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OMBUDSMEN IN AMERICA: OFFICERS TO CRITICIZE ADMINISTRATIVE ACTION

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When a bureaucrat irritates you, or delays too long, or requires too much red tape, or denies what you want, you can quickly and easily get relief, if you are entitled to it, by merely writing to the Ombudsman. If the bureaucrat is wrong, the Ombudsman may publicly reprimand him. If the governmental system is out of gear, the Ombudsman may recommend that it be set right, and his view is likely to prevail. This is what happens in such places as Utopia and Scandinavia.¹ The institution of the Ombudsman works exceedingly well, especially in Denmark. Maybe the general idea is one that we Americans ought to explore.

During the twelve months I recently spent traveling around the world in quest of new ideas for solving problems about the administrative process, I encountered many ideas, large and small, and the one large one I most want to present for American consideration is the idea that lies behind the institution of the Ombudsman in the Scandinavian countries. The idea, coupled with American ingenuity to

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¹ Sweden has had an Ombudsman since 1809, Finland since 1919, Denmark since 1955, and Norway has such a system under active consideration. West Germany has the system for military affairs only. The longstanding Russian system of the Procurator, which survived the Russian revolution, has much in common with the system in the Scandinavian countries. The Russian Procurator, like the Swedish Ombudsman, supervises not only administrators but also the courts.

adapt it to our institutions, may have considerable potentiality for our various governments, federal, state, and local.

Accompanying this introductory article are two articles about the Ombudsman, one on the Swedish system² and one on the Danish.³ Furthermore, the Danish Ombudsman himself published a descriptive article in England in 1958 and another in 1961 in the *Wisconsin Law Review*.⁴ Other articles have appeared in English periodicals.⁵ The English Bar and the English public are relatively well informed about the Ombudsman.⁶ Professor Walter Gellhorn of Columbia University has provided leadership in American thinking about the potentialities of an Ombudsman in America.⁷

A DESCRIPTION OF THE OMBUDSMAN

The two articles accompanying this one fully describe both the Danish Ombudsman and the Swedish Ombudsman, and I shall neither repeat nor summarize any portion of those articles. Instead, I shall present my own summary and critique, allowing my selection and emphasis to rest upon my American background and interests. I shall draw not only from the accompanying articles and other literature but from my interviews in Copenhagen and Stockholm. My focus will be primarily on the Danish system, because I find it more provocative.

Any person who is displeased with action or inaction of any administrator or civil servant may complain to the Ombudsman, usually by means of an informal letter. The Danish Ombudsman receives about a thousand such complaints each year. About half are dismissed because they plainly lack merit. The other half are investigated, that is, they are sent to the administrative authority with a request for explanation and pertinent documents. In addition, the

² Jägerskiöld, *The Swedish Ombudsman*, 109 U. PA. L. REV. 1077 (1961).

³ Christensen, *The Danish Ombudsman*, 109 U. PA. L. REV. 1100 (1961).

⁴ Hurwitz, *The Danish Parliamentary Commissioner for Civil and Military Government Administration*, 1958 PUB. L. 236; Hurwitz, *Denmark's Ombudsman: The Parliamentary Commissioner for Civil and Military Government Administration*, 1961 WIS. L. REV. 169.

⁵ Blom-Cooper, *An Ombudsman in Britain?* 1960 PUB. L. 145; Hurwitz, *The Danish Ombudsman and His Office*, 63 THE LISTENER 835 (1960); Pedersen, *The Danish Parliamentary Commissioner in Action*, 1959 PUB. L. 115. See also CHAPMAN, *THE PROFESSION OF GOVERNMENT* ch. 12 (1959).

⁶ Professor H. W. R. Wade, then of Cambridge University, said in a television program in London in 1960: "I certainly think that the British public knows more about the Danish Ombudsman, at the moment, than it knows about our own Council on Tribunals." Hurwitz, *supra* note 5, at 837.

⁷ See Professor Gellhorn's testimony in *Hearings Pursuant to S. Res. 234 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. 116-35 (1960); Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, Colum. Alumni Bull., Spring 1961, pp. 18-31.

Ombudsman may interview the complainant, the civil servant or administrator, and others. The statute requires government officers to make full disclosure to the Ombudsman. In ten to fifteen per cent of the cases investigated, the Danish Ombudsman has made a criticism of administration or a recommendation for change.

The Ombudsman can act on his own motion without a complaint, and he has no duty to take any action with respect to any complaint. He may refuse to criticize the administrator or civil servant but, at the same time, he may make suggestions for the future. Sometimes as a result of investigating a complaint the Ombudsman decides to make a major study of a whole area or of a large problem involving many cases. Much of his most important work has developed in this way.

The Ombudsman may inquire into substance, procedure, delay, convenience, and even politeness. His criticisms go not merely to questions of legality but to all questions of good administration. What is good administration depends not merely upon statutes, regulations, precedents, and customs, but also upon the Ombudsman's opinion. Indeed, I think that one of the most vital elements of the system lies in the Ombudsman's creativeness. He studies problems of administration imaginatively. Just as courts build bodies of judge-made law, the accumulated criticisms and recommendations made by the Ombudsman become an authoritative body of Ombudsman-made law. A criticism of one administrator is likely to be known by and heeded by another administrator.

