

ARTICLES

Federal Ombudsmen: An Underused Resource

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"The mouse that hath but one hole is easily taken." (Old English Proverb)

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 Army Materiel Command (AMC) Ombudsman, 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 remnants of an ombudsman program in the Department of Commerce, and another at the Interstate Commerce Commission (ICC). 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 into American government, the Administrative Conference of the United States (Administrative Conference) has been concerned with the debate and analysis of that question. It commissioned this Article 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.

This Article considers the record of six ombudsmen: those in the IRS, the AMC, the RCRA program, the ICC, the Commerce Department, and the federally supported Long-Term Health Care Ombudsmen at the state level. The goal of this Article is to discover what makes an ombudsman's office work, what makes it fail, and when and under what circumstances, establishing an ombudsman makes

sense. This Article 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 slights and oversights that can complicate dealings with the bureaucracy.

The ombudsman idea is not new. The first ombudsman was established in Sweden in 1809. The first ombudsman in this country, at least at the federal level, came into being twenty years ago, in 1971. Nevertheless, there is an adequate record for at least a preliminary assessment of the value of federal ombudsmen programs; enough to promote or 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.

The first section of this Article summarizes the history of American interest in the ombudsman as an institution of government. The next section presents six case studies. The third section raises some of the underlying issues presented when the creation of an ombudsman is under consideration. The last section sets forth the authors' recommendations for the creation of additional federal ombudsmen.

I. 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 before litigation, rather than as a substitute for existing grievance handling procedures.

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

1. Stieber, *Government Ombudsmen Share Global Complaints: Notes from Canberra*, 44 ARB. J. 42, 42 (1989).

the Office of 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 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 in control 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 a greater scale than exists today. One reason that there were no ombudsmen until the late 1960's or 1970's is that there was less need for an official to help deal with grievances against the government.

Because elected officials and party organizations view the go-between function of the ombudsman as incident to the political process, it has not been easy to persuade them to share their duties 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. The public employees 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 of the ombudsman 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 the idea took hold at all.³

2. Interview with Bernard Frank, Esq., in Allentown, Pa. (Aug. 10, 1989) [hereinafter Frank Interview].

3. See S. ZAGORIA, *THE OMBUDSMAN: HOW GOOD GOVERNMENTS HANDLE CITIZEN'S GRIEVANCES* 65 (1988) (cataloging low number of established ombudsmen in United States).

1. *The First Settlers*

Ten years ago, Stanley V. Anderson⁴ canvassed the early American literature on the nature and likely applications of ombudsman service in this country.⁵ Anderson credits Professor Henry Abraham with publishing the first work on ombudsmen, *A People's Watchdog Against Abuse of Power*,⁶ 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*,⁷ and two definitive works by Walter Gellhorn, *Ombudsmen and Others*⁸ and *When Americans Complain*,⁹ all made significant contributions to our knowledge of the nature and workings of ombudsmen.

These observers found the European experience very interesting. Sweden, the first country to establish a national ombudsman, did so in 1809; its constitution provided for the ombudsman.¹⁰ In Sweden, 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

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), and the editor of *OMBUDSMAN FOR AMERICAN GOVERNMENT?* (1968), and *OMBUDSMAN PAPERS: AMERICAN EXPERIENCE & PROPOSALS* (1969).

5. S. ANDERSON, *OMBUDSMAN READINGS 1-19* (1980).

6. H. ABRAHAM, *A PEOPLE'S WATCHDOG AGAINST ABUSE OF POWER* (1960).

7. D. ROWAT, *THE OMBUDSMAN: CITIZEN'S DEFENDER* (1965).

8. W. GELLHORN, *OMBUDSMEN AND OTHERS: CITIZEN PROTECTORS IN NINE COUNTRIES* (1966).

9. W. GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* (1966). Professor Walter Gellhorn, Columbia School of Law, a founding member of the Administrative Conference of the United States (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, Washington) ombudsmen.

10. "Ombudsman" is a Swedish word meaning "agent" or "representative." Henry & Anderson, *The Ombudsman: Tribune of the People*, 363 *ANNALS* 44, 45 (1966). The classic Scandinavian ombudsman 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 from Professor Gellhorn to Charles Pou, Esq. (Mar. 16, 1990) [hereinafter Gellhorn Letter]. However, the term "ombudsman" is now widely, and often rather loosely, used to describe any functionary with responsibility to consider a grievance.

degree, all the ombudsmen created since Sweden originated the office owe much to the Swedish experience.

In 1919, Finland became the second country to establish an ombudsman. The Finnish ombudsman is also appointed by the legislature and is empowered to review judicial decisions for fairness, as well as decisions of the executive branch.¹¹

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 not those of the judicial branch. They also were not empowered to institute prosecutions of public officials. They did, however, have discretion, in some cases, to issue public reports of their findings. Indeed, the power of report, as it is sometimes called, is the principle means by which the ombudsman's findings and recommendations gain attention.

2. Spread of American Interest in Ombudsmen

Approximately 150 years passed between the time Sweden established the ombudsman and America took serious notice of the concept. There are several reasons for this long delay: the relative isolation of, and distance between, the two countries, as well as cultural, lingual, and political differences. In fact, the ombudsman idea was slow to reach 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 began to take hold around the world. In large part, the idea spread due 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. Among others, he discussed his ideas with three Americans who did much to establish the concept in the United States: Professors Gellhorn, Davis, and Abraham.

In 1967, the American Assembly (Assembly) adopted a statement at its thirty-second meeting urging "the prompt enactment of laws to create the special office required to handle citizens' complaints, the Ombudsman."¹² The following year the Western American Assembly

11. See D. ROWAT, *THE OMBUDSMAN PLAN: THE WORLDWIDE SPREAD OF THE IDEA* 15, 17-18 (Univ. Press of Am. 1985) (outlining developments of Finnish ombudsman as reaction to czarist oppression in Finland).

12. REPORT OF THE THIRTY-SECOND AMERICAN ASSEMBLY, *THE OMBUDSMAN* 7 (1967).

on the Ombudsman, made up of sixty-six members from university, government, and private sector backgrounds, expanded on the previous year's work by the parent American 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.¹³

The fourth finding, relating to judicial resolution of disputes, reflects what citizens often discover to their dismay, if not to their peril; 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. However, he may have a tale that would interest an ombudsman, not only in the merits of wrong uncovered by the whistle-blower, but also because of the manner in which the matter was considered.¹⁴ On the strength of its factual findings, the Assembly urged that “the concept of the Ombudsman be introduced at the federal level.”¹⁵

The Administrative Law Section of the American Bar Association (ABA) formed a committee to consider the ombudsman concept in 1967. In 1969, the ABA House of Delegates passed a resolution urging the use of ombudsmen in the United States.¹⁶ At the federal level, the

13. INSTITUTE OF GOVERNMENTAL STUDIES, WESTERN AMERICAN ASSEMBLY OF THE OMBUDSMAN 26 (S. Scott ed. 1968) [hereinafter WAA].

14. We are indebted to Professor Gellhorn both for this example and the observation that not all grievances can be addressed effectively in trial-type hearings. Gellhorn Letter, *supra* note 10.

15. WAA, *supra* note 13, at 27.

16. See *Proceedings of the 1969 Midyear Meeting of the House of Delegates*, 94 ABA ANN. REP. (1969) (hereinafter *1969 Midyear Meeting*) (recommending that state and local governments consider establishing and listing twelve essentials of ombudsmen). See also D. ROWAT, *supra* note 11, at 86 (describing attempts to develop

ABA initially proposed that the Administrative Conference serve as a central ombudsman for the Federal Government and that it experiment with the concept in specific agencies.¹⁷ The ABA modified this proposal in 1971, when it proposed a program limited to a particular geographical area, government agency, or program.¹⁸ 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.¹⁹

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 early 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 each of several selected executive branch departments and agencies.

1. The Ombudsman for Congress

In 1963, Representative Henry S. Reuss (D-Wis.) introduced a bill to establish an ombudsman for Congress.²⁰ Reuss' goal was to centralize constituent case work in a single office on the Hill. He argued that

federal level ombudsmen).

17. See 1969 *Midyear Meeting*, *supra* note 16, at 20 (noting that section three of resolution contained American Bar Association's (ABA) suggestions for implementing ombudsman program on federal level).

18. 8 ABA ANN. REP., ADMIN. L. SEC. 48-49 (1971). The ombudsman committee report also included the reasons for the change in the resolution and status report on the legislative efforts to date. *Id.* at 51-57. See also D. ROWAT, *supra* note 11, at 86 (explaining reasoning behind ABA amendment as inability of Administrative Conference to handle role larger than limited complaint handling).

19. ABA Resolution 108-A (Aug. 9, 1989) (adopting recommendations of the Section of Labor & Employment Law). See also Letter from Walter H. Beckham, Jr., Secretary of the ABA, to Marshall J. Breger, Chairman, Administrative Conference of the United States (Sept. 19, 1989).

20. H.R. 7593, 88th Cong., 1st Sess., 109 CONG. REC. 12,749-51 (1963). "Administrative Counsel" was the name given to the ombudsman in the July 16, 1963, Reuss bill. Representative Reuss reintroduced the bill in the following three Congresses: H.R. 4273, 89th Cong., 1st Sess., 113 CONG. REC. 1158 (1965); H.R. 3388, 90th Cong., 1st Sess., 113 CONG. REC. 1158 (1967); H.R. 8017, 91st Cong., 1st Sess., 115 CONG. REC. 5051 (1969). A similar Senate proposal was introduced by Senator Vance Hartke (D-Ind.), S. 2134, 92d Cong., 1st Sess., 117 CONG. REC. 22,004 (1971) and reintroduced by Senator Gravel (D-Alaska), S. 2500, 93d Cong., 1st Sess., 119 CONG. REC. 31,933-35 (1973).

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.

Reuss' proposal made little headway. Opposition came from Members of Congress (Members) who were unwilling to give up any control over the constituent case work function. Reuss attempted to meet that objection by limiting the work of the congressional ombudsman to cases referred to it from Members and by requiring 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.²¹ The high water mark for the Reuss legislation was a hearing on the companion measure, S. 984, introduced in the Senate by Claiborne Pell (D-R.I.) in 1965.²²

2. Ombudsmen for Executive Agencies

Other legislation introduced in the 1960's and early 1970's was proposed to create ombudsmen in selected executive departments and agencies, mainly to deal with problems encountered by citizens eligible for benefits from federal entitlement programs. Although these bills did not pass, they probably did help build interest in the inspector general laws that were passed in the 1970's to deal with fraud, waste, and abuse.²³

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 IRS, and the Federal Bureau of Prisons.²⁴ Senator Long added the Selective Service System to his list of covered agencies in 1968.²⁵ The Long bill permitted the ombudsman to deal directly with the complainant. The agencies that were covered objected to the proposal on the ground that the oversight was not necessary and would add another layer of bureaucracy.²⁶

21. S. ANDERSON, *supra* note 5, at 17.

22. S. 984 was introduced on February 3, 1965. *Hearings on S. 984 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (Mar. 7, 1966).

