

# OMBUDSMAN IN OHIO

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## I. INTRODUCTION

Proposals for the establishment of ombudsmen in American federal, state, and local government are in vogue. In Ohio bills were introduced by members of both political parties in the 107th General Assembly (1967-1968) providing for the creation of the office of Ombudsman. While these proposals were not enacted, the high level of interest in ombudsmen promises re-introduction. The prospect that such legislation will pass and that Ohio will have an Ombudsman in the future is not presently measurable. For now, Ohio is leading rather than lagging among the states to consider ombudsmen, but its ultimate determination to adopt or not to adopt the ombudsman system must await a better formation of opinion by the public and by law-makers.

The idea of an official administrative critic, an ombudsman, is novel to American government systems. It is a function that is proving immensely successful, however, in a number of other countries which have administrative agency systems not unlike those of our federal, state, and local governments.<sup>1</sup> The ombudsman system of a singular, independent, respected official, with power to investigate a broad range of administrative complaints and the expert status to warrant official and public attention to his recommendations, merits serious consideration by American state governments. It could be an economical and effective method for maintaining and improving an already sound administrative law system. To advocate an ombudsman is not to criticize the present administrative agency system or the present administrators. Ombudsman is a device for the cure of interstitial ills in the present administrative law system. As pointed out by Professor Walter Gellhorn, America's leading commentator on ombudsmen, an ombudsman can function well only when the state is already possessed of sound government institutions and a good civil service, as his powers are quite limited.<sup>2</sup>

Distinct from the merits of ombudsman on the federal level, there is particular utility in an administrative critic with juris-

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<sup>1</sup> See W. GELLHORN, WHEN AMERICANS COMPLAIN 212-32 (1966) [hereinafter cited GELLHORN, AMERICANS].

<sup>2</sup> *Id.* 132.

diction over state and local agencies.<sup>3</sup> The ordinary person is perhaps affected more by state and local agency action than he is by federal agency action. Such state and local action is likely to concern matters of little public impact and small dollar amounts which are of immediate personal importance to the individual. For the affected individual, the procedural apparatus of judicial review is too costly, too slow and too poorly understood to perform its function of assuring due process and reasonable administrative action. Thus, the person with a complaint about his driving license, his unemployment, his workmen's compensation or welfare claim, garbage collection, his child's teacher, street maintenance, or his treatment by police or prison officials may be effectively without any remedy. He may complain, and if sufficiently vocal he may receive redress at executive or legislative instance. Nevertheless, he will likely find the mayor, the county commissioner, or the governor, however sensitive to a dissatisfied citizen, and however much an "approachable potentate,"<sup>4</sup> unwilling to upset the work of an agency whose chief officials serve at his pleasure.<sup>5</sup> It is also likely that his state representative, whose staff, salary, and time are severely limited in comparison to his congressman, cannot handle his complaint.

In addition to the close identification of the executive with administrative agencies and the part-time nature of most legislative bodies, at both the state and local level,<sup>6</sup> there is an inherent defect in redress through executive or legislative sources. Help from these sources is almost invariably accomplished by special treatment. However effective for the complainant, such favoritism is not conducive to sound administration. It is often a bending of lawful standards and procedural safeguards which puts the complainant ahead of rather than equal to others. Review by an ombudsman with some expertise, but no powers to compel redress, could satisfy a complainant without depreciating the administrative system, and without the undesirable side effects of pressure and undue blame on elective officeholders.

Notwithstanding the possible benefits of ombudsmen, it must

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<sup>3</sup> See *id.* 131-32; MOORE, *State Government and the Ombudsman*, OMBUDSMEN FOR AMERICAN GOVERNMENT? 70-100 (S. Anderson ed. 1968); Unruh, *The Need for an Ombudsman in California*, 53 CALIF. L. REV. 1212 (1965).

<sup>4</sup> GELLHORN, AMERICANS 161.

<sup>5</sup> See, e.g., OHIO REV. CODE ANN. § 121.03(A) (Page Supp. 1967) (administrative department heads serve terms concurrent with appointing governor and at his pleasure).

<sup>6</sup> See generally GELLHORN, AMERICANS 157-59.

be noted that ombudsmen are doubtful cure-alls.<sup>7</sup> By nature they are rather toothless watchdogs whose advisory growl is frequently ignored by administrators aware of their relative impotence. It would seem from the Danish and New Zealand experience that their success might depend to a large degree on the personality of the incumbent.<sup>8</sup> There is a very real danger that the confidence of the public and administrators alike might be soured by an unfortunate selection, particularly that of an initial ombudsman. The establishment of a state ombudsman would be a relatively cheap reform, however, and when properly established, an ombudsman could do little harm if unsuccessful and much good if the foreign experience prevails.

Ombudsman legislation has been introduced in more than a half dozen states, Connecticut, California, Illinois and New York among them, and has been enacted in Rhode Island and Hawaii. It is too early to know whether these newly created ombudsmen will be able to accomplish the desired purpose, but further enactments creating state ombudsmen can reasonably be expected. In Ohio, there was the bi-partisan introduction of ombudsmen legislation in the last legislative session, and memories of the Ohio Bar Association's Administrative Law Committee proposal for an administrative court for Ohio<sup>9</sup> to evidence a felt need for review reform in Ohio administrative law. The question of whether this need can be met by adoption of the ombudsman institution in Ohio will be examined in the following discussion. The merits and mechanics of adopting an office of Ombudsman will also be considered.

