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# Ombudsmen and Others and When Americans Complain

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**Ombudsmen and Others.** By WALTER GELLHORN. Cambridge: Harvard University Press. 1966. Pp. xvi, 448. $6.95.

**When Americans Complain.** By WALTER GELLHORN. Cambridge: Harvard University Press. 1966. Pp. xii, 239. $3.95.

"Governmental activities nowadays touch so many people in so many ways that bruises and scratches are inevitable. Reducing the occurrence and gravity of wounds is socially desirable."[1] With this as his concern in *When Americans Complain*, Professor Walter Gellhorn proceeds to examine the manner in which these "bruises and scratches" are dealt with at all levels of government in the United States. The companion volume, *Ombudsmen and Others*, is a description and evaluation of the use of external, independent critics of governmental administration in nine countries.

Though Professor Gellhorn clearly favors experimentation with some variety of "watchdog" for citizen's rights, he advances cautiously and respectfully in his critical assessment of administrative processes in the United States. "In general, American administrative adjudication and rulemaking are attended by the world's most fully elaborated procedural protections against ill-informed exercises of official judgment."[2] Administrative decision-making may be subjected to scrutiny in three ways: (*1*) by judicial review; (*2*) by the intercession of a third party; and (*3*) by appeal to a superior decision-maker within the administrative structure. While acknowledging the frequent effectiveness of each of these alternatives, Professor Gellhorn is quick to point to their frequent ineffectiveness.

Several shortcomings are noted in the procedure for judicial control of administrative decisions. It is a costly, burdensome, and slow method, particularly in regard to relatively minor disputes. In many instances, the irritants with which Professor Gellhorn is concerned do not entail a "case or controversy," so that jurisdictional problems would often preclude review. Furthermore, in some instances an individual may have no legally cognizable right, despite the fact that the conduct of the official is undesirable.

> Early morning searches of the homes of female "home relief clients" provide a glaring example. Investigators' demands for entry into impoverished homes have been coupled with threats to terminate relief payments if entry be barred. The substantive theories behind the searches may be sustainable: A male who shares the delights of a lady's bed may perhaps have to share the burdens of paying for it as well; or the presence of too many unsanctified daddies in mommy's arms may suggest that children are being raised in an unwholesome environment. Even if these propositions be sound, atrocious means of giving them effect are unjustifiable—though very possibly they are beyond the reach of judicial review.[3]

Even assuming that a legally protected right has been invaded, it is unlikely that such a welfare recipient will seek legal redress. Finally, asks Professor Gellhorn, even if there is a justiciable dispute, is it not undesirable that the courts constitute the only recourse available to a party aggrieved by an administrative decision? This is particularly unfortunate when the conflict

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[1] Gellhorn, When Americans Complain 1 (1966).
[2] Id. at 212.
[3] Id. at 28-29.

between citizen and official does not involve a substantial evidentiary dispute: a school child is expelled for refusing to salute the flag for religious reasons; a college instructor is discharged for failing to answer a question from a legislative committee. "The ultimately favorable outcome of those cases cannot obscure the fact that an extremely heavy burden had to be borne before protection was procured."[4]

The second alternative open to an aggrieved party is to solicit the assistance of a third party to intervene in his behalf. Professor Gellhorn devotes a considerable portion of his book to a study of the "case work" done by members of Congress and for several reasons finds it generally to be an undesirable method of handling problems. First, the handling of private disputes between constituents and governmental authorities has grown to absorb such a large portion of the average Congressman's time and energy that he is not able adequately to discharge his primary function as law-maker.[5] Second, the reason for which a Congressman chooses to pursue a cause for a constituent and the manner in which he goes about it may or may not coincide with the public interest. Satisfying the complainant and rendering justice are not necessarily the same thing, and the former is doubtlessly the prime concern of the legislator. Observes Professor Gellhorn:

> Bending an administrator's position to suit a constituent-complainant may ignore larger values—values which deserve to be (but are not in all cases) considered before efforts are launched to please the complainant. Unremitting pressures by legislators on administrators may gratify constituents for the time being, but, to the extent that they lessen the administrators' will to serve faithfully, the pressures demoralize those whom they touch. Cynics rarely prove to be effective law administrators.[6]

