

# Denver Law Review

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Volume 45  
Issue 1 *Symposium - International Business  
Transactions: The Transfer of Technology in  
Transnational Business*

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Article 8

January 1968

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### Recommended Citation

Loren L. Mall, Colorado's Ombudsman Office, 45 Denv. L.J. 93 (1968).

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## Colorado's Ombudsman Office

# NOTE

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## COLORADO'S OMBUDSMAN OFFICE

### INTRODUCTION

IN 1605 Don Quixote de la Mancha rode forth from the pages of Cervantes' classic book to do battle against all wrong. He fancied himself a grand knight in shining armor whose self-appointed quest was to seek out the destroyer, end tyranny, and bring justice to the weak and the oppressed. His thirst to conquer the foe soon set him tilting at a giant knight who proved to be a windmill and then pitted his prowess against a great army which was only a flock of sheep. His goals may have been admirable, but his lack of contact with reality doomed him to defeat from the start.

Today a new knight is setting out on much the same mission. This present day defender of the public, the ombudsman, has not cast himself in the ancient quixotic mold. He is a concept which citizens throughout the world<sup>1</sup> have conjured up from enthusiastic reports from Scandinavia.<sup>2</sup> The people would dub the ombudsman their champion and send him forth to battle every official wrong. They want him as a means of satisfying their need for a sense of personal importance in the vastness and the facelessness of bureaucracy. They have romanticized the ideals inherent in the office into a fantasy that does not exist;<sup>3</sup> the ombudsman they see is a panacea for most of the shortcomings of the modern administrative system.<sup>4</sup> As agency control over the lives of people grows more pervasive, their demand for relief from governmental red tape becomes more audible and their infatuation for this hero becomes more clear. In response, a bevy of nations, including the United States and its state and local governments, have recently begun considering transplanting

<sup>1</sup> Bainbridge, *A Civilized Thing*, NEW YORKER, Feb. 13, 1965, at 136, reprinted in *Hearings on S. Res. 190 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 106 (1966) [hereinafter cited as *1966 Hearings*]; Kastari, *Finland's Guardians of the Law*, in *THE OMBUDSMAN* 58 (D. Rowat ed. 1965).

<sup>2</sup> W. GELLHORN, *OMBUDSMEN AND OTHERS* 5-6, 239 (1967); Krislov, *A Restrained View*, in *THE OMBUDSMAN* 246, 247 (D. Rowat ed. 1965); e.g., Asher, *Ombudsman (Mr. Fixit) Here to Explain Unique System*, Washington Post, Mar. 7, 1966, reprinted in *1966 Hearings* 28; see Anderman, *The Swedish Justitieombudsman*, 11 *AM. J. COMP. L.* 225 (1962), reprinted in *1966 Hearings* 96.

<sup>3</sup> See W. GELLHORN, *OMBUDSMEN AND OTHERS* 195 (1967). This development has been referred to affectionately as "ombudsmania." Marshall, *The United Kingdom*, in *THE OMBUDSMAN* 173 (D. Rowat ed. 1965).

<sup>4</sup> A Pattern of Executive Protection: The Ombudsman, address by Hans Blix, at Howard University School of Law, Feb. 21, 1965, reprinted in *1966 Hearings* 90.

this ancient Nordic institution to their shores.<sup>5</sup> At least two American governments, Hawaii<sup>6</sup> and Nassau County, New York,<sup>7</sup> have adopted the idea, and others seem destined to follow suit. Whether this American experiment will fulfill the public's high expectations or whether it will prove to be only a quixotic exercise remains to be seen.

Colorado, having docketed an ombudsman bill in both houses during the 1967 legislative session and having an unofficial and voluntary ombudsman in the person of Lieutenant Governor Mark Hogan, may count itself in the forefront of the American governments which have seriously considered the ombudsman idea. The Lieutenant Governor has done more than anyone else to spark interest among the people of the state. Shortly after taking office in January 1967, Mr. Hogan announced that he intended to assume the role of ombudsman for Colorado.<sup>8</sup> The public has taken advantage of his offer, and requests for his aid are increasing as publicity about his work mounts. The local newspapers have added to the interest by carrying on a lively debate over the merits of the concept. The question which this situation presents to Coloradans is whether the institution should be given formal status by the enactment of an ombudsman bill at some future date.

Intelligent consideration whether this foreign institution has any value for Colorado must be founded on a good understanding of what the institution involves. The theory is simple: an ombudsman is a government official appointed to receive and investigate complaints made by individuals against abusive or capricious acts of public officials. If he finds the complaint is justified, he tries to correct the action. He cannot reverse the official decision, but he does try to persuade the agency to change its ways. He can often influence a reluctant agency to adopt his recommendation by publishing his own opinion in the news media to bring public pressure to bear.

Although the theory is simple, the ramifications are complex. A good deal of information should be considered before any conclusions are reached about Lieutenant Governor Hogan's ombudsman work or about the ombudsman bills proposed for Colorado. The Colorado situation can be better evaluated after viewing the ombudsman institution in its historical setting and after analyzing

<sup>5</sup> Anderman, *supra* note 2; Krislov, *supra* note 2, at 246-47.

<sup>6</sup> 10 STATE GOVERNMENT NEWS, July 1967, at 7.

<sup>7</sup> County Executive of Nassau County, N.Y., Press Release, May 31, 1966. See also N.Y. Times, Nov. 20, 1966, § 1, at 53, col. 1. The County Executive presented a proposed local law to the Board of Supervisors which would create the office of Public Protector. On the same day he appointed the Commissioner of Accounts to assume the powers and duties detailed in the proposal. The Board has not yet submitted the bill to the people on referendum.

<sup>8</sup> Rocky Mountain News, Jan. 12, 1967, at 23, col. 1.

its strengths and weaknesses as revealed by the existing ombudsman systems in other countries. Then this institution which developed within a parliamentary, civil law form of government must be measured against the unique aspects of our congressional, common law system.

Reports of the detailed workings of most of the present ombudsman offices have been published by competent authors. That material will not be repeated here except to the extent necessary to give a glimpse of how the office has traditionally functioned and to show what results have been achieved. The parts of this article which deal with specific facts and statistics recorded in the ombudsman countries are drawn in large part from the first hand reports written by Professor Walter Gellhorn and collected in his excellent book, *Ombudsmen and Others*.<sup>9</sup>

### I. THE SWEDISH INSTITUTION

The ombudsman concept is a product of monarchical Sweden.<sup>10</sup> The direct predecessor of the present Ombudsman<sup>11</sup> came onto being in 1713 during Sweden's war with Russia under Czar Peter I. After twelve years of absence from the country as Commander-in-Chief of his army, Sweden's King Charles XII found himself unable to dispense enlightened justice or to assure himself that his servants were faithfully carrying out the law. Therefore, he made a decision which was to prove fateful for modern administrative government. He appointed the King's Supreme Ombudsman to oversee the tax collectors, the judges, and the handful of public servants who administered the law in his name.<sup>12</sup> The Swedish of today have praised his decision,<sup>13</sup> but it is likely he was motivated more by a desire to insure himself against embezzlement than by a desire to protect his people against oppression.<sup>14</sup>

The temporary appointment became a permanent part of the

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<sup>9</sup> W. GELLHORN, *OMBUDSMEN AND OTHERS* (1967) [hereinafter cited as GELLHORN].

<sup>10</sup> It is noteworthy that the office was created by an absolute monarch, since American critics have attacked the idea as part and parcel of "creeping socialism." Unruh, *The Need for an Ombudsman in California*, 53 CALIF. L. REV. 1212, 1213 (1965).

<sup>11</sup> "Ombudsman" is an early Swedish term composed of three syllables. "Om" translates as about, "bud" means message, and "man" is person. Thus the literal translation is "man with a message about something." Fowle, *Two Ombudsmen Report on Roles—Civic Control Described by Swede and New Zealander*, N.Y. Times, Feb. 20, 1966, § 1, at 20, col. 1, reprinted in 1966 Hearings 380. In Swedish idiom the term more accurately means a "person who represents someone." Address by Blix, *supra* note 4, at 93.

<sup>12</sup> GELLHORN, *supra* note 9, at 194-95; Bexelius, *The Swedish Institution of the Justice Ombudsman*, 27 INT'L REV. AD. SCI. 243 (1961), reprinted in 1966 Hearings 77-78; address by Blix, *supra* note 4, at 93; Rudholm, *The Chancellor of Justice*, in THE OMBUDSMAN 17-18 (D. Rowat ed. 1965).

<sup>13</sup> See, e.g., Bexelius, *The Ombudsman for Civil Affairs*, in THE OMBUDSMAN 22, 25 (D. Rowat ed. 1965).

<sup>14</sup> GELLHORN, *supra* note 9, at 2.

royal government. After the death of Charles XII the officer became known as the Chancellor of Justice. In 1766 when Sweden's Parliament, the Riksdag, had gained the balance of power, it appropriated the right to appoint the Chancellor. Later when the winds of political fortune reversed, the new King reasserted the monarchical authority and made the Chancellor the Crown's officer once more. Then in 1809 while the nation was again at war with Russia and engulfed in national and international crises, the Riksdag led Sweden away from royal government toward representative democracy. The Constitution which was drafted and adopted by the Riksdag gave it many new powers to offset the great authority of the King. One brief clause created the office of Justitieombudsman as a safeguard against disregard of the law by royal officers. The King had his Chancellor of Justice to watch the civil service; now the Riksdag had its own inspector of courts and administrative agencies, the Ombudsman.<sup>15</sup>

#### A. Results in Sweden

These developments in Sweden in 1809 launched the revolutionary idea of an official critic of government. The institution has flourished there, and after more than one hundred and fifty years the tradition permeates the thinking of the Swedish people.<sup>16</sup>

With only a few assistants and a present annual budget of \$120,000,<sup>17</sup> the Ombudsman has carved a permanent niche in Swedish life and has exerted a definitely beneficial influence on the quality of its government.<sup>18</sup> The Ombudsman has been particularly effective in protecting the civil rights of citizens, *e.g.*, the rights of peaceful assembly, free speech, and access to all official documents. The liberties of the citizens have been safeguarded against encroachment by the judiciary, the prosecutors, the police, and the penal institutions. While success in checking administrative agency derelictions has been less noteworthy,<sup>19</sup> the results have been impressive,

<sup>15</sup> Authorities cited note 12 *supra*.

<sup>16</sup> Anderman, *supra* note 2, at 237-38, 1966 *Hearings* at 105-06.

<sup>17</sup> Bainbridge, *supra* note 1, at 142, 1966 *Hearings* at 108. The staff consists of nine lawyers and three secretaries.

<sup>18</sup> Anderman, *supra* note 2, at 234-35, 1966 *Hearings* at 102-03. "[F]ew would deny that the Ombudsman institution has in its various forms achieved much good in those countries where it exists." Mitchell, *The Irrelevance of the Ombudsman Proposals*, in *THE OMBUDSMAN* 273 (D. Rowat ed. 1965).

<sup>19</sup> Anderman, *supra* note 2, at 235-37, 1966 *Hearings* at 103-05. There are special factors which have hindered progress in this field. The administrative branch of government is expanding rapidly without an increase in the staff available, or a decrease in other responsibilities. The agencies usually do not explain their decisions. There is no administrative procedure act, and furthermore, neither the courts nor the Ombudsman can easily determine their jurisdiction over administrative decisions. The institution is presently shifting focus from supervision of the judiciary to supervision of administration, and the transition is not complete. It has been suggested that a country with a more highly developed system of judicial review would not experience these difficulties because jurisdiction could be more clearly defined. *Id.*

especially in achieving uniformity of procedure and uniformity of interpretation.<sup>20</sup> It is as legislative reformer that the Ombudsman has made little progress. His proposals to Parliament for statutory change have largely been ignored although his annual reports to Parliament and his petitions to the executive branch continue to repeat his advice on matters in the expectation that his suggestions will eventually prevail.<sup>21</sup>

The influence of the Ombudsman does not result from the few constitutional powers he is given. It stems from his position as the trustee of Parliament, and from the tremendous prestige the office has accumulated over the century and a half of its existence. His carefully reasoned arguments made from this respected position are usually sufficient to persuade an official, if not the Parliament, to accept his suggestion. These factors are the source of his influence, and the press is the means by which it is maintained and disseminated.<sup>22</sup>

The Swedish would be the first to admit that their Ombudsman is not a single handed miracle worker. There have been no sensational disclosures of scandal on a national level. In fact, very few of the cases have been remarkable, but that has not detracted from their importance to the individuals involved.<sup>23</sup>

The first Ombudsman corrected the most spectacular abuses which have been discovered. On one inspection in 1825 of a debtors' prison at Stockholm, the Ombudsman found an unfortunate brewer who had been imprisoned for twenty-two years waiting for the Supreme Court to decide his appeal. The Court had mislaid his file! The executive branch was moved to release the man without any further penalty.<sup>24</sup>

A more typical example of recent years resulted in standardization of agency procedure. Swedish law authorizes county administrators to revoke driving licenses on evidence that the holder does not meet the standards of skill, responsibility or reliability required of a driver. The Ombudsman's investigation into revocation procedures showed that various administrations employed widely different standards. Some revoked the driving licenses of persons for

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<sup>20</sup> GELLHORN, *supra* note 9, at 240.

<sup>21</sup> *Id.* at 244-46.

<sup>22</sup> See Bexelius, *supra* note 13, at 25; Anderman, *supra* note 2, at 225, 1966 *Hearings* at 96; Bainbridge, *supra* note 1, at 138, 142, 1966 *Hearings* at 107-08. "[T]he Ombudsman's finding fault causes some temporary pain and perhaps some loss of self-esteem in most instances, but . . . it rarely leaves permanent scars if the offense was not willful. . . . A headline saying the Ombudsman has criticized the police is almost the equivalent of a prosecution." GELLHORN, *supra* note 9, at 249-50. The individual's career is not lost because his superiors may choose to ignore the incident in favor of the rest of his record when promotions are considered.

<sup>23</sup> Bexelius, *supra* note 13, at 36-37.

<sup>24</sup> *Id.* at 38.

drunkenness even though they had not been driving. Other administrations only revoked licenses after two or three cases of drunkenness. The Ombudsman's remarks were sufficient to cause each administration to adopt the same revocation procedure.<sup>25</sup>

An examination of 400 cases involving driving under the influence of alcohol revealed that some courts had used incorrect formulas to determine the alcohol content of the blood. Two outstanding scientists were called upon to define a valid calculation. Their information was passed along to the courts which were able to increase accuracy and administer better justice.<sup>26</sup>

A man in a mental hospital wrote a letter complaining that one of the doctors was opening his mail. The Ombudsman could only reply that the doctor was authorized by law to do so.<sup>27</sup>

In another case, a band of gypsies set up camp on a beach in a town. They were located on a public camping site so they refused to leave when the local chief of police requested them to move on. The next day the gypsies and their belongings were loaded onto a police bus and dumped off in a desolate area. They asked the Ombudsman to investigate. Since the gypsies had violated no law, the police chief had acted illegally. The police chief was prosecuted by the Ombudsman under the rarely used constitutional authorization to prosecute officials who commit unlawful acts or who neglect to perform their duties in the proper manner. The court found the police chief guilty of the charge and assessed a fine.<sup>28</sup>

The Ombudsman once read in a Stockholm newspaper of an alcoholic who had killed his wife in a drunken rage. Four days earlier she had asked the police for protection, insisting that her husband was a dangerous alcoholic. The Ombudsman wrote to the police and asked why they gave the lady no protection. They replied that they had taken the man into custody at once, but had to release him since the law did not allow detention of an alcoholic for more than one day. During that day the police had not been able to gather sufficient evidence to have him committed to an institution for alcoholics. The police were exonerated, but the government was moved to amend the law so as to authorize detention of a person charged as a dangerous alcoholic for enough time to complete the investigation.<sup>29</sup>

A statistical examination of the Swedish Ombudsman's efforts gives another perspective of the work he and other ombudsmen do. In 1964 the Ombudsman received 1,429 new cases. Of those, 1,239

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<sup>25</sup> 1966 *Hearings* at 35-36.