23. Frank Interview, *supra* note 2.

24. S. 1195, 90th Cong., 1st Sess., 113 CONG. REC. 5575 (1967). *Administrative Ombudsman, 1969: Hearings on S.1195 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968).

25. S. ANDERSON, *supra* note 5, at 20.

26. *Id.* at 20-21.

In 1971, Senator Jacob Javits (R-N.Y.) introduced the Administrative Ombudsman Experimentation Act.²⁷ This 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 as well as the Office of Economic Opportunity (OEO). The bill also proposed a foundation to conduct ombudsman research and demonstration projects.

Similar bills were introduced throughout the 1970's by other Members of Congress. Representative 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.²⁸ In 1973, Representative Kenneth Keating (R-N.Y.) and Representative Lee Metcalfe (D-Mont.) introduced bills to establish an ombudsman for the Federal Bureau of Prisons and the Board of Parole.²⁹ Senator Charles L. Percy (R-Ill.) introduced a bill in 1973 to establish an ombudsman for the federal criminal justice system.³⁰ In 1974, Senator Gaylord Nelson (D-Wis.) introduced a bill to create federal citizens' advisory boards in the ten federal judicial circuits to review complaints against agency actions.³¹ 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.³²

3. Outcome

None of these bills became law. Indeed, none of them were reported out of committee. Everard Munsey, administrative assistant to Representative Reuss for much of the period in question, thought that part of

27. S. 2200, 92d Cong., 1st Sess., 117 CONG. REC. 22,900 (1971). A similar bill was introduced in the House by Representatives Steiger (D-W.Va.) and Reuss. H.R. 9562, 92d Cong., 1st Sess., 117 CONG. REC. 23,134 (1971). See D. ROWAT, *supra* note 11, at 86-87 (viewing bill as calling for experimental ombudsman rather than creating permanent bureaucratic position).

28. See D. ROWAT, *supra* note 11, at 87 (stating bill would restrict funds to states establishing such ombudsmen).

29. Representative Keating introduced H.R. 11,146, 93d Cong., 1st Sess., 119 CONG. REC. 35,206 (1973). Representative Metcalfe introduced H.R. 8848, 93d Cong., 1st Sess., 119 CONG. REC. 23,701 (1973); H.R. 9270, 93d Cong., 1st Sess., 119 CONG. REC. 23,701 (1973); and H.R. 10,216, 93d Cong., 1st Sess., 119 CONG. REC. 29,405 (1973).

30. S. 2160, 93d Cong., 1st Sess., 119 CONG. REC. 23,479 (1973).

31. S. 3043, 93d Cong., 1st Sess., 120 CONG. REC. 3,739 (1974).

32. SENATE COMM. ON WATERGATE, S. REP. NO. 93-981, 93d Cong., 2d Sess. (1974).

the reason lay in the difficulty of transplanting a uniquely European tool of government to American political soil.³³ For all of their good intentions, some of the bills had serious flaws. By requiring the ombudsman to work through the congressional office involved, the Reuss bill added a layer of organization that makes the process seem top heavy. There also was, and still is, the turf argument. Because Congressmen essentially see themselves as the "ombudsmen" of first resort for 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 proposals came at a time when Congress was enacting the social programs that made up the "great society" vision of President Lyndon B. 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 the bureaucratic tangles created by these programs became apparent, the country was more inclined to look for ways to cut the federal budget than to 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 twenty-five 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 IRS, a step which led to the

33. Interview with Everard Munsey, former administrative assistant to Representative Reuss, in Alexandria, Va. (Nov. 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 to which Munsey referred. President Johnson's remarks were passed on to us by Benny Kass, Esq. Interview with Benny Kass, Esq., in Washington, D.C. (Sept. 26, 1989).

establishment of what has become the most successful of the present federal ombudsmen programs.

2. State Ombudsmen

The first state ombudsmen projects were inaugurated with assistance from grants in aid provided by the OEO.³⁴ 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 agencies.³⁵ Nebraska followed suit in 1969,³⁶ Iowa in 1970, and Alaska in 1975.³⁷ The District of Columbia, Puerto Rico, and Guam also have ombudsmen, 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, New York, county executive in 1967.³⁸ Jackson County, Missouri established an ombudsman in 1970 to deal with racial conflicts.³⁹ The City of Seattle and King County, Washington, joined together 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 assistance by OEO and the Kettering Foundation in 1971. There are municipal ombudsmen in Buffalo and Jamestown, New York, and in Detroit and Flint, Michigan, among other cities.⁴⁰

34. By 1968, ombudsman legislation had been introduced in a majority of states. To date, Hawaii, Nebraska, Iowa, Alaska, the District of Columbia, Puerto Rico, and Guam have established an ombudsman. See D. ROWAT, *supra* note 11, at 87, 88 (tracking recent state-level ombudsman developments).

35. HAW. REV. STAT. § 96-2 (1985 & Supp. 1990).

36. NEB. REV. STAT. §§ 81-8, 240 (1981).

37. ALASKA STAT. § 24.55.010 (1985).

38. See D. ROWAT, *supra* note 11, at 83 (characterizing Nassau County ombudsman, working in Office of Commissioner of Accounts, as having authority to protect against failures of government).

39. See S. ZAGORIA, *supra* note 3, at 29 (giving case histories of ombudsmen established through city charter revisions). The Jackson County ombudsman views her role as doing justice outside the court system, thus achieving effective results while diminishing case backlog and court costs. *Id.*

40. See S. ZAGORIA, *supra* note 3, at 71, 74 (listing pioneer ombudsmen on state, county, and city levels). See also D. ROWAT, *supra* note 11, at 90-92 (describing establishment of ombudsmen in Dayton-Montgomery County, Ohio, Seattle-King County,

4. Other Ombudsmen

The ombudsman movement spread to quasi-public and private institutions, as well as to state and local governments. Many businesses, hospitals, universities, and newspapers set up ombudsmen to deal with customer, patient, student, and reader complaints.⁴¹ 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.⁴²

D. *The Administrative Conference's Role in the American Ombudsman Movement*

The 1964 law creating the Administrative Conference of the United States⁴³ 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 Administrative Conference. Given the ombudsman's mission and nature of its function, it is probably not surprising that proposals were made to designate the Administrative 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.⁴⁴ Professor Victor G. Rosenblum's Administrative Conference study on federal agency complaint-handling mechanisms⁴⁵ 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.

Washington, and Newark, New Jersey).

41. Article, *Ombudsman Jobs are Proliferating, and Characterized by Diversity*, 2 BNA ADR REPORT 198 (May 25, 1988).

42. M. Rowe & M. Simon, *Ombudsman Dilemmas: Confidentiality, Neutrality, Testifying, Record-Keeping* (Oct. 19-22, 1989) (unpublished report presented at the annual Society of Professionals in Dispute Resolution Conference, Washington, D.C.).

43. Administrative Conference Act, 5 U.S.C. §§ 571-576 (1988).

44. REPRESENTATION OF THE POOR IN AGENCY RULEMAKING OF DIRECT CONSEQUENCE TO THEM, ACUS RECOMMENDATION 68-5, 1 C.F.R. § 305.68-5 (1991).

45. See Rosenblum, *Handling Citizen Initiated Complaints: An Introductory Study of Federal Agency Procedures and Practices*, 26 ADMIN. L. REV. 1 (1974) (based on recommendations on questionnaire sent to federal agencies).

Grunewald led to an Administrative Conference statement advocating a federal ombudsman to deal with Freedom of Information Act matters.⁴⁶ Administrative Conference member Kenneth Culp Davis chaired the Administrative Law Section Committee of the ABA which sponsored that group's initial resolution supporting the use of ombudsmen. Jerre Williams, the first Administrative 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.⁴⁷ Walter Gellhorn, of course, gave the concept currency with the publication of his two works on ombudsmen.⁴⁸

In 1966, Professor Gellhorn concluded his study of governmental grievance handling mechanisms,⁴⁹ and proposed that the Federal Government try the ombudsman system. Even though a grievance bureau could not remedy the citizenry's irritations, it would support a reasonable expectation of improvement. Professor Gellhorn went on to say that experimenting with the idea would be a relatively simple and inexpensive matter, and one that could be tried "without committing its proponents so deeply that they can never afterward bear to admit failure."⁵⁰ To succeed, he said, one needed top-notch personnel, understanding supporters, and public servants who are not actively antagonistic.⁵¹ He noted that these were not "forbidding conditions."⁵²

II. 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 were abandoned, some were made permanent after a trial period, and 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 federal level to begin evaluation of their utility and to make recommendations for expanding

46. See 1986 ACUS 71, 1341 (recommending ombudsman to address Freedom of Information issues).

47. Cramton, *A Federal Ombudsman*, 1972 DUKE L.J. 1 (suggesting federal ombudsman as response to increased demands for complaint-handling devices in ever growing Federal Government).

48. W. GELLHORN, *supra* note 9; W. GELLHORN, *supra* note 8.

49. W. GELLHORN, *supra* note 9, at 232.

50. *Id.*

51. *Id.*

52. *Id.*

their use.

Six federal ombudsman programs are considered in some detail in this section of the Article. The first four, those in the IRS, AMC, the long-term health care field, and the EPA, are all in operation today. Each tells us something about what does or does not work, and each tends to bear out Professor Walter Gellhorn's view that top-notch personnel, informed support, and a receptive bureaucracy are necessary. The other two programs, those set up in the Department of Commerce and at the ICC, 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

1. The Taxpayer Ombudsman's Office

Taxpayers and tax collectors, if not natural enemies, are often combatants. Because the levy and collection of taxes is prone to dispute, the IRS offers a likely setting for an ombudsman. The ombudsman hears taxpayer gripes and 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 movement 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, Commissioner of IRS from 1977 to 1980, sought a means to meet the concerns expressed by Congress. Against this background, Kurtz proposed and strongly supported the creation of an internal ombudsman as an adjunct to the Commissioner's office to deal with taxpayer complaints.

