussed above in the Settlement Rate section, we have no data showing how the office is regarded by the businesses that have used it.

6. CONCLUSION

The AMC ombudsman was created on an informed hunch by General Richard H. Thompson as he was assuming command. If the office has not performed a minor miracle, it has come close. The record shows what can be done to cut red tape by a person with high motivation and skill backed by real authority from the top. General Thompson began by finding the person he wanted to be his ombudsman.

C. Department of Health & Human Services Supported State Long Term Care Ombudsmen

TYPE: Legislatively mandated (1978 Comprehensive Older American Act Amendments). Supported with federal funds, decentralized, implemented at the state level by the State Unit on Aging.

THUMBNAIL DESCRIPTION: Federal grants made in 1972 to selected states helped to develop test ombudsman programs in and for nursing homes. Legislatively extended to all states in 1978 Comprehensive Older American Act Amendments. Expanded in 1981 legislation to include board and care homes, in addition to nursing homes, requiring that any such long term care facilities receiving federal funds have an ombudsman.

CURRENT HOLDER: Depends on which state. Usually administered by the State Unit on Aging.

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[86] Ashley Inteview, August 23, 1989.

DUTIES/POWERS: Investigates and resolves complaints made by, or on behalf of, residents of long term care facilities. May also on occasion act as an advocate for the patient.

STATUS IN ORGANIZATION: Depends on state. Most ombudsmen are part of the state agency on aging but the duties of a few programs are contracted out. Ombudsman programs are independent from the facilities they monitor.

1. OMBUDSMAN PROGRAM

A. Organization

Nursing home care became a national issue by the mid 1970's with cases of abuse and neglect resulting in congressional investigations, hearings, and legislation. Evidence was presented that the frail and elderly in some long term care institutions who were most vulnerable and susceptible to mistreatment were at the mercy of staffs that were often inadequately trained, bored and sometimes even malicious. Isolated from their families and other outside support mechanisms, patients often were afraid of the consequences of speaking up.[87] Some who protested were ignored because they were said to lack the capacity to describe their living conditions accurately.

By the early 1970's many presumed that state governments were not adequately monitoring the nursing home industry. This, combined with the demographic fact that an aging population was a growing constituency, made it politically desirable to address these concerns.[88] Ombudsman were thought to be one means of redressing this imbalance of power.

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[87]A recent draft report of the U.S. Department of Health and Human Services concluded that abuse of nursing home residents often goes unreported and that there is no effective system to investigate complaints. The report goes on to say that more than half of the nursing home residents surveyed believe that abuse is rarely reported to authorities. It also states that 36% of nursing home aides witnessed a case of physical abuse of a patient in the past year, and 10% admitted to being the abuser. Reports of abuse rarely make it to the local police, as these types of cases are difficult to prove because most do not have third party witnesses. What investigations there are are likely to be conducted by the state ombudsman and medicaid fraud units. From, Anderson & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Mon. Dec. 18, 1989, p. C-15.

[88]The 1970's were also a time when the concept of advocacy for the disadvantaged was growing in popularity. By the early 1980's, there was a move to decentralize government services under the notion of "new federalism." This federal ombudsman program, implemented at the state, regional and local level, is viewed by some as the epitome of decentralization. Based on an interview with Eileen Bradley, Associate Commissioner, Office of Hearings & Appeals, Social Security Administration, Department of Health & Human Services, Thurs. Sept. 28, 1989.

In 1972, the Federal Department of Health, Education and Welfare (HEW) funded the development of experimental nursing home ombudsmen programs for four states and one national organization.[89] The plan was the brain-child of the Presidential Advisory Commission on Aging[90] and the Secretary of HEW Arthur Flemming[91] and was intended to investigate complaints of older institutionalized individuals about action adversely affecting their health, safety and welfare. In 1973, this program was transferred from the Health Services and Mental Health Administration of HEW to the Administration on Aging (AoA). AoA initiated the ombudsman development programs in all states through modest grants under Title IV of the Older Americans Act[92]. The 1978 Amendments to the Older Americans Act of 1965 intended that all nursing home facilities receiving funding from HHS would have an ombudsman. The scope of the legislation was expanded to include all board and care homes by the 1981 Keys Amendments. In 1988, there were 578 local recipients of federal funding for state long term care ombudsmen programs.[93]

Each state unit on aging may itself operate the long term care ombudsman program or may contract with another agency or independent nonprofit group to operate it. Each state submits its ombudsman program "state plan" to the federal AoA. Plans vary from state to state, depending on the identity of the plan administrator, access, statutory authority, scope, and staffing patterns.[94]

Since these state long term care ombudsmen must be independent to be effective, the law requires that they be sponsored by an office which is outside the system being monitored. Most state long term care ombudsman programs are housed in the Office on Aging, or elsewhere in state government, sometimes in large umbrella agencies which also operate the Department of Health.[95] Others are independent agencies reporting directly to the governor; and some states contract out their ombudsman programs to private nonprofit groups.

In Washington, DC, for example, the long term care ombudsman is not housed in the DC Office on Aging because this agency operates one of the nursing homes in the District. By contracting out the ombudsman function to

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[89]Mailick, Mildred, "Chapter 9: The Ombudsman in Health Care Institutions in the United States," Caiden, Gerald E., Ed., *International Handbook of the Ombudsman: Evolution and Present Function*, Westport, CT: Greenwood Press, 1983, p. 122.

[90]Comments from Ann Weaton, Administration on Aging, April 20, 1990.

[91]Interview with Eileen Bradley-SSA/HHS, Thurs. Sept. 28, 1989.

[92]Comments from Ann Weaton, AoA, April 20, 1990.

[93]Ibid.

[94]Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 122.

[95]Comments from Ann Weaton, AoA, April 20, 1990.

private nonprofit organizations, the possibility of a conflict of interest was removed.[96]

Each state must allocate a percentage of its AoA budget to the ombudsman program. Some states have allocated substantial additional funds to the ombudsman program. In a recent survey of a majority of state long term care ombudsman programs, federal funding accounted for approximately two-thirds of average funding.[97] Some states have responded to fiscal constraints by focusing on a limited number of nursing homes, restricting the geographic area they serve, or restricting the categories of complaints to which they will respond. The 1978 Older Americans Act Amendments broadened the definition of long term care facilities to include any skilled or intermediate care institution, nursing home, or other adult care home. Because of insufficient funding, many long term care ombudsman programs are only able to service nursing homes.[98]

The law also supports the training and use of volunteers and citizen organizations in the state long term care ombudsman program.[99] Most states have an average of three paid professional full-time staff in the state level ombudsman office.[100] The balance of paid and volunteer staff varies from state to state, but most programs depend on some nonpaid assistance. Other organizations, such as health consumer groups, organizations of relatives of institutionalized patients, residents' councils, state prosecutors, and regulatory agencies work with the ombudsman programs in surveying and controlling state long term care facilities.[101] Frequently, the professional long term care

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[96]The DC State Long Term Care Ombudsman program is contracted out to the Office of Legal Counsel for the Elderly (which is part of the American Association of Retired Persons-AARP), a private nonprofit organization. Legal Counsel for the Elderly subcontracts for ombudsman services with three local private nonprofit agencies, one in each of the three districts that have nursing homes. One central ombudsman oversees these three district programs. The DC Council developed long term care ombudsman legislation, modeled after the federal legislation, but it has no control or oversight over the ombudsman. Based on interview with Vera Mayer, Long Term Care Ombudsman in the NW section of Washington, DC, Fri., Sept. 8 1989. (Hereafter "Mayer Interview").

[97]Based on a 1987 survey of 49 state long term care ombudsman programs, Title III compromised 61% of funding; other federal sources accounted for another 6%; NonOlder Americans Act state funds provided 27%; with another 6% coming from other nonfederal sources. See *Comprehensive Analysis of State Long-Term Care Ombudsman Offices*, National Association of State Units on Aging-NASUA, Sept. 1988, p. 19.

[98]Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 124

[99]Ibid.

[100]*Comprehensive Analysis of State Long-Term Care Ombudsman Offices*, NASUA, Sept. 1988, p. 15.

[101]Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 125.

ombudsmen train the volunteer ombudsmen. One DC long term care ombudsman seeks to assign one volunteer to each nursing home floor.[102]

B. Authority/Scope Of Duties/Limits On Power

The effectiveness of the state long term care ombudsman program often depends on whether it is run by a state agency or private contractor.[103] Operation by a private agency obviously affords independence from state control. While this may also eliminate some red tape, privately sponsored programs may increase problems of coordination, communication and cooperation with the state agencies which monitor them. Ombudsman programs operated by state agencies on aging or health may encounter still other problems if entrenched bureaucrats are not supportive. When the ombudsman program is run from the governor's office, it may gain in prestige, but will be more sensitive to political pressures. Nevertheless, this model is thought to be the most effective in that it is the most similar to the classic ombudsman model.[104]

The congressional mandate of the Older Americans Act Amendments requires that the community be involved in these long term care ombudsman programs. This is demonstrated by the degree of volunteer participation in the program.

This legislation also required that each state "establish procedures for appropriate access to long term care facilities and patient records,"[105] but does not specify what is meant by appropriate, leaving room for a broad range of interpretations.[106] In some states, the ombudsman has legal access to all facilities and records. In others, access is not guaranteed, and facility managers must consent to entry to the premises. When access is dependent upon the cooperation of the institution, ombudsman effectiveness and independence are compromised.

Access to patient records varies from state to state.[107] Some states allow the ombudsman to review patient records without restriction. Others interpret the law as requiring the written consent of the patient before giving the ombudsman permission to read records. While intended to safeguard the patient's privacy, the effect is to disclose to the staff that a particular patient

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[102]Mayer interview.

[103]Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 123.

[104]Ibid.

[105]*The Older Americans Act*, Pub. L. No. 89-73, 42 U.S.C. SS 3001 et seq. 1965; amended 1978, Pub. L. No. 95-478, #307 (a)(12)(B).

[106]Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 123.

[107]Ibid.

has made a complaint. This conflicts with the intent of the law which is to protect the right of the patient to complain in confidence.

In one example, the Washington, DC City Council gave statutory authority to protect the confidentiality of its long term care ombudsman and her designees, providing freedom from liability and the legal basis to look at all records.[108] This state ombudsman also has the authority to go to court to gain compliance with the law.[109] In one case, the DC state ombudsman and the DC Corporation Counsel jointly argued in defense of a decision handed down by an administrative law judge which the nursing home facility appealed.[110]

State long term care ombudsmen confront many issues involving their authority. One involves the state long term care ombudsman's proper role in the nursing home licensing process. (Obviously an ombudsman who has a role to play in that process will have more influence with licensed facilities than those that do not get involved.[111]) Another issue is the adequacy of inspections. License inspections occur infrequently, as little as once a year. In the past, moreover, inspections were more comprehensive and included observations of the facilities' operations. Because of budget constraints, superficial inspections are not uncommon. After the Institute of Medicine's 1986 report, Congress attempted to incorporate its ideas into legislation. One of the reforms included training surveyers to interview residents and evaluate outcomes rather than relying on the facilities' documentation and written policies.

C. Modus Operandi

The ombudsman programs investigate complaints of older institutionalized individuals about action adversely affecting their health, safety and welfare; monitor the development of applicable laws, regulations and policies; provide information to public agencies about residents of long-term care facilities; and promote private organizations' and volunteers' participation in the ombudsman program.[112] The state ombudsman is also required to establish a statewide uniform reporting system to collect and analyze data relating to complaints and

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[108] *District of Columbia Long-Term Care Ombudsman Program Act of 1988*, DC Act 7-293, Jan. 6 1989 a New Chapter 33 of title 6 of the DC Code.

[109] *DC Ombudsman Expands Powers: Official Assumes Role of Protector of the Aged in Private Facilities, The Washington Post*, Mon. Oct. 24, 1988, p. D-1.

[110] Mayer Interview.

[111] Ibid.

[112] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 123.

conditions in long term care facilities for the purpose of identifying and resolving significant problems.[113]

For example, in DC, one long term care ombudsman goes from room to room to see patients, meets with their families, sits in on staff meetings, trains volunteers and has affected certain policy changes.[114] She utilizes a computerized intake form, developed by the State Ombudsman for use by the three local projects. She also keeps confidential notes, cross indexed by facility and resident's name.[115]

Ombudsman investigate complaints against facilities and alert the relevant governmental agencies to possible abuses. They also undertake their own investigations and attempt to resolve the underlying problems when issues of mistreatment are raised. The ombudsman acts as a problem solver, facilitator, liaison, and advocate for patients and their families with the institutions and governmental agencies.

Volunteer ombudsmen assist the professional ombudsman by gaining visibility for the program, building relationships, and serving as the link between patients, families and staff. They visit the facility on a regular basis, meet individually with patients, families and staff, and are often able to gain the trust of the patients. Volunteer ombudsman staff expand the reach of the program and act as a liaison to the community. Most handle the routine complaints and refer the more difficult problems to the professional ombudsman staff. Constant recruitment and training are required to maintain the pool of competent volunteers.

Complaints may be received directly from patients and their families as well as from staff during visits by the ombudsman. The ombudsman may also pursue independent investigations on-site. Complaints are received by telephone "hotlines" and correspondence. In those programs which depend on paid ombudsman staff and have these hotlines, complaints are logged and usually are responded to within a set period of time, usually 48 hours.[116] In many instances, the ombudsman often must gain the facility's consent before they can embark on the investigation.[117] Uncooperative operators can frustrate the investigation by withholding consent.

An investigation into a particular complaint involves several steps. These include making personal contact with the parties; completing consent forms for representation and release of records; identifying relevant issues areas raised by the complainant; collecting and assembling necessary facts; identifying

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[113] *Older Americans Act* Sec. 307 (a) (12) (C).

[114] Mayer Interview.

[115] Ibid.

[116] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 125.

[117] Ibid.

applicable state and federal laws; interviewing staff; reviewing expert information; supervising volunteer investigators; communicating with the complainant to relay progress of the investigation; and developing and implementing a strategy to resolve meritorius complaints.[118]

In general, state long term care ombudsmen attempt to resolve problems at the lowest level of authority as possible.[119] This is done to protect the complainant from possible retaliation. Once a complaint is substantiated, it may be referred to the appropriate agency for legal action if other avenues fail.

Long term care ombudsmen are usually required to submit reports to the state ombudsman and the area agency on aging. All of the DC long term care ombudsmen prepare monthly reports, consisting of a computerized summary of complaints.[120]

2. CASE WORK

A. Clients/users

The primary users of state long-term care ombudsman programs are residents of nursing homes receiving federal funding and their families. The program is used less often by the staffs of such long term care institutions and is used by nursing homes administrators very rarely. The program mainly serves patients, but nursing home staffs may on occasion turn to the ombudsman to solve problems involving difficult patients and their families. Occasionally, representatives of advocacy groups for the elderly intervene in particular cases. Congressional interest in a particular case may occur as an outgrowth of constituent casework services. Officials from related state and federal agencies may also refer matters to the ombudsman in a particular problem case.