<sup>26</sup> *Id.* at 36.

<sup>27</sup> Bainbridge, *supra* note 1, at 142, 1966 *Hearings* at 109.

<sup>28</sup> 1966 *Hearings* at 33.

<sup>29</sup> *Id.* at 30.



were citizens' complaints, 179 were the result of his inspections or other information, and eleven were initiated on his own motion on the basis of newspaper reports.<sup>30</sup> Although they comprise only thirteen percent of his caseload, the Ombudsman thinks his inspections produce the most significant leads to administrative shortcomings.<sup>31</sup> About twenty percent of the private complaints come from inmates of mental hospitals and penal institutions.<sup>32</sup> About thirty percent of the personal complaints are dismissed without an inquiry. Approximately ninety percent of all investigated complaints are dismissed after an examination of the relevant documents. All complainants whose cases are dismissed receive a written explanation of the dismissal.<sup>33</sup> Only about ten percent of all complaints are determined by the Ombudsman to be justified.<sup>34</sup>

### B. *Adoption of the Swedish Institution Elsewhere*

In spite of its longstanding acclaim in Sweden, it is only within the last two decades that the ombudsman institution has gained much recognition elsewhere.<sup>35</sup> Finland is the one exception; her historical links with Sweden caused Finland to create an Ombudsman office in 1919.<sup>36</sup>

Denmark generated the current worldwide interest by installing an ombudsman for civil and military affairs in 1954.<sup>37</sup> The office was adopted by West Germany in 1957,<sup>38</sup> and then, in quickening succession, by Norway and New Zealand in 1962.<sup>39</sup>

Guyana, a newly emerged nation state, created an ombudsman office by its new constitution.<sup>40</sup> Laval, Canada, a suburb of Quebec City, became the first North American government to establish the office by adopting its own version in January 1966.<sup>41</sup> Nassau County, New York, was the first United States government to have an ombudsman. However, the office created there in May 1966 was instituted by executive order rather than by legislative enactment or by

<sup>30</sup> GELLHORN, *supra* note 9, Table XII at 208.

<sup>31</sup> *Id.* at 208.

<sup>32</sup> Bainbridge, *supra* note 1, at 142, 1966 *Hearings* at 109.

<sup>33</sup> GELLHORN, *supra* note 9, Table XIV at 214; address by Blix, *supra* note 4, at 94.

<sup>34</sup> GELLHORN, *supra* note 9, at 213.

<sup>35</sup> GELLHORN, *supra* note 9, at 5; Bainbridge, *supra* note 1, at 136, 1966 *Hearings* at 106.

<sup>36</sup> GELLHORN, *supra* note 9, at 48-50; Anderman, *supra* note 2, at 225, 1966 *Hearings* at 96.

<sup>37</sup> See generally GELLHORN, *supra* note 9, at 5-8; Northey, *New Zealand's Parliamentary Commissioner*, in *THE OMBUDSMAN* 127, 131 (D. Rowat ed. 1965).

<sup>38</sup> Anderman, *supra* note 2, at 225, 1966 *Hearings* at 96-97.

<sup>39</sup> GELLHORN, *supra* note 9, at 154-59 (Norway); Northey, *supra* note 37, at 127 (New Zealand).

<sup>40</sup> Gellhorn, *Ombudsman in America?*, *TRIAL*, Apr.-May 1967, at 38.

<sup>41</sup> Cloward & Elman, *Poverty, Injustice and the Welfare State, An Ombudsman for the Poor?*, *THE NATION*, Feb. 28, 1966, at 230, 233.

referendum of the people.<sup>42</sup> Hawaii, in June 1967, became the first of the states to enact an ombudsman bill. But that legislation remains on the books, unconsummated, because the legislature did not fill the office or provide a fund for its operation.<sup>43</sup>

## II. ANALYSIS OF THE EXISTING OMBUDSMAN OFFICES

Each government which has transplanted the institution has built on the original foundation, making adaptations to fit the special needs of the adopting country. An examination of the strengths and weaknesses which have been highlighted by the variations from Scandinavia to New Zealand reveals much about the form the office should take. At the same time, the comparison gives some indication of the success which could be expected in Colorado.

### A. Qualifications

It may not be essential that an ombudsman be an attorney, but legal training would be an important asset.<sup>44</sup> While a good portion of his work primarily requires common sense and an overall view of the administrative system, there remains a substantial part of the program which only an attorney is trained to handle. For example, the ombudsman must provide expert investigation involving questions of law if the public, the agencies and the legislature are to be influenced.<sup>45</sup> The officer must be capable of demanding certain standards of conduct from an agency and be capable of persuading officials that the law requires no less.<sup>46</sup> As another example, it is highly unlikely that anyone other than an experienced attorney could successfully argue that the case of *SEC v. Chenery Corp.*<sup>47</sup> requires

<sup>42</sup> Authorities and material cited note 7, *supra*.

<sup>43</sup> 10 STATE GOVERNMENT NEWS, July 1967, at 7. See also Rocky Mountain News, June 15, 1967, at 55, col. 1.

<sup>44</sup> See GELLHORN, *supra* note 9, at 422-23; cf. Aaron, *Utah Ombudsman: The American Proposals*, 1967 UTAH L. REV. 32, 44.

<sup>45</sup> Abrahamson, *Ireland*, in THE OMBUDSMAN 201, 204 (D. Rowat ed. 1965).

<sup>46</sup> See Abraham, *The Need for an Ombudsman in the United States*, in THE OMBUDSMAN 234, 236 (D. Rowat ed. 1965).

<sup>47</sup> 332 U.S. 194 (1947). Many experienced attorneys will find this reading of the second *Chenery* case startling. It is, however, an interpretation which has been made by the respected Administrative Law Section of the American Bar Association.

[T]he *Chenery* case is uniformly cited or miss-cited [*sic*] to support an agency's election to proceed by *ad hoc* adjudication rather than by rule making. Occasionally, as in the *E & B Brewing* case [NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960)], it is cited as establishing limitations upon retroactive application of standards established in such adjudications. It has not been cited as establishing or suggesting, as it does, standards for finding abuse of discretion in the persistent failure or refusal of agencies to promulgate as rules those "rules of decision" which have become hoary as "well established" precedents, sometimes followed with *stare decisis* faithfulness.

Recommendations of Vice Chairman Smalley to the Committee on Agency Rule Making, 12 AD. L. BULL. 190 (1960).

the agency in a given situation to establish policy by published rules rather than by ad hoc adjudication. It is doubtful that a non-legally trained person could convincingly argue that an agency's denial of an application for a license without following announced criteria violates due process as defined in *Hornsby v. Allen*.<sup>48</sup> Moreover, it is unlikely that case law arguments would even occur to someone outside the legal profession.

The constitutional guarantees of the first eight amendments as well as those of procedural and substantive due process have become familiar terms to large numbers of the public. But whether they have been violated is a question requiring legal skill, and safeguarding these guarantees has traditionally been treated as a legal concern.

A large number of complaints force the investigator to construe statutes, rules and opinions of courts and agencies. He must be able to analyze legislative history when that is necessary to statutory interpretation. He must be capable of suggesting reorganization and delineation of responsibility among the various agencies. His work as a legislative reformer means he must be adept at many phases of law, from determining what reforms are necessary to perhaps drafting the legislative revision.

The ombudsman's effectiveness can be bolstered if his opinion, based on hindsight and expertise in administrative law, is convincing on its merits.<sup>49</sup> He cannot satisfy the complainant unless the individual is assured the investigation was thorough and accurate. He cannot effectively urge the legislature to revise without presenting solid reasons for the change. He cannot persuade the agency to adopt a new procedure without convincing it that the proffered method is more sound administratively. In the final analysis, he cannot be wrong often or he will not be able to influence anyone that his opinions are reliable.

All these requirements do not mean, however, that legal training is an indispensable prerequisite to effectiveness as an ombudsman. It is commonplace for administrators and executives without legal backgrounds to succeed. They must make many decisions involving legal considerations, but they rely on advice from attorneys. An ombudsman could do the same by making an attorney a member of his staff. Nevertheless, legal training would relieve an ombudsman of the necessity of relying on another person's advice in many matters. An ombudsman with a legal background would undoubtedly

<sup>48</sup> 326 F.2d 605 (5th Cir. 1964).

<sup>49</sup> W. GELLHORN, *WHEN AMERICANS COMPLAIN* 229-30 (1966).

have a valuable advantage; without it his efforts could be seriously hampered.

The Scandinavian countries explicitly make legal education a prerequisite, and Norway even requires that the ombudsman meet the qualifications of a judge of its highest court.<sup>50</sup> New Zealand sets out no qualifications for its ombudsman,<sup>51</sup> evidently trusting the House of Representatives to select a suitable individual. The only man appointed so far has been considered eminently qualified; he was a successful lawyer before becoming an administrator and diplomat.<sup>52</sup>

Personal characteristics are probably the most important criteria in the selection of an ombudsman.<sup>53</sup> His effectiveness rests upon several highly significant but intangible characteristics: his personality, his public image, his ability to communicate, his tenacity.<sup>54</sup> His own integrity and objectivity must be beyond doubt; if they are not, there is little that his criticism can do to effect changes or little that his opinion can do to placate complainants.<sup>55</sup> He must be self-sufficient if he is to carry out his task in the face of the criticisms that are sure to be made. He must be strong enough to criticize high ranking officials when necessary, and courageous enough to take an unpopular position. Above all, he must remain apart from partisan politics to retain the confidence indispensable to his work.<sup>56</sup>

The Danish Ombudsman, without trying, is the only official critic around whom a personality cult has developed.<sup>57</sup> While this gives him great prestige and ability to persuade, it tends to transform criticism of the man into criticism of the office. This development is probably due to the selection of a highly popular and prominent individual, and it is certainly fostered by what Professor Gellhorn describes as colorful and able performance.<sup>58</sup>

Most countries have tended to select someone who is relatively unknown, perhaps to avoid choosing a political partisan. The Swedish like to say, as one parliamentary leader expressed it, "The man we select does not lend distinction to the office; the office distinguishes him."<sup>59</sup> The Norwegians chose a judge from their Supreme

<sup>50</sup> GELLHORN, *supra* note 9, at 158.

<sup>51</sup> Ombudsman Act § 2 (1962) (New Zealand), *reprinted in 1966 Hearings* 132.

<sup>52</sup> GELLHORN, *supra* note 9, at 92.

<sup>53</sup> *Id.* at 423.

<sup>54</sup> See Abraham, *supra* note 46, at 237.

<sup>55</sup> W. GELLHORN, WHEN AMERICANS COMPLAIN 47 (1966).

<sup>56</sup> Anderman, *The Swedish Justitieombudsman*, 11 AM. J. COMP. L. 225, 226 (1962), *reprinted in 1966 Hearings* 96, 97.

<sup>57</sup> GELLHORN, *supra* note 9, at 33-34.

<sup>58</sup> *Id.* at 5 & n.1. Mr. Hurwitz was a law professor on the faculty of the University of Copenhagen.

<sup>59</sup> *Id.* at 203.

Court to be their first Ombudsman.<sup>60</sup> He has been described as a modest and shy man who does not receive widespread press coverage. Even without news reports, his work has been effective due mainly to dissemination of his opinions through specialized publications.<sup>61</sup>

On the other hand, the mildness of Finland's Ombudsman has meant that the potentialities of the office have been only partly realized. For example, while the Ombudsman agreed that local officials had no authority to intrude into the private life of one complainant, he did no more than that. He did not come to the defense of each citizen's right to privacy by issuing a rebuke and giving it widespread publicity. If he had, he might have been responsible for strengthening this right throughout the country.<sup>62</sup>

Mr. Bexelius, the Swedish Ombudsman, furnishes a good example of the attitude required. He has said:

[M]any of my friends have been angry with me. Often when I criticize a judge, he is a man with whom I have worked in court and know very, very well. Naturally, I don't like to criticize him, but I must. The ombudsman cannot be concerned about his popularity. It is no secret that high officials in Sweden — all of them — dislike the ombudsman. They say that he is always interfering in things he doesn't know anything about, and that they could do their jobs better if he would stop meddling, and so on. But all their grumbling doesn't mean a thing. Everybody knows that it is necessary to have an ombudsman.<sup>63</sup>

### B. *Method of Selection*

The Swedish procedure of a non-partisan selection by the legislative body has been widely followed. Since the ombudsman has been conceived everywhere as the legislature's agent, that body naturally exercises the prerogative of selection. Realizing that the ombudsman's whole power depends upon his objectivity, most legislatures have not succumbed to the temptation to make a partisan choice.<sup>64</sup>

The Swedish Parliament chooses a body of forty-eight electors and empowers it to elect the Ombudsman. Seats on the electoral body are proportionate to party representation in the Riksdag, twenty-four members being chosen from each house. Since World War I the elections have been unanimous. Pending elections have not received much attention by the public or the press which presumably leaves the electors free to choose a well qualified individual rather

<sup>60</sup> *Id.* at 158.

<sup>61</sup> *Id.* at 189-90.

<sup>62</sup> *Id.* at 88-89.

<sup>63</sup> Bainbridge, *A Civilized Thing*, *NEW YORKER*, Feb. 13, 1965, at 136, 151, *reprinted in 1966 Hearings* 106, 112.

<sup>64</sup> GELLHORN, *supra* note 9, at 424.

than a spokesman for the majority party. The tradition in Sweden of selecting a jurist strengthens the absence of a choice based on partisan considerations because the judiciary is removed from political elections.<sup>65</sup> The ombudsmen of Denmark, Finland and Norway are elected directly by their parliaments.<sup>66</sup>

New Zealand's method of selection is unique. The Ombudsman is appointed by the executive branch, but only upon the recommendation of each Parliament. It is possible that the Government can dictate the choice since it nominally controls the votes of its supporters. This has not happened; New Zealand's election has followed the non-partisan tradition firmly established in most of the Scandinavian countries.<sup>67</sup> It should be noted that the institution was established in Sweden in an era when party politics in the modern sense did not exist.<sup>68</sup> The recent experience in Denmark and New Zealand,<sup>69</sup> however, is a strong indication that the office can be transplanted into today's political atmosphere without loss of neutrality.

Finland is the exception to the tradition. Perhaps the injection of partisan considerations into the selection accounts for the fact that this ombudsman has less influence than those of other countries. Each party nominates a candidate and the nominee of the majority party is routinely elected. At least the procedure of voting by secret ballot without discussion<sup>70</sup> avoids what otherwise could be irreparable damage to the prestige of the individual and to his ability to fulfill the task.