The Ombudsman has no power to change any administrative action. His only powers are to investigate, criticize, recommend, and publicize. His power rests heavily on his individual prestige. In Sweden, where the Ombudsman's office dates from 1809, the schools have long taught about the Ombudsman and both the public and civil servants have come to rely upon his functions. In Denmark Professor Stephan Hurwitz, the first and only Ombudsman, who took office in 1955 and was unanimously reelected by Parliament four years later, spent much of his time during his early years in office making more than one hundred public speeches, with much publicity. He thinks that widespread public knowledge of his function is essential. That he has achieved this goal is indicated by the fact that he sometimes receives complaints addressed in such ways as "The Professor of State," and postmen as well as others know who is meant by such an appellation.

Prestige plus publicity may provide a powerful sanction. The Danish press seems eager for any statement the Ombudsman cares to release and the public seems interested in what he says. Of course,

he does not publicize all that he does. Some of his most effective work may result from a quiet question to an administrator: "Would this be better?" Or he may go further: "Wouldn't this be better?" Or he might publish a statement: "This would be better." He might even say in public: "Anything but this seems to me inexcusable." For the worst governmental offenses, he has the power to institute prosecutions in the courts, but this power is kept in the background and is of small significance in comparison with his power of criticism.⁸ He draws his criticisms together in annual reports to Parliament, and he may make recommendations for legislation.

The Ombudsman must obviously avoid taking positions on questions of political opinion. Lack of confidence in his judgment would weaken or destroy the prestige on which his whole power depends. Even when the Ombudsman sees clearly what administrative changes are needed, he may move cautiously in order to avoid significant opposition. Being right is not enough. He must be both right and convincing. He can act successfully only when he keeps informed opinion with him. But he can still take strong positions. Because of his great prestige, he can and does lead public opinion on some issues.

Parliament can dismiss the Ombudsman at any time, and his term is only four years, subject to reelection. A member of Parliament may request the Ombudsman to investigate a case, just as he may ask questions of a minister about a case. But Parliament cannot interfere with the Ombudsman's treatment of individual cases. Parliament has a committee for liaison with the Ombudsman which invites the Ombudsman to meet with them.

Although availability of judicial review has no effect upon the Ombudsman's powers, a 1959 statute in Denmark provides that complaints may not be made to the Ombudsman about "decisions" that are subject to administrative appeal. But the 1959 restriction applies neither to complaints about the manner of treatment of a case nor to investigations which the Ombudsman initiates on his own motion.

The Ombudsman in Denmark is essentially a one-man institution, although he has a staff of ten, including five "jurists." Professor Hurwitz emphatically believes that an organization cannot succeed in the way that an individual can, for an organization cannot develop the same degree of public confidence. Although in visiting England Professor Hurwitz has interested the British public in his office, he has refrained from advocating the system for the British government because he does not know whether the one-man system, which he thinks essen-

⁸ The Danish Ombudsman may also recommend that free legal aid be granted to a complainant for an action against the state or against an officer.

tial, can be transferred from a nation of four and a half million people to one of fifty million.

SOME AMERICAN FUNDAMENTALS IN WORLD PERSPECTIVE

All over the world the growth of positive government has surged upward during the past quarter century or more, with a consequent multiplication of dangers from improper use of governmental power. The first line of protection everywhere lies in attempts to provide able and conscientious personnel striving for the highest quality of performance. If we could only achieve this, many of our other problems would be solved in whole or in part. But experience both in America and elsewhere shows that achievement in this respect is likely to be uneven and that the results are at best likely to be shot through with imperfection. The second line of defense is procedural safeguards. Our American achievement in the development and refinement of procedural safeguards is a great and significant one—probably by a wide margin the best in the world. Our weaknesses may be that we tend to push some safeguards much too far, that is, to overjudicialize, and we have neglected potential safeguards that are designed to assure effective and efficient administrative action, for our focus has been almost entirely upon safeguards against unfairness. For a third line of protection we rely heavily upon the principle of check. This is the system under which anyone who exercises power is subject to check by someone else. The principle of check accounts for administrative appeals, for judicial review of administrative action, and for an unsteady but sometimes meaningful review of administrative action by congressional committees. The principle of check also accounts for internal administrative arrangements of great consequence by which not only do superiors check subordinates but colleagues check colleagues on the same level and subordinates in some measure check superiors.

Our American development of the principle of check may be superior to that in most of the rest of the world, for we have a greater appreciation for the values of limited review. Many European countries, as well as Japan, have followed the broad outline of the French system, which fails to build principles of administrative procedure in the way the American courts do. For instance, if an applicant for a license in France alleges procedural unfairness, the *Conseil d'État* typically will decide whether he gets the license, the result being that no precedent is created on the procedural question. My belief is that the American system in its broad outline is superior in that procedural principles established through review in one case will normally protect

parties in the ninety-plus per cent of cases that are not reviewed. In France and in the many countries that copy the principal features of its system, the main reliance is upon a kind of cross between administrative and judicial review and not upon procedural safeguards in the initial administrative action.⁹

Even though, compared with the rest of the world, we are doing exceedingly well in protecting against improper governmental action, a good deal that is unwanted still seems to seep through our three major lines of protection. Perhaps an additional use of the principle of check is needed. If so, an Ombudsman, having the power to investigate, to criticize, to publicize, and to recommend, but having no power to take substantive action, can stop up some of the leaks. An Ombudsman can provide an additional line of protection against improper use of governmental power.