B. Nature of Cases

Complaints which are commonly within the ombudsman's jurisdiction involve the action, inaction, or decisions of providers of long term care, or their representatives, relating to the services of long term care institutions, public agencies, or of other social service agencies, which may adversely affect the health, safety, welfare or rights of such residents.[121] States may also

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[118] *Analysis of Policies & Procedures of State Long Term Care Ombudsman Offices*, National Association of State Units on Aging-NASUA, Sept. 1988, pp. 110-11.

[119] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 125.

[120] Mayer interview.

[121] *Older Americans Act* Sec. 307 (a)(12)(A)(1)

investigate complaints made by a patient against a particular family member or other private individuals.[122]

State long term ombudsmen deal with three types of complaints: quality of life issues, quality of care issues, and issues of patients rights.[123] Quality of life issues involve patient discomfort, either material ones or those resulting from staff conduct. Quality of care issues involve complaints about the quality of medical care, health care, or nutrition received. Infringement of rights cases deal with violations or limitations of patient freedoms, such as access to their funds, visitor restrictions, or reservation of rooms upon return from temporary hospitalization.[124]

The most common complaint is neglect of resident patients.[125] Complaints include residents who have been scalded by hot water when left unattended in hot showers; some who have been strapped to beds and chairs for too long; and others who not assisted to go to the bathroom. Other cases are more serious.

Institutionalization itself may give rise to complaints from patients. Sometimes patients cause themselves problems by failing to follow nursing home rules, e.g., regulations against smoking. Facilities sometimes fail to follow Federal and state procedures controlling the discharge of residents from the facilities or transfers within.[126] Complaints also arise when families of patients make unreasonable or insensitive demands.

Current issues facing state long term care ombudsmen include conflict of interest problems, nurse's aide training, patient transfers from one facility to another, boarding care homes, providing legal services to patients and rapidly changing federal laws.[127]

C. Acceptance criteria

State long term care ombudsman are generally not limited in the types of cases that are appropriate for them to address or refer. They have discretion to deal with a broad range of problems. Medical or legal experts may be asked to assist with a particular problem. The scope of clientele aided will depend to a large degree on the individual ombudsman, his or her caseload, and resources.

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[122]Analysis of Policies & Procedures of State Long Term Care Ombudsman Offices, NASUA, p. 110.

[123]Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 124.

[124]The Patient Bill of Rights codifies some of these rights.

[125]Anderson, & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Monday, December 18, 1989, p. C-15.

[126]Mayer Interview.

[127]Interview with Ann Lordeman, NASUA Senior Program Associate, Fri., Oct. 27, 1989.

D. Case load

In one year, there were 411 complaints recorded in one DC Ombudsman project.[128] During the same time frame, there were 596 complaints issued, 96% of which were fully or partially substantiated.

E. Settlement rate

In one year, 401 out of 411 complaints were resolved, 5 were not able to be resolved and 5 are still active.[129]

3. OUTREACH

A. Printed material

Some state ombudsman programs depend more heavily on paid than on nonpaid staff. These programs solicit complaints by using well-organized educational campaigns.[130] Some State Long Term Care Ombudsman distribute brochures and manuals describing their program services.[131] Others also post notices and posters about their role in the nursing homes. Long term care ombudsman usually submit reports to the state ombudsman and the area agency on aging.

The National Association of State Units on Aging (NASUA) in Washington, DC operates a National Resource Center for State Long Term Care Ombudsman, funded by the Administration on Aging. With the assistance of AoA funding, NASUA produced three resource publications for the state long term care ombudsman program.[132]

B. Meetings with users & others

Professional and volunteer ombudsmen visit the care facilities on a regular basis and meet with patients, families and staff.

These ombudsmen may belong to one of two professional associations devoted to state long term care ombudsmen. One is made up of the heads of

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[128]For the period between October 1988 and September 1989. Furnished by Vera Mayer, Iona House, NW DC Ombudsman, March 1990.

[129]Ibid.

[130]Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 124.

[131]Mayer interview.

[132]*Comprehensive Analysis of State Long Term Care Ombudsman Offices, Analysis of Policies & Procedures of State Long Term Care Ombudsman Offices*, and *Training Activities of the State Long Term Care Ombudsman Offices*.

state level ombudsman programs, the other of all those who operate at the local level, a majority of whom are volunteer ombudsmen. The local long term care ombudsman association sponsors workshops for training programs and information and referral services.

C. Referral mechanisms

Families of patients often contact the state long term care ombudsman before placing a patient in a particular facility. Generally, however, the ombudsman is contacted after the patient becomes a resident and a problem has developed. Staff members often refer cases to the long term care ombudsman. Some nursing homes social workers and other professional specialists may refer cases to the ombudsman.

Those state ombudsman programs which depend more heavily on paid staff than on nonpaid staff also tend to invite complaints by using 24 hour toll-free hotlines.[133] These require greater effort on the part of the complainant than do the programs in which the ombudsman regularly visit patients. Programs with a higher proportion of professional staff tend to be more concerned with the few more serious abuses than with the regular day-to-day complaints.[134]

The state long term care ombudsman program often deals with several state agencies. State long term care ombudsmen often use written working agreements to clarify roles, coordinate services, and establish operating procedures with other agencies.[135] Most of these working agreements are with the licensing and certification units, usually in the state health departments.[136] In the District of Columbia, for example, matters are often referred to the Office of Adult Protective Services within the Department of Human Services, or to the Service Facility Regulation Administration within the Department of Consumer and Regulatory Affairs. An ombudsman may refer the more serious violations to the state licensing agency or the police.

4. SPECIAL PROBLEMS

A. Lack of uniformity among state programs

States have wide latitude in implementing the federal long term care ombudsman program. This results in marked disparities in the quality of states' programs. While this discretion allows states to adapt programs to local

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[133] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 124.

[134] Ibid.

[135] Comprehensive Analysis of State Long-Term Care Ombudsman Offices, NASUA, p. 32.

[136] Ibid.

needs, standardized enforcement and evaluation are difficult to implement. One result is some loss of control by the federal agency which oversees the programs. However, the involvement of the community and congressional oversight tend to render state long term care ombudsman programs more accountable than they might be otherwise.

Even in cases where programs are similar, information sharing is limited to a few professional organizations and national associations (participation in these is not mandatory nor is it universal). Most of these associations have limited resources and therefore can not afford to focus their programs on this particular field. Not only is there difficulty coordinating programs between the federal and state level, but there is also a broader intergovernmental problem in coordinating between these levels and the local level.

B. State long term care ombudsmen often act as patient advocates

Many state long term care ombudsmen are not in fact neutral, as in the sense of the classic ombudsman model, but in practice act as advocates for the elderly.[137] For this reason, the ombudsman may occasionally need to call in a mediator or other third party neutral, to resolve a particular dispute. Some ombudsmen tend to justify this role on the grounds that the nursing home industry is politically powerful in many states.[138] Some state ombudsmen believe that many nursing home owners have the resources to make improvements but not the will to do so.[139] This suggests that ombudsmen may lack influence with long term care facility administrators.

C. Growing demand based on fiscal constraints and an aging population

Only five percent of the aged are in nursing homes at any one time, but much larger percentages will require nursing home care at some point in the future.[140] Most still live in their communities. Advancements in the medical field have resulted in the expansion of the average life span. As a result, the elderly are the fastest growing segment of the population. The number of senior citizens in this country is expected to double in the next 40 years.[141] Similarly, the nursing home population is expected to double between 1985

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[137]Interview with Linda Work, National Institute for Dispute Resolution-NIDR, Monday, August 28, 1989.

[138]Interview with Eileen Bradley-SSA/HHS, Thurs., Sept. 28, 1989.

[139]Anderson & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Mon., Dec. 18, 1989, p. C-15.

[140]Mayer interview.

[141]Anderson & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Mon., Dec. 18, 1989, p. C-15.

and 2020.[142] Even though there are more nursing homes now than ever before, the need will continue to increase.

Many nursing homes, moreover, are suffering from fiscal constraints. Aides are often undertrained, underpaid, and overworked. The current shortage of licensed nurses is another factor making nursing homes increasingly difficult to administer.[143] The complex regulations governing these facilities also contribute to the problem, in the absence of clarification of the interplay of the various levels of regulation.[144]

It is not surprising then, that there should be neglect of some nursing home residents. State long term care ombudsmen and their volunteers do not always have the staff to go door to door to check on patients and take other steps, that if routinely implemented, could improve service.

D. Limited Jurisdiction

Another problem in the long term care area are the approximately 40,000 licenced[145], and untold unlicenced, institutions known as "personal care facilities," that house individuals on public assistance, such as recipients of Social Security and welfare. These types of facilities generally have lower standards than those in which the long term care ombudsmen operate and therefore cry out for some type of ombudsman program. Such a program would need substantially more funds then currently provided to the state long term care ombudsman system but there are even fewer public resources available for monitoring operation of these facilities.

5. ASSESSMENT

A. Within Government

Although the state long term care ombudsman program is generally well liked within the U.S. Department of Health and Human Services, a recent draft report of this agency concluded that abuse often goes unreported and there is no effective system to investigate complaints.[146] This study may be pointing

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[142]Projected Population of Nursing Homes, in Millions (1989 data), "The Cost of Growing Old (Vital Statistics)," *The Cutting Edge: News and Notes About Health*, *The Washington Post* Health Section, October 3, 1989, p. 5.

[143]Mayer interview.

[144]Ibid.

[145]House Select Committee (on Aging?) Report, March 1989.

[146]Anderson & Van Atta, *Nursing Homes a Worsening Problem*, *The Washington Post*, Mon., Dec. 18, 1989, p. C-15.

out the problem with trying to quantify ombudsman cases. How are abuses recorded? Do all cases neatly fit into the different complaint categories? This study could also be pointing to a resource problem. Conversely, it might be the case that the ombudsman program as originally designed cannot meet the demands of the growing long term care population in need of service. Those issues deserve closer attention then they have received, or than we can give them here. Meanwhile, long term care ombudsmen themselves believe that they often alleviate problems and thus stave off hardship and potential litigation.

B. By Users

Patients who are institutionalized in nursing homes and other long term care facilities are often very dependent on the state long term care ombudsman system and appreciate having a spokesperson. The ombudsman program gives families some peace of mind that these institutions are being monitored.

Some staff appreciate the presence of the state long term care ombudsman at nursing home meetings because the ombudsman can provide a more objective perspective to administrators.[147] In this way, the ombudsman serves as a facilitator. The nursing home itself may look to the ombudsman to help resolve problems because of the independent position he or she holds. The role of the ombudsman may in unique situations be perceived as one of providing assistance to the nursing homes, and the function is not always resented by staff.

In some states, politically powerful nursing home lobbies can limit the effectiveness of the ombudsman's role.[148] Jurisdictions structured with ombudsman systems which are independent from monitoring state agencies are often not as sensitive to such political pressure.[149]

C. By Congress

Congress has been very supportive of the state long term care ombudsman program as it mandated its creation and continues to endorse it. Congressional staffs who receive cases from patients of long term care facilities, or their families, welcome the assistance an ombudsman provides constituents.

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[147] Mayer interview.

[148] Ibid.

[149] Ibid.

6. SUMMARY & CRITIQUE

It is difficult to generalize about a decentralized ombudsman program with so many variations. There is a clear need to give the ombudsman more statutory authority in those states where the right of access to the facility is not guaranteed. Some critics contend that state long term care ombudsmen are only effective in those institutions in which the officials being monitored are responsive to complaints.[150] Whether these critics are right or wrong, ombudsman programs are probably most useful and effective when they address less severe matters, with more serious ones being referred to the appropriate state officials or local authorities. Ombudsmen also serve to monitor and collect data on the conditions of facilities and are in a position to affect future policy. The existence of the state long term care ombudsmen probably acts as a deterrent to some abuses.

D. Environmental Protection Agency-RCRA Hazardous Waste Ombudsman

TYPE: Legislatively mandated.[151]

THUMBNAIL DESCRIPTION: The Hazardous Waste Ombudsman was authorized for a four year trial in 1984 as part of the Resource Conservation and Recovery Act (RCRA) amendments to the Solid Waste Disposal Act of 1976,[152] but the office was not organized until 1986. As a matter of Agency policy, the Ombudsman took on Superfund program issues including those arising out of the Underground Storage Tank, the Emergency Planning and the Community Right-to-Know programs as well.

CURRENT HOLDER: Robert Knox.

DUTIES/POWERS: Responds to complaints and inquiries from the public regarding regulations or technical matters arising out of the programs subject to his jurisdiction.

STATUS IN ORGANIZATION: Housed in Office of Solid Waste & Emergency Response. Ombudsman is a senior staff position. Office has one assistant and one secretary, little political clout or exposure. Ombudsman office oversees 10 regional ombudsmen who also serve as line staff.

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[150] Mailick, "The Ombudsman in Health Care Institutions in the U.S.," p. 125.

[151] Pub. L. No. 98-616; 42 U.S.C. Sec. 6917.

[152] Pub. L. No. 98-616.

1. OMBUDSMAN'S OFFICE

A. Organization/place in agency structure

The 1984 Resource Conservation and Recovery Act (RCRA) and the 1976 Solid Waste Disposal Act (SWDA), which it amended, strengthened existing federal laws which protect the environment and provided the framework for an extensive and complicated regulatory scheme. For example, the law prohibits dumping toxic materials from dry cleaning plants, filling stations, and pulp mills.

Compliance with these laws and regulations can be quite expensive, especially for smaller businesses. Larger business, on which local economies often depend, and local officials concerned about plant closings resulting from the enforcement of environmental laws, sought ways to reduce the scope and impact of enforcement. On the other side, environmental protection groups sought more vigorous and focused enforcement. Initial agency responses to the competing forces were sometimes confusing and often slow in coming. Citizens on both sides were left wondering if these laws were to be strictly enforced, delayed, changed or waived. Barbara A. Mikulski (D-Md.), then a member of the U.S. House of Representatives, received so many complaints from constituents who could not get clear answers on these environmental inquiries or prompt action on their requests for waivers, that she sponsored an amendment to the 1984 revisions establishing an ombudsman to handle these complaints.

Robert Knox, the Hazardous Waste Ombudsman, was appointed in 1986. His office is located in the EPA Office of Solid Waste & Emergency Response. Knox reports to the Assistant Administrator of the Office of Solid Waste & Emergency Response, the EPA bureau which deals with hazardous waste treatment, storage, and disposal; "Superfund" cleanup (the Comprehensive Environmental Response, Compensation, & Liability Act also known as CERCLA); emergency preparedness; "community right to know" programs; underground storage tanks; and energy recycling.