In 1976, before the Office of the Ombudsman 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).⁵³ On the strength of

53. To test which organizational arrangement worked better, the Internal Revenue Service's (IRS) 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

this test, the program was implemented on a national level in 1977.⁵⁴ The evidence showed that the program not only helped taxpayers with their immediate problems—its basic objective—it 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.”⁵⁵

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, spelled out the PRP goals:

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.
2. To . . . identify recurring internal systemic and procedural problems.
3. To serve as an advocate for taxpayers within the IRS⁵⁶

a. Organization/Place in Agency Structure

The Taxpayer Ombudsman reports to the Commissioner of the IRS. He is a member of the Senior Executive Service, a high-ranking career official who directs a national headquarters office staff of some twenty 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,⁵⁷ review the reports of the problems encountered in the field to identify those that recur or emerge as a result of the constantly changing text of the Internal Revenue Code, seek solutions to those problems, 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 250 or so persons who make up the national PRP staff are lo-

when the program was instituted nationally the following year. I.R.S., *PROBLEM RESOLUTION PROGRAM* (1986).

54. *Id.* at 5.

55. *Id.*

56. I.R.S. PUB. 1320, *OPERATION LINK 1* (Rev. 12/87). For information on obtaining this pamphlet, see *infra* note 69.

57. I.R.S., *INTERNAL REVENUE MANUAL 1279, PROBLEM RESOLUTION PROGRAM HANDBOOK* (1979). First issued in 1979 and updated periodically, the manual provides detailed instructions for dealing with all of the ordinary and many of the more esoteric problems the PRO staff is likely to encounter.

cated in the ten service center offices, sixty-three districts, seven 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, such as 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."⁵⁸ 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. The regional and national office staffs provide guidance, moral support, and advice on uniform application of program procedures to the staff in the field.

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, as an executive ombudsman, the ombudsman and some of the duties and powers of the office have been since recognized by the recent Omnibus Taxpayers' Bill of Rights.⁵⁹ 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 PRP 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."⁶⁰ The Subcommittee also noted its doubts that the Taxpayer Communications Branch had sufficient management experience to carry out the program.⁶¹ These concerns contributed to the decision 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 the staff were in place, ques-

58. *Id.* at ch. 200.

59. Technical and Miscellaneous Revenue Act, 26 U.S.C. § 7811 (1988).

60. STAFF OF HOUSE SUBCOMM. ON OVERSIGHT OF THE COMM. ON WAYS AND MEANS, 95TH CONG., 2D SESS., REPORT ON I.R.S. PROBLEM RESOLUTION PROGRAM FOR HANDLING TAXPAYER COMPLAINTS (Comm. Print 1978).

61. *Id.* at 32-36.

tions arose as to the nature and extent of the program's authority to stay decisions by the collection, examination, and other enforcement bureaus 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 that the status quo be maintained, if, in the opinion of the Problems Resolution 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 Problems Resolution 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 Problems Resolution officer the authority to issue taxpayer assistance orders (TAOs). Under the current law, the enforcement officer 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 a taxpayer 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"⁶² in which the tax laws are being administered. The TAO may be used to release property subject to a levy or to stop or set aside a collection action. The Omnibus Taxpayers' Bill of Rights also requires the Taxpayer Ombudsman to make an annual report to the Senate Finance Committee and the House Ways and Means Committee "regarding the quality of taxpayer services provided,"⁶³ a report filed jointly with the Assistant Commissioner for Taxpayer Services.

c. Modus Operandi

The PRP operates much in the manner of a traditional European ombudsman. The Problems Resolution officer does not work on the underlying tax problem, but investigates facts and then, on the basis of ascertained facts and applicable tax law, makes a recommendation on how to deal with the complaint. Damon Holmes, the current Taxpayer Ombudsman, emphasizes the importance of establishing the facts cor-

62. Technical and Miscellaneous Revenue Act, 26 U.S.C. § 7811 (1988).

63. *Id.* § 7811(a).

rectly as a predicate for the PRP recommendation. Usually, the Problems Resolution 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 pursuing other forms of review provided by the tax laws, the decision may be taken as dispositive, particularly in those cases where the Problems Resolution officer has gained the taxpayer's confidence.

The systematic collection of data from the field about the types of problems that recur or that 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 tax 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 PRO offers the Commissioner direct access to the front line experience, and provides information that may be more meaningful than that which filters up through the functional division bureaucracies.

The relationship between the Commissioner and the ombudsman varies somewhat according to the management style and backgrounds of the persons involved. When it is working at its best, the Commissioner's office has at hand a ready and steady source of information and insight about the workings of the agency, and about the places where troubleshooting or broader reforms are needed. The ombudsman's office is across the hall from the Commissioner's office. This proximity not only indicates the ombudsman's status, but also allows the two offices to consult easily.

2. *Case Work*

a. *Clients/Users*

The taxpayers and their representatives⁶⁴ are the primary users of the PRP. Members of Congress also refer cases to the PRP on behalf of their constituents.

b. *Nature of Cases*

The most common problems handled by the PRP "involve missing

64. One estimate is that just under 50% of all tax returns are prepared by professional tax return preparers. Interview with Patricia Burton, Enrolled Agent of the National Association of Enrolled Agents, in Washington, D.C. (Sept. 12, 1989).

refunds, mixed-up Social Security numbers, incorrect billings by IRS, and mistakes made by the taxpayers."⁶⁵ Many problems start with mistakes taxpayers make in reporting their income, filling out their returns, and meeting filing deadlines. In Fiscal Year 1989, in nearly sixty-five percent of the cases handled by PRP, the taxpayers had made some type of mistake that led to the problem. However, if the IRS failed to sort out these problems or compounded them by making other errors, the cases became eligible for PRP assistance. Errors made during processing of items or payments and failing to answer mail from taxpayers gave rise to most of the cases calling for PRP involvement where the IRS was at fault. The enactment of the Omnibus Taxpayers' Bill of Rights has also led to a high volume of requests for TAOs.

c. Acceptance Criteria

The IRS holds out PRP as the avenue of last resort, short of its formal grievance procedures, 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 deal with this problem, the program has set forth the following set of case acceptance criteria to qualify a matter for PRP control in its pamphlet *Operational Link*:

1. Refunds: PRP intercedes if a refund has not been made within ninety days after the refund claim was submitted and the taxpayer has made two or more inquiries about the refund's status after ninety days.
2. Requests for Information or Assistance: PRP steps in after forty-five days have elapsed without a response.
3. Notices: PRP handles notice cases⁶⁶ after the taxpayer has failed 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 has been blocked.
5. Other Problems: PRP retains discretion to take other cases if doing so is necessary to unclog a bottleneck or is otherwise considered to be in the interest of the IRS.

Cases excluded from PRP include: those subject to an established administrative or formal appeal; those in which an appropriate response

65. I.R.S. News Release IR-89-N1 (Jan. 4, 1989).

66. "Notice case" refers to a matter in which the taxpayer has received a written notice from the IRS calling on the taxpayer to submit additional information or otherwise act to complete and pay his or her taxes.

has already been provided; those within the jurisdiction of another agency of government; matters subject to the jurisdiction of the Criminal Investigation Division of the IRS; matters involving a tax protest or a refusal to pay a tax due; and those cases which do not involve tax administration, such as personnel matters, disclosure and inspection questions, where the IRS is involved.

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. The caseworker contacts the taxpayer and becomes the taxpayer's liaison for the duration of the complaint, thereby assuring that at least one person at the IRS will follow the complaint's status. The PRP caseworker 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 Taxpayers Bill of Rights led to an increase in the number of requests for TAOs from fifty per week to 300 per week. By the end of February 1990, the PRP had handled 17,700 cases involving requests based on hardship factors.

e. Settlement Rate

Of the 17,700 applications for TAOs received, 9,900 qualified as hardship cases. Of these, the PRP was able to provide relief to the taxpayer in seventy-three percent of the cases. Enforcement issues comprised forty-eight percent of the cases with significant hardship. The remaining fifty-two percent involved accelerated refund or other requests. Of the 7,800 applications that did not show significant hardship, seventy-one percent were treated as regular PRP cases or were forwarded to another office that could assist the taxpayer.⁶⁷

The objective of the PRP is to close seventy to eighty percent of its cases within thirty days of receipt. A case is regarded as "over age" if it is still open after thirty days. The program collects data on its seven-day settlement rate and its thirty-day settlement rate.⁶⁸

67. Figures furnished by the Taxpayer Ombudsman's office. For more information, see *infra* note 69.

68. In Fiscal Year 1989, 38.6% of cases were closed within seven days and 89.5%

3. *Outreach Mechanisms*

a. Printed Materials and Hotlines

“Operation Link” is the name given by the PRP to its effort to improve communications between the IRS and tax practitioners. It is described in program handouts.⁶⁹ It contains the addresses of the PRP offices in each of the service center and district offices where practitioners may send information that alerts the 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 directories. The PRP is described in the booklet of instructions the IRS sends out with tax return forms.

b. Meetings with Users

The PRP meets with practitioner groups around the country to explain the program and to take suggestions for making the program 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, the 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, according to its staff, needs to be overhauled and upgraded. As a result of these funding constraints, many professionals on the program’s data processing staff have left the agency for more challenging and better paying jobs.⁷⁰

were closed within 30 days. Figures have been furnished by the Taxpayer Ombudsman.

69. A copy of the *Operation Link* pamphlet may be obtained by writing to Ms. Linda Martin, Director, Problem Resolution Program, IRS, Washington, D.C. 20224.

70. The problem is not limited to the Problem Resolution Program (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

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 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, what 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 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 generated ninety-five percent of the favorable mail the IRS receives.⁷¹

b. At Other Government Agencies

The General Accounting Office (GAO) reviewed the PRP in 1987 in response to a request by three members of the United States Senate.⁷² By and large, the GAO found that the program worked well in provid-

office supplies as pens and pencils." Eaton, *Hill Report Depicts IRS As a Hobbled Behemoth*, Washington Post, Jan. 10, 1990, at A17, col. 5.

71. Interview with Michael J. Murphy, Senior Deputy Commissioner of the IRS, in Washington, D.C. (Mar. 30, 1990).

72. GAO/GGD-88-12 TAX ADMINISTRATION: IRS CAN IMPROVE ON THE SUCCESS OF ITS PROBLEM RESOLUTION PROGRAM, REPORT TO CONGRESSIONAL REQUESTERS (1987) [hereinafter GAO study of the IRS PRP]. The report, completed in December 1987, was requested by Senators John Heinz (R-Pa.), Bob Packwood (R-Or.), and William V. Roth (R-De.).

ing special assistance to taxpayers, but less well in identifying taxpayers who qualified for special assistance.⁷³ This shortcoming reflected the increase in the number of taxpayers who were not satisfied by the IRS handling of their complaints. The GAO report shows that sixty-two percent of taxpayers who received special assistance were satisfied with the handling of their complaint compared with a twenty-three percent satisfaction rate among those who did not receive special assistance.