NEED FOR SUSTAINED STUDIES

Such an objective for an Ombudsman in Washington—providing an additional check against unfairness—would in my opinion be an altogether inadequate objective. The ingenuity that is needed relates not merely to protecting against occasional injustice but also to the challenging task of making governmental programs fully effective and at the same time avoiding unfairness. I deeply believe that effective government can be fair government, and that fair government can be effective government. Our objective should be not to concentrate either upon the one element or the other element; our objective should be to find ways and means of making the administrative process at one and the same time both effective and fair.

If we are to accomplish this objective, we must give much more attention to the problems of administrative effectiveness. Some of the current literature about the administrative process seems to assume the recent discovery of new problems about deficiencies in the administrative process. Yet we have no such problem now that we did not have ten and twenty and thirty years ago. A prediction in an article in 1949 was founded upon rather ordinary observation, not upon extraordinary insight: "Another easy prediction is that fear of administrative excesses will in some measure give way to concern for administrative deficiencies. Administrative inaction which unduly injures the public will some day be as grievous a fault as administrative

⁹ This observation is subject to many exceptions and qualifications, but I think it is sound as a statement which is limited to the broad outline of the system.

Such countries as Austria, Poland, and Spain have gone further in developing systems of procedural safeguards than have the great democracies of Western Europe.

action which unduly injures the regulated.”¹⁰ That prediction may be in process of coming true. I hope so. The article continues: “[A]n important attribute of the administrative process . . . deserves more attention. Administrative apathy is all the more insidious because of its silence. A defeat of legislative will through inaction usually harms only an inarticulate general public and is likely to pass unnoticed. Abuses of an affirmative character are less dangerous because they usually damage interests which are vocal or vociferous. Fear of bureaucracy has overemphasized excessive zeal and has underemphasized administrative apathy.”¹¹

Unless we can find some feasible alternative to the administrative process—and nowhere in the world has anyone’s imagination yet come even close to anything in that direction—we have no choice but to deal with administrative apathy and with the various other deficiencies of the administrative process that largely stem from administrative apathy. The talk in some circles about those who are either for or against the administrative process seems to me to be based upon profound misunderstanding. For instance, Professor Louis Jaffe writes that “many who a few years ago discovered the agencies as vehicles of social reconstruction now regard them as positive impediments.”¹² In the polemics of any controversial subject we usually have our extremists who indulge in all-or-nothing thinking, but not often does a leading scholar promote such thinking. Our choice is not between regarding “the agencies” as either angels or devils. The truth still is, as it has always been, that the administrative process is a tool that can be used for “social reconstruction” or as a positive impediment to social reconstruction. It is today used for both purposes, and for mixed purposes. The administrative process can be used and is used to go left and to go right, to go forward and to go back. It is “no more conservative or liberal than the elevator in the Senate Office Building. It is used to promote pro-business policies, anti-business policies, and policies having little or nothing to do with business. It has often been used as an instrument of law reform, but it is also used as a means of protecting vested interests.”¹³

The problem is not whether we shall have an administrative process but what we shall make of it. It can be molded in any direction, and different parts of it can be made to go in different directions

¹⁰ Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193, 194 (1949). See also DAVIS, *ADMINISTRATIVE LAW* 138 (1951).

¹¹ 63 HARV. L. REV. at 225 (1949).

¹² Jaffe, Book Review, 73 HARV. L. REV. 1638 (1960).

¹³ 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* 14 (1958).

at the same time. I have long believed that we need to give more attention to the problems of increasing the effectiveness of the administrative process. For instance, I wrote in 1953:

The area most in need of original research is the one that has been most neglected—the political science aspects of the regulatory process. The opportunities in this area are quite unusual, for continuing darkness covers some of the most fundamental problems. Although the lawyers have been working in this area rather intensively, their emphasis is upon the safeguarding of private rights. The need is for studies designed to provide an empirical basis for increasing administrative effectiveness in accomplishing the objectives of regulatory legislation. To what extent are legislative choices nullified by administrative failures? To what extent do the regulated groups control the regulators? To what extent, if at all, do regulatory agencies effectively represent an otherwise unprotected public interest? How can the regulatory process be made more successful—or less unsuccessful—in carrying out the will of the people's representatives?¹⁴

That is the central problem. The subsidiary problems that need sustained and systematic investigation seem truly infinite. I shall continue to quote 1953 words, partly to defeat the widespread misconception that these problems have been discovered during the last year or two and partly because the 1953 words express what I want to say in the present context:

What are the effects upon administrative policies of conducting general investigations of the broad problems that lie behind masses of small adjudications, as compared with the prevalent system of separately treating each problem in each adjudication? Are agencies often deficient in failing to make early use of formal rules to fill the gaps left in policies declared through adjudication? What are the potentialities of a greater interaction between rule making and adjudication, and of a broader and perhaps more democratic participation of affected parties by enlarging the role of policy making through rules and restricting the role of policy making through adjudication? . . .