Each of the ten EPA regions has a regional ombudsman. The regional ombudsmen report to the Regional Director and not directly to the RCRA ombudsman who is nevertheless responsible for their training and coordination. All but one of the regional ombudsmen also serve in either program administration or public information positions.

The EPA program information hotlines, including one for RCRA, are operated by independent contractors, an incongruous situation which deprives the public and the agency of the benefits of integrating this service with the ombudsman's other functions.

Legislation was introduced in the House and Senate on the opening day of the second session of the current 101st Congress to make EPA a cabinet level department. The House version of the bill originally contained a section to establish an ombudsman within the Secretary's office. Although the ombudsman proposal had the strong support of the committee chairman, John Conyers (D-Mich.), it was removed from the bill as introduced to assure bipartisan support. As it passed the House, the legislation contained a provision calling for a study of the proposal to create a departmental ombudsman.[153]

B. Authority/Scope of Duties/Limits on Power

The RCRA ombudsman is a legislatively mandated position which arose out of dissatisfaction with the way the agency was responding to complaints from the public about the way the law was being administered. The ombudsman is intended to be the office of last resort to be used after the complainant has exhausted the remedies available through normal channels. The law clearly spells out his duties:

> "It shall be the function of the office of ombudsman to receive individual complaints, grievances, requests for information submitted by any person with respect to any program or requirement under this act.
>
> . . . [T]he ombudsman shall render assistance with respect to complaints, grievances, and requests . . . and shall make appropriate recommendations to the Administrator."[154]

Knox has access to agency records in the investigation of complaints.

As a matter of policy, the RCRA ombudsman [and each regional ombudsman] is instructed that,

> "[W]hile striving to be objective, the Ombudsman must remember that he or she is part of EPA's mission and thus, must work within EPA's system to address problems rather than standing apart and criticizing the Agency."[155]

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[153]H.R. 3847, *Department of Environmental Protection Act*, House Committee on Government Operations, introduced Tuesday, January 23, 1990 by Rep. Conyers.

[154]Pub. L. No. 98-616, Sec. 103; 42 U.S.C. 6917. The committee report accompanying this section stated that Congress expected the ombudsman to, "be of sufficient stature within the Agency that citizens will be able to secure meaningful assistance as quickly as possible."

[155]*Hazardous Waste Ombudsman Handbook*, Office of Ombudsman, Office of Solid Waste & Emergency Response, U.S. Environmental Protection Agency, pp. 1-4.

The law provides that the RCRA ombudsman "shall not effect any procedures for grievances, appeals or administrative matters"[156] under the regular channels.

C. Modus Operandi

The Hazardous Waste Ombudsman's office is housed deep in a corner of a cavernous office building in the area set aside for the Assistant Administrator for Solid Waste and Emergency Response. Because of the building design and the location of the ombudsman's office in the section of the building assigned to the program, the office is not easily accessible. This discourages walk-in traffic. Most cases originate by telephone calls, some through correspondence.[157] Knox engages in outreach functions, such as speech giving at technical professional association meetings, but most cases are referrals from satisfied users.

The ombudsman helps the public obtain information and locate the appropriate EPA office to handle a particular problem. Despite the apparent authority to do so, the ombudsman does not normally attempt to serve as a mediator or problem solver. Nor is he a spokesman for the public on issues raised by proposed rule and policy changes.

Knox responds to inquiries as received "over the transom" or from referrals from others who have used the service. The RCRA hotline deals with routine questions about the status of regulations, but when the contractor's staff is out of its depth the inquiry is referred to the ombudsman.

This ombudsman was given a good deal of discretion in designing the position. Knox sought to model his office after that of the IRS Taxpayer Ombudsman. For example, Knox uses the IRS Taxpayer Ombudsman's "self-correction" method of problem solving which encourages line staff to iron out the complaint, thereby allowing program staff to correct the problem without unnecessary interference by the ombudsman. Knox attempts to stay in touch with complainants as their case is being processed and to set a time-frame within which the problem will be addressed.

Knox often tries to bring people together to resolve problems in a team approach, calling in experts for particular cases as needed. For example, he often consults with experts in environmental law.

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[156] 42 U.S.C. Section 6917 (c); Solid Waste Amendments Pub. L. No. 98-616 Section 2008 (c).

[157] Booz, Allen & Hamilton Inc., *Evaluation of the Hazardous Waste Ombudsman Program*, Environmental Protection Agency, Office of Solid Waste & Emergency Response, Office of Ombudsman, Dec. 1988 ("Ombudsman evaluation").

2. CASE WORK

A. Clients/users

Knox mainly deals with lawyers representing clients who are affected by RCRA regulations. A recent study found that the national ombudsman's main user is the regulated community,[158] followed by the general public, environmental groups, Congress, EPA program offices, and environmental consultants.

In the regions, the regulated community makes the greatest use of the ombudsman service. However, there is a higher percentage of inquiries from the public,[159] environmental groups and consultants than at the national level.

B. Nature of cases

The ombudsman is typically involved in cases in which EPA regulations as interpreted and enforced work an unusual hardship, in matters needing clarification, and in the odd case that does not seem to fit anywhere else. He may also step in in cases of unusual delay.

By far the greatest number of inquiries deal with matters involving RCRA, approximately seven times the amount of any other type of case, including, Superfund, Community Right to Know and underground storage tank matters.[160]

Of the matters handled at the national level, two-thirds of the ombudsman's cases involve requests for information and only one-third involve actual problems.[161]

In most regions, on the other hand, the ombudsmen deal with problems more often than inquiries for information.[162] This may be due to the fact that more problems occur at the regional level, or that clients feel the regional ombudsmen are less remote than the federal office.

C. Acceptance criteria

The RCRA ombudsman responds to complaints and inquiries from the public regarding regulations or technical matters primarily involving the 1976 Solid Waste Disposal Act and the 1984 RCRA program. In addition, the

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158 *Ombudsman evaluation*, p. II-12.

159 Ibid.

160 Id, p. II-9.

161 Id, p. II-8.

162 Ibid.

ombudsman may address other matters beyond the RCRA program, including "Superfund" questions. The ombudsman also investigates pesticide and drinking water matters if they involve some hazardous waste issue.

If the RCRA hotline cannot answer a question from the public, it is referred to the ombudsman who will ordinarily refer it to the program staff. If that approach fails, the ombudsman may step back in, and handle the problem himself. The RCRA ombudsman may decline to accept a case because it does not fall in the RCRA hazardous waste category (for example, he will refer appropriate cases to the Asbestos or Small Business Ombudsman.)

At the regional level, since most of these ombudsmen deal with problems in the first instance in their roles as program or public information officers, fewer cases are referred to the regional ombudsman as a last resort.

D. Case load

The national ombudsman handles about twice as many cases annually as the busiest regional office, approximately 300 inquiries.[163] It appears that all but one or two of the regional ombudsmen are underutilized. This may be due to the fact that they regard their ombudsman duties as secondary to their principal assignment.

The amount of time devoted to ombudsman activity varies by region depending on which program office houses the ombudsman.[164] Ombudsman located in the Hazardous Waste Management Division spend most of their time on ombudsman duties. Those located in the regional offices of External Programs spend less, those in the Policy & Management Office spend even less time, and those housed in the Waste Management Division spend the least of all.

E. Settlement Rate/Action Taken

The federal RCRA ombudsman responds directly to most cases himself. Only a relatively small percentage of cases are referred to another office to handle itself.[165]

Approximately half of the cases at the regional level are referred to the program offices and the other half are handled directly by the regional ombudsman.

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[163] Id, p. II-4.

[164] Id, p. II-29.

[165] Id, p. II-16.

3. OUTREACH

A. Printed material

Knox produced two manuals, Hazardous Waste Ombudsman Handbook, which is primarily for inhouse use, and a RCRA Orientation Manual, which is also used by the regulated public. The Ombudsman Handbook provides a clear guide to the acceptance, consideration and solution of problems likely to be encountered. The Orientation Manual contains an introduction to the RCRA law and thoughtful, comprehensive sections dealing with solid waste management, hazardous waste management and underground storage tanks. These two volumes provide the necessary background and methodology to permit the regional staff to handle most problems on their own.

B. Meetings with users

Knox gives speeches at technical and professional associations on behalf of the Office of Solid Waste and Emergency Response. He also meets periodically with the regional ombudsmen.

C. Referral mechanisms

Cases are referred to the ombudsman by the various program "hotlines." Program staff and other users also refer matters to the ombudsmen.

4. SPECIAL PROBLEMS

A. Agency Implementation of Legislation

The legislation which created the RCRA ombudsman gave EPA wide discretion in implementing the program. What resulted was an office in which the ombudsman is not independent and not in a strong position to influence the way complaints are handled within the agency. The ombudsman program is still relatively unknown. Most of the regional ombudsmen are ineffective because they downplay the importance of their ombudsman function.

B. Political Environment

The environment in which the EPA Hazardous Waste Ombudsman serves is very politically fragmented. The regulated public includes many diverse interests such as industry, environmental groups, conservationists, local community groups, as well as state and local government. It is more difficult

for an ombudsman operating in such a climate to maintain his or her independence and neutrality.

5. ASSESSMENT

A. Within agency

Within the RCRA program area, the ombudsman is underutilized, and does not appear to play a major role in dealing with complaints or grievances.

The RCRA Ombudsman is relatively unknown outside of the program area. It seems to be the prevailing view in the Agency that most problems are handled effectively in normal channels and thus that there is little need for a grievance bureau of the sort contemplated by the 1984 amendment which is the basis for the RCRA ombudsman.[166]

B. At other government agencies

The RCRA Ombudsman is virtually unknown to officials at other agencies.

C. By Users

There is some satisfaction, and in general a positive response, from the clients who have used the service.[167] The ombudsman office seems to be generally perceived as helpful and fair.[168]

D. By Congress

The RCRA ombudsman was initially created as a result of congressional interest. Indeed, but for the follow-up from Capitol Hill there is a question as to whether or not the office would have been set up at all. However, there is little record of effective subsequent congressional oversight of the ombudsman office. Recently, congressional interest in the ombudsman service at EPA has been renewed. As pointed out above, the House version of the bill to establish EPA as a cabinent level agency contains a provision calling for a study of a departmental ombudsman.

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[166] Id, p. II-6.

[167] Based on correspondence received from users. Interview with Robert Knox, EPA RCRA Ombudsman, August 3, 1990.

[168] Telephone interview with Chris Harris, Esq., DC, [date?]

6. SUMMARY & CRITIQUE

The RCRA ombudsman's office possesses the potential to be of significant service to the public. The current ombudsman offers a unique blend of apt skills, technical expertise, and a genuine willingness to be of assistance to persons in need. Because of the organization and location of this office, its lack of support from the top, and its limited resources, the ombudsman's potential has not been realized. Legislation centralizing the various EPA ombudsman functions and elevating the status of the office so that it reports directly to the Administrator (or Secretary) would go a long way towards improving the independence and effectiveness of the ombudsmen offices at EPA.

E. Interstate Commerce Commission Ombudsman

TYPE: Created by Director of the Office of Proceedings.

THUMBNAIL DESCRIPTION: First ombudsman appointed 1975. Staff originally included one ombudsman and one assistant. At its peak in 1980, the ombudsman's office had a staff of five. Four ombudsman served between origin of program and its dissolution in 1985. There has been no official ombudsman at the ICC since then.

CURRENT HOLDER: The ombudsman position was eliminated during the 1985 ICC budget conference.

DUTIES/POWERS: Assisted applicants with motor carrier licenses in filing forms, clarified regulations, and advised applicants seeking licensing approval from the Motor Carrier Board. Later expanded to include other motor carrier issues such as permanent authority filings and interpretations of various provisions of the 1980 Motor Carrier Act.

STATUS IN ORGANIZATION: The position was held by a series of GS 14 adjudicators who were also classified as paralegal specialists. The position was housed in the Office of Proceedings.

1. OMBUDSMAN'S OFFICE

A. Organization/place in agency structure

The ICC regulates interstate "for-hire" transportation by truck, rail, bus and barge. The Commission approves operating licences, maintains evidence and monitors the status of carriers' insurance coverage, reviews rates and hears disputes.

Following Congressional criticism of ICC's "regulatory lag" during the mid 1970's, then Commission Chairman Stafford, established a blue ribbon

panel to study the agency's workload. Among other recommendations, the panel recommended that an attempt be made to insulate agency adjudicators and decisionmakers from the public. As a result, the agency created the ombudsman program in 1975 to respond to inquiries from the public about the status of cases and regulations. This office also interpreted ICC rules for the public and assisted in the filing and prosecution of applications for certificates.

The ICC ombudsman was located in the Office of Proceedings, the office handling legal cases within the agency. The ombudsman's office operated as a separate office within the Office of Proceedings to isolate employees of the Motor Carrier Board (the arm within the Office of Proceedings that adjudicated temporary and emergency authority applications) from direct contact with the public. Also, this position was designed to assist the public (usually small motor carriers or the legal counsel of larger firms) with clarification of regulations.

The director of the Office of Proceedings sponsored the ombudsman proposal in 1975 and was instrumental in the creation of the office. When he left, agency support for the program was temporarily diminished. While there also had been a great deal of political support for the ombudsman program by the ICC Commissioners at the time of its creation, new appointees were unfamiliar with the ombudsman program and were less likely to support it.

From 1975 to 1980, the ombudsman office consisted of only the ombudsman and one assistant. As a result of the 1980 Motor Carrier Act (which substantially deregulated and relaxed entry into the interstate motor carrier industry), the role of the ombudsman became more significant due to a much higher volume of inquiries from the public. By this time the office had a staff of five. During the "phasing-in" of deregulation, a large number of new motor carriers wanted operating authority but did not know how to get it. The ombudsman assisted these individuals. Ten telephone "hotlines" were set up at the time to cut through red tape. In 1980, the ICC Small Business Assistance Office and the Small Business Administration (SBA) jointly sponsored nationwide seminars to assist motor carriers in dealing with the new statutory regime.

Between July of 1980 and January of 1985, the ombudsman received enhanced resources. Attorneys and others were detailed to the ombudsman's office to assist with the volume of cases. Those who served as ombudsman were adjudicators, paralegals, or special assistants to the director of the Office of Proceedings. At times during this period, the ombudsman also served as spokesperson for the Office of Proceedings.

The services provided by the ombudsman office were needed during the phasing in of motor carrier deregulation. Following the relaxation of entry requirements, thousands of applications were filed by persons seeking initial or

expanded operating authority. Not surprisingly, a considerable number of applicants or their legal representatives were unfamiliar with the new rules.