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 PRO in every IRS office provides practitioners and the public with a means to question a troublesome decision by operating staff. This often motivates the operational people to meet an objection before the taxpayer goes to PRP for assistance. The fact that the program is still not known enough to be invoked in all the cases which qualify for assistance is the major drawback to potential users.

d. By Congress

PRP is, 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 congressional budget priorities.⁷⁴

6. *Conclusion*

The record of 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.

73. *Id.* at 31.

74. *See supra* note 70 and accompanying text (explaining problems within program).

B. The Army Materiel Command Ombudsman

1. The AMC Ombudsman's Office

The Army Materiel Command (AMC or the Command) is one of five major commands that comprises the Army.⁷⁵ It is responsible for supplying the Army with the weapons, vehicles, and other equipment the Army uses. AMC spends approximately sixty percent of the Army's budget. It has 114,000 personnel stationed at posts in forty-three states and some foreign countries, and its operations bring it into daily contact with hundreds of concerns that do business with the Army. Inevitably, snags occur in the process.

When General Richard H. Thompson took office as Commanding General in 1984, he proposed using an ombudsman to handle problems arising out of the Command's dealings with industry. When he submitted this proposal to his senior staff, they objected; they thought an ombudsman 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 approximately forty candidates, he selected Lewis J. Ashley, who had an extensive background in defense acquisition matters gained from serving on the staffs of two Senate Armed Services and Budget Committees, as well as at the Pentagon and Department of Energy. Ashley's first tasks were to prepare the Charter for his 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.⁷⁶ The ombudsman reports directly to the Command-

75. 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.

76. AMC OMBUDSMAN CHARTER (Feb. 20, 1985) [hereinafter CHARTER]. 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. The Charter is published as Appendix E to "Ombudsmen and Federal Agencies: The Theory and the

ing General, and speaks for him on matters within his ombudsman's domain.⁷⁷

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

b. Authority: Scope of Duties; Limits on Power

The ombudsman's goal 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.⁷⁸ The ombudsman concentrates on external complaints about the workings of the Command: those dealing with confusing procurement documents, ineffective or unfair contract administration, and delays in providing clarification or relief. He acts as a confidential intermediary in cases where a contractor is worried about offending the AMC, 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 as they occur. 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.

c. Modus Operandi

Ashley takes a hands-on approach to the problems he accepts. He

Practice," David R. Anderson and Diane Stockton, Administrative Conference of the United States, May 1990 (to be published in 1990 ACUS ____).

77. *Id.* The Charter provides that "the Ombudsman will report and be accountable only to the Commanding General." *Id.* § I.

78. 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." AMC Press Release No. PR-5 (Apr. 11, 1985).

acts as a mediator between the contractor and the Command involved, seeking an outcome that is satisfactory to all concerned. The ombudsman's work party begins by assembling the facts.⁷⁹ If the work party decides that the Command acted questionably, 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."⁸⁰ 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 detain a procurement pending his investigation, and may require that the procurement be readvertised if the initial effort was flawed.⁸¹ He is empowered to "[d]irect corrective action in the name of the CG [Commanding General] of the AMC when [he] determines it to be necessary."⁸²

Once the ombudsman decides to take a case, he assembles the work party (an 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 procurement, effectively precluded the established

79. The Charter gives the ombudsman unlimited access to the Army Materiel Command's (AMC or Command) records, within specified limits on access to classified material, and the authority to make unannounced visits to any organization or staff within the Command. CHARTER, *supra* note 76, § VII.

80. *Id.* § IV.B.1.c.

81. 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 were changed to incorporate current technology in subsequent procurements. PUBLIC AFFAIRS OFFICE, AMC, OMBUDSMAN CORNER, PERSPECTIVES (Nov. 1988).

82. CHARTER, *supra* note 76, § IV.B.1.f. On its face, this provision appears to empower the ombudsman to substitute his judgment for that of the line official whose decision is being considered, which is 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, AMC Ombudsman (Apr. 18, 1990).

supplier 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.⁸³ Currently, large businesses account for forty-three percent of the requests for assistance the ombudsman receives, and small businesses account for forty-seven percent.

b. Nature of Cases

Most of the cases involve complaints that the AMC has failed to exercise proper judgment or to follow federal procurement regulations or practices. Examples include cases in which: a procurement contained unnecessarily restrictive specifications; a procurement contract was alleged to have been improperly awarded; technical data or other bidding information was flawed in some way; actions appeared arbitrary, or involved inordinate delay.

The AMC Ombudsman also has jurisdiction to hear complaints from "whistle-blowers."⁸⁴ These cases involve allegations of wasted 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

Cases which have been considered by the appropriate authorities in the ten sub-Commands, are not subject to GAO or court action, and in which the complainant considers the outcome to be unsatisfactory, are eligible for the ombudsman's attention.

83. CHARTER, *supra* note 76, § IV.B.1.a.

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

d. Case Load

The office handles about eighty 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 it may take longer depending on the complexity of the case and the time required to investigate the matter. 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 a higher authority after the matter had been resolved by the ombudsman.⁸⁵

3. Outreach

General Thompson announced the establishment of the ombudsman in meetings with industry groups, by press releases, and in letters to the chief executive officers of major defense contractors. The letters invited them to contact the ombudsman "in the event you have any areas of concern which need my attention."⁸⁶ In addition, Ashley used press releases, the "Ombudsman Corner" column in *Perspectives*, a newsletter distributed to industry,⁸⁷ and talks at trade association meetings to describe the office and to invite those with problems to use it. Referrals from companies that have used the office, and from the Defense Department and other government staff persons familiar with it, also account for part of the case load.

4. Special Problems

The AMC Ombudsman 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 Commanding General changes at the AMC.⁸⁸ The respect the office

85. Interview with Lewis J. Ashley, AMC Ombudsman, in Washington, D.C. (Aug. 23, 1989) [hereinafter Interview with Ashley].

86. Letter from General Thompson to John R. Opel, Chief Executive Officer of the International Business Machine Company (Apr. 12, 1985).

87. See Interview with Ashley, *supra* note 85.

88. Two new Commanding Generals at the AMC have come into power since the ombudsman was created. The most recent change in command occurred in October 1989. Neither successor to General Thompson has made any changes to the

commands 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 twelve-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 demanding and will be 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 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 use of the service.

As demonstrated in the next section, action is underway to replicate the ombudsman function at each of the ten AMC sub-Commands. Once these sub-Command-level ombudsmen are in place, there will be the means to increase the case load and train potential headquarters staff. With the addition of the new officials, it seems likely that the headquarters case load will continue to expand.

5. *Assessment*

a. Within Agency

If 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 ten AMC sub-Commands have established ombudsmen because the commanding officers there wanted to duplicate the headquarters program. If these trials work out, the AMC's plan is to put an ombudsman in each of the other eight sub-Commands.

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.⁸⁹ Today, the Air Force is experimenting with an ombudsman program at each of its sub-

Ombudsman Charter or to any other aspect of the operation.

89. See Interview with Ashley, *supra* note 85.

Commands.

6. Conclusion

The AMC Ombudsman was created 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 demonstrates what can be done by a person with high motivation and skill backed by authority from the top.

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

1. Ombudsman Program

a. Introduction

Nursing home care became a national issue by the mid-1970's; widely publicized cases of abuse and neglect resulted in congressional investigations, hearings, and legislation. According to the evidence, frail and elderly patients in some long-term care institutions 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.⁹⁰ Some who protested were ignored because they were said to lack the capacity to describe their living conditions accurately.

The assumption that many state governments were not adequately regulating the nursing home industry, combined with the increase in the aging population, made it politically desirable for Congress to address these concerns.⁹¹ Ombudsmen were thought to be one means of

90. See Anderson & Von Atta, *Nursing Homes a Worsening Problem*, Washington Post, Dec. 18, 1989, at C15 (discussing recent draft of United States Department of Health and Human Services report which concluded that abuse of nursing home residents often goes unreported and that there is no effective system to investigate complaints). The report stated that more than half of the nursing home residents surveyed believe that abuse is rarely reported to authorities; it also stated that thirty-six percent of nursing home aides witnessed a case of physical abuse of a patient in the past year, and ten percent admitted to being the abuser. *Id.*

91. Interview with Eileen Bradley, Associate Commissioner, Office of Hearing & Appeals, Social Security Administration, Department of Health & Human Services, in Arlington, Va. (Sept. 28, 1989) [hereinafter Interview with Bradley]. 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 as part of the move towards a "new federalism." This federal ombudsman program, implemented at the state, regional, and local levels, is viewed by some as the epitome of

redressing the imbalance of power between patient and providers.

b. Legislative Framework

In 1972, the Department of Health, Education and Welfare (HEW) funded the development of experimental nursing home ombudsman programs for four states and one national organization.⁹² The plan was the brain-child of the Presidential Advisory Commission on Aging⁹³ and the Secretary of HEW, Arthur Flemming.⁹⁴ The program was intended to investigate complaints of older nursing home patients 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.⁹⁵ The 1978 amendments to the Older Americans Act of 1965 provided that all nursing home facilities receiving funding from HHS would have an ombudsman. The scope of the legislation was expanded, under the 1981 Keys Amendments, to include all board and care homes. In 1988, there were 578 local recipients of federal funding for state long-term care ombudsmen programs.⁹⁶

A state unit on aging may itself operate the long-term care ombudsman program or it may contract with another agency or independent non-profit group to operate it. Each state submits its ombudsman program "state plan" to the federal AOA for approval. Plans vary from state to state, depending on the identity of the plan administrator, access, statutory authority, scope, and staffing patterns.⁹⁷

Since these state long-term care ombudsmen must be independent to be effective, the law requires that they be sponsored by an office outside the system being monitored. Most state long-term care ombudsman

decentralization.

92. See MAILICK, *The Ombudsman in Health Care Institutions in the United States*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 122 (G. Caiden ed. 1983) (explaining enabling legislation funding and responsibilities of model nursing home ombudsmen programs).

93. Interview with Ann Weaton, Administration on Aging, in Washington, D.C. (Apr. 20, 1990) [hereinafter Interview with Weaton].

94. Interview with Bradley, *supra* note 91.

95. Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat. 218. See Interview with Weaton, *supra* note 93.

96. *Id.*

97. See MAILICK, *supra* note 92 (discussing effects of enabling legislation on programs).

programs are housed in the Office on Aging, or elsewhere in state government, sometimes in large umbrella agencies which operate the state health department.⁹⁸ Others are independent agencies reporting directly to the Governor; and some states contract out their ombudsman programs to private non-profit groups.