What are the effects upon administrative policies of greater autonomy in professional staffs, increased subdelegation, more decentralization, heavier reliance on methods of informal supervision as compared with methods of formal adjudication and formal rule making, comprehensive and periodic clarification of enforcement or prosecution policies as against *ad hoc* development of enforcement or prosecution policies from case to case, confidential settlement of cases as compared with public reporting of

¹⁴ Davis, *Reflections of a Law Professor on Instruction and Research in Public Administration*, 47 AM. POL. SCI. REV. 728, 748-49 (1953).

all consent orders and all agreements on which consent orders rest?

What are the unrealized potentialities of administrative advisory opinions? Could the Federal Trade Commission, for example, increase its effectiveness by imitating the Securities and Exchange Commission's method of using advisory opinions, at least for a considerable portion of the Trade Commission's work? . . .

In what circumstances are lobbying objectives lost before legislative bodies but won before administrative bodies, and with what consequences? . . . Can and should the groups whose interests the legislation is designed to protect somehow be made more influential in the pull and haul of policy formulation? . . . What have been the specific effects of . . . independence or subordination [of agencies] upon administrative lobbying concerning particular issues? Is an independent agency more vulnerable or less vulnerable than an agency in an executive department to the pressures of the regulated groups? . . . What are the limits of regulatory policies which the regulated groups strongly oppose, when the regulatory policies have varying degrees of support by public opinion, by Congress, and by the President? . . .

What are the activities of individual congressmen, representing constituents or otherwise, in influencing administrative policies, what are the improprieties, what should be the limits, and what, if any, controls can be provided? What does experience show concerning use and misuse of the power of appropriation to control administrative policies? What are the processes by which regulatory policies are worked out through cooperative arrangements with congressional committees, with other parts of the executive branch, and with affected private interests, and what are the practical consequences?¹⁵

These are *samples* of unending questions on which we lack sufficient enlightenment. I am now inclined to add one more fundamental problem; it has been with us from an early time but awareness of it has sharpened during the past few years. This is the problem of how to strip down the use of trial-type hearings on some types of issues. We are discovering that an unlimited right of cross-examination is sometimes unduly cumbersome and unduly expensive (as in many FCC and CAB proceedings, for instance); yet we are properly unwilling to give up an unlimited right of cross-examination on some issues. My guess is that the ultimate solution will lie along the line of allowing unlimited trial on issues of adjudicative facts but normally using the method of argument, written or oral or both, and not trial, to resolve issues of legislative facts. Yet this much, even if it

¹⁵ *Id.* at 749-52. Various other similar questions are raised in the same article.

wins general agreement, is only a beginning, for in some circumstances trials may be convenient on issues of legislative facts, and at all events the problems of classification in concrete contexts may require special studies of considerable magnitude.¹⁶

Perhaps an Ombudsman in Washington, with a continuing, long-term assignment, could bring to bear upon problems of increasing administrative effectiveness some sustained inventiveness and some sustained pressures. Continuing inquiry at the highest intellectual level is needed not only on the various questions that Dean Landis has tackled so far, but also on even more fundamental aspects of the administrative process.

OMBUDSMEN, EXISTING AND PROPOSED, IN AMERICA

The Nordic countries have no monopoly on thinking about Ombudsmen. Quite independently and on our own motion we Americans have come up with numerous constructive ideas about official critics of administrative action. We now have in Washington various arrangements having something in common with the Ombudsman, and various other arrangements have been proposed. The following list of a dozen items, chronologically arranged, is not exhaustive.

(1) The Attorney General's Committee on Administrative Procedure, reporting in 1941, recommended creation of an Office of Federal Administrative Procedure "to examine critically the procedures and practices of the agencies which may bear strengthening or standardizing, to receive suggestions and criticisms from all sources, and to collect and collate information concerning administrative practice and procedure."¹⁷ The proposal was not adopted.

¹⁶ Professor Nathanson, in a thoughtful and valuable book review, has recently written that the distinction between adjudicative and legislative facts "in actual application . . . is as elusive as all the other magic keys which have been offered for the solution of the right to hearing problem." Nathanson, *Book Review*, 70 *YALE L.J.* 1210, 1211 (1961). He then gives an illustration showing that the distinction is an unhelpful one. I agree that the distinction is often elusive in the borderland, and I agree that in his illustration the distinction is unhelpful. But every distinction we make, whether legal or nonlegal, creates problems in the borderland. The distinction between night and day is a useful one, even though Professor Nathanson could show that it is both elusive and unhelpful by focusing exclusively on a problem of classifying a one-minute period during the twilight or the dawn. The distinction between adjudicative and legislative facts has its noons and its midnights as well as its dawns and twilights, even though Professor Nathanson does not mention them.