As the industry became acquainted with provisions of the 1980 Act and the ICC's new procedures, the volume of inquiries lessened. The Commission's budget was then reduced and the agency was forced to eliminate several positions.[169] Auditors were brought in to help consider ways to reduce the size of the agency. The ombudsman's position was eliminated in 1985 and many of its functions were assigned to other offices within the agency, including the Small Business Assistance Office[170] and the five motor carrier teams of the office of proceedings.[171]

The Small Business Assistance Office and the Special Counsel's Office[172] were merged in 1984 to create the current Office of Public Assistance.[173] Some feel that the attorneys in this office who now respond to inquiries are not as responsive as the previous ombudsman's office.[174] Even though the position was officially eliminated, two former ombudsmen are still with the ICC, and occasionally serve informally as such because of the relationships they had built with parties they previously served in their official capasity.

B. Authority/Scope of Duties/Limits on Power

This ombudsman was charged with responding to inquiries from the public regarding the motor carrier regulations, licensing applications, and related issues. New interstate transportation laws were interpreted for the public. The ombudsman's office also provided advice to regional motor carrier boards and other review boards concerning policy, procedures and decisionmaking criteria in temporary authority proceedings.

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[169]The 1981 Staggers Rail Act and the 1982 Bus Regulation Reform Act were instrumental in both the deregulation of the interstate transportation industry and the ultimate shrinkage of the ICC. During the early 1980's, ICC field offices went from over 50 to just 22 in number. Originally, there were six ICC regional offices, now there are just three. The Office of Proceedings staff also fell from 360 to 110.

[170]A satelltite office of the Chairman created in 1977.

[171]Additionally because of staffing cuts throughout the ICC, the five motor carrier teams were reduced to four.

[172]An office within the ICC charged with contributing to the development of complete records in agency proceedings and with authority to participate in cases before the commission.

[173]The mission of the Office of Public Assistance is to advise small businesses, shippers, governmental bodies, and the public of Commission policies, rules, programs, and proceedings affecting their interests; and to contribute to the development of complete records in agency proceedings and advise the Commission of changing public needs and concerns relating to the regulated interstate surface transportation industry.

[174]Interview with Judy Holyfield, ICC, Thursday, October 5, 1989.

The ICC ombudsman did not have the authority to issue corrections, process applications or pleadings, nor to direct other agency offices to make corrections; it had no power or authority to change a board or ICC decision. The office helped the regulated applicants perfect their applications. The ombudsman also interpreted decisions for applicants, explaining to applicants the reasoning for board findings and decisions.

Unlike the Small Business Assistance Office, which acted as a clearinghouse for the resolution of problems experienced by small and minority businesses and users of interstate transportation, the ombudsman's office extended its services to include furnishing help to businesses represented by legal counsel and larger organizations. Although the ombudsman was expected to develop recommendations concerning existing or proposed ICC policy, rules, or regulations,[175], such advice was not normally offered unless specifically requested. On the other hand, one of the Small Business Assistance Office's primary objectives was to advise the Commission of the changing problems and concerns of both transportation providers and consumers and to recommend actions to address such issues, and they often consulted with the ombudsman soliciting their suggestions on matters pertaining to motor carrier licensing.

C. Modus Operandi

Work handled by the ombudsman's office normally began with a request for assistance to interpret ICC rules and policies as well as problems with pending cases. If problems existed that office would indicate a number of "trouble shooting" actions, such as contacting the appropriate motor carrier team supervisor to resolve the problem. The ombudsman office's intake process started by checking the status of the applications. Then a judgment was made as to whether or not the case required special handling.

Ombudsman office clerks performed the intake function and provided status reports to the applicant. The ombudsman's office had a policy that all calls should be handled within 24 hours. The ombudsman kept records of their cases on log sheets. Daily records were kept for each inquiry handled which identified the person seeking assistance, the nature of the inquiry, the response provided, and any recommendations to other offices.

The ICC ombudsman supervised a staff in providing assistance to the general public about ICC law and regulations and application processing requirements. The ombudsman also analyzed problems and suggested corrective alternative solutions. The assistant ombudsman also developed manuals for staff use and the training of new employees.

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[175] Based on description of duties from a performance evaluation.

Although the ombudsman program was not designed to provide a complaint handling function, ICC has other mechanisms which are responsive to the public. Currently, the Section on Tariffs occasionally receives complaints from the public. If it is a complaint about a legal case, the case is referred to the Office of Proceedings. Any other ICC complaint will result in a letter going to the director of the affected office. Most complaints are handled at the regional level, due to the fact that staff in the field often have first hand knowledge of problems.

Most ICC dealings with the public involve inquiries rather than complaints about the quality of service. Currently, status calls are responded to by the Status Branch of the Office of Proceedings. Inquirers must have knowledge of the docket numbers before requesting the status. Questions beyond the status of motor carrier application filings are handled primarily by the Office of Public Assistance.[176] In addition to answering questions and offering suggestions to persons seeking motor carrier authority information, upon request the Office of Public Assistance reviews draft application filings and offers recommendations to insure completion of requests and that they are legally sufficient.

2. CASE WORK

A. Clients/users

The major constituents of the ombudsman's office were lawyers, practitioners, and carrier officials, representing primarily motor carriers as well as brokers, freight forwarders and water carriers. Most of the ombudsman's time was given to new applicants in the field as well as smaller entities not represented by attorneys.

B. Nature of cases

The ombudsman's primary area of responsibility involved applications for motor carrier licensing. The ombudsman office handled inquiries about ICC rules, procedures, and policies. Inquiries dealt with everything from whether a particular rule was still in effect to obtaining relief for a particular problem.

The ombudsman was also called upon to interpret agency and board decisions for the public. The ombudsman also assisted with filing of

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[176]The current Office of Public Assistance tries to anticipate the needs of the public. This office does not lobby nor advocate for legislative change. It does, however, give its opinion on proposed ICC policy and legislation. Mainly, the Office of Public Assistance gives information and provides referrals for the public.

applications and with administrative compliance requirements for the issuance of certificates and permits. The ICC ombudsman provided status reports on pending authority applications based on computerized data printouts.

C. Acceptance criteria

No formal set of criteria existed for the ombudsman to become involved with a particular case. While the ombudsman's office often discovered problems with an application for a motor carrier licence and intervened on the applicant's behalf, usually former clients referred cases to the ombudsman. Occasionally, other agency staff would also refer cases to the ombudsman's office.

D. Case load

During Fiscal Year 1981, the ICC Ombudsman office responded to approximately 73,000 public inquiries.[177] More than half of those inquiries involved the status of pending applications, about a third dealt with regulations, and one tenth involved individual cases with procedural problems.

E. Settlement Standards

The ICC ombudsman was judged primarily on responsiveness rather than the rate of settlement of cases.[178] The performance measurements required that minimum standards and time frames be met before a fully satisfactory performance rating could be given to the ombudsan. The performance standards required that the ombudsman staff answer inquiries at or about the time of receipt 90% of the time. The ombudsman also was to return call-back messages on the day they were received 90% of the time. Ombudsman staff were required to meet informational needs within an acceptable time frame 80% of the time and generally did so. Adverse feedback about the ombudsman was limited to less than 1% of inquiries handled. The ombudsman was expected to completed review of draft applications within 48 hours after receipt at least 90% of the time. Responses to inquiries via correspondence were to be completed within 48 hours 90% of the time. The performance appraisals of all ombudsman consistently exceeded the fully satisfactory standards.

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[177]Holyfield, *What the ICC is Doing for its Constituents*, E. TRANS. LAW SEMINAR, 1981 p. 161.

[178]Found on an ICC performance appraisal of the ombudsman.

3. OUTREACH

A. Printed material

The ombudsman sent out press releases and developed a small business motor carrier assistance booklet.

B. Meetings with users

The ombudsman would give speeches to professional associations and the regulated transportation community.

C. Referral mechanisms

Cases were often referred from staff from other offices within ICC, such as the Congressional Liaison and the Small Business Offices and hotlines as well as from former clients.

4. SPECIAL PROBLEMS

The ICC ombudsman's office was severely limited in its authority. It was housed in a line office at a relatively low level in the organization, and dealt only with one type of problem, motor carrier applications. It did not have the prestige within the agency that an ombudsman with a broader mandate and higher status might have had. Questions of neutrality and independence were not issues for this ombudsman, given that it was not his or her place to challenge board or Commission actions. The ombudsman's effect on agency policy, procedures and regulations was quite limited.

5. ASSESSMENT

A. Within agency

The ICC ombudsman was well liked by the commissioners during its heyday. It was perceived as fulfilling its limited mission at the time when it was needed. Because of the crisis in the deregulation of the motor carrier field, other offices, such as congressional affairs and public assistance, welcomed the assistance of the ombudsman at the time. Its limited success gave rise to some internal agency rivalries, because some staff members in the

agency apparently resented the influence of the ombudsman with agency higher ups.[179]

B. By other government agencies

The Department of Transportation had a favorable opinion of the ombudsman program at the time.[180] It was perceived as serving a helpful function during a turbulent period.

The Small Business Administration had a good working relationship with the ICC ombudsman office.[181] This was because of their shared interest in assisting smaller interstate transportation entities with federal regulations affecting them. SBA and the ICC often sponsored joint workshops for small motor carriers.

C. By Users

In general, the ICC ombudsman was thought to be knowledgeable and responsive by those who used the service.[182] The responses from those users who were appropriate recipients of ombudsman aid were quite favorable. While the client population was limited by the scope of the ICC's ombudsman operation, few bureaucrats in the agency were thought of as being more helpful to the public than these ombudsmen.[183]

D. By Congress

The ICC ombudsman was well liked by congressional staff involved in transportation deregulation. Congress realized the traumatic effect deregulation would have upon the interstate transportation industry, and welcomed innovations to ease the transition. Congressional staffs also could better help constituents by using the ombudsman service. However, once the agency adjusted to the new legislation, the Congress could no longer justify continued support for the ICC ombudsman as it was originally designed.

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[179]Interview with John Hedetniemi, ICC, Thursday, October 5, 1989.

[180]Ibid.

[181]Interview with Judy Holyfield, ICC, Thursday, October 5, 1989.

[182]Based on correspondence from users which was received by the ICC ombudsman during their tenure. (Interview with John Hedetniemi & Judy Holyfield, ICC, Thursday, October 5, 1989.)

[183]Interview with Gary Edles, former Director of the ICC, Office of Proceedings (currently Legal Counsel, ACUS), Friday, October 6, 1989.

6. SUMMARY & CRITIQUE

This ICC ombudsman program was very limited in its mission. It only operated in one functional area and therefore did not serve the entire agency nor did it serve all the public which the Commission regulated.

Because the ombudsman's office was set up to serve a short-term need (i.e., better agency responsiveness to motor carrier license applicants), its position was tenuous once this need diminished. The main justification for continued existence of the ombudsman function was that it was a means for the agency to respond better to the deregulation crisis, but once this ended, the office was disbanded. Now any remnants of any "public responsiveness" function the ombudsman provided have been transferred to other offices within the agency.

This is one ombudsman model that agencies can look to for improving bureaucrats' responsiveness to the needs of the regulated public in a crisis--that is, a short term mechanism to provide basic data to the public and "limit the damage" which otherwise might be caused.

F. The Department of Commerce Ombudsman

TYPE: Executive; Created by order of the Secretary of Commerce in 1971.

THUMBNAIL DESCRIPTION: First federal ombudsman. Responded to complaints and inquiries from companies having trouble doing business with the government. Acted as a go-between for businesses with other federal agencies. Between 1971 and 1973 the office consisted of the ombudsman, two professionals and two secretaries with other professionals assigned on a temporary basis as needed. Initially successful; mission diluted and ultimately eliminated as the result of successive reorganizations.

CURRENT HOLDER: None. Office defunct. Remaining functions located in the Office of Business Liaison, Diane Terpeluk, Director.

DUTIES/POWERS: Typical cases included mishandling of export license applications, payment disputes; complaints about red tape and penalties for failing to respond to requests for business information.

STATUS IN ORGANIZATION: Originally located in Secretary's office where it was independent, authoritative. Subsequently moved to the Office of Domestic and International Business Administration where its status and authority were gradually reduced; subsequent organizational changes converted office to a business information office.

1. THE OMBUDSMAN FOR BUSINESS

Maurice H. Stans, Secretary of Commerce in the first Nixon administration, established what appears to have been the first ombudsman in the federal government. He created the Ombudsman for Business by secretarial order in March 1971.[184] The primary purpose of the office was to reduce the red tape in doing business with the government.

Secretary Stans was ahead of his time. Interest in using an ombudsman in the federal government was high in the 1960's and early 1970's. Up to the time of the Stans order, however, no one had turned the talk to deed. The order setting up the office contains three sections, each brief and to the point. When the order showed up on the department's bulletin boards, it must have been clear to all that the secretary meant to lend a hand to those who hit a snag in their efforts to do business with Uncle Sam.

A. Organization/Place in Agency Structure

The order established the position of Ombudsman for Business in the secretary's office. The ombudsman was given the status of a special assistant to the secretary and reported directly to the secretary's office. Initially, the ombudsman's office had a complement of five persons: the ombudsman, Thomas Drumm; two professionals, Gordon W. Schmidt and Martha C. Finerty; and two secretaries. In addition, the ombudsman was authorized "as necessary" to call upon units of the Department "for services of personnel and other assistance in carrying out his functions."[185]

This initial organization lasted until Mr. Drumm, the first ombudsman, retired in June 1973, and, from the account of those who assisted him, worked well. In fact, the first two years seem to have been the most productive for this program.[186] Since then it has been recast, moved, amalgamated, and more or less forgotten. Several months passed before a successor to Drumm was appointed. In the meantime, as the result of effective internal lobbying by the office of Domestic and International Business Administration (DIBA), the ombudsman office was moved to DIBA where the ombudsman and his staff

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[184]Department of Commerce Organization Order 15-7, issued March 26, 1971 (USCOMM-DC - 7171).

[185]In practice, that gave the ombudsman temporary borrowing rights to staff members from other offices in the department. The borrowed professionals were called on when the ombudsman's office was unusually busy or otherwise short handed. Interview, by telephone, with Gordon W. Schmidt, February 21, 1990.

[186]Interview with Diane Terpeluk, Director of the Office of Business Liaison, Gordon W. Schmidt and Martha C. Finerty, members of the business assistance staff of OBL, August 1, 1989.

reported to the assistant secretary. This move, which appears to have been a means to capture the budget associated with the ombudsman function, weakened the authority of the ombudsman and was the first of several steps which have diluted its problem solving role to the vanishing point.[187] Today, following a reorganization in 1980, what remains of the original functions are performed in the Office of Business Liaison, where Schmidt and Finerty report to the Director. The title "ombudsman" is no longer in use.