In Washington, D.C., for example, the Long-Term Care Ombudsman is not housed in the District of Columbia Office on Aging because this agency operates one of the nursing homes in the District. Contracting out the ombudsman function to private non-profit organizations removed the possibility of a conflict of interest.⁹⁹

Each state must allocate a percentage of its AOA budget to the ombudsman program. Some states allocate 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 the average funding.¹⁰⁰ Some states have responded to fiscal constraints by limiting the number of nursing homes served, either by restricting the geographic area covered, or by limiting the categories of complaints which will be considered. 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.¹⁰¹

The law also supports the training and use of volunteers and citizen organizations in the state long-term care ombudsman program.¹⁰² Most states have an average of three paid professional full-time staff in the state-level ombudsman office.¹⁰³ The balance of paid and volunteer staff varies from state to state, but most programs depend on some non-paid

98. Interview with Weaton, *supra* note 93.

99. Interview with Vera Mayer, Long-Term Care Ombudsman in the Northwest section of Washington, D.C., in Washington, D.C. (Sept. 8, 1989) [hereinafter Interview with Mayer]. For example, in Washington, D.C., the District of Columbia Office on Aging, which operates a nursing home, contracts with the Office of Legal Counsel for the Elderly, part of the American Association of Retired Persons (AARP), a private non-profit organization, to provide the ombudsman service.

100. Based on a 1987 survey of 49 states' long-term care ombudsmen programs, Title III comprised 61% of funding; other federal sources accounted for another six percent; Non-Older Americans Act state funds provided 27% with another six percent coming from other non-federal sources. *Id.* See NATIONAL ASSOCIATION OF STATE UNITS ON AGING (NASUA), COMPREHENSIVE ANALYSIS OF STATE LONG-TERM CARE OMBUDSMAN OFFICES 19 (Sept. 1988) [hereinafter NASUA REPORT].

101. See MAILICK, *supra* note 92, at 124 (analyzing staffing differences and options open to state programs after 1987 amendments).

102. *Id.* (discussing varying scope of state nursing home ombudsman programs).

103. NASUA REPORT, *supra* note 100, at 15.

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.¹⁰⁴ Frequently, the professional long-term care ombudsmen train the volunteer ombudsmen. One District of Columbia long-term care ombudsman seeks to assign one volunteer to each nursing home floor.¹⁰⁵

c. Authority: Scope of Duties and Limits on Power

The effectiveness of the state long-term care ombudsman program may vary depending on who runs it; a state agency or private contractor.¹⁰⁶ 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 state bureaucrats are not supportive. When the ombudsman program is run from the Governor's office it may gain prestige, but may be unduly sensitive to political pressures. Nevertheless, this model is thought by some to be the most effective in that it is the most similar to the classic ombudsman model.¹⁰⁷

The Older Americans Act Amendments require that each state "establish procedures for appropriate access to long-term care facilities and patient records,"¹⁰⁸ but does not spell out the requirement, leaving room for a broad range of interpretations.¹⁰⁹ 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

104. See MAILICK, *supra* note 92, at 125 (stating that ombudsman programs are less effective in combatting serious abuses, but in conjunction with other authorities they are able to increase effectiveness).

105. Interview with Mayer, *supra* note 99 (noting that volunteer involvement also satisfies requirement for community participation in programs required by Older Americans Amendments).

106. See MAILICK, *supra* note 92, at 123 (describing techniques for ensuring independence of ombudsman).

107. *Id.* (noting that states generally have placed control of ombudsmen in one of three organizations' executive offices: "private" community or volunteer agencies and state offices of health or aging).

108. Older Americans Act, 42 U.S.C. §§ 3001, 3027(a)(12)(B) (1988) (originally enacted as Older Americans Act of 1965, ch. 73, § 303, 79 Stat. 218, 233).

109. See MAILICK, *supra* note 92, at 123 (declaring that access is another issue where state programs differ and achieve varying results).

institution, the ombudsman's effectiveness and independence are often compromised.

Access to patient records varies from state to state.¹¹⁰ 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 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.

State long-term care ombudsmen confront many issues involving their authority, such as the role of the ombudsman in the nursing home licensing process. Ombudsmen who are allowed to be heard in that process generally have more influence with licensed facilities than those that are not.¹¹¹ Another issue is the adequacy of state and local inspections of long-term care facilities. 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. Today, because of budget constraints, more superficial inspections are not uncommon.

d. Modus Operandi

The ombudsman programs investigate patient complaints 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 conditions in long-term care facilities for the purpose of identifying and resolving significant problems.¹¹³

State long-term care ombudsmen often use written working agreements to clarify roles, coordinate services, and establish operating procedures with other state agencies.¹¹⁴ Most of these working agreements

110. *Id.* (noting that ombudsmen's access to patient records is based on ambiguous language in 1978 amendments).

111. *Id.*

112. See MAILICK, *supra* note 92, at 123 (outlining goals set for state long-term care ombudsmen programs by enabling legislation).

113. 42 U.S.C. § 3027(a)(12)(C) (1988) (discussing what state plans should provide with respect to long-term care ombudsman program).

114. See NASUA REPORT, *supra* note 100, at 32 (analyzing effectiveness and de-

are with the licensing and certification units, usually in the state health departments.¹¹⁵ 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.

The ombudsman investigates complaints against facilities and alerts the relevant governmental agencies of possible abuses. He also undertakes his own investigations and attempts 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.

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

An investigation involves several steps: locating and contacting parties; obtaining their consent to the representation and release of records; identifying relevant issues raised by the complainant; collecting and assembling the facts; applying state and federal laws; interviewing witnesses; reviewing expert information; providing status reports to the complainant; and identifying the means to resolve meritorious complaints.¹¹⁸

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

velopment of state long-term care ombudsmen).

115. *Id.*

116. See MAILICK, *supra* note 92, at 125 (distinguishing type and means of complaint in programs staffed by volunteers from those staffed by paid workers).

117. *Id.*

118. NASUA, ANALYSIS OF POLICIES & PROCEDURES OF STATE LONG-TERM CARE OMBUDSMAN OFFICES 110-11 (Sept. 1988).

119. See MAILICK, *supra* note 92, at 125 (explaining process in complaint resolution).

the informal approaches fail.

Long-term care ombudsmen are usually required to submit reports to the state ombudsman and the area agency on aging. For example, all of the District of Columbia 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 federally funded nursing homes and their families. The program also is used by the institution staffs and is sometimes used by nursing home administrators. In addition, advocacy groups for the elderly may intervene in particular cases. Congressional interest in a particular case may come about as an outgrowth of constituent casework services.

b. Nature of Cases

Ombudsmen are required to investigate complaints involving actions by providers of long-term care, public agencies, or other social service agencies which adversely affect the health, safety, welfare, or rights of such residents.¹²¹ State long-term ombudsmen deal with three types of complaints: quality of life issues, quality of care issues, and patients' rights issues.¹²² Quality of life issues involve patient discomfort, either material discomfort or discomfort resulting from staff conduct. Quality of care issues involve complaints about the quality of medical care, health care, or nutrition received, as well as abusive treatment. 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.¹²³

Institutionalization itself may give rise to complaints from patients. Sometimes patients create problems for themselves by failing to follow nursing home rules, such as regulations against smoking. Failure to follow discharge and transfer rules are another source of problems.¹²⁴ Unreasonable or insensitive demands made on nursing homes by families

120. Interview with Mayer, *supra* note 99.

121. 42 U.S.C. § 3027(a)(12)(A)(1) (1988).

122. See MAILICK, *supra* note 92, at 124 (discussing types of complaints frequently made as well as typical responses thereto).

123. See *id.* at 125 (noting that Patient Bill of Rights codifies some rights).

124. Interview with Mayer, *supra* note 99.

of patients also give rise to complaints.

Current legal and policy issues facing state long-term care ombudsmen include conflict of interest problems, nurses' aide training, patient transfers from one facility to another, boarding care homes, provision of legal services to patients, and rapidly changing federal laws.¹²⁵

c. Acceptance Criteria

State long-term care ombudsmen 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 services provided will depend to a large degree on the individual ombudsman, his or her caseload, available staff, and the program's budget.

d. Case Load

In one year, there were 411 complaints recorded in one District of Columbia ombudsman project.¹²⁶

e. Settlement Rate

In one year, 401 out of 411 complaints were resolved, five were not resolved, and five are still active.¹²⁷

3. Outreach

a. Printed Material

Some state ombudsman programs depend more heavily on paid than on non-paid staff. These programs are better able to solicit complaints by using well organized educational campaigns.¹²⁸ Some state long-term care ombudsmen distribute brochures and manuals describing their program services. Others also post notices and posters about their role in the nursing homes.

The National Association of State Units on Aging (NASUA) in

125. Interview with Ann Lordeman, NASUA Senior Program Associate, in Washington, D.C. (Oct. 27, 1989).

126. Interview with Mayer, *supra* note 99 (furnishing data for period between October 1988 and September 1989).

127. *Id.*

128. See MAILICK, *supra* note 92 (explaining educational campaigns).

Washington, D.C. operates a National Resource Center for state long-term care ombudsmen. With the assistance of AOA funding, NASUA has produced three resource publications for the state long-term care ombudsman program.¹²⁹

b. Meetings with Users and Others

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

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.

Some of the better funded state ombudsman programs use toll-free hotlines to take complaints.¹³⁰ While this method increases a patient's access, it also requires a greater effort on the part of the complainant to lodge a complaint than do the programs in which the ombudsman learns of the complaint during a regular visit to the patient. Programs with a higher proportion of professional staff tend to focus on more serious cases than on the regular day-to-day complaints.¹³¹

4. *Special Problems*

a. Lack of Uniformity Among State Programs

States have wide latitude in implementing their long-term care ombudsman programs. This results in marked disparities in the nature and quality of the state programs. While this discretion allows states to adapt the programs to meet local needs, standardized enforcement and evaluation are difficult to implement. One result is the loss of control

129. These publications include: 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. These publications are available from Ann Lordeman, NASUA Senior Program Associate, Washington, D.C.

130. See MAILICK, *supra* note 92, at 124 (noting that telephone hotlines are more prevalent in programs which have paid staff).