Finally, although a complaint from a constituent might well serve to uncover a general problem in governmental administration, it will probably not lead to reform. Once the dispute has been settled to the satisfaction of the constituent, the legislator's interest in the matter customarily vanishes. Thus Professor Gellhorn refers to a chief of a regulatory agency who observed that it was generally far simpler for his agency to grant the congressman what he asked for than to attempt to explain why the claim was delayed five or six months.[7]

The third alternative open to the aggrieved party is to seek action by a superior decision-maker within the administrative structure. In some instances, a particular office may handle grievances, such as the Department of Agriculture's Inspector General or, at the local level, the City of New York's Commissioner of Investigation, who is "authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."[8] The difficulty with such

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[4] Id. at 143.

[5] Quoting Senator Mike Monroney: "If I had a complaint to make, it would be that so often the staffs we create for help to Congress in the handling of legislative matters and prime legislative duties are preempted by the urgency of taking care of constituents' requests or casework." Id. at 84-85.

[6] Id. at 217.

[7] Id. at 78.

[8] Id. at 166.

internal checks, according to Professor Gellhorn, is that in every instance the investigator's loyalty is to his superior, not to the public. A former New York Commissioner of Investigation concedes, "Yon're really in business for the Mayor. You can do what he wants you to do, and that is all. The practical purpose is to protect him, not the pnblic in general."[9] Thus, concludes Professor Gellhorn,

> Self-policing, highly valuable though it be for managerial purposes, will never be a wholly accepted means of redressing errors so long as administrative heads may veil their own or their subordinates' discovered blunders in order to avoid possible embarrassment.[10]

Having determined that the existing grievance procedures are inadequate, Professor Gellhorn, in *Ombudsmen and Others*, conducts a critical examination of innovations in other nations with a view towards finding an alternative means of protecting the rights of aggrieved citizens. Three types of administrative critics are discussed: (*1*) the Ombudsman, who functions in Sweden, Finland, Denmark, Norway, and New Zealand; (2) the procurator, found in the Soviet Union, Yugoslavia and Poland; and (*3*) the Administrative Inspection Bureau in Japan.

The Ombudsman is a national officer who serves as an independent critic of governmental administration. In addition to acting on the complaints of citizens, he is empowered to initiate investigations on his own motion. Generally, he has a right of access to all official documents which have a bearing on a matter under investigation. Though he lacks the power to compel action by an administrative authority, following an investigation he may publicly express an opinion as to particular official conduct and make recommendations to the appropriate authority. By and large, his suggestions have been favorably received.

In Denmark, when the Ombudsman feels an official has been guilty of misconduct (as opposed to poor judgment on a discretionary matter) he may order the public prosecutor to either investigate the matter further or initiate criminal proceedings.[11] Analogous authority is granted the Ombudsman in Finland and Sweden.[12] Notwithstanding this power, the effectiveness of the Ombudsman's work is primarily contingent upon the respect his opinion commands from the official whose decision he reviews. The success of the Ombudsman in all five nations is largely attributable to the fact that the individual holding the office has been highly regarded, both by the public and by governmental administrators. Consequently, the Ombudsman's advice has rarely been rejected.

A few illustrative cases may indicate the value of the Ombudsman. The New Zealand Ombudsman received complaints that the Department of Health was actively seeking to influence voters in a local referendum on the fluoridation of public water. After an investigation, the Ombudsman concluded that the Department, though acting in good faith, "exceeded the proper functions of furnishing information or of pursuing normal health education activities," and

[9] Id. at 167.
[10] Id. at 218.
[11] In fact, the Danish Ombudsman has never gone further than requesting the prosecutor to investigate, and no prosecutions have ultimately resulted. Gellhorn, Ombudsmen and Others 13 (1966).
[12] The Ombudsmen in New Zealand and Norway have no such power.

advised that the Department should refrain from such activities in the future.[13]

A complaint was brought to the New Zealand Ombudsman by a historian whose book had been published by the Government Printing Office. The publishers did not feel the publication was of general interest and therefore decided to restrict the number of review copies to two. The Ombudsman concluded that the publisher should have been somewhat more energetic in promoting the book, "having regard to the nature of the work, the time, money, and labour which had been expended on this publication, and the likely appeal of the work to the serious reader, as well as the historian."[14]