B. Authority/Scope of Duties/Limits on Power

The Ombudsman for Business derived authority from the secretarial order creating the office. The order empowered the Ombudsman for Business to carry on the following functions:

> 1. Field questions on federal government programs of interest to business.
>
> 2. Serve as a focal point for the lodging of complaints, criticisms and suggestions from the public about Government activities relating to business.
>
> 3. Arrange conferences for businesses with officials within the Department and in other government agencies and to follow up to determine whether further assistance was necessary and appropriate.
>
> 4. Develop proposals to remedy the causes of complaints for the action of the Secretary.[188]

As this shows, the Ombudsman for Business' authority to mediate a complaint to a solution was more implicit than explicit. At least in the first phase of its existence, however, the Office did just that.[189] The Ombudsman for Business' authority was carefully limited to preclude the office from intervening to "assist businesses and individuals on specific matters, cases or

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[187] Drumm's successor tried, and failed, to have the ombudsman's office moved back to the Secretary's office. As an agency newcomer, and one who arrived on the scene after the critical decision to relocate the ombudsman had been made and put into effect, he was unable to persuade then Secretary Frederick B. Dent to reverse the action. Interview, by telephone, with Gordon W. Schmidt, February 21, 1990.

[188] Ibid.

[189] Interview with Schmidt and Finerty, August 1, 1989. For example, the ombudsman helped to work out payment by a foreign concern for agricultural goods purchased from an American supplier who had not received payment prior to the ombudsman's efforts. Interview, by telephone, with Gordon W. Schmidt, February 21, 1990. More frequently, the ombudsman served as a go-between for businesses in their dealings with other federal agencies.

issues before Federal regulatory agencies . . ."[190] In addition, the order specified that the Ombudsman not "participate in, intervene in regard to, or in any way influence, the negotiation or renegotiation of the terms of contracts between business and the Government."[191]

C. Modus Operandi

In its first phase, the ombudsman was a trouble shooter for the Department and to a lesser extent for other government departments and agencies. When it received a complaint within its broad jurisdiction, it undertook to investigate, find the facts, talk with the Department or other government official involved, and propose a solution. For example, one function of the Department was to encourage the export of American goods. Delays in processing requests for export licenses formed a bottleneck which could deprive American businesses of foreign trade. If the ombudsman's approach to the licensing office did not suffice to get action on the license, the ombudsman could appeal directly to the secretary for help in bringing about action on the export license. In the early 70's, particularly 1973-74, a number of commodity shortages existed. Many businesses and individuals wrote to complain and to seek help in finding supplies of various chemicals, home canning lids and jars, steel, bailing wire, and other products. The Ombudsman staff responded to letters and phone calls on short supply matters by preparing and mailing Situation Reports.

Files were established for each matter as it was received and one of the professionals in the office assigned. The ombudsman established standards for prompt processing of complaints and procedures for follow through to make sure that the matter was dealt with and that the person raising it had a ready means to check on its status.

Today, by contrast, the OBL serves as an information office, directing businesses to the office where their matter or application awaits action and making sure that they are offered a chance to be heard. As Diane Terpeluk, the Director of the Office of Business Liaison in the Commerce Department put it, "I feel everyone should have a chance to present their case."[192]

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[190] Secretarial Order, op. cit. *supra.*, Section 3.02.

[191] Id at Section 3.03.

[192] Schmidt & Finerty interview, August 1, 1989.

2. CASE WORK

A. Clients/Users

The Office accepted inquiries and complaints from businesses and others with dealings with the government. It also fielded inquiries from the press.

B. Nature of the Cases

Delays encountered in applications for export licenses accounted for a large part of the early case load, as did late payment complaints. The office also dealt with complaints about discourteous (or even abusive) conduct and complaints about slow or inadequate responses to correspondence. The office dealt with complaints that businesses had been unfairly disqualified from doing business with the government, and with complaints about the imposition of penalties for failure to complete and return forms requesting certain business information.

C. Acceptance Criteria

The Office accepted virtually all the requests it received for assistance that were bona fide on their face and which did not run afoul of the limits on the Office's authority set out in Sections 3.02 and .03 of the Order creating the Office.[193]

D. Case Load

There are not statistics available on the number of cases handled by the original ombudsman and his staff. However, the early ombudsman actively encouraged the use of the office and sought to respond quickly to complaints. Today, OBL serves primarily an information dispensing function, responding to requests from the public and the press. It handled 18,000 queries in 1985, most asking about government procurement, exporting, marketing, statistical sources and regulatory matters.

E. Settlement Rate

The Office successfully expedited the grant of export licenses in the early '70's, and ultimately helped work out a solution to the processing log jam, by recommending a numberof remedies to the Secretary including an increase in the procesing staff. The Ombudsman was also able to deal effectively with

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[193]See footnote 192, *supra*.

complaints about slow payment of bills, a problem ultimately resolved by the passage of the federal Prompt Payment Act. Since the OBL no longer serves complaint handling functions, it is not meaningful to use case settlement data as a measure of its effectiveness.

3. OUTREACH

A. Printed materials/Hotlines

Initially, the ombudsman used a printed brochure and a press release to describe the service and to encourage its use. The office was also described in Commerce Department publications (e.g.,"Business America" and "Commerce Business Daily"). The Ombudsman for Business was also publicized in trade association and other private sector publications.

Today, OBL uses a brochure to describe its information service. There is no toll free hotline, but preprinted Rolodex cards with the OBL telephone number are sent with the brochure and other printed materials.

B. Meetings with Users

The initial ombudsman met frequently with businessmen, spoke at trade meetings and conventions, where he touted the service provided by his office and handed out the brochure describing it.

C. Referral Mechanisms

The Commerce Department staff was extensively briefed on the service and encouraged to refer persons to it. In addition, the ombudsman was instrumental in having liaison officers appointed in the other cabinet level departments and other agencies such as the General Services Agency, Environmental Protection Agency and the Small Business Administration, to work with the ombudsman and to refer matters to his office.

4. SPECIAL PROBLEMS

The most arresting feature of the ombudsman for business is the ease with which it was originally created by Secretary Stans. With a stroke of the pen, the office came into being in March 1971. For the next 26 months it operated actively as an ombudsman, taking complaints, sorting them out, mediating between businessmen and bureaucrats, and coming up with proposals to deal with chronic problems such as the delays in acting on export license applications. The two professionals who served as the ombudsman's principal

assistants reflect the satisfaction the office took in its accomplishments. But once Drum retired and the office was downgraded, its mission was modified, and it lost its unique problem solving role. Thus the ease with which the office was created seems to have foreshadowed the ease with which it was undone. This experience suggests that an executive ombudsman needs a constant champion in the head of the department or agency in order to remain viable. It also suggests that a permanent ombudsman, one required by statute, will be less effective during periods when the office is not actively supported by the agency head.

5. ASSESSMENT

Such data are difficult to locate for this program. Gordon Schmidt and Martha Finerty consider their work in the original Ombudsman for Business Office as a high point in their careers in the department. Their feelings are based on their sense of accomplishment and the value of the mission.

6. CRITIQUE

In many ways, this is the most interesting of the case studies conducted for this report. It was apparently the first ombudsman's office established in the federal government following the spate of interest in the idea that occurred in the 1960's. From what we now know, it worked well. After the first ombudsman retired, the office became a budget plum for the Office of Domestic and International Business. The ombudsman was not successfully repotted and gradually wilted to its present status as a query answering function in the Office of Business Liaison. All that remained of the first operation when the current OBL Director took office was a minute or two in her briefing about the remaining ombudsman functions and how they came to be placed in her office.[194]

[194]Interview, August 1, 1989. See fn. 187, *supra*.

IV. ISSUES TO BE CONSIDERED IN ESTABLISHING AN OMBUDSMAN

A. Legislative versus Executive Ombudsmen: What turns on the choice?

The more independent an ombudsman is, the more effective. This is the prevailing view of the students of the field, and it is amply born out by our investigations. It also seems to be the case that ombudsmen created by an act of the legislature (we know of no instance in which a state constitution calls for the appointment of an ombudsman) are more independent, more durable and at least as effective as ombudsmen created by agency order. On the other hand, there are situations where expediency may require that an ombudsman be created without waiting for the legislature to act.

The early state ombudsmen (Iowa, Nebraska, Alaska and Hawaii) were created by acts of their respective legislatures. By law, the ombudsman in each of those states is separate from the executive branch agencies with which it deals. While the law creating the ombudsman in each of those states may be may be modified or even repealed,[195] until it is the ombudsman enjoys a status sufficient to command the attention and respect of the other state agencies.

By contrast, most of the federal ombudsmen derive their authority from an order of the agency which they were created to assist: of those we studied, the Commerce, Interstate Commerce Commission, Army Material Command and the Internal Revenue Service ombudsmen were set up by departmental order; the RCRA ombudsman was set up by departmental order implementing a provision of the 1984 RCRA amendments passed by Congress. The fate of the Commerce Department ombudsman illustrates one drawback of creating an ombudsman by administrative fiat. While the order permitted then Secretary Stans to establish the office quickly, his successors were free to reassign and downgrade the ombudsman's office to the point where the function is little more than a memory today.

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[195]More likely, a disgruntled legislature (or one finding itself financially strapped) may cut the ombudsman's budget. For example, the Alaska state ombudsman's budget was cut in half one year (and only gradually restored) after the office incurred the displeasure of a Senator who attempted to obtain confidential information from the ombudsman to use in an election. In Iowa, the ombudsman's office survived by a tie vote in the Senate when a hostile Senator proposed to eliminate the office as a cost cutting measure.

In theory, at least, the IRS Taxpayer Ombudsman, which was administratively created could have been administratively eliminated until Congress passed the Omnibus Taxpayer Bill of Rights legislation in 1988. By giving the ombudsman certain powers (e.g., the ability to issue Taxpayer Assistance Orders) and duties, Congress put its imprimatur on the office. While the U.S. Code does not state in so many words that there shall be an ombudsman in the IRS, that would seem to be the purport of the 1988 law. However, this form of organization does not insulate the IRS ombudsman from the need to wage internal battles for budget, prestige and influence. As it stands, then, the Taxpayer Ombudsman may be classified as a mixed legislative/executive ombudsman, reflecting an accommodation that is not unusual in our system of government, particularly in a period when Congress and the White House are controlled by different parties. And while this accommodation results in a structure that is vulnerable to change as agency notions of good administration change, it has been a durable model so far.

One has only to look to the RCRA ombudsman, however, for an example of a mixed legislative/executive ombudsman that has not been as effective. In the RCRA case, the legislation came first in the form of a two-paragraph provision in the 1984 RCRA amendments. The law called for the establishment of an ombudsman to help the public deal with the increasingly complex requirements for disposing of toxic materials and other hazardous wastes. Apart from a four-year sunset provision and a few other particulars, however, Congress left it to the agency to flesh out the proposal and implement it. The agency apparently was opposed to the idea from the beginning and showed little interest in creating the office or assuring that it would be effective. It not only delayed creating the office for two years (and then did so only in response to congressional prodding), when it finally acted, it placed the office inside the program, where it is neither a full-fledged ombudsman nor a conventional public information office. It has evolved as more of an interpreter of program decisions than an independent representative of the public.[196]

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[196]The struggle between Congress and EPA over the need for and role of an ombudsman is ongoing. Early drafts of House bills to make EPA a cabinet level department contained language (similar to that in the pending bills to make the Social Security Administration an independent agency) called for a single, department-wide ombudsman at the secretarial level. The provision was deleted from the bills as introduced to obtain bipartisan support. At the House Government Operations Committee hearing on the House bills on February 7, 1990, EPA Director William K. Reilly, in answer to a question, objected to adding the ombudsman provision to the bill. He said the agency did not need another ombudsman or another pair of eyes looking over EPA bureaucrats' shoulders. The bill's ranking Republican sponsor, Rep. Frank Horton (N.Y), said the administration also opposed the ombudsman for budgetary reasons and he expressed the view that the President would veto the bill if it contained provision for an ombudsman. In the

Legislation to make the Social Security Administration an independent agency is also under consideration by Congress. It contains a provision for a Beneficiary Ombudsman with powers not only to handle individual complaints, but also to serve as an advocate for beneficiaries in agency policy formation. If adopted, this provision would lead to the first legislatively created permanent ombudsman in the federal government. While it may be necessary to revisit the law after some experience with the resulting ombudsman's office, such a legislatively created ombudsman would seem to overcome many of the weaknesses observed in the executive and mixed legislative/executive models examined for this study.

B. Method of Appointment

The pending legislation to establish the Social Security Administration as an independent agency places responsibility for administering the agency in the hands of a board appointed by the President with the advice and consent of the Senate. In turn, the board is given the power to appoint the beneficiary ombudsman provided in the bill.[197] The model ombudsman statute places the power to appoint in the executive subject to confirmation by the legislature.[198] The executive ombudsmen considered in this report were selected by the head of the agency without formal consultation with the legislature. Given the nature of the ombudsman function, the method used to select the ombudsman should, to the extent possible, assure the ombudsman's independence and neutrality.

C. Qualifications of the Ombudsman

The ombudsman should be one who is by experience, training and temperament able to command respect for his or her proposed solutions to

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meantime, EPA has not said whether it will seek authority to continue the RCRA ombudsman beyond its currently scheduled 1990 expiration under the four-year sunset provision. Given the Agency's opposition to the ombudsman provision in the cabinet status bill, it is entirely possible that it will close the RCRA office if it can do so without offending congressional proponents.

[197]H.R. 791, 101st Cong., 1st Sess. See sections 101 and 102.

[198]Gellhorn, Walter, "Annotated Model Ombudsman Statute," in Anderson, Stanley V. (editor), *Ombudsmen For American Government*, Prentice Hall, Englewood Cliffs, N.J., 1968, pp. 159 & 161.

problems, and one whose views will be sought by agency policy makers. Professor Gellhorn found that "experience abroad points clearly to the desirability of the ombudsman's having a legal background because he must deal with many grievances that hinge on analysis of statutes and rulings."[199] He also recommended against requiring any specific experience and against absolutely excluding any category of persons (such as former legislators or other office holders) from the position.[200]

D. Who Needs an Ombudsman?

Larry B. Hill, the University of Oklahoma expert on the nature and use of ombudsmen in this country, states, "[w]hatever else an ombudsman may be, it is an additional citizen access point to the 'system'."[201] Hill classifies government agencies along functional lines as follows: client-serving agencies (e.g., those dealing with housing and employment problems); client-processing agencies (licensing, regulation, taxation) and "nonclient oriented" agencies (resources and manufacturing problems, environmental and land problems).[202] In terms of the need for improved citizen access to these agencies, there is nothing about their respective functions that makes one or the other of the three categories more or less likely to benefit from having an ombudsman. Inevitably, problems will arise in all three, problems that, in the last resort, will be thrashed out in litigation, rulemaking or legislation if the agency's processes are inadequate to the task.