131. See *id.* (attributing tendency to deal with more serious abuses to either patient's reluctance to call and report minor grievances or paid staff's greater skill).

by the federal agency which oversees the programs. However, strong community involvement and congressional oversight help render accountable state long-term care ombudsman programs. Not only is there difficulty coordinating programs between the federal and state level bureaucrats, there is a broader problem in coordinating these levels with the local level.

b. Loss of Neutrality When State Long-Term Care Ombudsmen Act as Patient Advocates

In practice, many state long-term care ombudsmen act as advocates for the elderly.¹³² While this may provide the patient with an able representative, it does so at the cost of the ombudsman's impartiality. For this reason, the ombudsman may occasionally need to call in a mediator or another neutral third party, in order to resolve a particular dispute. Some ombudsmen tend to justify the advocacy role on the ground that the nursing home industry is politically powerful in many states.¹³³

c. The Effect of Fiscal Constraint and the Growing Demand for Ombudsmen Services

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.¹³⁴ Most elderly persons still live in their communities. As a result of increases in the average life span, the elderly are the fastest-growing segment of the population. The number of senior citizens in this country is expected to double during the next forty years. Similarly, the nursing home population is expected to double between 1985 and 2020.¹³⁵ 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.¹³⁶ The complex regulations governing these facilities contribute to the problem, as does the absence of clarifi-

132. Interview with Linda Work, National Institute for Dispute Resolution (NIDR), in Washington, D.C. (Aug. 28, 1989).

133. Interview with Bradley, *supra* note 91.

134. Interview with Mayer, *supra* note 99.

135. *The Cutting Edge: News and Notes About Health*, Washington Post, Oct. 3, 1989 (Health), at 5, col. 3.

136. Interview with Mayer, *supra* note 99.

cation of the interplay of the various levels of regulation.¹³⁷

It is not surprising, then, that some nursing home residents are neglected. 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 licensed,¹³⁸ and untold unlicensed, institutions known as "personal care facilities," that house individuals who are on public assistance such as social security and welfare. Personal care facilities generally have lower standards than those which the long-term care ombudsmen operate, and therefore they urgently require some type of ombudsman program. Such a program would need substantially more funds than currently provided to the state long-term care ombudsman system, but there seems to be even less funding 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 HHS, a recent draft report of this agency concluded that abuse often goes unreported and that there is no effective system to investigate complaints.¹³⁹ This is likely to continue until adequate funding for these programs is provided.

b. By Users

Whatever the shortcomings, patients in nursing homes and other long-term care facilities who depend on the long-term care ombudsman system appreciate it. It is also beneficial because it provides an outsider's view. Many nursing home employee and administrative meetings welcome the contributions made by the ombudsman.¹⁴⁰ In this way, the

137. *Id.*

138. See SUBCOMM. ON HEALTH AND LONG TERM CARE OF THE HOUSE SELECT COMM. ON AGING, 100TH CONG., 1ST SESS., REPORT ON BOARD AND CARE HOMES IN AMERICA: A NATIONAL TRAGEDY 7 (Comm. Print 1989) (documenting plight of Americans residing in substandard long-term facilities).

139. Anderson & Van Atta, *Nursing Homes a Worsening Problem*, Washington Post, Dec. 18, 1989, at C15, col. 3.

140. Interview with Mayer, *supra* note 99.

ombudsman serves as a facilitator.

c. By Congress

Congress has been very supportive of the state long-term care ombudsman program. It provides congressional caseworkers, who receive complaints from patients at long-term care facilities or from their families, a place to turn for assistance.

6. *Summary and Critique*

It is difficult to generalize about a decentralized ombudsman program with so many variations. There is a clear need to give the long-term care ombudsmen a statutory right of access to the care facilities where that right is not guaranteed by state law. 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.¹⁴¹ Whether these critics are right or wrong, ombudsman programs are probably most useful and effective when they address less severe matters, with more serious complaints being referred to the appropriate state officials or local authorities. By collecting data on the conditions of facilities, long-term care ombudsmen are in a position to affect future policy. In addressing the existence of the state long-term care, ombudsmen act as a deterrent to some abuses.

D. Environmental Protection Agency—Resource Conservation and Recovery Act Hazardous Waste Ombudsman

1. *The Ombudsman's Office*

a. Organization/Place in Agency Structure

The 1984 Resource Conservation and Recovery Act (RCRA)¹⁴² which amended the 1976 Solid Waste Disposal Act (SWDA),¹⁴³ 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 businesses, on which the local

141. MAILICK, *supra* note 92.

142. Pub. L. No. 98-616, 98 Stat. 3225 (1984) (codified as amended at 42 U.S.C. § 6917 (1988)).

143. 42 U.S.C. § 6901 (1988).

economies often depend, and local officials concerned about plant closings resulting from the enforcement of environmental laws, often seek ways to reduce the scope and impact of enforcement. On the other hand, environmental protection groups seek more vigorous and focused enforcement. Initial agency responses to these conflicting pressures 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 United States 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 Environmental Protection Agency (EPA) Office of Solid Waste and 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 and 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 101st Congress to make the 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 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.¹⁴⁴

144. H.R. 3847, 101st Cong., 2d Sess., § 303(a)(5), 136 CONG. REC. 1170, 1176

b. Authority: Scope of Duties; Limits on Power

The RCRA Ombudsman is a legislatively mandated position, established in response to dissatisfaction with the way the agency was responding to complaints from the public concerning the administration of the law. The ombudsman is intended to be an "office of last resort," to be used after the complainant has exhausted the remedies available through normal channels. The law clearly defined 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.¹⁴⁵

The ombudsman is granted access to agency records in the investigation of complaints.

As a matter of policy, the RCRA Ombudsman and each Regional Ombudsman is instructed that "while 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."¹⁴⁶ The law provides that the RCRA Ombudsman "shall not effect any procedures for grievances, appeals or administrative matters"¹⁴⁷ under the regular channels.

c. Modus Operandi

The Hazardous Waste Ombudsman's office is housed in a corner of a cavernous Washington office building. It is in the area set aside for the Assistant Administrator for Solid Waste and Emergency Response, and it is not easily accessible; this discourages walk-in traffic. Most cases thus originate by telephone calls, some through correspondence.¹⁴⁸ The

(1990).

145. 42 U.S.C. § 6917 (1988). 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." H. REP. NO. 198, 98th Cong., 2d Sess. 62, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5621.

146. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, OFFICE OF OMBUDSMAN, HAZARDOUS WASTE OMBUDSMAN HANDBOOK 1-4 (1986).

147. 42 U.S.C. § 6917(c) (1988).

148. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, OFFICE OF OMBUDSMAN, EVALUATION OF THE HAZARDOUS WASTE OMBUDSMAN PROGRAM (Booz, Allen & Hamilton, Inc. 1988) [hereinafter Booz, Allen & Hamilton].

ombudsman engages in outreach functions, such as giving speeches at technical professional association meetings. Most cases, however, are the result of referrals from other users.

The ombudsman assists the public in obtaining information and locating 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. Instead, the ombudsman responds to "over the transom" inquiries, to referrals, and to questions raised by the public on the ombudsman's new toll-free hotline.

The EPA gave Robert Knox a good deal of latitude in designing this position. He 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, without unnecessary interference by the ombudsman. Knox attempts to stay in touch with complainants as a case is being processed and to set a time-frame within which the problem will be addressed. Knox may use a team approach to resolve a problem, calling in experts for particular cases as needed.

2. Case Work

a. Clients/Users

The ombudsman 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,¹⁴⁹ 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's service. However, the regional office receives a higher percentage of inquiries from the public,¹⁵⁰ environmental groups, and consultants than does the national office.

b. Nature of Cases

The ombudsman is typically involved in matters needing clarification such as cases in which the interpretation and enforcement of EPA regulations result in unusual hardships. He may also step in in cases deal-

149. *Id.* at II-12.

150. *Id.*

ing with unusual delay. Inquiries dealing with RCRA matters substantially outnumber all others, including Superfund, community right to know, and underground storage tank matters.¹⁵¹ 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.¹⁵² In most regions, on the other hand, the ombudsmen deal with actual problems more often than they deal with inquiries for information.¹⁵³ This may be due to the fact that more problems occur at the regional level, or that clients feel the Regional Ombudsmen are closer to the problem than the national 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 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 staff cannot answer a question from the public, it is referred to the ombudsman, who ordinarily refers it to the program staff. If that approach fails, the ombudsman may reenter the process, 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, and only then as a last resort.

d. Case Load

The National Ombudsman handles approximately 300 inquiries annually, about twice as many cases as the busiest regional office.¹⁵⁴ 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

151. *Id.* at II-9.

152. Booz, Allen & Hamilton, *supra* note 148, at II-6.

153. *Id.*

154. *Id.* at II-4.

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.¹⁵⁵ Regional Ombudsmen 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 and 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.¹⁵⁶ 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.

3. Outreach

a. Printed Material

Knox produced two manuals; the *Hazardous Waste Ombudsman Handbook*, which is primarily for staff use, and the *RCRA Orientation Manual*, which is 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 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 ombudsmen by the various program "hot-

155. *Id.* at II-29.

156. Booz, Allen & Hamilton, *supra* note 148, at II-16.

lines." Program staff and other users also refer matters to the ombudsman.

4. *Special Problems*

a. Agency Implementation of Legislation

The legislation which created the RCRA Ombudsman gave the EPA wide discretion in implementing the program. The result is 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 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. These competing groups add to the difficulties facing the RCRA Ombudsman.

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. Outside of the program area, the RCRA Ombudsman is relatively unknown. It seems that the RCRA as a whole believes that there is little need for a grievance bureau of the sort contemplated by the 1984 amendment legislation creating the ombudsman.¹⁵⁷

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

157. *Id.* at II-6.

the clients who have used the service.¹⁵⁸ The ombudsman's office seems to be generally perceived as helpful and fair.¹⁵⁹

d. By Congress

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

6. *Summary and 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 skills, technical expertise, and a genuine willingness to be of assistance to persons in need. Because of the organization and location of the 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 ombudsmen functions and elevating the status of the office so that it reports directly to the Administrator (or Secretary) would greatly improve the independence and effectiveness of the ombudsman's office at the EPA.

E. Interstate Commerce Commission Ombudsman

1. *The Ombudsman's Office*

a. *Organization/Place in Agency Structure*

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

Following congressional criticism of the "regulatory lag" at the ICC during the mid 1970's, then-Commissioner Chairman Stafford established a blue-ribbon panel to study the ICC's workload. Among other

158. Interview with Robert Knox, Hazardous Waste Ombudsman, in Washington, D.C. (Aug. 3, 1990) (citing information based on correspondence received from users).

159. Telephone interview with Chris Harris, Esq., in Washington, D.C. (Apr. 1990) (Harris used ombudsman service).

recommendations, the panel recommended that an attempt be made to insulate agency adjudicators and decisionmakers from the public. As a result, the ICC 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 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. This position was also designed to assist the public, usually small motor carriers or the legal counsel of larger firms, in clarifying 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, ICC support for the program declined. While there had been a great deal of political support for the ombudsman program among the ICC Commissioners at the time of its creation, new appointees were unfamiliar with the ombudsman program and were less supportive.