If the premise asserted here that the ombudsman must function independently is accepted, then most considerations favor a non-partisan selection, and little valid reason exists for a political choice. Playing politics here is a two-edged sword. A sophisticated citizenry might soon realize that the controlling party had not acted to help and protect the public but rather to advance its own fortune by entrenching a political hack in a powerful position to heap abuse on the opposition and to make excuses for his own party. The tactic could well cause an adverse reaction at the polls. Appreciation of this possibility probably accounts for the fact that few legislatures make a partisan choice.

<sup>65</sup> See Lundvik, *Comments on the Ombudsman for Civil Affairs*, in *THE OMBUDSMAN* 44-45 (D. Rowat ed. 1965); GELLHORN, *supra* note 9, at 202-03.

<sup>66</sup> GELLHORN, *supra* note 9, at 424. The Finnish Parliament elects its Ombudsman by a simple majority vote. *Id.* at 51.

<sup>67</sup> *Id.* at 103-04.

<sup>68</sup> Holmgren, *The Need for an Ombudsman Too*, in *THE OMBUDSMAN* 225, 230 (D. Rowat ed. 1965).

<sup>69</sup> GELLHORN, *supra* note 9, at 103-04.

<sup>70</sup> See generally *id.* at 424.

### C. Tenure, Salary and Staff

Sweden's experimentation with the most advantageous length of term has provided a touchstone for others. Before 1941 Sweden's Ombudsmen were elected for a one year term. Even though many were re-elected the changeovers proved to be too frequent. At present the Swedish Ombudsman serves a four year term, and his salary is equal to that of a judge of the Supreme Court. He may be re-elected indefinitely although indications are that Parliament considers twelve years service the maximum. It deems a new officer with a fresh outlook desirable. Parliament is also aware that the strain of the responsibility might take its toll on any person's devotion and initiative after many years in the office.

Although Parliament retains the power to remove the Ombudsman during the term for exceptional reasons, it has never done so.<sup>71</sup> Even failing at re-election the officer is not without security; he may choose to resume his previous career or to retire on a full pension.<sup>72</sup> The other Scandinavian countries allow each new parliament to elect an ombudsman or to re-elect the incumbent. The New Zealand Ombudsman serves until his successor has been appointed by a succeeding Parliament.

Removal from office during the term is more difficult in New Zealand than in most of the Scandinavian countries, although removal has seldom occurred anywhere. The New Zealand Ombudsman can be removed or suspended only for disability, bankruptcy, neglect of duty or misconduct.<sup>73</sup> The Nordic parliaments can remove their appointee when a simple lack of confidence occurs.

A term of at least three or four years is necessary for the individual to master the demands of the office, to establish rapport with those he serves and for the public to realize full benefits. The notion applied to the judiciary in some jurisdictions of insuring autonomy by means of an appointment for life might unduly rigidify the institution while gaining an independence that most legislative bodies are already willing to grant. An individual could lose both his initiative and his flexibility after holding the office for a long time. Further, there must be a hedge against loss of confidence by the legislature, the agencies or the people. An ombudsman without influence would be a lameduck appointee without effectiveness.<sup>74</sup>

If lengthy tenure is not a desirable feature, other aspects must make the job appealing to attract highly qualified individuals to

<sup>71</sup> See generally Lundvik, *supra* note 65, at 45. See also Bainbridge, *supra* note 63, at 140-42, 1966 *Hearings* at 108.

<sup>72</sup> GELLHORN, *supra* note 9, at 203; Lundvik, *supra* note 65, at 45.

<sup>73</sup> Ombudsman Act § 5 (1962) (New Zealand), *reprinted in* 1966 *Hearings* 132, 149.

<sup>74</sup> GELLHORN, *supra* note 9, at 425.

this formidable task. The possibilities of future advancement in public office are no longer much of an inducement. Even in Sweden it is the practice to choose an older individual and to refrain from appointing him to another office at the end of eight or twelve years of service. He is then relieved of the economic need to curry favor rather than criticizing forthrightly.<sup>75</sup> This philosophy in altered form has appeared in some of the ombudsmen bills proposed in the United States. Most of the proposals bar any member of the state legislature from holding the office within two years after leaving the legislature.<sup>76</sup> At the same time the proposals bar the ombudsman from holding any state position for either two or three years after he relinquishes that office.<sup>77</sup>

While these restrictions will be helpful in preventing the office from being used as a reward for the faithful, but losing, political candidate, or from being turned into a patronage post for a career civil servant, they will also tend to limit the number of interested applicants. To be barred from a public position for several years after serving as ombudsman would seem to eliminate the career civil servant. It could well eliminate judges, the class which has most frequently filled the office elsewhere. There would be no guarantee that these people could ever resume their careers in public service after their terms as ombudsmen.

The American proposals would prevent the incumbent from holding any position for remuneration during his tenure,<sup>78</sup> but he should be able to take a leave of absence from many vocations. The latter factor should broaden the field of selection somewhat, even if legal training is made a requisite. In that case, attorneys engaged in private practice and law professors would be likely classes to provide the ombudsman. However, the right individual could come from the bench or the district attorney's office, or from any legal background if he expected to retire at the end of his service. In that event the restriction on employment after service would be no hindrance.

Two factors which might cause a qualified individual to accept the position are an adequate salary and a competent staff. An additional reason to set a high salary is to enhance its public image by giving material recognition to the importance of the office. The Scandinavian countries have fixed the salary at a level commensurate with that of a judge on the highest court, or equal to the chief judge's compensation. Only in New Zealand is the salary left to

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<sup>75</sup> Bainbridge, *supra* note 63, at 140, 1966 *Hearings* at 108.

<sup>76</sup> Aaron, *Utah Ombudsman: The American Proposals*, 1967 *UTAH L. REV.* 32, 44.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*



the discretion of the chief executive. The salary there has been fixed below that of most of the higher judges and other ranking officials.<sup>79</sup>

The power to determine salary level can be important as a control over the independence of the ombudsman. It can mean an executive official, a legislative committee, or a legislature itself with power to reduce the flow of funds during the ombudsman's term can influence his work. The Scandinavian procedure which establishes the salary at a par with that of the judges of the supreme courts is one solution to this problem.

It seems highly likely that the recurring governmental problem of competing poorly with private business salaries will appear here. The individuals who are qualified will likely be receiving compensation at a rate well over what the government will pay. These factors may be unimportant, however, since no country has experienced difficulty in attracting able men to the post. The chance to make a real contribution to a better life and the attendant prestige are probably persuasive enough to cause many to accept the challenge in spite of the hardship it entails.

An ombudsman's work is invariably viewed as highly personal since his own integrity and objectivity are the factors which make his judgments effective. His effectiveness can be hampered if he is not allowed to choose his own staff. It is essential that the assistants who will do much of his research have his confidence. All of the countries which have an ombudsman allow him to select his own assistants. Several of them, however, select a deputy ombudsman in the same manner as his superior is chosen to assist and to fill a vacancy.<sup>80</sup>

One engaging feature of the institution is the small staff with which it has traditionally functioned. The Danish staff consists of seven lawyers and five clerical employees. Most of them work only part time because their services as attorneys are in great demand in private practice. Yet they consider working with the Ombudsman desirable employment because many have been able to advance to good positions after their broad exposure to governmental activities.<sup>81</sup>

Sweden's Ombudsman operates with a staff of nine attorneys and three secretaries.<sup>82</sup> The New Zealand staff consists of a lawyer, an administrator, an investigating officer and two clerical employees. Another attorney and another typist also work part time.<sup>83</sup>

<sup>79</sup> GELLHORN, *supra* note 9, at 425.

<sup>80</sup> *Id.* at 425-26.

<sup>81</sup> *Id.* at 29.

<sup>82</sup> Bainbridge, *supra* note 63, at 142, 1966 *Hearings* at 108.

<sup>83</sup> GELLHORN, *supra* note 9, at 116 & n.56.

These staffs are not large considering the populations they serve. Sweden, the most populous of the Scandinavian countries, counts eight million people.<sup>84</sup> New Zealand has a population of three million people.<sup>85</sup> It is encouraging to note that no ombudsman has been denied the staff he needs, nor has had difficulty in recruiting qualified persons.<sup>86</sup>

#### D. *Jurisdictional Powers*

Limiting the jurisdictional reach of the ombudsman has been one of the most difficult problems encountered. An ombudsman cannot revise the entire governmental framework let alone function as a superior administrative authority for each agency. He cannot be made competent to examine every public problem, but the difficulty lies in where and how to draw the line. No matter how jurisdiction has been defined, it is characteristic of each ombudsman office that much time and effort has been required to determine whether a particular matter falls within its scope.<sup>87</sup>

No ombudsman has been empowered to supervise the work of the legislature which, after all, created the office to assist it and not to govern it. Yet the responsibility to criticize inadequate laws and to recommend revision amounts to an indirect supervision of the legislature. Still, an ombudsman has no formal sanctions to compel the adoption of his suggestions for legislative reform, just as he is given no formal power to effect his other suggestions.

The Danish Ombudsman is authorized to supervise some local matters and every phase of national administration, military and civil, excluding the courts. His jurisdiction encompasses "ministers, civil servants and all other persons acting in the service of the State" except those who work in judicial administration.<sup>88</sup> Even with this wide jurisdiction the Ombudsman has sought to enlarge his jurisdiction. In 1964 he took cognizance of complaints against lawyers appointed by the national government whose indigent clients were dissatisfied. He felt these attorneys were within his reach as "persons acting in the service of the State." In fact, he astounded the entire profession by intimating that lawyers should be within his jurisdiction because they perform a public function and can only serve when duly licensed by the state. The issue has not been finally settled

<sup>84</sup> The Swedish government estimated the population at 7,773,000 in 1966. *THE WORLD ALMANAC AND BOOK OF FACTS FOR 1967*, at 258.

<sup>85</sup> The New Zealand government officially estimated the population at 2,647,282 in 1965. *Id.* at 258.

<sup>86</sup> GELLHORN, *supra* note 9, at 426. But the rapidly increasing backlog of cases in the Swedish office indicates that this ombudsman staff is reaching the limit of its capability to handle the increasing volume of cases. Text accompanying note 106 *infra*.

<sup>87</sup> See generally *id.* at 426-27.

<sup>88</sup> *Id.* at 10-11.

although the bar association persuaded him to disclaim a present competence.<sup>89</sup>

New Zealand's experience is informative. Its statute states that the principal function of the Ombudsmen is to "investigate any decision or recommendation made . . . or any act done or omitted, relating to any matter of administration and affecting any person or body of persons in his or its personal capacity."<sup>90</sup> A schedule lists those departments which are placed by statute within the Ombudsman's jurisdiction, but that does not solve the problem. The Ombudsman has the difficult task of deciding whether an act relates to what the statute terms a "matter of administration" over which he has jurisdiction or to a matter of policy over which he does not. The Ombudsman has not been able to devise any general principles which resolve the problem so he is forced to decide his jurisdiction case by case. His decisions have sometimes been strongly criticized, his detractors fearing that he is extending his jurisdictional reach into policy decisions.<sup>91</sup> The New Zealand Ombudsman has stated that a quarter of his working time is taken in resolving his own doubts about jurisdiction.<sup>92</sup>

### 1. Review of Discretion

The Swedish institution was originally charged with the responsibility of insuring compliance by public officials with laws and regulations. It gradually assumed the additional duty of reviewing administrative decisions, not so much to change the result of the case at hand but to insure other cases are properly considered.<sup>93</sup> Traditionally an ombudsman does not criticize simply because he would have reached a different decision but only if the action under review is so clearly erroneous as to be illegal. Discretion is only abused where there are no valid reasons for the way it is exercised, that is, where the controlling reasons are arbitrary or capricious. Yet this distinction is notoriously difficult for the courts or the ombudsman to draw in practice.

The New Zealand statute allows the widest latitude for ignoring the distinction. The Ombudsman may review an administrative decision not only for illegality, but to determine whether it is "un-

<sup>89</sup> *Id.* at 43. The Scandinavian countries do not have a declaratory judgment procedure which could provide a definite answer to disputes such as this. *E.g.*, Lundvik, *Comments on the Ombudsman for Civil Affairs*, in *THE OMBUDSMAN* 44, 46-47 (D. Rowat ed. 1965). This article also includes a discussion of the difficulties caused by this lack.

<sup>90</sup> Ombudsman Act § 11 (1962) (New Zealand), *reprinted in 1966 Hearings* 132, 136.

<sup>91</sup> *See generally* GELLHORN, *supra* note 9, at 107, 110.

<sup>92</sup> *Id.* at 118.

<sup>93</sup> The Office of Ombudsman in New Zealand — Its Origin and Operation, address by Sir Guy Powles, before the Canadian Bar Association, *reprinted in 1966 Hearings* 207, 208.

reasonable, unjust, oppressive, or improperly discriminatory," or "was based . . . on a mistake of law or fact," or "was wrong."<sup>94</sup> The statute in effect opens the door to review of all decisions, discretionary or otherwise, and the present Ombudsman has seized the opportunity to do so.<sup>95</sup>

Other countries try to restrain their critic more closely. Norway allows review and criticism when the decision is "found to be clearly unreasonable or otherwise clearly in conflict with fair administrative practice."<sup>96</sup> Yet the Ombudsman has found it proper to consider more and more of the borderline cases, and Professor Gellhorn concludes he has acted on many complaints which are outside his jurisdiction since there was no clear abuse of discretion.<sup>97</sup>

The Danish statute provides that the Ombudsman is to "keep himself informed" whether those subject to his supervision "commit mistakes or acts of negligence in the performance of their duties." The Parliament's general directives expand on this by directing criticism of "arbitrary or unreasonable decisions."<sup>98</sup>

The actual practice of ombudsmen to assume wide jurisdiction over matters of discretion is clearly apparent.<sup>99</sup> The statutory definitions may be different semantically, but in practice there is no distinction between an "unreasonable" decision and a "clearly unreasonable" decision. Language will probably never be adequate to control the extent of an ombudsman's assertion of his jurisdiction. It seems that the only effective check will be supervision by the legislative committee which is commonly charged with responsibility to oversee the ombudsman's work.<sup>100</sup>

## 2. Exhaustion of Remedies

One of the controversial issues is whether the doctrine of exhaustion of remedies should be applied to the ombudsman. Theoretically, the citizen has enough protection if he has a right of appeal to any court or administrative tribunal. There should be no need for a second review by the ombudsman; a fully adjudicated decision is supposed to be better justice than that which the om-

<sup>94</sup> Ombudsman Act § 19 (1962) (New Zealand), *reprinted in* 1966 *Hearings* 132, 143.

<sup>95</sup> GELLHORN, *supra* note 9, at 433-34.

<sup>96</sup> *Id.* at 168.

<sup>97</sup> *Id.* at 169-70.

<sup>98</sup> *Id.* at 13 & n.15.

<sup>99</sup> *Id.* at 434.

<sup>100</sup> Sweden's system of parliamentary supervision of the ombudsman is typical of that used by other countries. The First Law Committee of the Riksdag is charged with maintaining a working relationship between the Riksdag and the Ombudsman. The Ombudsman's required annual report of his work is addressed to that committee. The committee receives any complaints made about his activities, and its members may criticize his past decisions or suggest he concentrate his energies in a different area. Bexelius, *The Ombudsman for Civil Affairs*, in *THE OMBUDSMAN* 22, 25 (D. Rowat ed. 1965).

budsman can offer. If the issue is the substantive soundness of a decision affecting a private interest, the tribunal is probably best qualified to consider the merits. But if the complaint relates to procedure, arbitrariness, behavior or issues other than the merits, the ombudsman is better equipped to give a decision.<sup>101</sup>

Ideally the ombudsman should be free to cut across the bureaucratic structure to get at the crux of the complaint. If he is able to do so, however, many complainants will come directly to him rather than pursue the elaborate and expensive review structure that is available. The advantage to the individual is that the ombudsman will take the case upon himself without any further effort or expense of the individual. On the other hand, the ombudsman has no power to change a decision even though his suggestions or criticisms often achieve that result for the individual.