Much has been written about ombudsmen and other administrative critics in other nations and about the adaptability of the institution to American governmental systems. Consideration of these matters will therefore be limited to a brief description of the foreign institutions and their present, functional, American counterparts.

## II. AN INVENTORY OF OMBUDSMEN, OVERSEERS, AND OTHER ADMINISTRATIVE CRITICS

The supervision and review of administrative agency procedures and decisions in modern societies are conducted by a variety

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<sup>7</sup> See generally *id.* at 224-32.

<sup>8</sup> See W. GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* 5-47, 91-153 (1966) [hereinafter cited GELLHORN, *OMBUDSMEN*].

<sup>9</sup> See Fulda, *A Proposed "Administrative Court" for Ohio*, 22 OHIO ST. L.J. 734 (1961).

of institutions. The legislatures which create the agencies and prescribe their general powers, the procedural codes which govern them, and the executives who are charged generally with public administration, exercise an ultimate sort of oversight.<sup>10</sup> But the kind of control that is of immediate importance to the ordinary person is that exercised by the body to which he must turn in a dispute with an administrative agency.

In the United States such remedial control of federal, state, and local agencies is primarily exercised by the courts.<sup>11</sup> If the complainant has exhausted his administrative remedies and joined a legal issue with the administrators,<sup>12</sup> it is to the courts, possibly through a specialized bar,<sup>13</sup> that he must turn. In France and West Germany, and to a certain extent in Sweden, such control is exercised by a specialized administrative court system, the *Conseil d'Etat* and the *Verwaltungsgerichten*, a refinement on the American system.<sup>14</sup> In Denmark, Finland, New Zealand, Norway, Sweden, Yugoslavia, Poland, U.S.S.R. and Japan, the citizen can seek redress for administrative grievances through an official administrative critic, whose powers are more or less limited.<sup>15</sup>

There are three distinct types of administrative critics functioning in these latter societies: the ombudsman, the procurator, and the administrative inspector. Both the procuratorial system and the administrative inspection system involve multiple critics and a decentralized organization, the formidable bulk and cost of which precludes their serious consideration for American state adoption, even though they might be effective.<sup>16</sup> It may be an oversimplifi-

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<sup>10</sup> See GWYN, *Transferring the Ombudsman*, OMBUDSMEN FOR AMERICAN GOVERNMENT? 37, 53-58 (S. Anderson ed. 1968). See generally W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 82-212 (4th ed. 1960).

<sup>11</sup> Compare Administrative Procedure Act, 5 U.S.C. §§ 1001-11 (1964) with, e.g., OHIO REV. CODE ANN. §§ 119.0-.13 (Page 1953) as amended, (Page Supp., 1967) (administrative procedure). See also OHIO REV. CODE ANN. §§ 2506.01-.04 (Page Supp., 1967) (appeal from local agency).

<sup>12</sup> See W. GELLHORN & C. BYSE, *supra* note 10, at 260-64.

<sup>13</sup> See C. HORSKY, *THE WASHINGTON LAWYER* ch. II (1952).

<sup>14</sup> See G. SAWYER, OMBUDSMEN 15-17 (1964); GELLHORN, AMERICANS 37-39. See also Fulda, *supra* note 9.

<sup>15</sup> GELLHORN, OMBUDSMEN 421-39. This excellent, recent study examines the origin, processes, and effect of administrative critics in nine nations. For material on the adoption of an ombudsman system in a common law country, see *id.* at 91-153 (New Zealand); G. SAWYER, OMBUDSMEN 25-34 (1964); ROWAT, *The Spread of the Ombudsman Idea*, OMBUDSMEN FOR AMERICAN GOVERNMENT? 7, 18-25 (S. Anderson ed. 1968).

<sup>16</sup> See GELLHORN, AMERICANS 5-13.

cation to describe the procuratorial system as a prosecuting attorney who has the additional duty of scouring the halls of government as well as the streets and countryside for business.<sup>17</sup> Such a system is sanction rather than remedy oriented, but it assures that a faithless public servant is not lightly dealt with as a member of the government team. By contrast, the Japanese administrative inspection system<sup>18</sup> employs respected lay leaders in multiple offices who smooth the course of administration for the less able.<sup>19</sup>

Together with the singular ombudsman, these two kinds of official critics are characterized by (1) independence from the legislative and executive authorities, (2) possession of extensive investigatory powers and (3) the use of reasoned opinions to achieve results by persuasion rather than by decree.<sup>20</sup> In addition to these officially constituted critics, quasi-official and unofficial critics presently function as checks on administration in most political units. Perhaps foremost of these is the press, which is given quasi-official standing to participate in the administrative process in Poland<sup>21</sup> and which functions as a voluntary critic elsewhere, not infrequently involving itself in individual disputes. Bar association committees concern themselves with administrative procedure and var-

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<sup>17</sup> See *id.* at 336-71.

<sup>18</sup> See *id.* at 372-420.