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 because of a large increase in inquiries from the public and the office grew to a staff of five. During the initial period 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, attorneys and others were detailed to the ombudsman's office to assist with the volume of cases.

As the industry became acquainted with provisions of the 1980 Motor Carrier Act and the ICC's new procedures, the volume of inquiries decreased. The Commission's budget was then reduced and the ICC was forced to eliminate several positions.¹⁶⁰ Auditors were brought in to

160. The 1981 Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982), were instrumental in both the deregulation of the interstate transportation industry and

help consider ways of reducing the size of the ICC. The ombudsman's position was eliminated in 1985 and many of its functions were assigned to other offices within the ICC, including the Small Business Assistance Office¹⁶¹ and the five motor carrier teams of the Office of Proceedings.

The Small Business Assistance Office and the Special Counsel's Office were merged in 1984 to create the current Office of Public Assistance.¹⁶² Some feel that the attorneys in this office do not respond to inquiries as efficiently as the previous ombudsman's office.¹⁶³ Even though the position was officially eliminated, two former ICC Ombudsmen are still with the ICC and occasionally serve informally in that role.

b. Authority: Scope of Duties; Limits on Power

The ICC 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.

The ICC Ombudsman did not have the authority to issue corrections, process applications or pleadings, or to direct other agency offices to make corrections. The office helped applicants perfect their applications. The ombudsman also interpreted decisions for applicants. Unlike the Small Business Assistance Office, which acted as a clearinghouse for the resolution of problems experienced by small and minority busi-

the reduction in the mission of the Interstate Commerce Commission (ICC). During the early 1980's, ICC field offices were reduced from over 50 to 22. The six ICC regional offices were reduced to three. These figures were provided by Dan G. King, Director of the Office of Public Assistance, ICC, Washington, D.C. (Oct. 6, 1989). The Office of Proceedings staff declined from 360 to 110. This figure was provided by Judy Holyfield and John Hedetniemi, Legal Assistants, ICC, Washington, D.C. (Oct. 5, 1989).

161. According to Dan G. King, Director of the Office of Public Assistance, ICC, the Small Business Assistance Office is a satellite office of the Chairman created in 1977.

162. The mission of the Office of Public Assistance is to provide small businesses, shippers, governmental bodies, and the public with advice about Commission policies, rules, programs, and proceedings affecting their interests; to develop records in Agency proceedings; and to advise the Commission of changing public needs and concerns relating to the regulated interstate surface transportation industry.

163. Interview with Judy Holyfield, Legal Assistant, ICC, in Washington, D.C. (Oct. 5, 1989).

nesses and users of interstate transportation, the ombudsman's office offered its services 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,¹⁶⁴ such advice was not normally offered unless specifically requested.

c. *Modus Operandi*

The ombudsman office's intake process started by checking the status of the application. 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 twenty-four hours. 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 ombudsman also analyzed problems and suggested corrective alternative solutions. The assistant ombudsman developed manuals for staff use and the training of new employees.

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 to 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 assisted with the filing of applications and administrative compliance requirements for the issuance of certificates and permits and provided status reports on pending applications.

164. Expectations of the ombudsman were drawn from a description of duties listed in a performance evaluation provided by Judy Holyfield of the ICC.

c. Acceptance Criteria

No formal set of acceptance criteria existed.

d. Case Load

During Fiscal Year 1981, the ICC Ombudsman's office responded to approximately 73,000 public inquiries.¹⁶⁵ 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.¹⁶⁶ The performance measurements required that minimum standards and time frames be met before a fully satisfactory performance rating could be given to the ombudsman.

3. Outreach

The ombudsman sent out press releases, developed a small business motor carrier assistance booklet, and made speeches to professional associations in the regulated transportation community in order to describe the services of the office.

4. Special Problems

The ICC Ombudsman's office was severely limited in its authority. It was housed in an operating office at a relatively low level in the organization, and dealt only with one type of problem, motor carrier applications. The office lacked the standing within the ICC that an ombudsman with a broader mandate and higher status might have had.

5. Assessment

a. Within Agency

The ICC Ombudsman was well liked by the Commissioners during the ICC's heyday. It was perceived as fulfilling its limited mission at

165. Holyfield, *What the ICC is Doing for its Constituents*, E. TRANS. LAW SEMINAR 161 (1981).

166. ICC performance appraisals of the ombudsman reveal that responsiveness was considered to be of greater significance than settlement.

the time when it was most 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 success, however, gave rise to some internal agency rivalries, because some staff members in the agency apparently resented the influence the ombudsman had with ICC executives.¹⁶⁷

b. By Other Government Agencies

The Department of Transportation had a favorable opinion of the ombudsman program at the time.¹⁶⁸ The SBA had a good working relationship with the ICC's Ombudsman office.¹⁶⁹ This was because of their shared interest in assisting smaller interstate transportation entities with federal regulations affecting them. The 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.¹⁷⁰ 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.¹⁷¹

d. By Congress

The ICC Ombudsman was well regarded by congressional staff involved in transportation deregulation. Congress realized the disruptive effect deregulation would have upon the interstate transportation industry and welcomed innovations such as those provided by the ombudsman service to ease the transition.

167. Interview with John Hedetniemi, Legal Assistant, ICC, in Washington, D.C. (Oct. 5, 1989).

168. *Id.*

169. Interview with Judy Holyfield, *supra* note 163.

170. Interviews with John Hedetniemi and Judy Holyfield, *supra* notes 163 and 167 (citing information based on correspondence from users received by ICC ombudsmen during their tenure).

171. Interview with Gary J. Edles, former Director of the ICC, Office of Proceedings (currently General Counsel, Administrative Conference), in Washington, D.C. (Oct. 6, 1989).

6. *Summary and Critique*

This ICC ombudsman program was limited in its mission. The ombudsman's office was set up to serve a short-term need, which it did with distinction. Its value today is as a model which agencies can look to deal with a sudden increase in a particular type of regulatory caseload.

F. The Department of Commerce Ombudsman: The Ombudsman for Business

Maurice H. Stans, Secretary of the Department of Commerce (Department) 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 1971.¹⁷² The office's primary purpose was to reduce the red tape in doing business with the government.

1. The Ombudsman for Business' Office

a. Organization/Place in Agency Structure

The secretarial order established the position of Ombudsman for Business in the Secretary of Commerce'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 compliment 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."¹⁷³

This initial organization lasted until Mr. Thomas Drumm, the first Business Ombudsman, retired in June 1973. From the account of those who assisted him, the initial organization worked well. In fact, the first two years seem to have been the most productive for this program;¹⁷⁴

172. Dep't of Commerce Org. Order No. 15-7 (USCOMM Pub. 7171) (Mar. 26, 1971) [hereinafter Secretarial Order].

173. In practice, this authority gave the ombudsman temporary borrowing rights of 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. Telephone interview with Gordon W. Schmidt, member of the business assistance staff of the Office of Business Liaison (OBL), in Washington, D.C. (Feb. 21, 1990) [hereinafter Interview with Schmidt].

174. Joint interview with Diane Terpeluk, Director of the Office of Business Liaison, and Gordon W. Schmidt and Martha C. Finerty, members of the business assis-

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's office was moved to DIBA where the ombudsman and his staff 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.¹⁷⁶ Today, following a reorganization in 1980, what remains of the original functions are performed in the Office of Business Liaison (OBL), where Gordon Schmidt and Martha 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; and (4) develop proposals to remedy the causes of complaints for the action of the Secretary.¹⁷⁶

As the order demonstrates, 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 the office did mediate complaints.¹⁷⁷ The authority was carefully limited to preclude the Office

tance staff of OBL, in Washington, D.C. (Aug. 1, 1989) [hereinafter Interview with Terpeluk, Schmidt, and Finerty].

175. John P. Kearney, one of Drumm's successors 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 put into effect, he was unable to persuade then-Secretary Frederick B. Dent to reverse the action. Interview with Schmidt, *supra* note 173.

176. The order explicitly outlines the power of the ombudsman to include several duties. Secretarial Order, *supra* note 172, § 3.01-03.

177. Interview with Terpeluk, Schmidt, and Finerty, *supra* note 174. 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

from "assist[ing] businesses and individuals on specific matters, cases or issues before Federal regulatory agencies" ¹⁷⁸ 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." ¹⁷⁹

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 1970's, particularly 1973 through 1974, 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's 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 to each matter. 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 Office of Business Liaison (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 OBL put it, "I feel everyone should have a chance to present their case."¹⁸⁰

ombudsman's efforts. See Interview with Schmidt, *supra* note 173. More frequently, the ombudsman served as a go-between for businesses in their dealings with other federal agencies. *Id.*

178. Secretarial Order, *supra* note 172.

179. *Id.* § 3.03.

180. Interview with Terpeluk, Schmidt, and Finerty, *supra* note 174.

2. *Case Work*

a. *Clients/Users*

The ombudsman's 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 business' failure to complete and return forms requesting 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 conflict with the limits on the office's authority as set out in sections 3.02 and 3.03 of the order creating the office.¹⁸¹

d. *Case Load*

Statistics are not 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, the 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 1970's and ultimately helped work out a solution to the processing log jam by recommending a number of remedies to the Secretary,

181. See *supra* notes 178-79 and accompanying text (describing statutory limits on ombudsmen's ability to intervene in problem areas).

including an increase in the processing staff. The ombudsman was also able to deal effectively with complaints about slow payment of bills, a problem ultimately resolved by the passage of the Prompt Payment Act.¹⁸² Since the OBL no longer handles complaints, 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 services provided by the ombudsman and to encourage its use. The office was also described in Commerce Department publications such as *Business America* and *Commerce Business Daily*. The Ombudsman for Business was also publicized in trade association and other private-sector publications.

Today, the 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 along with the brochure and other printed materials.

b. Meetings with Users

The first Ombudsman met frequently with businessmen and 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 Department of Commerce 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, the EPA, and the SBA, 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 twenty-six months it operated actively as an ombudsman, taking

182. Prompt Payment Act, 42 U.S.C. § 3901 (1988).

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 Drumm 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*

Former Secretary of Commerce Stans highly regards the ombudsman office and the work it performed, and considers it a success.¹⁸³ 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. *Summary and 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 burst of interest in the idea 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 DIBA. The ombudsman's office was not successfully restructured and it gradually disintegrated to its present status as simply a query-answering office in the OBL. 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.¹⁸⁴

183. Interview with Schmidt, *supra* note 173 (commenting on Secretary's opinions about value of first ombudsman's office).