In a case brought to the attention of the Norwegian Ombudsman, an insolvent debtor sought the return of a trading license which had been issued to him and was still valid, but which was among papers involved in his bankruptcy proceeding. Without the license he could not pursue any new business activity. The Ministry of Trade said that as a matter of course the license would be restored when the bankruptcy proceedings were completed. When asked by the Ombudsman if there was any legitimate reason that the license should not be restored immediately, the Ministry admitted that it could think of none.[15]

In all these cases the advice of the Ombudsman was followed. In other cases, Ombudsmen have criticized a governmental department for failing to effectuate the Civil Defense Act;[16] recommended that hospital patients be properly advised of the seriousness and danger of a proposed operation;[17] suggested modernization of prisons;[18] and protected the rights of mental patients, contagious disease carriers, and juveniles.[19] In each instance the effectiveness or desirability of traditional judicial procedures would be at best dubious.

Procurators differ from Ombudsmen in that they are essentially prosecuting attorneys. Because they are numerous and are geographically confined in their authority, they lack the prestige of the Ombudsman. The narrowness of official concern often results in a duplication of effort by procurators and may prevent a proper examination of problems not of a local nature. Like the Ombudsmen, procurators have the power to examine official files relating to matters under investigation. In addition, they have the significant power to bring prosecutions on their own motion against officials they believe guilty of misconduct. The Administrative Inspection Bureau in Japan shares the disadvantage of the procurators in being a multiple-office agency. Its power is limited to negotiation, and it lacks the authority of the unified voice of the Ombudsman. "Too many persons deal too uncoordinatedly with too diverse grievances in too inconsistent ways to be able to achieve large-scale improvement of public administration."[20] Yet, within these limitations, both the procurators and the Administrative Inspection Bureau have been considered successful.

In contemplating the use of an external administrative critic, the reaction of governmental administrators towards the device is of major concern. Do ad-

13 Gellhorn, supra note 11, at 108.
14 Id. at 129.
15 Id. at 183-84.
16 Id. at 108.
17 Id. at 134.
18 Id. at 222.
19 Id. at 180.
20 Gellhorn, supra note 1, at 12.

ministrators have anything to fear from having their decisions and files subject to scrutiny by an outside, nonjudicial critic? Professor Gellhorn thinks not. Significantly, in every country studied, the external critic rarely finds that more than ten percent of the complaints he receives justify criticism of a governmental official. More often than not, the critic's responsibility becomes that of explaining to the aggrieved party why the governmental action was correct. Professor Gellhorn concludes that in each case the use of an external critic has reinforced confidence in civil servants.

> Genuine grievances do indeed exist, but they are far outnumbered by complaints by the chronically querulous, the psychopathically hostile, and the simply mistaken. Only when sober sifting has been undertaken can proper attention be paid to the truly aggrieved and, at the same time, proper support be given to those who truly serve. Without exception, every country that leans heavily on ombudsmen or other administrative critics has strengthened its civil service in the process of solacing those whom civil servants have offended.[21]

If Professor Gellhorn is to be faulted in any way in this study, the weakness is to be found in the limited perspective from which he examines the work of the citizen protectors. Beyond an analysis of the institutional structure based on constitutions and statutes, the bulk of his research consists of the official records of the administrative critics and interviews, often anonymous, with the critics and with governmental officials. Seldom does he indicate the reaction of the citizen—the party whose interests are being secured—to the operation of the system. Have the majority of complainants felt themselves fairly treated, even when, as in the great number of cases, they have been told that their complaint is without substance? An answer cannot be found in the record of the case.

It is also somewhat disappointing that Professor Gellhorn makes no concrete proposal for this country. He does in general recommend that some form of grievance procedure be adopted as an experiment. The success of such an experiment would depend upon "topnotch personnel, some understanding supporters (journalists among them), and a public service that, if not altogether friendly, is at least not actively antagonistic."[22] Professor Gellhorn closes with a quotation from Benjamin Franklin in defense of a suggested governmental reform in an earlier day: "The true question then is not whether there will be no difficulties or inconveniences; but whether the difficultics may not be surmounted; and whether the conveniences will not, on the whole, be greater than the inconveniences."[23] Professor Gellhorn believes they can, and will.

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[21] Id. at 44.
[22] Id. at 232.
[23] Ibid.
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