<sup>19</sup> Although beyond the scope of this article, the Japanese administrative inspection system warrants study as a useful model upon which two current American needs might be fulfilled: (1) employment in a socially useful manner of a vast and increasing number of retired persons, whose education, skill, and experience is a largely untapped resource, and (2) dissemination of advice and guidance to the uneducated, inexperienced, and disadvantage persons in the lower socio-economic, largely city-dwelling groups. These latter citizens are the subjects of a great deal of administrative action or inaction in the execution of existing governmental programs at all levels relating to education, employment, and welfare. Their complaints based on nothing more than lack of information bulk large among those received by agencies charged with administering such programs. Inarticulate and uninformed on how to complain effectively, many such persons must bear unaired grievances against government and the resulting disaffection indistinguishable from that engendered by unremedied administrative error.

While public information is properly a function of the agency and not that of a reviewer of agency action, a breakdown in information causes the same sort of grievance and loss of confidence in government as maladministration and must be treated in the same manner, whether by administrative critic, executive, or legislature. Employment of retired persons, on the Japanese model, to assist in the information function would lift this burden from administrator and reviewer alike, and conserve their energies for the resolution of real disputes.

<sup>20</sup> See GELLHORN, *AMERICANS* 9-10.

<sup>21</sup> See GELLHORN, *OMBUDSMEN* 321-27.

ious private citizens' organizations interest themselves in public administration generally. However, such groups cannot be considered a practical source of redress for the individual complainant. Like the official foreign critics, these latter bodies are independent of the power exercising branches of government, and they influence the administrative process by persuasion and the development of opinion. Unlike an official critic, however, they often lack any real fact-finding ability, and, since they are privately financed, they lack the stability of a government institution such as an ombudsman. As a source of redress for the ordinary citizen, unofficial groups are unreliable because they are usually interested in public administration only in a broad sense. They are not case oriented. They cannot apply their limited time, influence, or funds to the resolution of a relatively petty grievance of the kind typically considered by an ombudsman.

Curiously, the groups that point to themselves as the real ombudsmen in America are the federal, state, and local legislators and executives, in their individual capacities as responsive, elected officials. Congressmen, mayors, and indeed the administrative agencies themselves have said in response to ombudsman proposals that they are already performing the function of an ombudsman and therefore none is required.<sup>22</sup> Undeniably such officials secure resolution of a vast number of minor grievances. This constituent work is an integral part of political life. It could be delegated, but never fully transferred to an ombudsman, for complaints will continue to come to elected officials and no ombudsman would be able or have reason to dampen this opportunity to cut political hay. There are two reasons constituent work does not make these officials ombudsmen.

First, many potential complainants believe constituent work to be partisan. Right or wrong, it is the belief that matters. The aggrieved citizen who thus withholds complaint or complains without full satisfaction then bears two unaided grudges against his government. Second, such officials have a divided responsibility which makes it difficult to separate their individual leadership role from their roles as creators or supervisors of the agency apparatus about which there is complaint. The congressman, the state bureau of inspection<sup>23</sup> or the mayor may assume to be inspectors general

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<sup>22</sup> See GELLHORN, AMERICANS 57-58, 104-21, 157-70; GWYN, *supra* note 10, at 49-59.

<sup>23</sup> OHIO REV. CODE ANN. §§ 117.01-18 (Page 1953), as amended, (Page Supp. 1967) (bureau of inspection and supervision of public offices).

of government, but they cannot be detached from administrative agencies because they are not independent of the responsibility for administration. They cannot therefore achieve the kind of respect that supports acceptance by citizens and administrators alike of an ombudsman's findings and recommendations.

### III. OMBUDSMANIA

As the unofficial administrative critics are only *occasional* ombudsmen, the elected officials and their representatives are *spurious* ombudsmen. The epithet is not employed in these descriptions to depreciate the service of these groups in entertaining and working on resolution of citizens' complaints about administrative agencies. Instead, it is used to highlight a habit of imprecision that has developed as the idea of adopting ombudsmen has spread in America.

The habit to be discouraged is that of thinking that *anyone* who receives complaints is an ombudsman. Such *ombudsmania* occurs in a less virulent form when, upon observing the results of a narrow sample of cases, it is concluded that any officer capable of securing any measurable satisfaction is functioning as an ombudsman. The danger in this kind of thinking is that any number of government complaint departments may be created or re-designated within existing government departments and labeled ombudsmen without the constitutive characteristics of true ombudsmen. Alternatively, it might be concluded that an ombudsman is undesirable because existing institutions are engaged in the business of complaints. We shall then have missed the point entirely and lost whatever benefits ombudsmen might have offered American governments.

True ombudsmen are hybrid institutions. They do not readily admit to classification as legislative, executive or judicial institutions. They are something of all of these as are the administrative agencies they guard. If an ombudsman were established *within* the legislative or executive branches of American government, he would necessarily lack the quasi-judicial independence requisite to public and governmental respect for his opinions and recommendations, and would function only as a public relations or advisory office for such branches. If an ombudsman were created without investigatory powers there would be no basis for acceptance of his opinion as he would be no better informed than any other governmental or private commentator. If he were given powers to

compel redress, he would be no more than a super-administrative agency or a special court. The requirements of procedural due process would obviate the ombudsman's ability to avoid the cost, delay and complexity of judicial or quasi-judicial proceedings. If any one of the three characteristics, independence, investigatory power, or absence of revisory jurisdiction, is missing in an ombudsman proposal, such scheme would be essentially duplicating existing government institutions. Such variants may be desirable reforms, but they are not true ombudsmen as they are working successfully in other nations.