There are, however, some agency profiles which call out for the establishment of an ombudsman to deal with a particular exigency. The IRS Problem Resolution Program was set up to meet congressional concern that taxpayers were being inadequately served by the nation's tax collector. The backlog in processing tax refunds in 1985 added to the concern and led to a somewhat beefed up operation. This might be called the BUBD profile--backed up and bogged down. In 1980, the Interstate Commerce Commission enlarged its ombudsman's office to help it deal with the surge of applications it received after Congress deregulated interstate common carriage by truck, bus and barge lines. This might be classified as the temporarily overwhelmed

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[199] Id. at Section 5, p. 162.

[200] Ibid.

[201] Hill, Larry B., *The Citizen Participation-Representation Roles of American Ombudsmen*, 13 ADMINISTRATION & SOCIETY 4, 405, 407 (Feb. 1982).

[202] The latter might just as aptly be described as a mixed client serving and client processing agency.

agency profile, or, perhaps, the agency in transition profile. Similarly, the Federal Emergency Management Agency offices that handled disaster aid in the wake of the 1989 hurricane in the Carolinas and the San Francisco earthquake might have used ombudsmen on a temporary basis to help deal with the problems caused by those two disasters.

An ombudsman may also be used to good advantage in the troubled agency setting, both to help sort out the problems confronting the agency and to help restore public confidence. Housing and Urban Development Secretary Jack Kemp made use of the Department Inspector General to help identify and eliminate fraud and abuse in coping with the maladminstration of several of the Department's grant-in-aid programs. An ombudsman could have provided an early warning, and would have helped the Department deal with the problems raised by members of the public and businesses who suffered as a result of program abuses. To a similar end, an ombudsman in the Office of Federal Savings and Loan Insurance in the Federal Deposit Insurance Corporation attempts to deal with the problems that have arisen recently in the savings and loan area.

When an ombudsman is established to respond to a particular emergency or unique array of circumstances the office may, as was the case at the ICC, be disbanded once the crisis is past. The better course is to put it on permanent footing, either to help prevent the reoccurrence of the situation that led to its creation or to be ready to deal with the next emergency. Once the cadre of trained problem solvers is there, it seems wasteful both of funds and public respect to unseat them.

Quite apart from the occasions which call for the creation of an ombudsman to help an agency cope with a crisis of confidence, there is as much or more to be gained by establishing an ombudsman to help keep a well-functioning agency on course. One authority has observed that the agency that benefits most from having an ombudsman is a well run agency because of what the ombudsman is able to do to keep it that way.[203] In an era when it seems more difficult and time consuming than ever to obtain even routine services and information from the government, a phenomenon one authority describes as the "bureaucracy problem," the potential assistance an ombudsman may provide is too great to forgo.[204]

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[203] [Professor Gellhorn?].

[204] The term "bureaucracy problem" was coined by James Q. Wilson in 1967. We are indebted to Larry B. Hill for the reference. See footnote 202, *supra*.

E. Where Does the Ombudsman Belong?

By definition, the ombudsman is not a line official. The job of the ombudsman is not to administer the program, collect the tax or issue the permit. If anything is clear, then, the ombudsman should not be located in a line office and should not report to a line official.[205] Having said that, it should be noted that the location of the office may hinge as much on who sets up the ombudsman, the legislature or the executive, as on any organizational principle. The states that have created ombudsmen by statute provide that the office is independent of the executive and provide that it report to the legislature. This assures that the ombudsman is independent and that its recommendations will receive the attention of the executive branch officials whose action is the subject of the ombudsman's interest. An ombudsman that stands outside the agency gives up the insider's advantages: informal access to the head of the agency, and the trust and respect that comes from working relationships formed during his or her agency career.[206]

Executive ombudsman, on the other hand, are usually placed in or near the office of the agency director or head of the office for which the ombudsman is appointed. This is the case with the IRS and AMC ombudsmen, and of the Commerce Department and ICC ombudsmen during the periods of their greatest effectiveness. The subsequent histories of the Commerce and ICC ombudsmen demonstrate the adverse effects of moving the ombudsman out of the director's office into a line function.

Three objectives are served by placing the ombudsman in or as an adjunct to the director's office. First, it is the organizational arrangement most likely to assure the independence of the ombudsman from undue pressure from the line functions. Second, it provides the ombudsman with the perspective from which to observe all the agency's operations and to suggest reforms to enable the agency to better perform its mission. Third, it allows direct access to the

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[205]The lack of effectiveness of the RCRA ombudsman is attributable to the agency's decision to place the ombudsman in the line office and make him responsible to the assistant administrator (actually the deputy assistant) for the line function. As such, the ombudsman shares responsibility for carrying out the line program, and is deprived of the independence required of a neutral in a dispute resolution context. Moreover, since the office is regarded as something of an unnecessary evil in the agency, the ombudsman is almost entirely dependent on his personality and persuasiveness to obtain results.

[206]These are not insubstantial advantages. Personnel ombudsmen, i.e., those who deal with employee relations matters, are often chosen from among the agency's most senior and respected executives as the career servant's last assignment before retirement. An end of career appointment helps assure the personnel ombudsman's independence and neutrality since he or she will have nothing of a professional nature to gain by seeking to curry favor with either party to a dispute. The World Bank is one of the entities that follows this practice to good effect.

director thereby assuring that the ombudsman's views on individual complaints and policy matters are not watered down during review by the line operation involved. In short, placing the ombudsman in the director's office is the most effective means available to provide the public meaningful access to the head of the agency when the public senses it has a "bureaucracy problem."[207]

F. The Ombudsman's Functions and Powers

Professor Hill uses six models to describe the ombudsman's orientation to the public: the impartial investigator, the enabler-facilitator, the broker-negotiator, the arbitrator, the advocate and the political activist.[208] He found very few ombudsmen who identified arbitration and none who identified advocacy or activism as either the primary or secondary function of their offices.[209] This study confirms that the investigation and resolution of complaints are the primary function ombudsmen perform for individual members of the public. And while advocacy of institutional changes to improve agency operations is a common function, it is carried on for the benefit of the public at large rather than at the behest of an individual citizen.

The ombudsman's authority, that is, the ability to command respect and attention for the solution proposed to deal with a particular grievance or class of grievances, turns to a large degree on the power the ombudsman has to conduct meaningful investigations and to report findings and make recommendations. The power to investigate on complaint, or on his own motion, any act of the department or agency, the ability to examine agency records and interview agency personnel, and to issue subpoenas to compel the attendance of witnesses and the production of documents deemed relevant to the subject of the investigation are among those commonly provided to legislative ombudsmen.[210] The executive ombudsmen covered in this study typically have less authority to compel the production of testimony or documents, but generally had authority to investigate complaints and, in some cases, to conduct investigations. For example, the AMC ombudsman's charter charges the ombudsman with the duty to "[c]onduct impartial reviews or evaluations of the effectiveness of AMC programs."[211]

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[207]The organization charts showing the location of the ombudsmen studied in this report are reproduced in Appendix D.

[208]Hill, Larry B., *infra*, fn. 199, p. 422.

[209]Id. at 423.

[210]*Annotated Model Ombudsman Statute*, *op. cit supra*, fn. 199, p. 164-165, Section 9.

[211]AMC Ombudsman Charter, *op.cit supra*, fn.81, Section IV. B. 1. g.

Within the limits set out in the legislation or order creating the ombudsman, the ombudsman should have discretion to accept or reject a particular complaint or type of complaint and to prescribe the form in which a complaint is made. There is a closely related issue going to the question of whether the ombudsmen should encourage use of the service or reserve it for difficult or intractable cases. While it is essential that the ombudsman not be seen as supplanting existing grievance handling mechanisms or replacing other normal processing procedures, it is equally important that the service not be underutilized or available, as a practical matter, only to lawyers and others who regularly deal with the agency.[212]

G. The Question of Confidentiality

1. When is it needed?

Should the complaint proceedings conducted by an ombudsman be subject to a privilege protecting the information provided from disclosure and the complainant from the possibility of retribution or embarrassment? The answer to that question would seem to vary according to the circumstances.

Some matters, like those involving whistle blower, are particularly sensitive. Unless a whistle blower may approach the ombudsman with his concerns without fear of jeopardy, it is likely that the employee will look elsewhere to unfold his or her suspicions (e.g., by a surreptitious call to the press) or simply hold back.[213]

By law, tax returns and data relating to entitlement to Social Security and veterans benefits are treated as confidential information. In these matters, the taxpayer or benefits recipient ordinarily authorizes the agency to deal with his or her representative. By the same token, the taxpayer ombudsman and the Problem Resolution Program staff are entitled to inquire into the matter when a request for assistance is received. But the ombudsman is not thereby entitled to disclose the matters in dispute to a third party, e.g., to litigants in a law suit involving the complainant or to the members or staff of a congressional

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[212]On this point, see the account of the GAO study of the IRS PRP program *supra*, p. 71.

[213]Of the ombudsmen studied for this report, only one, the AMC ombudsman, has explicit jurisdiction to deal with whistle blower complaints.

Personnel matters, which are beyond the scope of this report, are another category of complaint which requires confidential handling. An employee is not likely to raise a concern about unfair treatment unless he or she may do so in confidence. The ombudsman may use the power to investigate to aid in the determination that a complaint raised in confidence was not lodged out of spite or malice.

committee or to personnel from other government agencies. As pointed out above at footnote 194, the Alaska ombudsman's budget was cut at the urging of a state senator because the ombudsman refused to disclose information obtained in confidence. Such demands put the ombudsman on the spot. Unless the statute and common law clearly protect information obtained in confidence from disclosure, the neutrality and effectiveness of the ombudsman may be compromised.

The need for confidentiality is so important as to merit consideration. To an extent, it is based on some of the factors cited in Conference Recommendation 88-11.[214] Moreover, it stems from the ombudsman's need to gain and maintain the confidence of members of the public who approach the ombudsman on personal, sensitive or proprietary matters.[215]

Cases where the law requires (or permits) disclosure of sensitive information pose a difficult set of problems. Today, much of what the government does is subject to discovery by means of a Freedom of Information Act (FOIA) request, not to mention the Federal Rules of Evidence and the common law. It would defeat the purpose of an ombudsman if otherwise confidential information relating to a matter before the ombudsman were subject to disclosure by means of an FOIA request. The Conference dealt with a closely related issue in proposing a framework to protect the confidentiality of settlement negotiations conducted by mediators and other neutrals under federal agency auspices.[216] The Conference recommended that agencies explicitly state, as a matter of agency policy, that they will not seek to discover or force disclosure of a neutral's notes or other papers and information developed in the course of settlement negotiations, and that they undertake to interpret FOIA so as to avoid disclosure of settlement communications.[217]

Having said this, however, it appears that neither the complainant nor the ombudsman stand to gain anything by treating a complaint (or the particulars of the complaint) as secret or confidential in most cases. One of the

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[214]Philip Harter, in his authoritative 1988 report to the Conference, has clearly and concisely discussed the legal issues in protecting mediatior confidentiality. Rather than recite his discussion, the authors refer interested readers to the report.

[215]*Ombudsman Mary Rowe Discusses, "Should an Ombudsman Testify?,"* 3 BNA ADR REPORT, June 22, 1989, p. 222.

[216]*1988 Recommendations and Reports*, Administrative Conference of the United States; Recommendation 88-11: "Encouraging Settlements by Protecting Mediator Confidentiality," pp. 60-74; Philip J. Harter, "Neither Cop Nor Collection Agent: Encouraging Settlements by Protecting Mediator Confidentiality," Id. at 219.

[217]Recommendation 88-11, see fn. 221, *supra*. While neither the recommendation itself nor the legislation implementing it specifically include ombudsmen within the class of neutrals whose settlement efforts are protected, as a matter of logic and policy, there is no basis for excluding them.

ombudsman's primary means of obtaining redress where the investigation supports the claimant's position is the power to report--the ability to make public the fact that a mistake was made and not corrected--assumes that the ombudsman may elect to disclose his findings and recommendations in order to prevent similar mistakes (even if he is unable to resolve the particular dispute). Nor does there seem to be any reason to forbid preparing and disseminating statistical data as part of a report on the operations of the office or to make the case for changes to deal with recurring problems. Nor is it inappropriate for the ombudsman to publish anecdotal summaries of actual cases as a means of illustrating common problems and educating the public to the nature of the service provided as long as the identities of the persons involved are disclosed only with their consent. Indeed many ombudsmen publish annual reports which rely extensively on both statistical data and anecdotal material.[218]

2. How is confidentiality provided (and assured)?

Confidentiality may be provided by law, rule, or agreement. All three approaches are used, all three have something to be said for them, and all three have weaknesses.

a. BY STATUTE

At the time of the early American interest in the ombudsman movement Professor Gellhorn drafted a Model Ombudsman Statute to "establish the ombudsman system in American states and cities."[219] It does not deal directly with the question of confidentially, but does provide that neither the ombudsman nor any member of his staff "shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance . . ."[220] As an example, the Nebraska ombudsman statute, which appears to be based on the model, does not to deal directly with the confidentiality issue.[221] On the other hand, the law creating the ombudsman for the province of Ontario, Canada, provides that, except in trial for perjury,

"no statement made or answer given by . . . any . . . person in the course of any inquiry . . . before the Ombudsman is admissible in evidence against any person in any court . . ."[222]

The bill currently pending before Congress to authorize and encourage federal agencies to use mediation "and other techniques for the prompt and

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[218]See, e.g., the *Annual Reports for the Alaska State Ombudsman* for 1985-87.

[219]Annotated Model Ombudsman Statute, *op. cit supra*, fn. 202.

[220]Id., at p. 172.

[221]*Nebraska Public Counsel Act*, Section 81-8, 240 to 81-8,254, R.R.S. 1943.

[222]*The Ombudsman Act*, 1975, Section 20 (6). The text of the Ontario law is published as Appendix E in Maloney, Arthur, *Blueprint for the Office of Ombudsman in Ontario*, Ontario, 1979.

informal resolution of disputes," a bill that the Administrative Conference helped draft and which carries its imprimatur, protects the federal neutral from testifying or furnishing documents "concerning any matter relating to a dispute resolution proceeding."[223] While the bill does not cover ombudsmen per se, the context of the bill is broad enough to cover ombudsman proceedings. Moreover, the policy considerations are the same whether it is the ombudsman or some other neutral who is conducting the proceeding.

b. BY RULE

The Federal Rules of Evidence (FRE) may also be used, in appropriate circumstances, to support a claim of confidentiality. For example, FRE 408 provides that an offer of compromise "is not admissible to prove liability for or invalidity of the claim or its amount," and it also provides that "evidence of conduct or statements made in compromise negotiations is likewise not admissible."[224]

The holes in Rule 408's shield make it rather uncertain protection. If nothing else is done, ombudsman offices, or better yet their agencies, should adopt procedures to help ensure confidentiality in cases handled.

c. BY AGREEMENT

It is common for parties to a dispute to agree that the content of their settlement negotiations may not be used in a proceeding growing out of the dispute. While the agreement may be effective as between them, it is less clear that it would protect their discussions and document exchanges from discovery by persons not parties to or bound by the agreement.