Furthermore, if the doctrine is applicable many meritorious complaints will never be appealed to the administrative tribunal much less reach the courts. The citizen is often thoroughly exhausted in finances and patience before he has exhausted the administrative remedies which stand between him and court review. Even if direct access to the court were granted, many individuals could not afford it, nor would they choose to accept it. The right to appeal is frequently not exercised.

There are arguments to be made for or against applying the exhaustion doctrine. Seeking the middle ground by leaving the matter to the discretion of the ombudsman affords no clear solution. Norway's Ombudsman is instructed by Parliament to require that a complainant pursue the administrative relief available unless "particular reasons" exist for assuming jurisdiction at once. Where administrative review remains open he has dealt with the merits in only two situations. One is when the complaint is clearly unjustified so that no good purpose could be served by requiring appeal before giving his opinion. The second is when the matter is too urgent to insist on following the appeal available. But even this Ombudsman is an example of the trend among official critics to assume jurisdiction even if other avenues remain open to the complainant. The Norwegian Ombudsman has managed to exert his influence without taking actual jurisdiction. For instance, he advised a prisoner to complain through channels, but at the same time he communicated informally with the Ministry of Justice to ask about some of the points of the complaint. This technique gives the department a clear indication of the Ombudsman's opinion even when he technically has not acted on the case.<sup>102</sup>

<sup>101</sup> See generally GELLHORN, *supra* note 9, at 110-11.

<sup>102</sup> *Id.* at 172 & n.36.

The Swedish Ombudsman, whose jurisdiction is not limited by the exhaustion doctrine, affords another example of the tendency to assume jurisdiction rather than to turn a complainant away. On occasion a case has been appealed to the ministerial body and simultaneously filed with the Ombudsman. In that situation the ministers have tended to wait for the Ombudsman to act, and he has waited for the ministers to act. But the Ombudsman admits that he has usually given in first and assumed jurisdiction.<sup>103</sup>

Other countries have resolved the question by statute in favor of a flat requirement of exhaustion of remedies.<sup>104</sup> The decisive factor is probably that, with any other rule, the ombudsman and his small staff would be inundated with more than he could handle. Even the Swedish Ombudsman has suggested that the doctrine be made applicable to him.<sup>105</sup> His backlog of cases almost doubled from 240 in 1961 to 447 in 1965, and this no doubt accounts for his recommendation.<sup>106</sup>

### 3. Statute of Limitations

Complaints are almost always filed when the matter is current, but exceptions do occur, necessitating a statute of limitations to establish a time limit after which an ombudsman no longer has jurisdiction. A complaint is considered valid in Sweden even if it is lodged ten years after the event. Other countries draw the line at one year to avoid airing ancient grudges and to limit complaints to those suitable for investigation.<sup>107</sup>

The shorter period has most of the arguments on its side. There is some reason to give the ombudsman authority to bypass the one year statute of limitations to pursue a meritorious case, but in the instances already discussed where an ombudsman has been given discretion, he has tended to expand his jurisdiction. Unlimited jurisdiction can create an unworkable situation, and it would seem best to foreclose that possibility with a mandatory statute of limitations.

### E. *Source and Processing of the Ombudsman's Work*

The manner in which the ombudsman institution is called into operation is important to its effectiveness. Matters are brought to an ombudsman's attention in several ways. Any citizen may write to lodge a complaint.<sup>108</sup> In addition, ombudsmen often investigate

<sup>103</sup> *Id.* at 207 & n.23.

<sup>104</sup> *See generally id.* at 428.

<sup>105</sup> *Id.* at 207 & n.23.

<sup>106</sup> *Id.* at 213.

<sup>107</sup> *Id.* at 427.

<sup>108</sup> *See generally id.* at 210-17; Bexelius, *supra* note 13, at 28; address by Blix, *supra* note 4, at 93.

questionable decisions or practices brought to their attention by the news media.<sup>109</sup> They may also seek out administrative abuse through inspections of agencies.<sup>110</sup> The real value of the institution as far as the public is concerned is direct and easy access to the service by means of a personal complaint.<sup>111</sup> The complainant need do no more. The ombudsman will decide whether to pursue the matter and he will conduct any investigation. While the Swedish Ombudsman feels that matters which he takes up on his own motion as a result of a news item or his inspection result in the most productive work,<sup>112</sup> other ombudsmen have ignored their inspection and self-initiated powers and have concentrated on individual complaints.<sup>113</sup> The authority to act by any of the three methods is a power which each ombudsman should be allowed to develop as he chooses.

### 1. Complaints

Complaints filed by letter with the ombudsman, either from an individual or an organization, constitute the bulk of his work. He is not obligated to leap into action but has broad discretion to dismiss complaints. Little formality is required other than a signed letter stating the facts, and these requirements are not strictly enforced. An individual may walk into the ombudsman's office and someone on the staff will assist him in drafting his complaint. No attorney is required although they have been known to draft complaints for their client's signature.<sup>114</sup> Anonymous complaints need not be considered but ombudsmen have investigated some anyway.

Only New Zealand requires a filing fee, equivalent to \$2.80, to discourage frivolous complaints. Experience shows, however, that the theory fails in practice. New Zealand has had its share of trivial letters, but only a few are complaints from prison inmates who usually comprise a large share of the clientele elsewhere. This is some indication that the fee has not discouraged the maladjusted but instead has disadvantaged the impecunious.<sup>115</sup>

The Swedish processing procedure emphasizes the personal control of the Ombudsman. He frequently reads the complaint as it arrives, sometimes scribbling instructions in the margin for a staff assistant, or choosing to handle the case himself. The complaint is then noted in a log. Most cases are assigned to a staff member who

<sup>109</sup> Bexelius, *supra* note 13, at 29; address by Blix, *supra* note 4, at 93.

<sup>110</sup> See generally GELLHORN, *supra* note 9, at 218-27; Bexelius, *supra* note 100, at 29; address by Blix, *supra* note 4, at 93.

<sup>111</sup> Note, in THE OMBUDSMAN at 184 (D. Rowat ed. 1965).

<sup>112</sup> GELLHORN, *supra* note 9, at 218; see Bexelius, *supra* note 100, at 42-44.

<sup>113</sup> GELLHORN, *supra* note 9, at 426-31.

<sup>114</sup> See, e.g., GELLHORN, *supra* note 9, at 122.

<sup>115</sup> *Id.*

takes the next step whether it be drafting a letter stating the reasons for its dismissal or requesting more information from the complainant. If an investigation is undertaken, the assistant contacts the agency and asks for the official file. The law requires public servants to provide documents and to give information, and they cooperate. The great majority of the cases are disposed of quickly after the file is received. A letter to the complainant explaining the finding is drafted for the Ombudsman, and the case is closed. No opinion is published unless the case is one of those the Ombudsman considers important enough to publish in his annual report to Parliament. This publication procedure has produced a body of administrative agency precedents which the Swedish agencies and Ombudsmen have followed.<sup>116</sup>

Other countries use a less cumbersome procedure. A complaint which is not dismissed at once is sent to the agency for its explanation. The ombudsman then forwards the comment to the individual. Most are satisfied at that point; if not, the ombudsman will investigate the official file, or take other necessary steps.<sup>117</sup>

## 2. Inspection

A viable inspection system does not exist even in Sweden where tradition and publicity cause citizens to feel and to act as if one were imminent. The Swedish Ombudsman, however, inspects as much as he can, making deft utilization of the spot check by examining files at random in the agency under scrutiny.<sup>118</sup>

Field inspection seems to be an essential element of any efficient and effective governmental organization. While the ombudsman can undoubtedly perform a valuable service here, especially by unifying procedure, the task is beyond his capability as the institution is usually constituted. The public may have to rely on internal audits by superiors in the structure to safeguard its interest. In addition any individual subjected to administrative abuse always has the option of filing a complaint with the ombudsman.

The plain facts are that no individual or small staff can adequately inspect all the agencies in a modern government. Further, the inspection may emphasize paperwork at the expense of training of agency personnel, internal audits or reorganization planning.<sup>119</sup> The extra documentation is just as apt to be that which exonerates the official as that which adds comprehensiveness to the file or assurance that safeguards were met. The Swedish Ombudsman has

<sup>116</sup> See generally *id.* at 210-12. The annual report is discussed *id.* at 251-54. See also Bainbridge, *supra* note 63, at 20, 1966 *Hearings* 109.

<sup>117</sup> GELLHORN, *supra* note 9, at 213.

<sup>118</sup> *Id.* at 218.

<sup>119</sup> *Id.* at 223.



recognized the futility of his attempt to reach each unit even as seldom as once a decade, and he has pleaded for permission to delegate routine complaints to the agency so as to free himself for exceptional complaints and more investigations.<sup>120</sup>

### 3. News Coverage

The news media play a large role in policing administrative agencies. They usually do not tackle a technical problem but are superb at exacting every drop of emotion out of a human interest story. While the ombudsman avoids being drawn into the personalities of the situation, his trained eye may spot a procedural deficiency or an inadequate law when others do not. He is free to delve into the question on his own initiative.

### F. *Privileges and Immunities*

The ombudsman's proceedings and decisions have been made immune from judicial review except for the subpoena power which he must enforce through the courts. A declaratory judgment, however, may be obtained in some countries when a party alleges the ombudsman has contravened the provisions of the act creating the office. Except in Sweden the ombudsman has control over whether the press shall have access to his work. The ombudsman has been accorded the same immunity from civil and criminal actions as judges, and he and his staff are privileged not to testify about their work.<sup>121</sup>

### G. *Investigative and Procedural Powers*

The ombudsman could be hamstrung without sufficient means to carry out his task. The institution has been given the subpoena power to compel any official to produce documents or to give testimony relating to an investigation.<sup>122</sup> The ombudsman usually has authority to establish his own rules of procedure for handling complaints, except for the jurisdictional restrictions already discussed. He has authority to initiate investigations, usually without notice.<sup>123</sup> He may recommend a change in statute to Parliament or to the

<sup>120</sup> Bexelius, *supra* note 100, at 43.

<sup>121</sup> See generally Bexelius, *The Ombudsman for Civil Affairs*, in *THE OMBUDSMAN* 22, 24-25 (D. Rowat ed. 1965) (Sweden); Kastari, *The Chancellor of Justice and the Ombudsman*, *id.* 58, at 62-63 (Finland); Northey, *New Zealand's Parliamentary Commissioner*, *id.* 127, at 135-37 (New Zealand); Os, *The Ombudsman for Civil Affairs*, *id.* 95, at 105 (Norway); Pedersen, *Denmark's Ombudsman*, *id.* 75, at 81 (Denmark). See also Aaron, *Utah Ombudsman: The American Proposals*, 1967 *UTAH L. REV.* 57-58, for a collection of the privileges and immunities afforded by the bills proposed in the United States.

<sup>122</sup> See GELLHORN, *supra* note 9, at 431; e.g., Ombudsman Act § 16 (1962) (New Zealand), reprinted in 1966 *Hearings* 132-49.

<sup>123</sup> See GELLHORN, *supra* note 9, at 430.

executive branch, or he may petition the agency for a change in its procedures.<sup>124</sup>

Countries which have adopted the institution have not given their ombudsmen sanctions as severe as those authorized in Sweden. Only the Swedish and Finnish Ombudsmen have authority to require any civil servant to aid in investigating any matter, or to prosecute a public servant for the crime of dereliction of official duty.

Probably the most persuasive power an ombudsman has at his command is publicity. Each existing ombudsman is required to file an annual report with the parliament. The Swedish Ombudsman's report, running up to 500 pages, outlines the work he has done and contains a fully reasoned opinion for each important case. While most officials never see it because it is printed in only 3,400 copies, they appear to be aware of its contents through secondary sources, *i.e.*, the press and specialized publications. There is a determined effort by officials to avoid the stigma of being named critically in the report.<sup>125</sup>

Even more influential than the annual report is the daily press coverage given an ombudsman's opinions. It is through this medium that his criticisms and suggestions gain wide circulation. The Swedish public believes it has excellent civil servants so it expects high quality performance from them. When a serious shortcoming is brought to light, the public treats it as a scandal. Civil servants on the sharp end of the news story react quickly to avoid a recurrence. Usually the news media does not identify the official's name or title, but his haste to make corrections is no less because his identity will be revealed in the annual report.<sup>126</sup>

Experience has shown that an ombudsman seldom has any need to invoke his procedural powers. The power of publicity and the existence of the formal powers are subtle threats which have been persuasive enough to assure the ombudsman cooperation and to gain the information his work requires.<sup>127</sup>

The ombudsman's primary powers, the right to investigate and to recommend, are not insignificant assets because of the very nature of the institution. Since he has no formalized authority to impose his opinion on the agency, he must resort to the persuasive tools of logic and reason augmented by the weight of his personal influence. If the agency rejects his suggestion without a good reason,

<sup>124</sup> See generally GELLHORN, *supra* note 9, at 205-08; Anderman, *The Swedish Justice-ombudsman*, 11 AM. J. COMP. L. 225-31 (1962), reprinted in 1966 *Hearings* 96-100; Bexelius, *supra* note 121, at 78-79.

<sup>125</sup> GELLHORN, *supra* note 9, at 251-54; Bainbridge, *A Civilized Thing*, NEW YORKER, Feb. 13, 1965, reprinted in 1966 *Hearings* 107-08.

<sup>126</sup> See generally Lundvik, *Comments on the Ombudsmen for Civil Affairs*, in THE OMBUDSMAN 44, 49-50 (D. Rowat ed. 1965).

<sup>127</sup> See generally GELLHORN, *supra* note 9, at 436-37.

he can resort to publicity to roast the agency in the wrath of public opinion. Publicity may not be the power to command, but it comes close to compulsion. Again, this power has not been used frequently, nor have personal attacks been indulged.

#### H. *Common Results*

The ombudsman development outside Sweden and Finland is relatively young, too new to evaluate with certainty that it will remain as effective as it now appears. Even so, its success in these adoptive countries is generally recognized after the five to fifteen years of trial it has undergone. The remarkable similarity of results reached from Scandinavia to New Zealand to Nassau County, New York, affords some assurance that the established pattern is stable. Crank letters have comprised only a small percentage of the complaints. Most cases have been dismissed immediately or after a brief investigation, and only ten to fifteen percent of the complaints have been judged meritorious.<sup>128</sup> The variations in results appear to be due more to differences in classifying cases because of differing jurisdictional limits and standards of judgment than to variations in personality characteristics among the nationalities.<sup>129</sup>

The small number of complaints found to be deserving is not an indication the value of the office has been negligible; its mere existence has considerable effect. Knowledge that its aid may be invoked serves as an incentive to agency officials to give good service.<sup>130</sup> Public confidence in public administration is increased by the mere fact that anyone has the possibility of presenting his case to the ombudsman.