It is the successful foreign ombudsman rather than an untested counterfeit that warrants consideration by American governments, particularly the states. This does not mean that the Danish or New Zealand ombudsmen, which are models of effectiveness, can be lifted intact and adopted by American states. The political and social differences between the nations having ombudsmen and American states requires that adaptations be made. What is imperative is that adaptation be made without substantially altering the essential constitutive characteristics of an ombudsman.

#### IV. AMERICAN STATE PROPOSALS

The remarkable thing about the accumulated literature on ombudsmen is not the near unanimity of opinion that it is a good thing, for new ideas are spread by advocates and not by opponents. It is that there is no serious difficulty in adapting ombudsman to the American state. The model ombudsman acts and the legislation introduced in several state legislatures support the consensus that ombudsman can be adapted to state use without loss of essential elements, at least as far as the mechanics of these statutes are concerned. The Ohio bills, following closely a model act, appear to preserve the characteristics which have made foreign ombudsmen successful while incorporating changes necessitated by the nature of state governments.

##### A. *Adapting Ombudsman to State Government*

If the courts leave something to be desired as a source of redress for citizens because of the cost and delay occasioned by the bulk of judicial proceedings, the judiciary is nevertheless an excellent model from which to fashion an American state ombudsman. While the courts lack initiative and the ability to respond to



a minimally formal or perhaps less than legally cognizable complaint,<sup>24</sup> their tradition, standards and power support public and official trust in and respect for their independence from political, social, or economic bias. This is reflected in judicial tenure, salary and privilege.<sup>25</sup> The creation of an administrative court would add the element of expertise in administrative law to the present system of review, but such a proposal would not appreciably reduce the cost of judicial review or expand its scope.<sup>26</sup> Moreover, it has not achieved success despite support from many lawyers, including those of Ohio. The stature necessary to the effectiveness of a state ombudsman could be maximized, however, by incorporating in the office as many attributes of judicial office as is possible, consistent with the ombudsman's function as critic as opposed to commander.<sup>27</sup>

There is a notable difference between those nations utilizing ombudsmen and the American state for which adjustment must be made if adoption is to be successful. Judicial review of administrative action, as it is understood in America, is severely limited or virtually unknown in such nations. In Sweden, for example, the administrator is the final authority and there is no appeal from his determination.<sup>28</sup> Administrative abuses are reviewable only by way of prosecution for criminal misconduct of the administrator. This serves as a check on abuse of power, but provides no remedy for the aggrieved citizen and cannot possibly redress simple error or minor wrongs. The Swedish Justiceombudsman (J.O.) has authority to inquire into minor abuses which may or may not be judicially reviewable in America, and a corresponding duty to conduct criminal prosecutions against administrators found to be engaged in misconduct. Such a system uses an ombudsman as a broad quasi-appellate authority and as a prosecutor, although prosecutions are very few in practice. American judicial review is satisfactory in many kinds of cases, particularly those in which the money or interest involved warrants the cost of extensive proceedings. The administrative agency is not as a practical matter the

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<sup>24</sup> See GELLHORN, AMERICANS 25-35; GWYN, *supra* note 10, at 54.

<sup>25</sup> See, e.g., OHIO CONST. art. IV, §§ 1-17 (1851); OHIO REV. CODE ANN. §§ 141.04-.07 (Page Supp. 1967) (salary of judges).

<sup>26</sup> See Fulda, *supra* note 9. See also GELLHORN, AMERICANS 37-39 (*Conseil d'Etat*).

<sup>27</sup> See GELLHORN, AMERICANS 226. See also GELLHORN, OMBUDSMEN 422-26; G. SAWYER, OMBUDSMEN 31 (1964).

<sup>28</sup> See GELLHORN, OMBUDSMEN 194-255.

final authority but is principally a fact-finder. Moreover, American administrators who err are not prosecuted. They are reversed.

What is desired in adapting ombudsman to the American state then is to import his functions with respect to relatively minor administrative wrongs. The foreign ombudsman's prosecutorial powers and his jurisdiction over what might be characterized as the upper dollar portion of the spectrum of alleged administrative abuse are not required. These facets of his authority would duplicate satisfactory, existing functions, and the summary and advisory nature of relief through an ombudsman is not well-suited to the resolution of the larger wrongs.

It must be noted that the practicing ombudsman is not greatly concerned with these bigger wrongs or prosecutions.<sup>29</sup> Administration is rarely so bad as to warrant prosecution, and practical wisdom dictates that the ombudsman apply his resources to cases where his recommendations would be accepted by citizen and administrator alike rather than wasting his efforts where the weight of the adverse interests involved precludes his effectiveness. It is the practicing ombudsman, whose daily work is with petty grievances, not the ombudsman reflected in the constitutions and statutes of other nations, which may have utility for the American state. The stature and prestige provided by his prosecutorial authority, and by the fact that he is frequently the only source of administrative review, could and should be replaced in state adaptation of the office by expanding on the ombudsman's judicial characteristics.