V. PROPOSED RECOMMENDATIONS FOR OMBUDSMEN IN FEDERAL AGENCIES

The ombudsman is an institution frequently used in other countries, and increasingly used in this country, as the office of last resort to hear and attempt to solve citizen grievances. Typically, an ombudsman may investigate selected complaints and issue a nonbinding report, with recommendations if corrections are needed. In cases involving the departments and agencies of the government, an ombudsman may deal with complaints arising from

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[223] S.971, H.R. 2497, 101st Cong., 1st Sess. [cite section].

[224] Fed. R. Evid. 408. See, Note, *Protecting Confidentiality in Mediation*, 98 HARVARD L. REV. 441 (Dec. 1984) for discussion of the difficulty of assuring protection for the confidential aspects of mediation. The note points out that it is common to allow the collateral use of statements made in mediation to prove anything from agency to bias. The authors are indebted to Ms. Gitta Grank, Stanford University Law School Class of 1990, an intern at the Administrative Conference during the summer of 1989, for her assistance to us on this and many other aspects of this paper.

maladministration, abusive or indifferent treatment, tardiness, unresponsiveness and the like.[225] To succeed an ombudsman must have influence with, or the confidence of, higher ups, be independent, and be able to conduct meaningful investigations into a complaint without being thwarted by the bureaucracy whose work is being reviewed.

The experiences of several federal agencies show that an effective ombudsman can materially improve citizen satisfaction with the workings of the government, and, in the process, increase the disposition toward voluntary compliance and cooperation with the government, reduce the occasions for litigation, and provide agency decisionmakers with the information needed to identify and treat problem areas. Agencies that have employed an ombudsman with success in various programs include HHS, the IRS, and the Army Materiel Command.

The Conference urges the President and Congress to support the creation of an effective ombudsman in those federal departments and agencies with significant interaction with the public. In the meantime, agencies with these functions should create an office of ombudsman using existing personnel either on an agency-wide basis or to assist in the administration of particular programs.

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[225] An ombudsman may be appointed by the legislature or by the executive, with or without a fixed tenure, and with a variety of possible powers, missions, and available resources. While there is no universally accepted notion of what an ombudsman should do, the Model Ombudsman Statute states that the ombudsman "should address himself particularly to an administrative act that might be,

1. contrary to law or regulation;

2. unreasonable, unfair, oppressive, or inconsistent with the general course of an administrative agency's functioning;

3. mistaken in law or arbitrary in ascertainments of fact;

4. improper in motivation or based on irrelevant considerations;

5. unclear or inadequately explained when reasons should have been revealed;

6. inefficiently performed; or

7. otherwise objectionable. . . ."

RECOMMENDATIONS

A. Ombudsman Legislation.

(1) Congress should consider enacting legislation to establish an ombudsman in those federal agencies with major responsibilities involving significant interactions with the general public, including the following functions: licensing, tax collection, procurement, prison administration, immigration, regulation of public health or the environment, award and distribution of welfare, pension and disability benefits, subsidy and grant programs, oversight of public lands and parks, relations with American Indians and territories, the supervision or provision of health care, employment assistance and vocational training, educational and other assistance programs.

(2) The legislation should conform generally to the guidelines set forth in paragraph B, below, and should be prepared after consultation with the agencies, affected members of the public or their representatives, and the Administrative Conference.

B. Guidelines for Legislation.

(1) *Powers, duties.*

(a) The legislation should set out the functions to be performed by the ombudsman and confer the powers needed to enable the ombudsman to (i) hear complaints, (ii) conduct investigations, (iii) recommend solutions in individual cases and make recommendations for administrative and regulatory reform to deal with chronic problems and other systemic shortcomings, and (iv) speak for the public within the agency on procedures, forms, and similar issues affecting the nature and delivery of services.

(b) The legislation should require the ombudsman to submit periodic reports to the agency head and to the relevant committees of Congress summarizing the grievances considered, investigations completed, recommendations for action or improvement in agency operations, agency response, and any other matters the ombudsman believes should be brought to the attention of the public.

(2) *Qualifications, term.* The legislation should set forth the qualifications required, the tenure of office, the salary, safeguards protecting the independence and neutrality of the ombudsman, and means for assuring access to the ombudsman. The ombudsman should be a respected, senior person

known for his or her judgment, probity, and persuasiveness; and the ombudsman's salary should be commensurate with that of the agency general counsel. Congress should consider whether, in any particular agency or program, circumstances require that the ombudsman be appointed for a fixed term and removable only for cause.

(3) *Confidentiality.* The legislation should protect communications to or from the ombudsman in connection with any investigation (other than reports intended to be made public), the ombudsman's notes, memoranda and recollections, and documents provided to the ombudsman in confidence. The legislation should provide protection consistent with that recommended by Administrative Conference Recommendation 89-11, Encouraging Settlements by Protecting Mediator Confidentiality, 1 CFR §305.89-11.[226]

(4) *Judicial review, liability.* The legislation should provide that (i) no proceeding, report, or other action of the ombudsman shall be reviewable in any court, and (ii) no civil action shall lie against the ombudsman for any action, failure to act, or statement made, in discharging the ombudsman's responsibilities.

(5) *Access to agency records.* The legislation should authorize the ombudsman to request agency officials to provide information (in person or in writing) or records the ombudsman deems necessary for the discharge of its responsibilities; and should require that such information be supplied to the extent permitted by law.

C. Creation of Agency Ombudsmen.

(1) Until legislation is enacted, each federal agency that performs one or more of the functions identified as calling for the creation of an ombudsman, should consider setting up an agency-wide or program-specific ombudsman as a means of gaining experience with the concept and improving service to the public.

(2) The following agencies are among those which should consider using an ombudsman:

(a) *Social Security Administration, Office of Hearings and Appeals.* The Office of Hearings and Appeals should establish an ombudsman to assist claimants whose cases may have been mishandled or delayed in processing, and to make recommendations to the Associate Commissioner for Hearings and

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[226] As a practical matter, confidentiality guarantees in pending legislation--the *Administrative Dispute Resolution Act*, S. 971 and H.R. 2497 (101st Cong., 1st Sess.)--would likely protect communications in ombudsman proceedings.

Appeals with respect to ways to improve docket management and case handling procedures.

(b) *U.S. Customs Services.* Customs should set up an ombudsman to deal with public grievances arising out of backlogs, service gaps, damaged cargo, or other inefficient processing.

(c) *Immigration and Naturalization Service.* INS should establish an ombudsman to handle grievances from aliens, immigrants, or others in their dealings with immigration authorities.

(d) *Bureau of Prisons.* The Bureau of Prisons should establish an ombudsman to handle grievances on a last resort basis from prisoners and their families, as well as local and state officials in whose jurisdictions a federal prison happens to be located.

(e) *Environmental Protection Agency.* EPA, or any Cabinet-level department succeeding it, should combine the three existing ombudsmen for RCRA, hazardous waste matters, and small business affairs into a single agency-wide ombudsman with broad powers to respond effectively to complaints from state and local governments, businesses, and the public arising out of EPA's programs.

(f) *Department of Transportation.* Transportation should establish an ombudsman to deal with public grievances arising from government regulation of the airlines and other modes of transportation as may be appropriate.

(3) The guidelines in paragraph B should generally be followed in establishing an agency ombudsman.

(4) An agency with an ombudsman should explicitly indicate that as a matter of policy it will not seek to discover or otherwise force disclosure of an ombudsman's notes, memoranda or recollections or of documents provided to the ombudsman in confidence.

D. Procedural Issues.

(1) Before announcing a conclusion or recommendation that criticizes an agency or any person, the ombudsman should ordinarily consult with that agency or person.

(2) When publishing a report or opinion adverse to an agency or person, the ombudsman should ordinarily include the substance of any statement of the agency or official regarding the complaint or the ombudsman's report or recommendations.

(3) An agency with an ombudsman should take effective steps to ensure that persons who deal with the agency are aware of the existence, purpose, and availability of the ombudsman service. These steps could include active

campaigns to inform the public of the service through mailings to persons with whom the agency deals, press briefings and releases, posters in agency offices used by the public, printed and video materials, and the like.

APPENDIX A

OMBUDSMAN MODELS IN OTHER COUNTRIES

Sweden was the first country to establish a constitutional ombudsman in 1809, appointed by the legislature for a four-year term (and eligible for reappointment). Similar functions were previously performed by a "chancellor of justice," an official similar to an attorney general, who was an appointment of the King and still exists today. In fact, the term ombudsman comes from a Swedish word meaning "the people's representative." As soon as a complaint is filed with this ombudsman, it becomes part of the public record.[227] This position was also given the power to initiate prosecution of public officials, though it has rarely occurred.[228] Originally in Sweden, the ombudsman's activities were concerned with the courts and police, but with the growth in the bureaucracy in this century, the focus shifted. In 1915, a separate military ombudsman was created. In 1968, a third national ombudsman was established for the courts, police and prisons. In 1976, a fourth ombudsman was implemented to focus on administrative matters such as taxation and the execution of judgments. All four national ombudsman share office space and support staff, with one serving as the administrative head. An example of a case in which the Swedish ombudsman intervened involved a man who was incorrectly placed in a mental institution.[229]

Finland established its national ombudsman in 1919 when the country formed itself as a republic, ending over a century of domination by the Russian Empire. (Prior to that it had been under Swedish rule, and Finland therefore developed a similar political system.) Like the Swedish model, the Finnish ombudsman has the authority to monitor judicial decisions for fairness.[230] This ombudsman is also legislatively appointed for a four-year term. (Finland also has a chancellor of justice who is appointed by the president of the republic, but it is more powerful than the one in Sweden, and much more powerful than the Finnish ombudsman.) In the early 1930's, the ombudsman assumed jurisdiction over complaints from prisoners and the military from the chancellor of justice.

Norway adopted an ombudsman specifically for the armed services in 1952. In 1962, however, Norway broadened this appointment by creating a parliamentary ombudsman with a four-year term for all the bureaucracy. At

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[227] Zagoria, *The Ombudsman*, p. 69.

[228] Id., at p. 59.

[229] Rowat, *The Ombudsman Plan*, p. 7.

[230] *Public Ombuds Trade Notes*, ALTERNATIVES, New York: Center for Public Resources, Vol. 7 & No. 10, October 1989, p. 175.

the national level, Norway also has three executively appointed ombudsman for (1) consumers, (2) discrimination and equality issues, and (3) for children,[231] the newest one, established in 1981. The Norwegian ombudsman models give greater significance to the confidentiality of the ombudsman's investigations, and give the ombudsman less power to criticize the substance of official policy as opposed to its fairness.[232]

Denmark's federal ombudsman was first appointed in 1955 with a four-year term, and like Sweden's, is given the power to initiate prosecution of all public officials except judges. Three ministries each assign an official to work for the ombudsman for two years giving the ombudsman's office a greater diversity of expertise.[233] In one case where the Danish Tax Appeal Board was criticized in the press for its delayed operations, the ombudsman investigated its procedures and proposed changes for improvement.[234]

In 1962, **New Zealand** created a national ombudsman chosen by the governor-general after consultations with the majority and opposition political parties. The ombudsman serves for a five-year term. It has local branch offices and, in 1976, was given jurisdiction over cities. At that time, there were three national ombudsman with one serving as the head. Since 1980 there have been only two national ombudsman, one of whom deals specifically with municipalities. A typical ombudsman's case in this country involved a woman who became unemployed and complained that officials in the local office of the Labor Department caused her hardship by advising her incorrectly about her entitlement to unemployment benefits.[235]

Australia established its national ombudsman in 1977, with a seven-year term. In 1981, a deputy federal ombudsman for military affairs was created. In the same year, its powers were expanded to include the federal police, and in 1982, freedom of information complaints. All six of the states in this country also have their own ombudsman. A typical Australian case involved complaints about the technical service of the telephone system operated by the state telecommunications commission.[236]

Great Britain created a "parliamentary commissioner for administration," who acts much like an ombudsman, in 1967. Complaints must be brought to this ombudsman through sponsorship by a member of parliament. The commissioner, or ombudsman, is appointed by the Queen and can only by

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[231] Zagoria, *The Ombudsman*, 1988, pp. 80-84.

[232] Rowat, *The Ombudsman Plan*, 1985, pp. 30-31.

[233] Zagoria, *The Ombudsman*, 1988, p. 57.

[234] Rowat, *The Ombudsman Plan*, 1985, p. 33.

[235] Id., at p. 35.

[236] *Commonwealth Ombudsman & Defense Force Ombudsman Annual Reports: 1987-1988*, Australian Government Publishing Service, Canberra, 1988, p. 41.

removed by both houses of Parliament. In 1973, separate Health Service Commissioner ombudsmen were created for England, Wales, and Scotland. Since then, these posts have also been held by the parliamentary commissioner. In 1969, Northern Ireland set up a separate office of the "commissioner for complaints" as well as a "parliamentary ombudsman." Since 1971, however, the commissioner for complaints has also served as the parliamentary ombudsman. Because the British central government is much more responsible for local affairs than is the case in the other countries, this national ombudsman often deals with a broad range of issues. For example, the "parliamentary commissioner" often must deal with complaints about the building of prisons close to communities and other problems of prison administration.[237] England also recently created an ombudsman for the insurance industry.

Austria's national ombudsman was legislatively created in 1977. This office is made up of three "people's attorneys" who are elected by the Parliament from political nominations from each of the three political parties. They serve for six-year terms, rotate the chairman's position and are usually former members of the legislature. Each ombudsman is responsible for different administrative agencies; and they often act as a commission on major cases.

In 1966, the city of Tel Aviv/Jaffo established an "Office of Public Complaints." By 1971, there was such an interest to have a similar function at the national level that an amendment to **Israel**'s comptroller's law formalized the complaint handling function of this position by also naming a "public complaints commissioner." The current State Ombudsman is a former Supreme Court Justice. Similarly, a 1972 amendment provided for a military ombudsman appointed by the defense minister with the approval of the related defense committee of the legislature. In 1973, an Office for Public Complaints, or police ombudsman, was also created. In 1980, the police and prison officers' complaints commissioner was appointed and housed within the Ministry of the Interior with the approval of the related legislative committee. A recent case involving the state ombudsman dealt with a complaint that the police did not test a driver for drunkenness after he had caused a fatal collision.[238]

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[237]Ablard, Charles D., *The Parliamentary Commissioner - The Ombudsman for Parliament*, Occasional Paper #40, Edmonton, Alberta, Canada: THE INTERNATIONAL OMBUDSMAN INSTITUTE, June 1987, p. 4.