If the public is to have faith in the integrity of its government, accusations of scandal or other abuse should not go unanswered. The governing officials can hardly assuage the public's suspicion because they obviously have an interest in whitewashing a deficiency. The ombudsman, however, can heal the sore before it becomes an open wound.<sup>131</sup> It is his responsibility to investigate these matters in depth and to publicize his findings. If he is objective enough to do that unhesitatingly, he will do much to restore faith in government. Sometimes he will be responsible for a great shakeup,<sup>132</sup> but

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<sup>128</sup> At the end of the first year of his work, Judge Samuel Greason, Public Protector of Nassau County, felt that 20% of his cases were well founded. County Executive of Nassau County, N.Y., Press Release, July 12, 1967.

<sup>129</sup> GELLHORN, *supra* note 9, at 118-19.

<sup>130</sup> Bexelius, *supra* note 121, at 41.

<sup>131</sup> *Id.* at 42.

<sup>132</sup> See, e.g., GELLHORN, *supra* note 9, at 57. The Finnish Ombudsman demanded the indictment of two cabinet members and two former Ministers for improper use of government funds. The cabinet members resigned immediately, and the two Ministers were convicted.

more frequently he will exonerate faithful government servants. The ombudsman office is a safety valve to those who invoke its aid as well as to the great majority who know they could call on it for help if their particular impasse with government grows worse. It vindicates directly the rights of only a small number whose complaint succeeds, but at the same time it serves others indirectly.

The great strength of the concept has been the flexibility with which it has adapted to the differing demands made in each new home. Most observers credit the individuals who have served as ombudsmen with its successes. The ombudsmen's skills have molded the office to their countries while their stature has bolstered its effectiveness.

This emphasis on personalism casts some doubt about the future capability of a single ombudsman assisted by a small staff. Many governmental units have populations which already could produce more complaints than one key individual can effectively process. Some proponents of an official critic have suggested installing more than one ombudsman so there would be enough to handle the volume of complaints.<sup>133</sup> But there is some question whether a committee can establish and maintain the rapport and identity with the people which has seemed necessary to public confidence. Some observers feel those characteristics would not be lost, but there is little proof.<sup>134</sup> The best approach for Colorado is to avoid experimenting with a plural ombudsman since the relatively small population makes it appear unnecessary here.

### III. IS THERE A NEED IN COLORADO?

#### A. *Government by Administrative Agencies*

Governmental responsibility to regulate is increasingly falling to the administrative agencies. Major issues in the lives of uncounted citizens are routinely settled by the administrative process. Observers have estimated that three to four times as many decisions are handed down by the agencies as by the courts.<sup>135</sup> With all this governmental activity closely touching so many people, it was inevitable that irritations, suspicion and hostility would develop.

This is not to say that those who enter the public payroll automatically become "power-crazed, obtuse, venal, ill-mannered, and

<sup>133</sup> E.g., Reuss and Munsey, *The United States*, in *THE OMBUDSMAN* 194-200 (D. Rowat ed. 1965); testimony of Dr. William Winter before the Colorado House State Affairs Committee, Feb. 28, 1967. *Denver Post*, Mar. 1, 1967, at 32, col. 1.

<sup>134</sup> Professor Gellhorn discounts the necessity of the personalism which has usually been an obvious factor in ombudsman institutions. He cites the fact that Sweden actually has three ombudsmen, the Chancellor of Justice, the Military Ombudsman, and the Ombudsman for Civil Affairs, without any loss of public identity caused by this multiplicity. GELLHORN, *supra* note 9, at 255.

<sup>135</sup> *THE POLITICS OF REGULATION* 2 (S. Krislov & L. Musolf ed. 1964).

inefficient."<sup>136</sup> Criticism of the agency process is not necessarily criticism of the individuals who comprise it. Human error will always be present, and American public servants are no different than other citizens. It is doubtful that their governmental career works any metamorphosis of their character, as many believe. Approximately one out of six employed Americans is paid from the public treasury at some level of government.<sup>137</sup> It is contrary to logic and daily experience to assert that so large a number is unfit to serve the public faithfully and well.

If all agency personnel are not guilty of deliberate wrongdoing or careless mistake, all are not innocent either. A Senate judiciary subcommittee recently concluded that "'undue influence,' 'illegal *ex parte* communications between private individuals and government agencies' and a record of 'inaction, endless delays, favoritism and arbitrary actions' . . . have created a 'wide-spread lack of public confidence in the fairness of agency decisions.'"<sup>138</sup>

The great increase in the number and size of regulatory agencies widens the opportunity for improper use of governmental power. Modern administration is both complex and powerful. The immensity of its responsibilities accounts for a serious conflict in its own goals: the merits and circumstances of each case should be weighed carefully, but the public obligation to fulfill all its tasks forces the agency to largely ignore individual differences. It can only operate efficiently by standardizing its procedures to fit the average case which cannot exist. Furthermore, the agency becomes so entangled in its own efforts that it is in no position to objectively evaluate the quality of the service it provides.

It is common parlance to label this burgeoning governmental phenomenon, "bureaucracy," and to saddle it with all the unsavory connotations that the term implies. The citizen increasingly views himself as living at the mercy of an ever growing and inaccessible administrative structure. A reasonably high level of public confidence in government is vital to a democracy. While America has not reached a danger point, it is no exaggeration to say that dissatisfaction continually mounts as the opportunity for friction increases. The belief that governmental decisions are made frequently by resort to influence peddling or outright graft is common.<sup>139</sup> If nothing worse, everyone is sure the public's best interest takes secondary consideration to the official's best interest. This type of suspicion has branded every politician's pronouncements suspect; it has

<sup>136</sup> W. GELLHORN, *WHEN AMERICANS COMPLAIN* 1 (1966).

<sup>137</sup> *Id.* at 43.

<sup>138</sup> Westin, *Inquiry Into Our Watchdog Agencies*, in *THE POLITICS OF REGULATION* 13 (S. Krislov & L. Musolf ed. 1964) (referring to federal agencies).

<sup>139</sup> See W. GELLHORN, *WHEN AMERICANS COMPLAIN* 139 (1966).

kept many of the best qualified from entering public service; it has encouraged cynicism and apathy.<sup>140</sup> The problem is one which no modern government can ignore.

American governments have more elaborate safeguards against governmental abuse than any other country in the world.<sup>141</sup> The safeguards are, ironically, so systematized, inflexible and misunderstood that they are themselves cited as evidence of red tape.<sup>142</sup> Furthermore, there is no right to review of administrative determinations beyond the strictly legal issues.<sup>143</sup> The individual is not interested in the legal technicalities; the sum total of his grievance may be that he does not understand why the decision was adverse to his interests. He may suspect the important facts were ignored, that procedure was prejudicial, or that somehow he was the victim of foul play. He wants a full review, far more than the terse technical response the appellate process can provide.<sup>144</sup> The highly vaunted right of appeal is too frequently illusory, if only because economics exerts a tremendous pressure to accept the administrative determination.

A good indication of the inadequacy of the present system is the current level of discontent reflected in the heavy volume of congressional complaints at the national level. No one knows just how large it is, but each House and Senate member receives several hundred to several thousand constituent letters each week. Most of these are requests for favors or aid and comfort of some sort rather than a complaint about administrative abuse. Still, the latter comprise substantial numbers.<sup>145</sup>

While the criticisms against the national administrative process are best documented, the same indictment is applicable to state and local levels of government.<sup>146</sup> Probably the need is greater at the state level because the quality of government performance is all too frequently lower.<sup>147</sup>

### B. *Colorado Administrative Government*

There are good reasons to doubt that the ombudsman institution can be transplanted with success into the American federal

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 212; see Abraham, *The Need for an Ombudsman in the United States*, in *THE OMBUDSMAN* 234, 235 (D. Rowat ed. 1965).

<sup>142</sup> W. GELLHORN, *WHEN AMERICANS COMPLAIN* 1 (1966).

<sup>143</sup> Marx, *The Importation of Foreign Institutions*, in *THE OMBUDSMAN* 255, 258 (D. Rowat ed. 1965).

<sup>144</sup> *Id.* at 257-58.

<sup>145</sup> See generally W. GELLHORN, *WHEN AMERICANS COMPLAIN* 58-66 (1966).

<sup>146</sup> Abraham, *supra* note 141, at 236; see Krislov, *A Restrained View*, in *THE OMBUDSMAN* 246, 254 (D. Rowat ed. 1965).

<sup>147</sup> Authorities cited note 146 *supra*.

government.<sup>148</sup> The staggering size and diversity of the population are foremost. The sheer volume of complaints would make anything like personal review totally impossible. The ombudsman, faced with a heterogeneous citizenry and keen competition for publicity, could not develop the nationwide rapport which is essential. The complex and delicate system of checks and balances which are unique to America also militate against the proposal. The executive branch would look askance at a legislative agent probing into its administrative processes. The doctrine of separation of powers which gives rise to the executive privilege to conceal information would interfere with the ombudsman's investigation. The necessity of running for re-election is a strong incentive for national legislators to deal directly with their constituents. Therefore, congressmen have not welcomed a national ombudsman who could receive complaints and who would thus stand between them and their best chance of re-election.<sup>149</sup>

The same objections are not so strong when a Colorado ombudsman is considered.<sup>150</sup> The problems of unwieldy geographic size, population and diversity do not exist in Colorado. The institution has been found workable in Sweden with eight million people, and Colorado's present population is estimated at two million.<sup>151</sup> An ombudsman in the traditional, personalistic sense would be

<sup>148</sup> See generally Abraham, *supra* note 141, at 237-38; Krislov, *supra* note 146, at 245-54; Marx, *supra* note 143, at 258-63.

<sup>149</sup> Representative Henry S. Reuss believes that the congressman's role as a mediator between citizens and bureaucracy is an unshakeable part of American government because the legislators feel the breadth and quality of their direct contact with their constituents is the difference between re-election and defeat. Therefore, he proposes creation of an Administrative Counsel of the Congress. Congressmen could refer their constituents' complaints to the Administrative Counsel whose expert staff would investigate and report to the Congressman. The legislator could use the information to urge the agency to change an error, and he could reply to the constituent so he would not lose credit for the good deed. Reuss & Munsey, *The United States*, in *THE OMBUDSMAN* 194-98 (D. Rowat ed. 1965). Representative Reuss' bill was introduced in the House in 1963, but so far he has been unsuccessful in gaining support for his plan. Abraham, *supra* note 141, at 237.

The supposition that congressmen depend on constituent service for re-election, as well as several other points applicable to this article, is made vividly apparent in a recent letter to *The Denver Post*:

There is no mystery about why Byron Rogers is returned to office every two years, and will continue to be just as long as he chooses to serve. He takes care of his constituents!

A phone call to his Denver office last week got right through to Congressman Rogers himself. He listened attentively to my tale of woe about government red tape gone wild, took notes, promised to look into the matter and called back the very next day to report.

It happens he was unable to remedy the situation, but how comforting to know that somebody cares.

Big government does not have to be impersonal.

Denver Post, July 24, 1967, at 19, col. 2.

<sup>150</sup> Abraham, *supra* note 141, at 238.

<sup>151</sup> The Census Bureau estimated the population at 1,975,000 as of July 1, 1967. Rocky Mountain News, Sept. 6, 1967, at 1, col. 4. It was placed at slightly over two million as of December 31, 1966, by a business group based on the volume of retail sales. SALES MANAGEMENT, June 10, 1967, Table B-1.

possible because the volume of complaints would be manageable by one official critic aided by a small staff. The ombudsman should be able to command the attention of his public. He would not be faced with the tremendous competition for publicity that would block this development on a national level. Accounts of his work would be assured of a statewide audience through the local newspapers and the local radio and television stations which extend their influence throughout the state.

The problems created by the separation of powers are not so easily dismissed. The Governor may have overshadowed the legislature in actual powers<sup>152</sup> as the President has surpassed Congress. But the personal influence of the Governor is less pervasive and less jealously guarded than that of the President, and it is likely that competition for prestige would be proportionally less at the state level. The legislature's agent could thus expect to be met with less hostility by the executive branch, so the Governor's people might less adamantly assert executive privilege to deny access to information. The legislature could no doubt resolve this problem by bestowing upon the ombudsman the authority to subpoena documents and to compel testimony as has been done in the countries with the institution.<sup>153</sup> The constitutionality of such powers has been upheld against a due process challenge on the ground that purely investigative proceedings do not require all the safeguards of rule making or adjudicatory functions.<sup>154</sup> As long as the ombudsman can only investigate without having authority to issue orders, the separation of powers doctrine will not be violated.<sup>155</sup>

Granting that an ombudsman could be constitutionally fitted into the governmental structure of the state, what does the future

<sup>152</sup> Nader, *Ombudsmen for State Governments*, in *THE OMBUDSMAN* 240, 241 (D. Rowat ed. 1965).

<sup>153</sup> Text accompanying note 122 *supra*.

<sup>154</sup> *Hannah v. Larche*, 363 U.S. 420 (1960).

<sup>155</sup> Cf. 1 E. COOPER, *STATE ADMINISTRATIVE LAW* 21-25 (1965); *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912) (legislature may not assume an executive function reserved to governor by the state constitution). Colorado has long adhered to a strict separation of powers doctrine. COLO. LEG. RESEARCH COUNCIL, *REPORT TO THE COLORADO GENERAL ASSEMBLY: SIMPLIFICATION OF STATE GOVERNMENT ORGANIZATION* pt. IV, at 6 (1964). The agencies have been known to assert a right to refuse the general assembly certain information. In 1950 the Regents of the University of Colorado investigated their faculty for subversives after one professor testified before the House Un-American Activities Committee that he had been a member of the Communist Party from 1938 to 1943. The Regents undertook self-investigation to quiet the great public furor which arose and also to head off a legislative investigation. The report was kept confidential by the Regents. In 1951 members of the assembly demanded it be made public. This was not done, so the assembly then demanded that it be turned over to the legislature in executive session. The Regents again refused the demand for disclosure, but finally caucused with the governor and legislative leaders to give them a summary. Other than this, the report was never disclosed, although there was no court determination of the agency's right to refuse. R. MACIVER, *ACADEMIC FREEDOM IN OUR TIME*, Appendix B: *The University of Colorado Investigates* 290-304 (1955).



in Colorado hold for an ombudsman? Several questions for which there are no ready answers should be examined before any bold prediction is made.

### C. *The Need in Colorado*

The crucial issue is whether an ombudsman is needed. There can be no clear cut statistical answer because there are no figures by which to calculate the level of citizen dissatisfaction with administrative agencies. Random sampling could easily provide an answer, but even if statistics were available there is no assurance they would be useful. We need to know something about the intensity of dissatisfaction. Everyone could say they disliked their prior experience with administration, but more pertinent is whether that affects their faith in government.

We need to know whether the present complaints are meritorious, but even this information would provide no definite answer to whether a Colorado ombudsman is needed. Even if complaints are unfounded, they should be met head on as long as they are made in good faith so that trust in government can be maintained. If they are not justified the individual should be given an explanation, and if they are justified a remedy should be sought.

Approaching the question of need from a different perspective may be helpful. Colorado is not among the most populous of the fifty states. Even so, a vast administrative network has been developed to carry out state functions. There are departments, boards, divisions, commissions and other units in great number — 212 by one count, and more if some closely related units are counted separately.<sup>156</sup>

This bewildering array has properly been called "the headless fourth branch of government."<sup>157</sup> The state constitution neatly categorized government into the legislative, executive, and judicial branches,<sup>158</sup> but in recent years administrative agencies which are neither one nor the other have been created without clear thought where they fit. They have authority to promulgate rules which have the effect of laws, they enforce the laws, and they adjudicate matters of great importance. They thus have characteristics of each of the three branches, but they are not effectively supervised by any of them. The judiciary has no jurisdiction except over the few cases which reach its appellate courts, so it cannot affect the administra-

<sup>156</sup> State Management Analysis Office, *Organization of State Government in Colorado* (Jan. 1967) (organizational chart based on the state statutes and budget groupings).