All of the foreign ombudsmen are instruments of the legislature. They are selected by or upon recommendation of the legislative body and are generally answerable to it even if they function independently.<sup>30</sup> None are linked with the executive branch. Whether this is due to executive responsibility for administration or to the fact that the executive branch is not fully independent of the legislature in these nations is difficult to tell.<sup>31</sup> In either event, the independence of state executives and the part-time nature of state legislatures suggest that a state ombudsman should be as independent of both branches as possible. The desirability of enhancing his judicial nature also suggests that a state ombudsman's salary, tenure and powers not be dependent on executive

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<sup>29</sup> See *id.* at 421-39.

<sup>30</sup> GELLHORN, AMERICANS 9; GELLHORN, OMBUDSMEN 424.

<sup>31</sup> See GELLHORN, AMERICANS 9, 136-41.

will, and at least not directly dependent on the will of the legislature. This might require an ombudsman to be established by constitutional amendment. Initially, however, statutory creation of the office and its powers would suffice, as most state constitutions already contain provisions relating to tenure, salaries, conduct, bond, removal and impeachment of state officers which would protect and limit the office.<sup>32</sup> Statutory establishment would also allow a degree of flexibility that may be needed to refine the system which from experience may show deficiencies.

While a state ombudsman could not effectively serve at the pleasure of the executive, there should be no objection to his appointment by the governor or an executive committee, possibly with the consent of the legislature. This is a traditional method of filling vacancies in all branches of state government and it has not depreciated the constitutional separation of powers.<sup>33</sup> The best qualified and most nearly independent ombudsman would be in the interest of an appointing executive intent on objective policing of the administrative process. Such an officer is likely to put out more embarrassing fires than he might start, and many of the administrators who might receive his attention are civil servants who do not serve at the pleasure of the governor but are effectively beyond his control.<sup>34</sup>

There is no comparable American experience, but the selection and appointment of foreign ombudsmen has not raised political issues or demonstrated partisan choices by either legislatures or executives.<sup>35</sup> The selection has usually come through a consensus which emphasizes the candidates' non-political qualifications such as education, experience, profession and even lack of political involvement. Although the office is highly personalized by its nature, and the choice of an ombudsman is most critical to its success, there is little reason to believe that existing methods for the selection of appointees to fill vacancies would be inadequate.

A practical choice for a state ombudsman would therefore be an officer in the nature of a judge in terms of tenure, qualifications and privilege. He might well be appointed by the governor, but for a term dissimilar from that of the executive, or by the legisla-

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<sup>32</sup> See, e.g., OHIO CONST. art. II, §§ 24, 38.

<sup>33</sup> E.g., OHIO CONST. art. III, § 21, art. IV § 13 (interim appointment of officers and judges).

<sup>34</sup> See GELLHORN, AMERICANS 136-41, 217-24.

<sup>35</sup> GELLHORN, OMBUDSMEN 424.

ture or a hybrid committee, or by a combination of these. However, the term of his office should be arranged to assure independence from both the executive and the legislature. This will allow non-partisan, independent criticism of administration. The inherent limitations on his powers and the constitutional controls over all state officers should serve adequately to check his conduct.

### B. *Proposed Legislation and Model Acts*

Detailed analysis of the ombudsman bills introduced in all state legislatures and all the model acts to which these bills are closely related would be fruitless. These proposed statutes are more remarkable for their likeness than for their dissimilarities. Moreover, many small changes are to be expected before enactment, and it may be anticipated that the experiences of the newly created Rhode Island and Hawaiian ombudsmen will be considered in future enactments.

There is a consensus among the draftsmen of the various bills as to what is required to adapt ombudsman to the states. Model bills have been unusually influential, probably because ombudsman legislation is virgin territory to the states. Perhaps the most refined of these is the model statute recently drafted by Walter Gellhorn, which is based on a Connecticut bill and on a model bill prepared by Harvard students, with antecedence in the New Zealand statute.<sup>36</sup> Professor Gellhorn's draft forms the backbone of the bills introduced in the Ohio General Assembly. Its salient features are:

(1) Ombudsman jurisdiction over all state administrative agencies, defined broadly to exclude only the courts and the persons and immediate staffs of the legislature and executive.

(2) Broad definition of the administrative action subject to review by the ombudsman.

(3) Provision for control by the ombudsman of his own staff, procedure, and the scope of his investigations.

(4) Broad investigatory powers, on complaint or on the ombudsman's own motion, supported by the right to inspect agency files and the power to compel production of documents and testimony.

(5) Otherwise, a complete absence of any powers of compulsion.

(6) Directory rather than mandatory descriptions of the kinds

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<sup>36</sup> GELLHORN, *Annotated Model Ombudsman Statute*, OMBUDSMEN FOR AMERICAN GOVERNMENT? 159 (Appendix) (S. Anderson ed. 1968) [hereinafter cited model act].

of abuses which may be investigated and of the kinds of complaints which need not be investigated.

(7) Fairplay provisions requiring notice of action to complainants and consultation with an agency prior to criticism.

(8) Right of ombudsman to make and publish recommendations and opinions on specific or general matters, but only if the response of any agency criticized is included.

(9) Duty to marshal the ombudsman's experience into an annual report to the legislature to facilitate evaluation of his office and the administrative process.

(10) Judicial immunity for the ombudsman and his staff, from testimony, review and civil liability.

(11) Express provision that resort to the ombudsman is supplementary to existing legal remedies but not dependent on the existence of any legal remedy.