Possibly forty per cent of the facts that tribunals use are rather clearly adjudicative and possibly forty per cent are rather clearly legislative. This leaves possibly twenty per cent that are difficult or sometimes impossible to classify. I think that either a long period of case-to-case adjudication or some extended research can increase the eighty and reduce the twenty, and I favor the research.

¹⁷ *FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE* 123 (1941).

(2) Reporting in 1942 to the Governor of New York, Commissioner Robert M. Benjamin recommended establishment in the state's executive department of a Division of Administrative Procedure, to "continue permanently an objective and detailed examination and study of quasi-judicial and quasi-legislative procedures and of problems of judicial review," and to exercise other related powers, including the power to "receive from the public complaints and suggestions with respect to procedures that are considered objectionable or subject to improvement."¹⁸ Commissioner Benjamin convincingly demonstrated that "the problems of administrative law are not to be solved at one stroke."¹⁹

(3) The first Hoover Commission's Task Force on Regulatory Commissions recommended: "To improve administration of the commissions, a permanent Office of Administrative Procedure should be created in the Executive Office of the President to study and report on the organization and operation of the administrative agencies. Such an office would call attention to deficiencies and propose corrective measures but should have no authority to order changes."²⁰ The Task Force said nothing of a function of receiving complaints concerning administrative action in specific cases, limiting itself to the proposal "that such an office should analyze organization, procedure, and methods."²¹

(4) The first Hoover Commission, instead of adopting its Task Force's recommendation, recommended "that the Administrative Management Division of the Office of the Budget should, with the aid of carefully selected legal consultants, suggest ways and means to improve and thereby reduce the cost of disposing of business before administrative agencies."²² The Commission added: "Administrative justice today unfortunately is not characterized by economy, simplicity, and dispatch. It remains, however, a necessity in our complex economic system."²³ The Commission made no mention of the possibility of receiving complaints from private parties.

¹⁸ 1 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 18 (1942).

¹⁹ *Id.* at 19.

²⁰ U.S. COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON REGULATORY COMMISSIONS, app. N at ix (1949).

²¹ *Id.* at 35.

²² U.S. COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 436 (1949).

²³ *Ibid.*

(5) The President's Conference on Administrative Procedure, reporting in 1953, recommended to the President the establishment of an Office of Administrative Procedure in the Department of Justice to "carry on continuous studies of the adequacy of the procedures by which Federal agencies determine the rights, duties, and privileges of persons" and to "collect and publish facts and statistics concerning the procedures of the agencies."²⁴ No mention was made of the possibility of receiving complaints as the Ombudsman does. The proposal was adopted in 1957.

(6) In 1956 the American Bar Association sponsored a measure to create a Congressional Committee on Administrative Procedure and Practice. A House Resolution was introduced, which provided for studying not merely procedures and practices of agencies but also "complaints concerning abuses of administrative authority and the exercise of unusual and unexpected powers and the need for legislative standards to limit the exercise of administrative discretion in areas of delegated power" ²⁵ This proposal has a good deal in common with the assignment of the Ombudsman. The Bar Association sponsor of the measure said that it "would afford the aggrieved citizens a continuing opportunity, in an orderly way, to bring his [*sic*] complaints concerning abuse of administrative authority to the attention of Congress. The few complaints which now reach Congress are scattered throughout the entire membership of the House and Senate and seldom does an expert group, schooled in the complex problems of the administrative process, have an opportunity to analyze the complaints and report on the need for legislative relief."²⁶ The resolution was not adopted.

(7) On February 5, 1957, the House of Representatives adopted a resolution authorizing the Committee on Interstate and Foreign Commerce to investigate "administration and enforcement by departments and agencies of the Government of provisions of law relating

²⁴ REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE 3 (1953).

²⁵ The resolution is printed in *Hearings on H. Res. 462 Before a Special Subcommittee of the House Committee on Rules*, 84th Cong., 2d Sess. 1 (1956).

²⁶ *Id.* at 7-8, statement by Rufus G. Poole, chairman of the section of administrative law of the American Bar Association.

My own opinion is that the resolution was properly rejected. I think we should expect congressional committees to do their own supervising of administration in their own way, which is characteristically spotty. To achieve even and systematic investigation of complaints in specific cases, a special office or officer in the executive branch of the government should be created.

Compare Senate Comm. on the Judiciary, *Report of the Subcommittee on Administrative Practice and Procedure*, S. Rep. No. 168, 86th Cong., 2d Sess. 5 (1961): "The Congress in its workings is too compartmentalized, too busy, and too ponderous to act as nursemaid and helpmate to the agencies."

to subjects which are within the jurisdiction of such committee.”²⁷ The Speaker of the House said that the resolution authorized the committee “to go into the administration of each and every one of these laws to see whether or not the law as we intended it is being carried out or whether a great many of these laws are being repealed or revamped by those who administer them,”²⁸ and the chairman of the committee said that a special subcommittee would be established.²⁹ This was the origin of the Subcommittee on Legislative Oversight, which has been extremely active on problems of the administrative process. No special mention was made of receiving complaints from aggrieved parties.