<sup>157</sup> *TIME*, July 31, 1964, at 57 (Senator Everett Dirksen referring to the federal regulatory agencies).

<sup>158</sup> COLO. CONST. art. III.

tive agencies except in a tangential, sporadic fashion. The general assembly meets for only four months in the long session and for only three months in the biennial short session.<sup>159</sup> It maintains no permanent legislative oversight committee to keep an eye on the agencies.<sup>160</sup> The only supervision forthcoming from this branch is the highly superficial review the general assembly can give an agency when it passes on the annual budget.

The executive branch should be in the best position to check administrative abuse. The Governor's singularity has placed him in a bright spotlight of publicity which focuses on him the year around rather than briefly during sessions of the assembly. He can call for expert advice upon his legislation proposals, exercise party discipline in the assembly, and prevail upon pressure groups to aid his legislative program.<sup>161</sup> But the Governor of Colorado is practically powerless to control actual administration of state functions. Several of the most powerful department heads are elected directly.<sup>162</sup> The Governor is placed in a much weaker position in relation to the administrative agencies than in many other states by virtue of an extremely strong state civil service program. He may appoint to fill a vacancy, but he cannot remove a civil service official. They serve almost indefinitely and can be removed only in accordance with the civil service rules<sup>163</sup> which strongly protect the public servant.

The Governor's 1966 attempt to discipline the commissioner of insurance is a case in point. The Governor took the commissioner to task before the public for what he considered unlawful acceptance of "any valuable thing" from the regulated insurance interests, and he recommended removal from office. The Civil Service Commission, possibly feeling the heat of public opinion, fired the commissioner, but a Colorado district court ordered him reinstated because the strict technicalities of the civil service laws had not

<sup>159</sup> COLO. CONST. art. V, § 7. The general assembly is limited during the short session to acting on the state budget and those subjects placed on the governor's call. *Id.*

<sup>160</sup> The Legislative Council on June 22, 1964, authorized the Clerk of the House of Representatives to review the rules and regulations adopted by Colorado administrative agencies. Mr. Donald H. Henderson's report contained graphic evidence of the need for some sort of permanent review of agency rule making. Rules of nine of the twenty-three licensing agencies were studied, and all or part of the rules of seven were found invalid. The shortcoming was failure to comply with the requirement of notice established by the Administrative Procedure Act, COLO. REV. STAT. ANN. §§ 3-16-1 to -6 (1963). COLO. LEG. RESEARCH COUNCIL, *supra* note 155.

<sup>161</sup> *Cf.* Nader, *supra* note 152.

<sup>162</sup> Secretary of state, attorney general, state treasurer. COLO. CONST. art. IV, § 3; Regents of the University of Colorado. *Id.* art. IX, § 12.

<sup>163</sup> State Civil Service Act, COLO. REV. STAT. ANN. §§ 26-5-1 to -32 (1963). See particularly § 26-5-23 for dismissal procedure. COLO. CONST. art. XII, § 13 provides that appointments to positions classified as civil service employment must be based on competitive tests of competence.

been met.<sup>164</sup> The commissioner remained in office, but the Governor's actions probably were an effective reminder to him and others in similar positions. The problem with leaving this sort of supervision to the Governor is one of logistics. He simply does not have the time nor the facilities to take on this additional task and to devote the necessary time to it.<sup>165</sup>

In the present situation the Colorado agencies are relatively free to interpret and apply the law as they see fit without effective control from any source. The delegations of power to them are necessarily broad and vague. They must use their judgment to determine what the law is. The problem is that their biases, although inherent in any exercise of judgment, may not be what the assembly contemplated or what the standards expressed by the legislature would mean to a court.<sup>166</sup> The individuals whose interests are adversely affected may protest, but that probably will not be persuasive. The agency interpretation gains significance as a precedent, and furthermore it is characteristic of human nature to resist change.<sup>167</sup>

An example of a common administrative abuse is that the licensing agencies all too frequently have been used by the regulated industry or profession to close the door to competition rather than

<sup>164</sup> Denver Post, Mar. 11, 1967, at 1, col. 1. The district court ruled that there had been no compliance with the statute requiring filing of written charges that the employee failed to comply with commission standards.

Another example of the Governor's lack of effective control over civil service officials was cited by the Colorado Legislature's Committee on Government Reorganization as the committee was attempting on November 11, 1967, to define the Governor's role vis-a-vis the heads of state departments:

[The] dispute [was] between former Gov. Steve McNichols and William M. Williams, head of the old Planning Division. When Williams refused to follow McNichols' orders, the governor had to bypass Williams to get certain jobs done. But Williams kept his job because he was protected by the Civil Service system.

The committee proposed the following statute for enactment by the legislature as part of the reorganization plan:

The governor, in accordance with Article IV, Section 2 of the Constitution, shall be the chief executive officer of the state. Subject to the Constitution and the laws of this state, the governor shall be responsible for formulating and administering the policies of the executive branch of the state government.

In the execution of these policies, the governor shall have full powers of supervision, approval, direction and appointment over all principal departments. . . .

Where a conflict arises between the head of a principal department and the governor or between the heads of principal departments as to the administration of such policies, such conflicts shall be resolved by the governor and the decision of the governor shall be final.

Denver Post, Nov. 12, 1967, at 28, col. 1.

<sup>165</sup> It should be noted that an ombudsman could have done no more in this situation than the Governor. But the Governor's attempt to remove the insurance commissioner was certainly fruitful in the long run, and the ombudsman cannot be criticized because he could have done the same thing.

<sup>166</sup> *Contra*, Byse, *A Modest Proposal*, in *THE POLITICS OF REGULATION* 58-59 (S. Kristol & L. Musolf ed. 1964).

<sup>167</sup> See, e.g., statement of Senator Edward V. Long, 1966 *Hearings* 2.

to protect the public interest by admitting qualified applicants.<sup>168</sup> Another common fault is that the agencies have not usually exercised their powers to promulgate rules, preferring instead to decide each case on the basis of standards which remain unrevealed to the public. Colorado's Administrative Procedure Act offers little help in correcting this shortcoming because it does not require promulgation of rules.<sup>169</sup>

Agency abuses in administering the law continue unchecked largely because there is no one unit charged with supervision of the agencies. This fact makes them virtually independent; this is the strongest single argument for adopting an ombudsman. Many of the most constructive changes for which he could work are the sort of thing which no individual citizen would have standing to contest. The serious problem of agency operation by secret law could be attacked by an individual affected by it in a particular case, but only an official critic could systematically review its use in each administrative unit and issue a single opinion applicable to all agencies.

Ralph Nader has compiled an impressive list of some of the administrative abuses which a state ombudsman could attack:

preferential treatment and influence peddling, inadequate and unpublished regulations, wrongful detention, state police overzealousness or laxity, unjust procedures in agency hearings, arbitrary censorship or secrecy, agency reluctance or refusal to give explicit reasons for decisions, patronage excesses, inefficiencies and delays by state personnel, undesirable conditions in prisons and mental institutions, payoffs and kickbacks in state contracts, and discriminatory enforcement or flagrant non-enforcement of state laws.<sup>170</sup>

#### IV. THE PRESENT COLORADO SITUATION

##### A. *Colorado's Proposed Legislation for an Ombudsman*

An ombudsman bill was introduced in each house of the general assembly in 1967.<sup>171</sup> While neither bill was enacted,<sup>172</sup> they are important indicators of the type of institution their proponents would transplant to Colorado. It is probable that another ombudsman bill will be introduced at some future date in this state, and that it

<sup>168</sup> Hamilton, *How to Turn Regulation into License*, in *THE POLITICS OF REGULATION* 63 (S. Krislov & L. Musolf ed. 1964) (federal agencies); Nader, *supra* note 152, at 242.

<sup>169</sup> COLO. REV. STAT. ANN. § 3-16-2 (1963).

<sup>170</sup> Nader, *supra* note 152, at 246.

<sup>171</sup> S.B. 192, 46th Gen. Assembly, 1st Reg. Sess. (1967), was introduced in the senate by Democratic Senator Anthony Vollack and Democratic Representative Tom Bastien on Feb. 10, 1967. H.B. 1223, 46th Gen. Assembly, 1st Reg. Sess. (1967), was introduced in the house by Republican Representative Tom Grimshaw on the same day.

<sup>172</sup> The house bill was reported favorably by the Committee on State Affairs, but it was killed in the powerful Rules Committee. The senate bill died in the Judiciary Committee without having had a hearing.

will embody the same basic features as the original models. This is the pattern that ombudsman proposals have taken in the nine other states which have considered such legislation.<sup>173</sup> Therefore, it will be useful to consider these bills.

Both bills would create a strong ombudsman in the traditional sense. They are alike in many features, but there are some important differences.<sup>174</sup> Both bills would make the ombudsman an agent of the legislature. The senate bill would establish an eight member ombudsman committee to nominate candidates for the office, to supervise the ombudsman's work, and to receive the annual report. The house bill would create a committee, but only to nominate candidates, not to supervise and not to receive an annual report. In fact, it does not require a report. The ombudsman would simply be authorized to report to the general assembly or governor as he deems advisable.

The house bill would give the ombudsman broad authority to investigate any administrative action. There is no limit on the authority to examine discretionary acts, and no requirement that administrative remedies be exhausted. The senate bill attempts to articulate some limits on jurisdiction. It allows the ombudsman to recommend corrective action to the agency if he finds any decision was "unreasonable, unjust, oppressive, or discriminatory, or was based upon a mistake of law or fact," or that a discretionary power was exercised arbitrarily or for an improper purpose. The ombudsman has wide discretion to refuse to investigate a complaint if there is an adequate remedy elsewhere or if the matter is more than one year old.

These broad grants of jurisdiction, without a requirement that other remedies be exhausted or that stale complaints be rejected, would no doubt lead to an ever expanding assumption of jurisdiction as it has in other countries. The senate provision allowing the ombudsman discretion on these two points is desirable, but there must be some check or that limitation could become no more than a mild exhortation. Certainly the language granting such broad jurisdiction could be seized upon to legitimate recommendations on any agency action. Experience abroad shows that it could and would happen. Committee review would be necessary to keep this power in proper bounds.

The ombudsman would have full investigative powers by either proposal, including subpoena power for testimony and documents whether the person is a state employee or not and whether the docu-

<sup>173</sup> Aaron, *Utah Ombudsman: The American Proposals*, 1967 UTAH L. REV. 32, 34 n.13.

<sup>174</sup> The house bill was patterned after an Illinois bill, and the senate bill was based on a proposal introduced in California.

ment is within the control of a state agency or not. Persons who mislead or obstruct the ombudsman could be found guilty of a misdemeanor and fined up to \$1,000.

One disturbing aspect of both bills is that they would prevent the ombudsman from disclosing any information obtained "except for the purpose of giving effect to this act."<sup>175</sup> He could thus make facts public when such action might be conducive to bringing about a procedural change. There is grave doubt, however, that this language would allow him to engage in the educational campaign which other ombudsmen have undertaken. The public must have a keen awareness of the type of work being done, and possibly such public education qualifies as furthering the purposes of the act. But surely the scholarly articles which other governments find so helpful would be precluded. There is no need for this severe restriction; those reports should be allowed as long as they do not divulge names or other personal information.

The House Committee on State Affairs favorably recommended its bill, and the amendments it made offer striking information about the aspects with which the legislators were most concerned. The amendments are encouraging. Instead of election by two-thirds of each house, the ombudsman would be elected by a majority of each party in each house, *i.e.*, four separate votes would be necessary. This is a strong and definite move to place the ombudsman above partisan considerations. On the other hand, it may be difficult to find someone whom all four groups would support. By another change, the ombudsman would be restricted to two full terms of six years each rather than being eligible for three full terms. The amendment means the committee appreciated the possibility of stagnation in office.

The committee struck the requirement that the ombudsman be a lawyer and retained the prerequisite of being learned in the processes of law and government.<sup>176</sup> An ombudsman without legal training would be forced to turn frequently for advice to an attorney, creating a real danger that his judgments would not be his own. It would inevitably slow his work by requiring him to take more time to learn the applicable law or to confer with his adviser. The provision defeats three of the most important aspects of the institution: speed, personalism, and expertise. Quick action is necessary or else another bureaucracy with complex procedural rules

<sup>175</sup> H.B. 1223, 46th Gen. Assembly, 1st Reg. Sess. § 3 (4) (1967). A similar restriction is expressed in S.B. 192, 46th Gen. Assembly, 1st Reg. Sess. § 11 (8) (1967).

<sup>176</sup> Testimony of Professor Donald Seney of the Political Science Department of the University of Denver before the State Affairs Committee on Feb. 28, 1967. *See also* text accompanying notes 44-52 for a discussion of legal training as a prerequisite. Lt. Governor Hogan does not have a legal background, and he considers that no disadvantage.

for giving service will be created. Personalism is important to public confidence. The ombudsman must believe in his opinions and be able to argue them persuasively in his daily contacts without reading from a staff memorandum. Personal expertise is essential to convincing a reluctant agency there is another way. The whole tenor of the office calls less for institutional expertise than for personal ability. In short, the ombudsman must above all be his own man. The amendment would severely restrict his ability to so establish himself.

The committee added a provision requiring that someone on the staff have administrative agency experience. Sweden has recently found it necessary to appoint specialists from the various administrative fields to the staff,<sup>177</sup> and it seems as important in Colorado as there. This assistant may be appointed from the state government without loss of tenure or retirement benefits, an idea which could well be extended to the ombudsman too. The house bill would have allocated \$60,000 for the first year's budget. The ombudsman's salary would be set on a par with that of a judge of the Colorado Supreme Court. The ombudsman could select his own staff and set their salaries as he might choose out of the budget. On the other hand, the senate bill made no appropriation and empowered the committee to establish salaries, powers which could well destroy the independence of the office.

Both bills would explicitly make the ombudsman an agency in the legislative branch. This in itself frees him of the requirements of the state Administrative Procedure Act which requires due process in rule making and adjudication by agencies in the executive branch.<sup>178</sup> A requirement to proceed by elaborate APA rules would stifle his efforts and go far to make the institution just another bureaucracy.

Each bill alone is woefully inadequate, but taken together their parts arrive at a facsimile of the traditional ombudsman. They would create a surprisingly strong ombudsman, place him above politics, and leave him with virtually no supervision. The weakness of the proposals lies primarily in their lack of limits on jurisdiction over stale complaints, over discretionary actions, and over complaints for which other remedies exist. The drafters drew on some of the strong points of bills proposed in other states, *e.g.*, giving the ombudsman power to apply to a court for a declaratory judgment to determine his authority to conduct an investigation or to issue a report when either is disputed. And the bills go to great length to assure the

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<sup>177</sup> Anderman, *The Swedish Justitieombudsman*, 11 AM. J. COMP. L. 225, 237 (1962), reprinted in 1966 *Hearings* 96, 105.

<sup>178</sup> COLO. REV. STAT. ANN. §§ 3-16-1 to -6 (1963).

investigated agency a chance to correct a deficiency before it is criticized publicly.