Important minor features of the model act include establishment of the ombudsman's salary as equal to that of the chief justice of the state, provision for a deputy to act in his absence, penal provisions for obstructing the ombudsman, and a requirement that any letter to the ombudsman which is in administrative custody be forwarded unopened.

The model bill provides for appointment of a state ombudsman by the governor subject to confirmation by two-thirds of the members of *each* house of the legislature. This assures broad acceptability of the appointee. It does not include any political disqualification, such as the requirement of the 1965 California bill that the appointee shall not have been a member of the legislature during the two years preceeding appointment,<sup>37</sup> or any disqualification from holding public office subsequent to serving as ombudsman, as has been suggested as a means of severing politics from the office. It does require, in a rather precatory manner, that the appointee "not be actively involved in partisan affairs."<sup>38</sup> Due to the nature of the office, which carries virtually no power beyond that engendered by the reputation for reason and even-handedness achieved by the ombudsman, the qualifications and disqualifications of ombudsmen probably do not require statutory elaboration. In fail-safe manner, ombudsmen simply must demonstrate those qualities of expertise and independence that are usually required to gain any substantial public influence. Nevertheless, the

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<sup>37</sup> A.B. 2956, Calif. Legislature, Reg. Sess., § 1 (10701) (1965).

<sup>38</sup> Model act Sec. 5.

method of appointment and qualifications are the points of greatest diversity in current American proposals.

As an alternative to the model bill, a California bill created a joint, bi-partisan, legislative committee to select and oversee the ombudsman, subject to approval by joint legislative resolution.<sup>39</sup> The Ohio bills propose yet two more methods. Senate Bill No. 243 proposes a blue-ribbon nominating committee to select candidates, after which there is gubernatorial appointment with the advice and consent of the senate.<sup>40</sup> Senate Bill No. 387 is the same, except that it eliminates the nominating committee.<sup>41</sup> The former follows the qualifications of the model act, while the latter simply provides that the ombudsman may not be a candidate for or hold other office during his tenure. The particular method of selection and qualification which might secure competent and independent ombudsmen is a question not of logic, but of what is required in the way of words to obtain an intelligent and non-partisan choice by the particular state officers charged with selection. It would appear to be a matter best left to the legislatures of each state. Differences of opinion therein should not obscure the fact that most of these varied provisions are aimed at securing an extra measure of independence in the ombudsman over other appointments. The foregoing outline of the model act, and the bills which have been based upon it, have also preserved the other two essential constitutive characteristics of successful ombudsmen. The proposed ombudsmen are given no powers to compel redress, but they are given extensive investigatory powers and the right to publicize the results of the ombudsman's work. They would therefore have the essential combination of fact-finding capacity without revisory jurisdiction. This combination has produced respected recommendations in other nations. What might happen between introduction and possible passage of an ombudsman bill remains to be seen.

### C. *The Ohio Proposals*

The ombudsman bills introduced in the 1967-1968 General Assembly were based largely on the model bill of Professor Gellhorn. They contain similar provisions; Senate Bill No. 387 being

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<sup>39</sup> A.B. 2956, *supra* note 37, § 1 (10701).

<sup>40</sup> S.B. 243, 107th Gen. Assembly, Reg. Sess., § 1 (sec. 118.02) (Ohio, 1967-68) [hereinafter cited S.B. 243].

<sup>41</sup> S.B. 387, 107th Gen. Assembly, Reg. Sess., § 1 (sec. 118.02) (Ohio, 1967-68) [hereinafter cited S.B. 387].

shorter and less elaborate than Senate Bill No. 243. Because of the discretionary nature of an ombudsman's work, it would not appear that elaboration of his duties is particularly beneficial as long as the terms of his appointment and his powers and immunities are clearly set forth. Nor would additional guidelines appear harmful unless they purport to be exhaustive or they impair flexibility in handling complaints and investigation. Length is simply no measure of the quality of an ombudsman statute. Since the model bill, which is somewhat shorter than either Ohio bill, represents a consensus on what legislation is necessary for an effective state ombudsman, the Ohio bills will be discussed in comparison to it and their distinctions will be noted only where significant.<sup>42</sup>

The Ohio proposals apply only to state agencies.<sup>43</sup> This follows the lead of other states, and is perhaps necessary to avoid conflict with the home-rule provisions of the Ohio Constitution.<sup>44</sup> There is little distinction, however, between the kinds of grievances citizens have against state or local agencies.<sup>45</sup> Both are likely to be personal and relatively petty, and some, like welfare administration, involve both state and county agencies. The model bill is designed for adoption by state *or* local governments, but not both. Undoubtedly, a state ombudsman would be hard pressed to deal with complaints against eighty-eight county governments and hundreds of municipal governments. The administrative agencies of many such subdivisions are sufficiently small and unbureaucratic that an ombudsman's services are largely unneeded. Furthermore, the cost of creating and maintaining the kind of organization needed to handle localized complaints would greatly exceed that envisioned as the price of a state ombudsman. Nevertheless, consideration should be given to local jurisdiction, particularly in the larger cities where administrative organization may approach that

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<sup>42</sup> This discussion presumes the currency of these Ohio bills. They are not currently being considered, but died in committee at the end of the 1967-68 legislative session. At this writing the 1969-70 session has not been convened. Since these bills were not considered on the floor and hearings not held on them in committee, it may be expected that they or one of them will be reintroduced, renumbered, in the coming or a future session, without substantial change.