(8) On February 6, 1957, the Attorney General created in the Office of Legal Counsel of the Department of Justice an Office of Administrative Procedure, to make studies of administrative procedures, to develop so far as practicable uniform rules of practice and procedure, to collect and publish facts and statistics, and to assist in the improvement of procedures. The three annual reports show that the Office has emphasized the collection of statistics.³⁰ It does not hold itself out as an office to which an aggrieved party may complain of bureaucratic abuses or failures.

(9) During 1959 the Senate adopted a resolution authorizing the Committee on the Judiciary or its subcommittee “to make a full and complete study and investigation of administrative practice and procedure within the departments and agencies of the United States in the exercise of their rulemaking, licensing, and adjudicatory functions”³¹ A Subcommittee on Administrative Practice and Procedure was then created, but it has made no special arrangement for receiving complaints. It made an excellent report in 1961.³²

(10) In his Report on Regulatory Agencies to the President-Elect in December 1960, James M. Landis recommended creation within

²⁷ H.R. Res. 99, 85th Cong., 1st Sess., 103 CONG. REC. 1555 (1957).

²⁸ 103 CONG. REC. 1556 (1957) (remarks of Speaker Rayburn).

²⁹ *Id.* (remarks of Congressman Harris).

³⁰ See also the informative statement by John F. Cushman, the second Director of the Office, in *Hearings on Title I of S. 600 and S. 2374 Before a Subcommittee of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. 211-35 (1959).

Within the limits of its structural framework, the Office of Administrative Procedure has probably done a competent job. But it is a distinctly subordinate establishment; it is not qualified either to criticize cabinet officers and other important administrators or to make studies of fundamental problems of administrative effectiveness and fairness. It is a good example of what an Ombudsman in Washington should *not* be.

³¹ The resolution is printed in *Hearings*, *supra* note 7, at 2.

³² See *Report*, *supra* note 26.

the Executive Office of the President of "an Office for the Oversight of Regulatory Agencies which will assist the President in discharging his responsibility of assuring the efficient execution of those laws that these agencies administer."³³ This recommendation has not been adopted, but the President said at a press conference on February 8, 1961: "I have asked Mr. Landis to come to the White House, not to fill such an office, of course, which is not established, but merely to work with the White House and with the interested members of Congress who are concerned about improving our regulatory procedures."³⁴ No mention has been made of receiving complaints from the public.

(11) On April 13, 1961, the President established the Administrative Conference of the United States, composed of a Council of eleven members and a general membership of not less than fifty. The purpose is "to assist . . . in improving existing administrative procedures. To this end the Conference shall conduct studies"³⁵ Nothing is said about receiving complaints from aggrieved parties or from the public. The Conference is temporary; its final report is to be made not later than December 31, 1962.³⁶

(12) The Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure in 1961 recommended establishment of an Office of Administration and Reorganization in the White House, which "would be charged with the compilation of statistics, the task of investigating trouble spots in the administrative field and of reporting to the President the causes of the trouble, the furnishing of management consultant services to the agencies, and with preparing reorganization plans for the more effective discharge of the public business."³⁷

Most of the dozen examples are vague or uncertain about the important question whether the particular proposed authority should receive complaints from aggrieved parties about specific cases. This seems to have been intended in some and perhaps in most instances but it is made explicit in only two or three. An assignment to study administrative procedure with an incidental consideration of complaints about specific cases differs quite significantly from an assignment like that of the Danish Ombudsman, which is to receive complaints, to

³³ LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, 86th Cong., 2d Sess. 86 (Comm. on the Judiciary Print 1960).

³⁴ N.Y. Times, Feb. 9, 1961, p. 18, col. 3.

³⁵ Exec. Order No. 10934, 26 Fed. Reg. 3232 (1961).

³⁶ *Ibid.*

³⁷ *Report*, *supra* note 26, at 6.

criticize administrative action in specific cases, and to study administrative procedure problems that grow out of investigation of specific complaints. Perhaps what is needed is a single authority with both kinds of assignments, and with interaction between the two.

THE BRITISH COUNCIL ON TRIBUNALS

In 1958 the British Parliament enacted the Tribunals and Inquiries Act,³⁸ which carried out nearly all the recommendations made by the Franks Committee in 1957, including the creation of a permanent Council on Tribunals to review the working of more than two thousand tribunals and to consider and report on administrative procedures involving statutory inquiries by or on behalf of a Minister.³⁹ (An "inquiry" differs from a "hearing" in that any interested person may participate.) In its first report, the Council says:

There appears still to be a good deal of misunderstanding and ignorance on the part of the general public about our functions and duties. . . . Nevertheless, we do receive amidst much that is irrelevant some useful comments and complaints on matters which come within our purview. These we investigate by visit to the tribunal concerned or by interviewing the complainant or by other suitable methods, and where necessary we take up the matter with the appropriate Department. . . . [T]he Council was established primarily in the interests of the public and we cannot render fully effective service to the public until they become more aware of our existence and of the scope of and the limitations upon our activities. . . . We are commonly described as "watch-dogs" for the public and we must look to them in large measure to inform us of matters requiring to be watched.⁴⁰

Professor Hurwitz, the Danish Ombudsman, has said on London television: "I find that you have in the Council on Tribunals something of a germ that could develop into a system of a similar kind to the Danish Ombudsman institution."⁴¹

My criticism of the Council on Tribunals, after talking with some of its members, including both of its full-time representatives, the chairman and the secretary, stems from a difference in British and

³⁸ 6 & 7 Eliz. 2, c. 66.