The bills present a potpourri of ideas rather than a comprehensive plan. The legislature would be well advised to substitute most of the model bill prepared by the Harvard Student Legislative Research Bureau<sup>179</sup> if and when another proposal is considered. The model bill is impressive for the comprehensive scheme it presents, and for its limitation on jurisdiction. However, the Harvard idea for gubernatorial appointment with the advice and consent of the senate should be rejected in favor of the State Affairs Committee amendment. The latter assures bipartisan selection by the general assembly, consistent with the theory that the ombudsman is the agent of the legislature.

### B. *The Lieutenant Governor as Ombudsman*

Colorado has an unprecedented opportunity to shed valuable light on the entire question of transplanting an ombudsman to America since Lieutenant Governor Mark Hogan voluntarily assumed that role for the state. Mr. Hogan announced that he proposed to act as intermediary for people who have problems "in their relations with that massive, bureaucratic maze called government. . . . The people of Colorado need this service. For the average citizen who has business to transact in government, the complex agencies sometimes are not only baffling but also forbidding."<sup>180</sup> The public has responded. After the first ten months, Mr. Hogan reports receiving approximately 1,325 cases.<sup>181</sup>

The voluntary assumption of the official critic's role by the Lieutenant Governor means several things. He can compile solid, statistical evidence of Colorado's need for an ombudsman. For the first time the number of complaints as well as their merits can be made amenable to logical discussion rather than based on emotional and intuitive assumptions. The capacity of an official critic to get results and to stimulate change in statutes or procedure can be tested. The ability of the people to understand the institution, and the willingness of the news media to support its efforts can be analyzed. Perhaps even the traditional value of the institution as an advocate of better government and a means of increasing the public's confidence in its government can be evaluated.

Not only is this opportunity to evaluate based on solid data important to Colorado, but it should reveal important facts for the

<sup>179</sup> 2 HARV. J. LEGIS. 213, 221-26 (1965).

<sup>180</sup> Colorado Springs Gazette Telegraph, Jan. 15, 1967, at 6-D, col. 1.

<sup>181</sup> Interview with Mark Hogan, Lieutenant Governor of Colorado, in Denver, Nov. 2, 1967. The following statements attributed to Mr. Hogan were made during this interview unless another source is indicated.



rest of the United States. It is a unique undertaking. While Hawaii has enacted an ombudsman bill it has not funded the operation and there is no present intent to do so.<sup>182</sup> Michigan has, so far as is known, the only other functioning ombudsman office outside Colorado. The secretary of state of Michigan appointed an administrative assistant to receive citizen complaints in 1966,<sup>183</sup> but this appointee can be no more than an aide to a state officer. Many state elected officials have received complaints in the past, but those efforts cannot be considered ombudsman institutions by any fair definition.

Colorado's experience should be more valuable because the present Lieutenant Governor has a remarkably independent position. He is a Democrat holding high office under a Republican governor, and working with an assembly controlled by Republicans. Whatever else can be said about the political implications, it is clear that Mr. Hogan is not functioning as an administrative assistant for an elected official of the majority party. He holds a virtually autonomous position with no need to act as the majority party's chief of whitewash.

A public protector was appointed along party lines last year in Nassau County, New York.<sup>184</sup> His work in a metropolitan county government will be instructive for the states, but Colorado's experience at the state level should surpass it in value.

The only other ombudsman office in operation handles complaints against the federal government and is closer to congressional constituent casework than the functions of an ombudsman. This last individual was appointed by Congressman Henry S. Reuss to his staff to collect data in what will be the congressman's renewed effort to establish a national ombudsman counsel. The work will be confined to Congressman Reuss's Fifth Congressional District in Wisconsin. The appointment was effective in February 1967, and the purpose is to collect data for only a few months after which the office apparently will be abandoned and the results published.<sup>185</sup>

Despite its great potential, much of what Colorado's experience could show will not be realized, or at least not until the present operation is conducted on a more systematic basis. Mr. Hogan has stated that he and his staff are making no efforts to collect or to record data. The reasons are understandable: he has not been allocated state funds for a staff, which forces him to rely on volunteer assistance; he has no intention to create another bureaucracy with

<sup>182</sup> 10 STATE GOVERNMENT NEWS, July 1967, at 7. See also Rocky Mountain News, June 15, 1967, at 55, col. 1.

<sup>183</sup> Secretary of State of Michigan, Press Release, Aug. 31, 1966.

<sup>184</sup> Authorities and material cited note 7 *supra*.

<sup>185</sup> N.Y. Times, Feb. 5, 1967 § 1, at 67, col. 1.

elaborate rules of operating procedure; and lastly he does not wish to abuse the confidence of citizens by recording personal matters.

These factors seem insignificant, however, when they are measured against the potential importance of what Mr. Hogan has undertaken. They are obstacles which could be overcome. For instance, since much of the work is first received, then investigated, and perhaps resolved over the telephone, it seems feasible that certain information concerning the complaint could be recorded in a daily log. Not much recordation is necessary to provide good statistical information. A few simple notations of basic facts should provide enough data on which to properly evaluate the institution. Foremost is an accurate counting of the volume. The agency against which the complaint is lodged is important, and the disposition of cases is essential to a valid study. Statistics could then be readily compiled at periodic intervals. The following information would be sufficient:

1. Volume of Cases
  - Complaints
  - Referrals from Legislators
  - Undertaken on Own Initiative
2. Agency Complained Against
3. Type of Complaint
  - Administrative Procedure
  - Adequacy of Opinions
  - Factual Consideration
  - Inadequacy in Present Law
  - Misconduct of Officials
4. Disposition of Cases
  - Requests for Information
  - Dismissed Without Investigation
    - Declined for Want of Jurisdiction
    - Recommended Consultation with Attorney
    - Lacked Merit
  - Investigated
    - Dismissed as Unjustified
    - Dismissed — No Direct Action Possible
    - Criticisms or Recommendation Issued

Time is probably the critical factor in the Lieutenant Governor's ability to collect this data. Mr. Hogan should not be saddled with great burdens, but by assuming the duty on his own initiative he takes on some responsibility to the public to provide the means by which to rationally evaluate the institution. His primary concern, he states, is to serve the public's need for an official critic. The

public's need for reliable information about an official ombudsman for Colorado is hardly less.

Recording these facts would not result in the creation of another bureaucracy. Those complaints received or answered by letter are already filed. Use of the telephone has proven beneficial so its use should be continued in this particular office. But the receipt of a case and its disposition should be logged in a docket whether it is handled by letter, personal interview or telephone.

The Colorado proposals for an ombudsman would have required that complaints be made by a signed letter as is the rule elsewhere. At the hearing before the house committee, Professor Seney of the Political Science Department of the University of Denver, criticized this requirement. He said, "A person ought to be able to come into the ombudsman's office and, in a sense, pour his heart out. In many cases individuals might hesitate to complain if a written statement were required."<sup>186</sup>

Evidently in response, the committee amended the house bill to allow receipt of a verbal complaint if it is put in writing, presumably by the staff, and signed by the complainant. This is the procedure which has been workable in Sweden, but almost all complaints have been received there in writing. Mr. Hogan's experience already shows that Colorado and probably the rest of the United States differs from Sweden. Many individuals bring complaints to Colorado's Ombudsman by personal visit, and large numbers lodge complaints by placing a telephone call. This is an indication that the next assembly to consider an ombudsman bill should have data from Mr. Hogan so it can intelligently decide whether to require that a complaint be written. Mr. Hogan's initial evaluation is that some of the most meritorious cases come to him by the telephone.

Identity of the individuals involved with a complaint need not be revealed by a recordation of the work being done. Ombudsmen in other countries log a case by a numerical or alphabetical designation so that the annual report does not disclose confidences. Of course, the agency criticized or exonerated is listed, but usually there is no need to reveal the identity of the agency personnel involved.

The present Ombudsman's work has provided enough information to make a preliminary and cautious evaluation. Mr. Hogan states that about 1,325 cases have been received in the first ten months of the undertaking, from January through October 1967. The volume of complaints did not decrease when the assembly adjourned, as Mr. Hogan had expected. He anticipates that it will double next year as awareness of the service spreads.

<sup>186</sup> Testimony before the State Affairs Committee on Feb. 28, 1967. Denver Post, Mar. 1, 1967, at 32, col. 1.

Mr. Hogan's evaluation of these cases is revealing. About forty percent have come from citizens who have private legal problems, and whom he has referred to their attorney or to a legal aid society. These are the cases over which an official ombudsman would have no jurisdiction because they do not involve complaints against governmental agencies. Rather than refusing to recommend the applicable source of assistance, Mr. Hogan has not hesitated to advise the individual to seek legal assistance. His inclination not to turn a deaf ear follows the pattern of the ombudsmen in other countries.<sup>187</sup> Still they handle less requests for information and legal advice than this<sup>188</sup> because their public is better educated about the ombudsman function. Mr. Hogan does not consider these cases to be requests for information, but bona fide complaints which the individual does not understand present a private legal question. He considers only ten percent of his cases to have been requests for information.

The Colorado experience does reflect the widespread demand for some sort of governmental information service; however, it is doubtful whether that need can be met by an ombudsman. It seems clear that information services could not be provided within the traditional ombudsman scheme. To do so would expand the activity of the office greatly, making a small staff and a personalistic system unworkable.<sup>189</sup> Mr. Hogan no doubt receives more than his share of information requests because, being self-appointed, he has been in no position to undertake a public education program. He also feels that once one individual in need of advice is steered in the proper direction, others become aware of this service, want it for themselves when the need arises, and therefore request information from his office. He is undoubtedly correct when he says that his unofficial operation allows him wider jurisdiction than an ombudsman working in accordance with a statute would have.

Another forty percent of the cases received have been quickly resolved by a few telephone calls. These involve situations concerning some governmental branch, although not necessarily the state government. Many citizens have demonstrated a marked lack of knowledge about the responsibilities of the different levels of government. Those complaints involving the federal government

<sup>187</sup> *E.g.*, the Danish Parliamentary Directives instruct the Ombudsman to take no action on a complaint beyond his jurisdiction other than to refer it to the appropriate authority and to give the complainant reasonable guidance. GELLHORN, *supra* note 9, at 21-22.

<sup>188</sup> *Cf.* GELLHORN, *supra* note 9, at 134.

<sup>189</sup> The need by the public for better information about administrative agency functions has been a major criticism made by the New Zealand Ombudsman. *Id.* Japan has over 9,000 Civil Liberties Commissioners who give advice to hundreds of thousands of citizens annually about "nearly everything under the sun." *Id.* at 411. At least one writer feels that an ombudsman should dispense general information about governmental agencies as one of his primary duties. Aaron, *supra* note 173, at 59.

have been referred to the appropriate federal agency, and those involving the local government have been referred to the appropriate local office. This service is an important function of the institution, and it should become a part of any official ombudsman program in Colorado.

That portion of this forty percent which involves state agencies varies widely in its scope. Many complaints arise because there has been a lack of communication between the agency and the individual. A large share of the complainants have been given inadequate information or no explanation at all. Even though they have negotiated, the agency is sometimes unable or unwilling to understand the individual's position. In some cases the Lieutenant Governor or his staff have mediated by locating the problem, drawing out the pertinent facts from the citizen and providing them to the agency, or arranging for the agency to meet again with the individual.

In one case a young couple decided to move from California to Denver. They flew to Denver to purchase a home and returned to California to move their personal property. They bought a motorcycle in California, paid a sales tax and listed their new Denver address on the registration papers. When they brought it to Colorado and applied for a Colorado certificate of title, the revenue department insisted on collecting a sales tax for what it thought had to be a taxable sale within the state. The two sides could not make the other see their point. Someone told the couple that the Lieutenant Governor was serving as an ombudsman so they contacted him. He intervened, explained the situation to the department, and the new Coloradans got their title without paying a double sales tax.

Another case involved a simple failure by the agency to meet its obligations. The state brand commissioner is required to inspect the brands of cattle shipped out of the state, and to collect a tax for each animal as well as an additional fee for the promotion of Colorado beef sales. The livestock owner is entitled to a refund of the promotional fee if he chooses, but he must apply within ten days on vouchers to be furnished by the beef board.<sup>190</sup> One cattleman did not receive the necessary application forms from the agency until after the deadline had passed. He was then refused the refund. After intervention by the Lieutenant Governor the agency supplied the forms and paid the rancher his refund.

Other cases in this category have involved situations where the individual went to an agency and was informed by it that they were not the unit responsible for his problem. The agency personnel either could not or did not refer the citizen to the proper agency. The

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<sup>190</sup> Ch. 69, §§ 15, 17, [1965] Colo. Laws 253, 254.

Lieutenant Governor has located the department and given the individual the information.

Mr. Hogan estimates that twenty percent of the cases have been investigated at some depth. Of these, he feels a large share have been meritorious complaints. His efforts as an ombudsman have usually resulted in some gain for the individual. Even in those few cases in which he has had to tell the complainant that nothing could be done, he feels confident they have been appreciative because they are at least satisfied everything possible under the present state of the law has been done. They are perhaps able to understand and accept a decision they had previously resisted. As Mr. Hogan expressed it, they appreciate the fact that, "Passing the buck has stopped," and that someone has told them frankly and convincingly that nothing else can be done.

Professor Seney, speaking for the ombudsman bill before the State Affairs Committee, said an ombudsman office inevitably would "be a sounding board for chronic complainers," but he doubted that such activity would "take over the office."<sup>191</sup> Lieutenant Governor Hogan's experience offers solid encouragement on this point. He had expected a good many querulous complaints. After ten months he could classify only three instances as "crackpot" cases of the type where "someone tells me they have been visited by little, green men from outer space and no governmental agency will pay any attention." His experience supports that of other ombudsmen who rarely receive complaints indicating derangement, or complaints that are frivolous, vexatious or made in bad faith.<sup>192</sup>

#### C. *Public Reaction to Colorado's Ombudsman*

Lieutenant Governor Hogan has mapped a very precarious route for himself. It weaves through the ins and outs of Colorado politics and between the public's desire for service in government and its strong distaste for increased state taxation. The Denver voters, for instance, have emphatically rejected every proposed salary increase for elected city officials since 1951.<sup>193</sup> The Colorado General Assembly, no doubt reflecting a general and sharply felt abhorrence of increases in state spending, has almost as consistently refused to raise the pay of elected state officials.<sup>194</sup>

<sup>191</sup> Testimony, note 186 *supra*.

<sup>192</sup> *E.g.*, GELLHORN, *supra* note 9, Table VII, n.a. at 119 (New Zealand).

<sup>193</sup> Denver Post, July 10, 1967, at 14, col. 1 (editorial). This refusal to increase salaries is all the more significant in light of the fact that salary rates average 30% to 50% lower than most of the salary scales of U.S. cities of comparable size. Report of Charter Salary Committee, Denver, Colorado, Mar. 14, 1966, on file in the mayor's office.

<sup>194</sup> Salaries of Colorado's top-ranking elected and appointed officials have been raised substantially, effective in 1970. Ch. 318, §§ 1-2, [1967] Colo. Laws 594-95. These salaries have remained at low levels since 1958, ch. 42, §§ 1-2, [1958] Colo. Laws 236-37, and the general assembly had refused repeatedly until 1967 to increase them.