<sup>43</sup> S.B. 243, sec. 118.01(A)(5); S.B. 387, sec. 118.01(A).

<sup>44</sup> OHIO CONST. art. X, § 1, art. XVIII, §§ 3, 7.

<sup>45</sup> On the vagaries and limitations of administrative procedure, see OHIO REV. CODE ANN. §§ 2506.01-.04 (Page Supp. 1967) (appeal from local agencies). See generally ANGUS & KAPLAN, *The Ombudsman and Local Government*, OMBUDSMAN FOR AMERICAN GOVERNMENT? 101-36 (S. Anderson ed. 1968).

of some state agencies in services and size. Perhaps provision should be made for local adoption of an ombudsman's office which would assume the same powers, duties and immunities of the state ombudsman, but would be limited to local agencies. Such local option provision might provide for local appointment of a regional deputy ombudsman, coordinate or subordinate to the state officer, who would function locally. This omission is not a defect in these bills, as a local option provision might be added at any time. It would seem, however, that early consideration might prevent disorganized and uncoordinated local efforts to establish ombudsmen which might lack the essential characteristics needed in the office.

Both Ohio bills broadly define "administrative agency" and "administrative act" which limit the jurisdiction of the ombudsman. Senate Bill No. 243 expressly exempts from the agency definition, the General Assembly, the governor, the courts, the attorney general and political subdivisions.<sup>46</sup> It would seem preferable to avoid the practice of listing exceptions. Elected officials and their personal staffs can be generally excepted on the premise that election is a sufficient control and such persons are clearly not administrative agencies. Otherwise, enumerated exceptions invite more, and might easily include purely administrative functions organized peculiarly or uniquely under a non-agency—e.g., an investigative arm of the domestic relations courts. The preferable form is to supply a basic definition and then to rely on the discretion of the ombudsman to know what agencies are appropriately within his jurisdiction.

Both bills provide for six year terms, control of the selection and compensation of the ombudsman's own employees, including the deputy authorized to act in his absence, and for a salary equal to the Chief Justice of the Ohio Supreme Court, currently \$32,000 annually.<sup>47</sup> These provisions follow the model bill and bring the term into line with that of Ohio judges. Both provide that the ombudsman's action shall not be judicially reviewable and that neither he nor his staff shall testify concerning his work, except where necessary to enforce the obstruction penalties, or the subpoena power, or where his action is reviewed on grounds that he lacks jurisdiction or is acting in bad faith. This latter exception to non-reviewability does not appear in the model act. It presumably opens up injunctive remedies should the ombudsman exceed his intended

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<sup>46</sup> S.B. 243, sec. 118.01(A).

<sup>47</sup> OHIO REV. CODE ANN. § 141.04(A) (Page Supp., 1967).



authority. Its need is questionable. If he should exceed his statutory jurisdiction, such remedies would be available irrespective of express authority, and the bad faith provision would be no more effective than the situation existing with respect to judges against whom no similar provisions are directed. The bills improve upon the model act, however, by providing "the same immunities from civil and criminal liability as a judge."<sup>48</sup> This clearly makes applicable the entire body of law pertaining to judicial immunity. The model bill simply reads, "No civil action shall lie \* \* \* for anything done or said or omitted, in discharging the responsibilities contemplated by this Act,"<sup>49</sup> which requires interpretation.

Both bills closely follow the model act's enumeration of wrongs appropriate for investigation, which appear to be sufficiently general to avoid undue restriction. Both incorporate four of the seven model act grounds for declining investigation, although Senate Bill No. 387 imposes a one-year limitation on filing complaints, while the others treat delay as a mere factor. The omitted grounds include lack of interest by the complainant, insufficiency of resources, and lack of importance. While it is important that an ombudsman not be given statutory authority to shirk, it is imperative that he be given some discretion to avoid the kinds of cases which his experience informs him cannot be resolved under his limited powers. Any requirements that he must investigate all cases coming within his apparent powers would force him to try where he can do no good and thus dissipate his real power.

The Ohio bills follow the model act in providing that the ombudsman may review final, unappealable agency action, but they fail to expressly provide that resort to the ombudsman is supplementary to all other remedies on appeals. The model bill might be improved by adding that review by the ombudsman is voluntary; and if it is not elected, it should not be interpreted as an adequate remedy at law or an administrative remedy to be exhausted prior to judicial review. Clearly stating the relationship between the ombudsman and judicial and administrative remedies cannot hurt and might possibly avoid misinterpretation in the appellate process.

Senate Bill No. 243 and the model act enumerate the kinds of recommendations the ombudsman may make, including whether "any other action should be taken by the agency."<sup>50</sup> Senate Bill No.

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<sup>48</sup> S.B. 243, sec. 118.17; S.B. 387, sec. 118.15.

<sup>49</sup> Model act, sec. 17(b).

<sup>50</sup> S.B. 243, sec. 118.13(E); Model act, sec. 13(a)(5).