³⁹ See Wade, *The Council on Tribunals*, 1960 PUB. L. 351, 365: "There is nothing in the constitution or practice of the Council on Tribunals to prevent it from considering complaints from individuals. . . . The British public . . . has taken a strong fancy to the Scandinavian office of Ombudsman . . . [L]ittle notice has been paid to the fact that Parliament itself passed an Act in 1958 which sets up an institution covering a considerable part of the Ombudsman's ground." See also Wade, *Recent Trends in the Administrative Process in England*, 13 AD. L. REV. 27 (1960).

⁴⁰ FIRST REPORT OF THE COUNCIL ON TRIBUNALS 5, 25 (1959).

⁴¹ Hurwitz, *supra* note 5, at 837.

American amenities. In getting information about administrative practices, the Council limits itself to interviews with top officers. This is said to be the British way. But I continue to be limited by my American attitude that one who wants to know about an army must talk not only with the generals but with the lieutenants and even the privates. Subordinates in Washington agencies usually know a great deal that their top bosses don't know, and what the subordinates understand sometimes goes to the essence. The chairman of the Council on Tribunals told me that he could not have an assistant talk with subordinates in a ministry, for that would involve going behind the back of the Minister.

A PLAN FOR AN OMBUDSMAN IN WASHINGTON

A permanent Office of Administrative Procedure and Organization should be created in the Executive Office of the President. This is essentially what has been already recommended by the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure and by Dean Landis in his Report to the President-Elect.⁴² Such an Office, I think, should have the two major assignments of (1) making continuing studies of ways to strengthen the combined effectiveness and fairness of the administrative process and (2) receiving and investigating complaints about administrative action, not merely that of regulatory agencies.⁴³ Indeed, I think the need for investigation of specific complaints is greater in other branches of administration than it is in the regulatory agencies; the need is greatest in that part of administration which is unprotected either by procedural safeguards or by judicial review. The idea that a party affected by administrative action may always have at least one of three kinds of protection is an attractive one—(1) procedural safeguards of the kind required by the Administrative Procedure Act for adjudication and for rulemaking, (2) opportunity for judicial review, or (3) opportunity for independent check by an Office of Administrative Procedure and Organization. The Office should have discretionary power to select the complaints it will investigate, and it probably should at first limit itself to complaints pertaining to administration unprotected either by procedural safeguards or by judicial review. The broad studies that are most urgent probably pertain more to regulatory agencies than to other administration, and in the present

⁴² My change in name of the Office is deliberate. The Subcommittee suggested an "Office of Administration and Reorganization." Dean Landis suggested an "Office for the Oversight of Regulatory Agencies."

⁴³ Dean Landis's proposal is limited to regulatory agencies; I believe the Office should not be so limited.

climate of opinion probably pertain more to effectiveness (accomplishment of governmental objectives, delay, cumbersomeness, expense) than to fairness.

In my opinion, the prestige and status of the Director of the Office are of prime importance; the Director's salary should be no less than that of a cabinet officer. Furthermore, if the job is to be done properly, the Office must have a sufficient budget to allow the Director's principal assistants to operate at a very high professional level. The power of the Office to receive and investigate complaints in specific cases should be widely publicized.

The Director should be appointed by the President with the advice and consent of the Senate, and he should serve at the will of the President.⁴⁴ He should have statutory power to compel agencies to make disclosures to him. The powers of his office should be limited to investigating, criticizing, publicizing, and recommending.

STATE AND LOCAL POTENTIALITIES

The system of the Ombudsman as it operates in Denmark, with emphasis upon investigation of complaints in specific cases, is more readily transferable to our state and local governments than to our federal government. A state government or a city government could feasibly have a system based on the work of one man with assistants, as distinguished from the rather sizable institution that would be necessary in Washington. A state or a city Ombudsman could easily

⁴⁴ This feature of my proposal may meet opposition from those who emphasize the importance of independence of regulatory agencies from presidential interference. Independence, of course, is a matter of degree. Even if the present degree of independence of most of our regulatory agencies in performing judicial functions should be preserved, as I think it should be, still the President, via the Director of the Office of Administrative Procedure and Organization, may appropriately control, to the extent he finds desirable, the recommendations concerning procedure and organization, even if the recommendations grow out of criticisms of specific decisions. The Director, of course, will carefully exclude himself from problems of substantive policy.

A document that may be destined to become of central importance is a report by Professor Emmette S. Redford, entitled "The President and the Regulatory Commissions," made on behalf of the President's Advisory Committee on Government Organization, dated Nov. 17, 1960. On the basis of some especially careful thinking, the report recommends a middle course: that the President should have no power to remove a commissioner without cause but that a cause for removal should be failure to follow policy directives of Congress or of the President; that a statute should provide for policy guidance by the President to a regulatory agency; and that delegation to the President of power to approve or disapprove specific regulatory decisions affecting rights of particular parties should be avoided.