An editorial in the *Colorado Springs Gazette Telegraph* mirrors this public opinion opposing increased spending, but surely its almost reactionary viewpoints will not be accepted by the majority of an intelligent electorate once it has an understanding of the ombudsman office:

"Watch it! You are in the process of being softened up for the creation of another tax-supported, politically motivated and controlled bureaucratic agency to eat out your substance." . . . [It] would provide for "ombudsmen" — that is, more bureaucrats — to stand between the already put upon taxpayers and the bureaucracy itself.

. . . .  
[I]f, as is certainly true, "the bureaucratic maze called government" has grown complex, baffling and forbidding, the answer, as should be obvious to anyone of even average intelligence, is to reduce the size, power and expense of the bureaucracy, rather than adding to it with more full time stenographers and full time administrative assistants.

The people of Colorado need "ombudsmen" and more bureaucratic "special pleaders" like they need more holes in their heads.

. . . "Let the Swedes and Russians and other socialistic countries keep their obudsmen. We have enough troubles (and taxes) as it is without adopting more old world socialistic ideas."<sup>195</sup>

Even political science professors, who should perhaps be better informed than emotional editorialists of the history and traditions of the institution, are not immune from misunderstanding. Also testifying on behalf of the bill before the State Affairs Committee, Dr. William Winter, Chairman of the Political Science Department at the University of Colorado, suggested that a commission rather than an individual should assume the duties of an ombudsman. His reasons were that a commission "'could represent several types of professional orientation' and would lessen the risk that a single ombudsman 'might go out chasing administrators just for the sake of knocking off a few administrators.'"<sup>196</sup> The professor's obvious distrust ignores the strong tradition of integrity and objectivity which ombudsmen have established everywhere they hold office. In all the years of their service, not one ombudsman has been implicated in scandal or any similar misuse of office. There is no reason to believe Colorado will have a different experience.<sup>197</sup>

With vitriolic and misleading statements emanating from influential and eminent sources in Colorado, one would expect the

<sup>195</sup> *Colorado Springs Gazette Telegraph*, Jan. 15, 1967, at 6-D, col. 1.

<sup>196</sup> Testimony before the State Affairs Committee of the Colorado House of Representatives on Feb. 28, 1967. *Denver Post*, Mar. 1, 1967, at 3, col. 1. See text at note 134 *supra* for an argument against a plural ombudsman for Colorado.

<sup>197</sup> Professor Winter's apprehension is similar to that expressed in an editorial in the *Denver Post* entitled, "Who'll Watch the Watcher." It suggests, perhaps facetiously, that "we might within a decade be hearing that we need some ombudsman-watchers." *Denver Post*, Feb. 9, 1967, at 14, col. 8.

Lieutenant Governor to tread warily. He has done just that. He has not sought the publicity which the public must have to understand and to support the institution. He has not advocated that the legislature accept the ombudsman bills. Right now his ombudsman experience leaves him convinced that his work is essential. "One hundred percent of these cases present work which ought to be done. But how it should be done, who should do it, where the office should fit in, and whether it can be done economically are questions about which I'm no longer so sure." Mr. Hogan gives the impression that he still feels an ombudsman could effectively work out of the lieutenant governor's office, and that it would have the advantage of not requiring another officer on the public payroll, nor requiring another office and equipment. It probably would necessitate funds for a full time secretary and an administrative assistant.

If constitutional amendment number one on the 1968 ballot is approved by the people of Colorado, the offices of governor and lieutenant governor will be unified politically. Each party's choices for the top two seats will either stand or fall together at the polls. Then the lieutenant governor would not be a stranger in his own administration. While Mr. Hogan realizes that a lieutenant governor might under those circumstances become a full working partner of the governor, he entertains some belief that the additional duties of an ombudsman could also be assumed.

With political traps lying all about him, the Lieutenant Governor is in no position to advocate that Colorado create an ombudsman in its traditional sense. "If the choice was between spending \$50,000 for an ombudsman," he said, "or for education, I would not have to hesitate to choose education." Still he is convinced that the work must be done by someone, and he is determined to fulfill that responsibility for the remaining three years of his term.

The lesson seems clear. The ombudsman institution must remain above party politics or it cannot perform its functions. Inter-meshed with politics, it would not be able to retain the trust of the people, the news media or the legislature. Mr. Hogan is not naive; he says his primary concern is in improving government for the people, but he admits that doing this work well can help him in his political career. However, it would not be accurate or fair to say that his work so far has involved partisan politics. For instance, he has not tried to exert his influence to gain favors for his clientele. He has made it a practice to approach an agency with respect for its own expertise and procedures. He asks what the criteria are and whether the individual has met those standards. Then he evaluates the worth of the procedure or the law as he evaluates the facts of the complaint.



In at least one case he was able to bring about a change in statute. A Canadian driving a diesel equipped Mercedes-Benz stopped in northeastern Colorado to fill his tank with fuel. The gasoline station could not sell him diesel fuel because he had not purchased the tax stamps from the state police. He could not understand why the stations could not sell the stamps directly so the station manager referred him to the Lieutenant Governor. Mr. Hogan agreed. After discovering that the state police saw no merit in having to leave their patrol to collect taxes, he persuaded the assembly to tack an amendment on to a pending road bill. The bill was enacted and the change was made within the week. By then the Canadian was out of state, probably never to return. The incident is also some indication that the work so far has not been politically oriented<sup>198</sup> because a Canadian has no vote in Colorado.

Mr. Hogan has received some constituent casework from the legislature. The members have no personal staff, and they are not in session long enough to handle many constituent complaints. Mr. Hogan does what he can to resolve problems and then replies directly to the individual citizen, being careful to mention the legislator's name.

There are some disturbing features of Mr. Hogan's ombudsman function. First, no matter how earnestly any elected official serving as an ombudsman tries to prevent it, his very party affiliation injects some degree of politics into the institution. This is precisely what must be avoided if the office is to succeed as it should.

Secondly, a crippled mutation of the ombudsman institution is being presented to the public. Colorado now has a blend of the traditional ombudsman and the traditional caseworking politician. The present unofficial function cannot receive the widespread educational publicity an official ombudsman should have. Therefore, misconceptions about the office are no doubt gaining currency, and increasingly so because the volume of complaints is growing as awareness of the office spreads.

Third, the present ombudsman perhaps conceives of his function too narrowly. He has concentrated more on getting results in a particular case rather than in improving procedure statewide because his unofficial status does not authorize him to supervise statewide. The latter function has not been ignored, however. One case serves as a good example. A lady complained that the instructions on the cosmetology licensing examination were so unclear as to prevent a fair test. While Mr. Hogan was investigating he discovered that two tests were kept on file. One battery was for Cau-

<sup>198</sup> Mr. Hogan discounted political motivations in an earlier account of his work. *Denver Post*, Mar. 27, 1967, at 13, col. 1.

casians and the other was reserved for minority groups. He referred the matter to the Colorado Civil Rights Commission which had no difficulty in ending the discrimination.<sup>199</sup>

Fourth, the lack of a staff and the demands of his other duties require Mr. Hogan to forego personal supervision of many cases. While difficult or important cases get his attention, his administrative assistant and his volunteer workers frequently handle all aspects of a complaint. This situation raises the possibility that no one person will notice complaints which present a recurring problem, all of which could be resolved by correcting the root of the trouble.

Fifth, the present investigation procedure cannot be thorough enough to command universal respect for its accuracy. Usually the official file is not examined, because there is no power to compel its submission and because Mr. Hogan fully appreciates his unofficial status. It is too easy for an agency in possession of all the facts to explain away the complaint when there is no independent and unbiased examination.

There are some heartening aspects at the same time. The Colorado institution has not slipped measurably into partisan politics. The ombudsman bill had bipartisan support; the house bill was offered by a Republican and the senate bill was proposed by two Democrats.

The Lieutenant Governor's assumption of the role has clothed the institution with the aura of high office which it must have. If the second ranking official in the state has served the people well, the office benefits from a tradition of prestige which should carry over to an official ombudsman. Mr. Hogan and his staff have demonstrated a real personal interest in the citizens who come to the ombudsman. Mr. Hogan reports that it is not easy day after day to hear complaints with sympathetic understanding, but realizing that it is essential, he has done so. He is thus doing much to establish the traditions and the public trust in the office that it will need in any official form.

#### D. Predictions

Many of the arguments which can be made against establishing an official ombudsman office in Colorado have already taken form. The most extreme reaction has come from the *Colorado Springs Gazette Telegraph* which decried the concept as socialistic.<sup>200</sup> It described the office as politically motivated and politically controlled,

<sup>199</sup> Interview with J. David Penwell, Assistant Attorney General and Legal Counsel, Colorado Civil Rights Commission, in Denver, Oct. 25, 1967.

<sup>200</sup> Colorado Springs Gazette Telegraph, Jan. 3, 1967, at 7-B, col. 1; *id.*, Jan. 15, 1967, at 6-D, col. 1.

an intolerable appendage to big government which would only make it bigger and more arrogant, and an inexcusable tax burden.

The *Denver Post* doubted the need for "a whole new . . . layer of government" since "state administration has been relatively responsive to the needs of the people . . ." <sup>201</sup> It suggested that an effective press and an alert minority party leadership could adequately safeguard the public's interest in good government. Another *Post* editorial expressed fear that an ombudsman would only become a "partisan fault-finder." <sup>202</sup> Besides, it argued, Americans are chronic grippers, so no individual could handle the volume of unnecessary complaints which would inevitably flow once the floodgates were opened.

Other arguments against adopting an ombudsman office could be made. It probably will be said that one man and a small staff cannot do enough to affect the totality of administrative government. It could be argued that there should be no "one man law-giver," and the courts or administrative tribunals should interpret all statutes and rules. The majority of the public probably could be persuaded that administrative problems only plague the poor who do not know how to deal effectively with agencies, and that the indigent can go to a legal aid society for help. It could be said that, all other arguments aside, the effort would not be worthwhile because the complaints are simply too minor and petty to present a real problem.

Most of these arguments have already been answered in the preceding material, and that discussion need not be repeated. The unanswered doubts deserve comment. Colorado administration admittedly has been relatively responsive to the public need. Mr. Hogan feels strongly that Colorado has a good administrative service, <sup>203</sup> but even a conscientious public administration contains problems and red tape as his present workload shows.

The press has long since been unable to uncover administrative abuse, <sup>204</sup> and the legislature's inability to do so has already been discussed. <sup>205</sup> Mr. Hogan's examples show that serious shortcomings have been corrected through his complaint system. Those same prob-

<sup>201</sup> *Denver Post*, Feb. 9, 1967, at 14, col. 8.

<sup>202</sup> *Denver Post*, Mar. 4, 1966, at 24, col. 1.

<sup>203</sup> Interview, *supra* note 181. The institution could not be successful unless the state was already reasonably well administered. Criticism would have no good effect where the government was riddled with corruption or where officials did not worry about public chastisement. See Rowat & Liambias, *Canada*, in *THE OMBUDSMAN* 186, 188 (D. Rowat ed. 1965); Northey, *New Zealand's Parliamentary Commissioner*, *id.* 127 at 142-43.

<sup>204</sup> Abrahamson, *Ireland*, in *THE OMBUDSMAN* 201, 203 (D. Rowat ed. 1965); Nader, *Ombudsmen for State Governments*, in *THE OMBUDSMAN* 240, 244 (D. Rowat ed. 1965).

<sup>205</sup> See note 160 *supra* and accompanying text.

lems had existed long before his program began, yet the press and the legislators were not aware of them. Even the individuals affected by the discriminatory cosmetology examination did not realize their rights were being violated. Only an independent investigator will be able to uncover this sort of abuse.

The General Assembly of Colorado has shown its determination to avoid partisanship in any ombudsman office it creates. With that sort of backing, it is hard to believe a Colorado ombudsman would overthrow all the traditions established elsewhere and here to become a partisan fault-finder. By the same token, Mr. Hogan's experience in Colorado shows that Americans are not chronic complainers of the type who would flood the ombudsman with petty complaints.

No one has as yet attacked the ombudsman idea as an enemy of the civil service, but that will be forthcoming. It is an accusation which has been leveled in every country which has recently adopted the institution. Yet the public employees have invariably found the ombudsman their friend. Statistics already presented show he has exonerated them from charges in the great majority of cases rather than casting blame and disrepute upon them.<sup>206</sup>

Funding the office is a real problem. On one hand, \$50,000 or \$60,000 is a small part of the state budget; it is insignificant compared to the cost of operating Colorado's court system. On the other hand, any allocation of state funds should not be made lightly. Colorado can rely on Mr. Hogan's ombudsman work to provide the answer to whether or not this expenditure should be made. It could be that the office would save the state as much as it would cost by decreasing the number of cases litigated in the courts and before the administrative agencies.

If the unofficial ombudsman's work continues to produce favorable results it will generate a widespread public expectation in Colorado that the service be continued after Mr. Hogan's four years in office are ended.<sup>207</sup> There will no doubt still be strong opposition so that a governor is likely at first to appoint his second in command or an administrative aide to fulfill the function. But before too long the need for a Colorado ombudsman will be documented from the

<sup>206</sup> The New Zealand public service reacted strongly against the proposal for an ombudsman, fearing that it would be victimized as his scapegoat. A few years of experience with the Ombudsman has persuaded the public service that he has been an impartial friend and defender rather than an enemy. GELLHORN, *supra* note 9, at 91-93. See also Os, *The Ombudsman for Civil Affairs*, in *THE OMBUDSMAN* 95, 96 (D. Rowat ed. 1965). Pedersen, *Denmark's Ombudsman*, in *THE OMBUDSMAN* 75, 77 (D. Rowat ed. 1965).

<sup>207</sup> The public's overt response to the ombudsman proposals has been favorable without exception. For citizen reactions, see these letters to the editor printed in the *Denver Post*, Feb. 21, 1967, at 27, col. 1; *id.*, Apr. 16, 1967 ("Perspective" section), at 5, col. 2; *id.*, July 20, 1967, at 19, col. 2.

data which should be collected, and eventually a traditional ombudsman will be instituted.<sup>208</sup> We can only hope that the present conception of the office will not prejudice that possibility by becoming a political gimmick or by accustoming the people to a heavily diluted perversion of the concept. In the final analysis the view adopted by the *Denver Post* will no doubt prove accurate:

Undoubtedly there will be great lethargy and some resistance, perhaps years of delay. But this idea eventually will prevail and then, after a few years, the people of Colorado will ask themselves how they got along all that time without an ombudsman.<sup>209</sup>

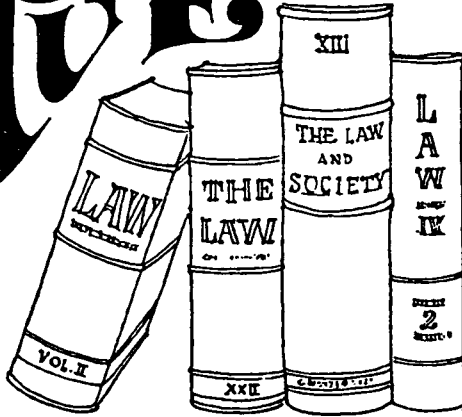
*Loren L. Mall*

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<sup>208</sup> It is probable that Denver will create an ombudsman office before the state does. Mayor Tom Currigan said in his second inaugural address on July 3, 1967, that he would propose soon to the Denver City Council that it establish the post for city and county government. *Denver Post*, July 3, 1967, at 4, col. 1.

<sup>209</sup> *Denver Post*, Feb. 7, 1967, at 14, col. 1 (editorial).

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