[238]Siegal-Itzkovich, Judy, *The Citizen Has A Gripe: The Ombudsman Received 5,000 Complaints Last Year of Mistreatment by the Authorities* (The Community), *The Jerusalem Post*-International Edition, February 11, 1989, p. 19.

Portugal created an ombudsman's office by decree in 1975. This position is appointed by the President of the Republic from a list submitted by the Prime Minister and the Minister of Justice. The 1976 constitution, however, provided for a "Provedor de Justia," elected by the legislature for a four-year term. This position has two additional responsibilities: (1) serving on a council which is concerned with the appointment and removal of judges, and (2) making recommendations on the constitutionality of laws and regulations.[239]

Spain has a national ombudsman, or "Defender of the People," authorized in a provision of its 1978 constitution; this is an appointment by the "Cortes," the Spanish Parliament, and is for a five-year term. Implementing legislation was enacted only in 1981. The Congress and the Senate appoint special committees which choose the candidates for the post, who is selected by the full Congress, with ratification by the Senate. The "Defender of the People" has authority to investigate all administrative activity, including that of ministers, and may refer matters to the constitutional court.[240]

In **France**, legislation to create a national ombudsman was introduced as far back as 1970 but it was not until late 1972 that the head of the government decided to appoint a "mediateur" for a six-year term. Complaints had to be forwarded by members of the legislature, and usually former legislators serve in the post. The mediateur receives no compensation. This scheme is very decentralized and uses representatives in each district in France. The mediateur makes proposals for administrative and legislative reform, and was instrumental in the adoption of legislation providing greater access to administrative documents.[241]

Some countries failed to set up national ombudsman but did establish state or regional level ombudsman. **India** attempted to legislate an ombudsman program twice in the early and late 1970's, but both attempts failed. Ombudsman do however exist in four of the states in that country. **Italy** had discussed creating an ombudsman at the national level, but currently only four regions have them. Legislation creating a federal ombudsman in **Switzerland** dates back to the early 1960's, but currently only one state in that country has an ombudsman.

Federal ombudsman proposals in the 1960's also occurred in **Greece, Hong Kong, Indonesia, Malaysia**, the **Netherlands, Ireland**, and **Singapore**, but none of these plans were adopted.[242]

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[239]Rowat, *The Ombudsman Plan*, 1985, p. 143.

[240]Id., at p. 150.

[241]Id., at p. 142.

[242]Frank, Bernard, *The Ombudsman & Human Rights*, ADMINISTRATIVE LAW REVIEW, Vol. 22, No. 3, April 1970, pp. 483-486.

During the 1960's, variations on the classic Scandinavian ombudsman model developed all around the globe. An ombudsman-like commission office was set up in **Tanzania**[243] and **Guyana** in 1966. Other countries with similar commission type ombudsman schemes include **Papua New Guinea, Nigeria,** and **Zambia**. The national ombudsman in **Fiji** is appointed by the governor-general with the consent of the prime minister and political party leaders for a four-year term. In **Mauritius**, the national ombudsman was established in 1967 and is appointed after consultations between the prime minister and leaders of the opposition. **Ghana, Jamaica, Trinidad & Tobago,** and the **Philippines** have also introduced national ombudsmen. The constitutions of **Bangladesh, Dominica**, the **Solomon Islands, Sri Lanka, St. Lucia,** and **Zimbabwe** make provisions for the establishment of an ombudsman as well. In some of these underdeveloped countries, communal tension often occur as a result of discrimination against a particular race or tribe. In such countries, the ombudsman provides an impartial source of redress for individuals and may promote justice for minority communities.[244]

Poland is the first eastern bloc country to appoint an ombudsman. There has been some recent discussion about creating a national ombudsman in **Argentina, Costa Rica,** and **Hungary**.[245]

Closer to home, **Canada** has special ombudsmen at the federal level for prisons, freedom of information cases and language problems. For example, the Commissioner of Official Languages acts as the ombudsman for complaints from citizens who feel their rights under the Official Languages Act, which requires bilingualism in the Parliament and federal government, have not been respected by a particular federal agency.[246] Also, nine of the ten provinces have legislatively created ombudsman, the first created in Alberta in 1967. A significant portion of complaints to the provincial ombudsmen involve housing issues, including damages caused to property by government programs such as highway construction.[247]

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[243]Ombudsman serve on either the Committee for the Enforcement of the Leadership Code or the Permanent Committee on Enquiry.

[244]Scott, Ian, "Introduction" (Chapter 17: *Ombudsman in Underdeveloped Countries*), in Caiden, Gerald E., Ed., INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: COUNTRY SURVEYS, Westport, CT: Greenwood Press, 1983, p. 311.

[245]*Public Ombuds Trade Notes*, CPR ALTERNATIVES, p. 175.

[246]Skuce, Robin, *The Commissioner of Official Languages*, (Chapter 2: "Canada"), Caiden, Gerald E., Ed., INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: COUNTRY SURVEYS, Westport, CT: Greenwood Press, 1983, pp. 35-36.

[247]Frank, Bernard, *Canada's Official Dispute Settlors*, Occasional Paper #14, Edmonton, Alberta, Canada: INTERNATIONAL OMBUDSMAN INSTITUTE, December 1981, p. 14.

APPENDIX B

FEDERAL OMBUDSMAN

Lewis J. Ashley

Department of Defense

Army Materiel Command

The Army Materiel Command's headquarters office has had an ombudsman for the last four years. This command provides materiel and related services to the Department of the Army, its other commands, and to other domestic and foreign agencies. This ombudsman handles mainly external complaints, but also deals with some internal agency matters. Typical disputes involve contractors who phone in, write, or visit alleging unfair procurement processes, and whistleblowers with allegations of legal violations resulting in waste, fraud and abuse. This ombudsman also does fact-finding, forms ad hoc task forces to do investigations, and makes recommendations.

Mark Lumer

Department of Defense

Army Materiel Command

Communications/Electronics Subcommand

In May of 1988, the U.S. Army Communications-Electronics Command at Fort Monmouth, NJ established a solicitation ombudsman. This command buys communications and electronics equipment for the Army. Its ombudsman resolves disputes over procurement bids and awards, post award claims, and Freedom of Information (FOIA) requests, as well as congressional inquiries. Unlike the classic ombudsman, this individual has authority to intervene and change bureaucratic decisions rather than merely serving an advisory or facilitation function.

Department of Defense

Department of the Navy

The commanding officer of each ship, station, or local command is authorized to appoint a family ombudsman who acts on behalf of military families with the commanding officer. Most are civilian wives who volunteer to help resolve personal problems of the families left behind in the home ports.

Philip M. Foisie

Department of Defense

"Stars & Stripes" newspaper

"Stars & Stripes" newspaper, published for U.S. military personnel stationed abroad, recently appointed an ombudsman to resolve censorship disputes. This position is housed in the Office of the Assistant Secretary of Defense for Public Affairs.

Department of Health & Human Services

Food & Drug Administration

The Food and Drug Administration of the Department of Health and Human Services recently proposed the establishment of an ombudsman in response to disclosures of problems with regulation of the generic drug industry. There will be one head ombudsman with a staff of nine spread around various field or branch offices. They will address questions of "fairness" in a variety of areas, including the generic drug area. (Currently, the FDA does not have its own inspector general to monitor agency cases of fraud, waste and abuse.)

Department of Health & Human Services Supported

State Long Term Care Ombudsman

Legislation for federal financial assistance to most state and regionally supported facilities for long-term care for older individuals (administered by HHS) mandated the establishment of an ombudsman program in 1978. The Federal Older Americans Act of 1978 amendments required the appointment of ombudsmen to protect nursing home occupants from abuse in institutions receiving federal income. By 1983, funds were available to establish ombudsman in most states, charged to investigate complaints, settle disputes,

monitor related legislation, regulation and policy, provide public information, and train program volunteers. The 1981 Amendments to the Older American Act broadened the mandate of the law to include board and care facilities as well.

Damon Holmes

Department of the Treasury

Internal Revenue Service

Taxpayer Ombudsman

An Assistant to the Commissioner of the Internal Revenue Service in the Department of the Treasury acts as the Taxpayer Ombudsman and administers its regional Problem Resolution Program (established in 1977). This federal ombudsman trains regional personnel in the handling of taxpayer complaints, but also performs the role of advocate for the taxpayer within the IRS.

Brian Gimmlet

Department of the Treasury

U. S. Secret Service

The U.S. Secret Service in the Department of the Treasury currently has two ombudsmen. They have been in place for two years and only operate in the uniformed division. The ombudsmen serve in a collateral duty position. One is a supervisor, as well as agent, who is involved in program and policy matters. The other ombudsman also serves as a lieutenant and has been with the organization for 19 years. The ombudsmen deal with internal employee problems of both a personel and professional nature. In the fall of 1989, the program expanded service-wide and now includes 9 ombudsmen.

Karen Brown

Environmental Protection Agency

Office of Small & Disadvantaged Business Utilization

Asbestos Ombudsman

The Environmental Protection Agency has an Ombudsman in its Office of Small and Disadvantaged Business Utilization (OSDBU). This program was created in the late 1970's to assist minority and small businesses in obtaining contracts with the EPA. The original ombudsman's office was established in 1982. Congress later mandated that EPA create an asbestos ombudsman and in April of 1988, this function was assumed by the Small Business Ombudsman's office.

The complaints are mainly in the area of regulatory compliance. This office operates a hot-line and offers technical assistance and referrals. Three engineers and an economist are currently on staff. The ombudsman often acts as a mediator between the small business community and EPA. This ombudsman also acts as an advocate by providing the small business perspective in the development of new agency regulations.

Robert Knox

Environmental Protection Agency

Resource Conservation & Recovery Act

Hazardous Waste Ombudsman

In 1984, the Resource Conservation and Recovery Act directed the Administrator of Environmental Protection Agency to establish an ombudsman office to resolve hazardous waste disputes under the Superfund program. The ombudsman's office was only established in May of 1984 and was supposed to function until November of 1986, but it is still in existence today. It mainly receives complaints from attorneys representing clients involved with EPA officials. The most common grievance is that the agency is slow in responding to inquiries concerning pending agency action or technical questions. The ombudsman acts as an intermediary between the public and the EPA on issues relating to hazardous waste, "community right to know" matters, underground storage, superfund and RCRA. As an agency insider, this ombudsman, on behalf of the public, brings attention to a matter, that might have been ignored or overlooked. This office is located in the Office of Solid Waste and Emergency Response.

Stillman K. Taylor, Jr.

Federal Deposit Insurance Corporation

Division of Federal Savings & Loan Insurance

The Office of Federal Savings and Loan Insurance (formerly the Federal Savings and Loan Insurance Corporation-FSLIC) which is now part of the Federal Deposit Insurance Corporation, insures the safety of savings in thrift and home financing institutions. In March 1988 FSLIC named an ombudsman, with a four-member staff, to deal with complaints from the public and provide information and referral services. This ombudsman serves as a mediator for thrift assistance agreement disputes. Due to increased numbers of thrift failures and the complexity of regulations, the Office of Communications needed relief from calls from attorneys, investors and brokers. This office receives inquiries from investors seeking information on buying assets, property management, participation loans, and receiverships. This office also does research for the agency and coordinates an orientation program for new employees. Intended to increase the agency's responsiveness to the public, the ombudsman's office normally responds to inquiries within a day and resolves most cases within a week.

Frank Swain

Small Business Administration

Since 1976, the Small Business Administration has been providing businessmen with an ombudsman, through its Chief Counsel for Advocacy, to represent the interests of small businesses before other federal agencies and in Congress when proposed policy changes may affect them. It also provides an "answer desk" to respond to inquiries from the public, usually small businesses with problems with the government.

This program has been facilitated by the passage of the Regulatory Flexibility Act which requires federal agencies to anticipate the effects of rules they promulgate on interested parties, especially smaller entities. The office of advocacy monitors whether federal agencies are complying with this mandate.

Robert Henry

U.S. Information Agency-Voice of America

Through its "Voice of America" program, the U.S. Information Agency provides international radio broadcasts of U.S. news and entertainment. Preliminary findings from a GAO audit suggested that existing channels of communication between labor and management were not always effective. An ombudsman was recommended to improve upon this by providing more neutral and confidential assistance. In 1988, this agency established such an internal ombudsman to resolve primarily managerial and employee grievances. This ombudsman facilitates the resolution of conflicts, makes recommendations, and seeks the director's intervention in rare cases.

INTERNATIONAL & QUASI-PUBLIC FEDERAL

Eugene Herbert

International Monetary Fund

The International Monetary Fund, made up of member donating countries similar to the U.N., has an ombudsman in its executive office in Washington, DC. This position has existed for ten years and handles primarily in-house employee grievances.

Bruce A. Quinn

Panama Canal Commission

The 1979 act which implemented the Panama Canal Treaty established a commission with an Ombudsman's Office. This offices provides services to employees of U.S. government agencies located in the former Canal Zone area. The commission ombudsman resolves jurisdictional disputes which have arisen out of the implementation of this treaty, primarily involving grievances from U.S. employees and their dependents. While sovereignty over the Canal passed from the U.S. to Panama, U.S. employees there are subject to U.S. laws and are immune from the jurisdiction of the government of the Republic of Panama. He or she resolves disputes as they relate to U.S. law but, if the case involves Panamanian law, the ombudsman must refer it to the appropriate bi-national committee established by the Treaty.

Ellen Spring

Pension Benefit Guarantee Corporation

The Pension Benefit Guarantee Corporation is a self-financing government corporation providing coverage for most private sector defined benefit pension plans. In February of 1989, it created a test program which established a half-time ombudsman position. This temporary position was designed to handle complaints from plan participants and to make recommendations on the utility of a permanent program. The plan participants' complaints are mostly about actions of PBGC employees, agency procedures, or policies which are perceived to be ineffective or which otherwise require some attention. Complaints also come from congressional offices, generally dealing with issues in the benefit payment area. This PBGC ombudsman position is only temporary and is also a collateral duty position in that the ombudsman also serves a policy analyst half of the time. She is housed in the office of, and is able to make recommendations directly to, the executive director, and in some

ways may be said to function as a special assistant to the executive director. The future status of this ombudsman program is uncertain.

Chandra Heilman

Smithsonian Institution

In the late 1970's, the Smithsonian Institution created an ombudsman position mainly to resolve museum employees' complaints. The initiative came from upper management as a result of the rapid growth of the size of the institution and the problems which resulted. This quasi-public organization is supported by private funding as well as by the federal government.

Vincent Riley

World Bank

The World Bank, the International Bank for Reconstruction and Development, is a quasi-public international organization funded in part by the U.S. federal government which assists in promoting economic advancement in developing nations. It has an in-house ombudsman who acts to resolve primarily internal personnel problems. This ombudsman has been with the agency for many years and this position is viewed as a preretirement step which allows for greater independence.