The present administration is hampered in new thinking about the degree of independence of regulatory agencies by a plank in the Democratic platform of 1960: "The Democratic Party condemns the usurpation by the Executive of the powers and functions of any of the independent agencies and pledges the restoration of the independence of such agencies and the protection of their integrity of action." 16 CONG. QUARTERLY 786 (1960). Possibly this explains the President's partial rejection of Mr. Landis's recommendations that moved in the direction of cutting into the independence of agencies.

combine the two major functions of investigating complaints and making continuing studies. Indeed, the potentialities of Ombudsmen in state and local governments seem to me very considerable.

One major failure of our whole system of government in the United States is the continued lack of correction of serious abuses by city police. The Supreme Court of the United States in recent times has been aggressively attempting to check the abuses, but its principal weapon is an awkward one—reversal of convictions influenced by illegally obtained evidence, even when the defendant is obviously guilty—and we are still sorely afflicted with such abuses as illegal arrests, the third degree, coerced confessions, police roundups, illegal searches, and other invasions of privacy. Perhaps the basic reason that such police abuses continue is absence of sufficient political will to stop them. But at least in some communities a latent political will may await the needed combination of leadership and practical program.

If political leaders in any city are searching for a practical program to eliminate or reduce police abuses, I think they may find the idea of the Ombudsman exceedingly attractive. The essentials are very simple: The Ombudsman should be a man of highest prestige and dignity, his power should be limited to investigating and criticizing, he should have full power to investigate complaints from private citizens and make known his criticisms, and his work should be highly publicized so that ordinary citizens who have complaints will know where and how to make them. If a city Ombudsman investigates particular police abuses and publishes his findings, then the determination of what to do will respond to public opinion. The problems are precisely of the kind on which an informed public can be reasonably competent. Over a period of time the democratic will, informed by reliable factfinding, would determine what police methods should be allowed or prohibited.

In trying to inform myself on police abuses, I have discovered that the idea just expressed is not a new one and that it is as much American as it is Scandinavian. In the foreword of a 1931 book entitled *Our Lawless Police*, Professor Zechariah Chafee of the Harvard Law School suggested that "there should be in each community an untrammelled body, not subject to political control, to which complaints of brutality and other official lawlessness can be brought, and by which such complaints will be energetically and fearlessly investigated" ⁴⁵ Several American cities already have independent Police Review Boards to receive and investigate complaints about police behavior.

⁴⁵ HOPKINS, *OUR LAWLESS POLICE* xii (1931).

OVERALL APPRAISAL

The fundamental idea behind the institution of the Ombudsman seems to me thoroughly sound. That idea is that governmental processes can be improved significantly through continuing criticism by an officer who focuses on problems of administrative action but who is not involved in making the substantive decisions and who is not limited to one field of administration. The idea rests heavily upon the cardinal principle of check which has played such an important role in the historical development of protections against unfair governmental action. The check is all the more effective because it is made by an officer with a different focus from that of the administrator whose action is criticized, and by one who has a much broader perspective. The check can be aimed not merely at unfairness but also at inefficiency; an Ombudsman can protect against procedure which is excessively cumbersome, as neither the parties nor the courts can ordinarily do. An Ombudsman can provide a check against unfairness not merely in adjudication and rule making but also in ordinary administration, in prosecuting, in supervising, and in informal dealing. An Ombudsman can prod agencies to give attention to underlying policies, not merely to decide each case as it arises; he can push an agency toward clarifying vague statutory standards through earlier development of agency standards or through use of a rulemaking power to round out and fill gaps in law made by case-to-case adjudication. An Ombudsman can protect parties against undue delay; he can dig into the various causes of delay, he can prod and publicize, and he can make recommendations to the legislative body, including recommendations about appropriations and administrative organization. An Ombudsman can learn from one agency and can make that learning available to another agency; agencies without this kind of outside help characteristically fall into ruts of their own making and seldom think to inquire how the same jobs are done elsewhere in the same government. An Ombudsman can combine the two major tasks of investigating complaints in specific cases and making sustained inquiries into possible ways to strengthen the administrative process; these two tasks belong together, for they interact on each other.

Neither codes of uniform administrative procedure nor laws prescribing minimum procedural safeguards can accomplish the single objective of devising better protections against unfairness and at the same time increasing the effectiveness of the administrative process. What is needed are sustained, continuing inquiries, embracing all kinds of governmental processes in all the myriad agencies. No one should dissent from Dean Landis's assertion: "No single mind and no group

of minds can in any short period of time grapple with all the complexities of administrative procedure and bring forth a reasonably definitive code. This is a problem which has to be tackled piece by piece and year by year by men who have a continuing concern with its ever-changing phases."⁴⁶

The basic idea of the Ombudsman is exceedingly attractive. Even though Americans have not yet carried the idea as far as the Scandinavians have, at least a dozen American groups, contemplating the fundamentals of our American arrangements, have independently come up with the essential idea of the Ombudsman or something resembling it. American ingenuity can adapt this basic idea to our institutions and can develop it further.

⁴⁶ LANDIS, *op. cit. supra* note 33, at 16.