184. *Id.*

III. 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 he may be. This is the prevailing view of the students of the field, and it is born out by our investigations. The state ombudsmen (Iowa, Nebraska, Alaska, and Hawaii) were created by acts of their respective legislatures. All are independent and appear quite durable. 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 modified or even repealed,¹⁸⁵ 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 Department of Commerce, ICC, AMC, and IRS Ombudsmen were set up by departmental order, and 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 Ombudsman illustrates one drawback to creating an ombudsman by administrative fiat; while Secretary Stans was able to establish the office quickly by using a secretarial order, his successors were able to reassign and downgrade the ombudsman's office just as easily.

In theory, at least, the IRS Taxpayer Ombudsman, which was administratively created, could have been administratively eliminated until Congress passed the Taxpayers' Bill of Rights legislation in 1988. By giving the ombudsman certain powers, such as the ability to issue TAOs and duties, Congress put its imprimatur on the office. While the *United States Code* does not specifically state 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, pres-

185. More likely, a disgruntled legislature, or one finding itself financially strapped, may cut the ombudsman's budget. For example, the Alaskan 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. See ALASKA ADMIN. CODE tit. 24, § 55.010-.340 (Sept. 1985) (codifying organization and function of ombudsman). 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. See IOWA CODE ANN. § 601B.1-G.23 (West 1988 & Supp. 1990) (defining purpose and role of ombudsman).

tige, and influence. As it stands, 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. 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 RCRA to flesh out the proposal and implement it. The RCRA apparently was opposed to the idea from the beginning and showed little interest in creating the office or assuring that it would be effective. Not only did the RCRA delay in creating the office for two years (and then did so only in response to congressional prodding), but it placed the office inside a 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.¹⁸⁶

186. There is an ongoing struggle between Congress and the EPA over the need for an ombudsman and the role the ombudsman is to play. Early drafts of House bills in the 101st Congress attempted to make the EPA a cabinet level department calling for a single, department-wide ombudsman at the secretarial level. The provision was deleted from the bills as introduced in order to obtain bipartisan support. H.R. 3847, 101st Cong., 2d Sess., § 303(a)(5), 136 CONG. REC. 1170, 1176 (1990). In spite of the concessions made with regard to the ombudsman provisions, the bill passed the House, but was never presented to the Senate floor, and thus died when the 101st Congress ended. At the House Government Operations Committee hearing on the House bills on February 7, 1990, the 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 the EPA bureaucrats' shoulders. *Hearings on H.R. 3847 Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operation*, 101st Cong., 2d Sess. 31-33 (1990) (statement of William K. Reilly, EPA Director). The bill's ranking Republican sponsor, Representative 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 provisions for an ombudsman. *Id.* at 72 (statement of Representative Frank Horton).

B. Method of Appointment

Legislation introduced in the 101st Congress to establish the Social Security Administration (SSA) as an independent agency, placed responsibility for administering the SSA in the hands of a board appointed by the President with the advice and consent of the Senate. In turn, this board is given the power to appoint the beneficiary ombudsman provided in the bill.¹⁸⁷ The Model Ombudsman Statute places the power to appoint in the executive, subject to confirmation by the legislature.¹⁸⁸ The executive ombudsmen considered in this report were selected by the head of the SSA without formal consultation with the legislature. Given the nature of the ombudsman function, the method used to create the ombudsman's office, should to the extent possible, assure the ombudsman's independence and neutrality.

C. Qualifications of the Ombudsman

An ombudsman who, by experience, training, and temperament is able to command respect for his or her proposed solutions to problems, and who is sought out by agency policymakers for his opinions on operation issues, will make the most of his office. 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."¹⁸⁹ He also recommends that no specific experience be required and that no category of persons, such as former legislators or other office holders, be excluded from the position.¹⁹⁰

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'."¹⁹¹ Hill classifies government agencies along functional lines as follows: client-serving agencies, those dealing with housing and employment problems; client-processing agencies, such as licensing, regulation, and taxation agencies; and "non-client oriented" agencies, such as re-

187. See H.R. 791, 101st Cong., 1st Sess., 135 CONG. REC. 5984, 6079 (1989).

188. Gellhorn, *Annotated Model Ombudsman Statute*, in OMBUDSMEN FOR AMERICAN GOVERNMENT 4, 159, 161 (S. Anderson ed. 1968).

189. *Id.* at 162.

190. *Id.*

191. Hill, *The Citizen Participation-Representation Roles of American Ombudsmen*, 13 ADMIN. & Soc'y 405, 407 (1982).

sources and manufacturing problems, and environmental and land problems. 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, 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 for the establishment of an ombudsman to deal with a particular exigency. The IRS PRP 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 "backed-up and bogged-down" profile. In 1980, the ICC 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 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 in the troubled agency setting, both to help sort out the problems confronting the agency and to help restore public confidence. The Housing and Urban Development (HUD) Secretary Jack Kemp made use of the HUD's Inspector General to help identify and eliminate fraud and abuse in coping with the maladministration of several of the HUD's grant-in-aid programs. An ombudsman could have provided an early warning and would have helped the HUD 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 could have attempted to deal with the problems that have arisen recently in the savings and loan area.¹⁹²

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 passes. The better course is to put it on permanent footing, either to help prevent the reoccurrence of

192. In addition, the Food and Drug Administration recently appointed an ombudsman in response to a need in the generic drug industry.

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. A well run agency may benefit by appointing an ombudsman because of what the ombudsman is able to do to keep things running smoothly. In an era when it seems more difficult and time-consuming to obtain even routine services and information from the government, a phenomenon one authority describes as the "bureaucracy problem,"¹⁹³ the assistance an ombudsman is able to provide may be too great to forego.

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.¹⁹⁴ 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: direct access to the head of the agency, and the trust and respect that comes from working relationships formed during his or her agency career.¹⁹⁵

193. The term "bureaucracy problem" was coined by James Q. Wilson in 1967. We are indebted to Larry B. Hill for the reference. See Hill, *supra* note 191, at 405.

194. 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, who functions as 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.

195. These are not insubstantial advantages. Ombudsmen who deal with employee relations matters are often chosen from among the agency's most senior and respected executives as a last assignment before retirement. An end of career appointment helps assure the personnel ombudsman's independence and neutrality since he or she will

Executive ombudsmen, on the other hand, are usually placed in or near the office of the agency director or head of the agency 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 Department 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, direct access to the director assures that the ombudsman's views on individual complaints and policy matters are not watered down during review by the line operation involved.

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.¹⁹⁶ 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.¹⁹⁷ This study confirms that the investigation and resolution of complaints are the primary function that ombudsmen perform for individual members of the public. 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 turns to a large degree on the power that the ombudsman has to conduct meaningful investigations and to report findings and make recommendations. The power to investigate, either through a complaint, or on his own motion, any act of the department or agency, the ability to examine agency records and interview agency personnel, and the ability to issue subpoenas to compel the

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 results.

196. Hill, *supra* note 191, at 405-30.

197. *Id.* at 423.

attendance of witnesses and the production of documents deemed relevant to the subject of the investigation are among those commonly provided to legislative ombudsmen.¹⁹⁸ The executive ombudsmen covered in this study typically have less authority to compel the production of testimony or documents, but generally have 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."¹⁹⁹

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.²⁰⁰

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-blowers, are particularly sensitive. Unless a whistle-blower may approach the ombudsman with his concerns without fear of jeopardizing their career, it is likely that the employee will look elsewhere to unfold his or her suspicions, such as by a surreptitious call to the press, or simply hold back.²⁰¹

198. Gellhorn, *supra* note 188, at 164-65.

199. See *supra* notes 81-86 and accompanying text (explaining ombudsman's powers under Charter).

200. See GAO study of the IRS PRP, *supra* note 72 and accompanying text (setting forth means IRS can improve PRP).

201. Of the ombudsmen studied for this report, only 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 requiring confidential handling; an employee is not likely to raise a concern about unfair treatment

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 PRP 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, such as to litigants in a law suit involving the complainant or to the members or staff of a congressional committee or to personnel from other government agencies.²⁰² 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 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.

Cases where the law requires or permits disclosure of such 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. 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 a FOIA request. The Administrative 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.²⁰³ The Administrative 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 the FOIA so as to avoid disclosure of settlement communications.²⁰⁴

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.

202. See ENCOURAGING ADMINISTRATIVE SETTLEMENTS BY ENSURING MEDIATOR CONFIDENTIALITY, ACUS RECOMMENDATION 88-11, 1 C.F.R. § 305.88-11 (1991) [hereinafter Recommendation]; HARTER, NEITHER COP NOR COLLECTION AGENT: ENCOURAGING SETTLEMENTS BY PROTECTING MEDIATOR CONFIDENTIALITY 839 (Nov. 15, 1988).

203. Recommendation, *supra* note 202. 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.

204. See 1985-1987 ALASKA STATE OMBUDSMAN ANN. REP. (discussing forced dis-

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 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. This 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. Also, there does not 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. It is also not inappropriate for the ombudsman to publish anecdotal summaries of actual cases as a means of illustrating common problems and educating the public as to the nature of the service provided. This can be done 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.²⁰⁵

2. *How is Confidentiality Provided?*

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."²⁰⁶ It does not deal directly with the question of confidentiality, 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 . . ."²⁰⁷ As an example, the Nebraska Ombudsman Statute, which appears to be based on the model, does not deal directly with the confidentiality issue.²⁰⁸ On the other hand, the law creating the ombudsman for the Province of Ontario, Canada, provides that, except in trial for perjury,

closure of notes).

205. See Gellhorn, *supra* note 188, at 159 (addressing ombudsmen's reports).

206. *Id.* at 172, § 17(c).

207. *Id.* at 176.

208. Nebraska Public Counsel Act, NEB. REV. STAT. §§ 81-8, 240-54 (1987).

"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 . . ." ²⁰⁹

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."²¹⁰ It also provides that "evidence of conduct or statements made in compromise negotiations is likewise not admissible."²¹¹

However, flaws in FRE 408's shield make its protection rather uncertain. If nothing else is done, ombudsmen offices, or better yet their agencies, should adopt procedures to help ensure case 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.

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 maladministration, abusive or indifferent treat-

209. The Ombudsman Act of 1975, 42 ONT. STAT. § 20(6).

210. FED. R. EVID. 408. See Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984) (discussing difficulty of assuring protection for 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 relationship to bias. *Id.*

211. FED. R. EVID. 408.

ment, tardiness, unresponsiveness, and the like.²¹² 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 the HHS, the IRS, and the AMC.

The authors urge 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 ombudsman's office using existing personnel either on an agency-wide basis or to assist in the administration of particular programs.

212. 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 ascertainties 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.

Gellhorn, *supra* note 188, at 159, 166, § 10(a).