387 properly omits such specification, for any recommendation not falling in the first three categories would fall in the latter. The point of specificity in the model bill was that when such specified wrongs were discovered which warranted agency action, the ombudsman should report to the *agency*.<sup>51</sup> The point is lost in the Ohio versions which apparently require reports to both the agency and the complainant in all cases investigated.<sup>52</sup>

The investigatory powers provided in the Ohio bills follow substantially those of the model act with respect to access to agency files, records and offices. The subpoena provisions are modified to conform with Ohio law. The subpoena powers are not directly enforced, by notaries public, but by application to the court of common pleas.<sup>53</sup> The draftsmen of Senate Bill No. 243 recognized the availability of fact-finding and audit services in the Bureau of Inspection and Supervision of Public Offices and have provided that that agency should assist, when requested, in cases involving actions within the authority of the bureau.<sup>54</sup> A more surprising addition to the model draft is the immunity extended by both bills to persons testifying or simply giving information in the course of investigation. Both provided that, except in a perjury trial, no statement given is admissible evidence in court or in any administrative proceeding.<sup>55</sup> This feature is undoubtedly intended to facilitate investigation, but it would seem to be a rather large price to pay in view of the relatively trivial nature of matters investigated. Since both bills excuse the ombudsman and staff from testimony regarding their work, and since their records are non-public, such suppression of reliable admissions and statements seems unwarranted. The immunity provisions come almost verbatim from the 1965 California bill, except that it limited the exclusion of evidence to subsequent *criminal* and administrative proceedings.<sup>56</sup> In either instance, the confidential relationship engendered between ombudsman and complainant or witness is not inconsistent with his duty to remain independent and his function to mediate disputes.

There are many other distinctions between the Ohio bills, the model bill and those introduced in other states. Most are unimpor-

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<sup>51</sup> Model act, sec. 13 & comment thereto.

<sup>52</sup> S.B. 243, sec. 118.13; S.B. 387, sec. 118.13 (cases warranting action only).

<sup>53</sup> S.B. 243, sec. 118.11(B); S.B. 387, sec. 118.11(B).

<sup>54</sup> S.B. 243, sec. 118.15. See OHIO REV. CODE ANN. §§ 117.01-19 (Page 1953), as amended, (Page Supp., 1967).

<sup>55</sup> S.B. 243, sec. 118.11(D); S.B. 387, sec. 118.11(D).

<sup>56</sup> See A.B. 2956, *supra* note 37, § 1 [10722(e)].

tant, and, in fact, the mechanical details of ombudsman legislation are probably not critical to his effectiveness as long as the essential elements are there. The practicing foreign ombudsmen have vastly differing legal authority, yet all behave and work very much alike and with similar effectiveness. Their compulsory powers are rarely used. The scope of their work is shaped more by the kinds of cases wherein they achieve results than by their written legal authority. Perhaps it would suffice to enact, without more, that there shall be an officer appointed by someone who shall serve a term of years and be paid so much and shall undertake the powers and duties of an ombudsman. This would be much like the constitutional grants of judicial power to the courts which exercise great compulsory power effectively, with little more limitation.<sup>57</sup> Seriously, however, there is a premium on brevity and generality in such legislation. It affords needed flexibility, and the nature of the office may be relied upon to check abuse of the authority given.

In common with most American ombudsman proposals, the Ohio bills contain a provision for annual reports to the governor and the General Assembly.<sup>58</sup> Senate Bill No. 243 further requires that he make a continuing evaluation of general administrative procedure for the purpose of recommending improvement and legislation.<sup>59</sup> Such provisions are rarely found governing foreign ombudsmen who must usually make an annual account but are not obligated to furnish legislative advice. Some do voluntarily, and they are undoubtedly the most reliable source for discovery of problem areas in the citizen-administration relationship. The double utility obtained by imposing on the ombudsman this advisory function would seem to be a bargain partially overlooked abroad.

The distinctions between the Ohio proposals and the model act are important. Some are decided improvements while others seem undesirable. Neither Ohio bill is distinctly the better. The greater length of Senate Bill No. 243 sometimes provides refinement over Senate Bill No. 387, sometimes confusion. Both appear to preserve the essential characteristics for an effective ombudsman.

The proposition before the General Assembly is not only whether one of these bills, with or without amendment, would produce an effective ombudsman, but whether Ohio desires an ombudsman as that office is generally understood.

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<sup>57</sup> See, e.g., OHIO CONST. art. IV, § 1.

<sup>58</sup> S.B. 243, sec. 118.16; S.B. 387, sec. 118.14.

<sup>59</sup> S.B. 243, sec. 118.16.

## V. THE CASE FOR OMBUDSMAN IN OHIO

The merits of ombudsmen have been debated at length elsewhere. It is not seriously questioned that ombudsmen, as a general idea, are a good thing.<sup>60</sup> Most observers agree that the office, as established by most state bills and the model bill, would work in the American state, assuming the need. Ombudsmania in both proponents and opponents has and will continue to support debate which never really reaches the decisive question of whether there is sufficient *business* for an ombudsman to warrant the cost of the office and the risk that it may not work quite as planned.

The following discussion assumes the feasibility of an Ohio ombudsman, and is directed at the need for one.

A. *The Business of an Ombudsman*

Disputes between citizens and administrative agencies may be divided into three classes with respect to the quality of available remedies.

First, there is the *big case*, which involves a substantial claim and in which the administrative determination is legally, and as a practical matter, subject to complete or nearly complete judicial review. The big case is exemplified by public utility litigation, wherein rates, routes and certification of public convenience and necessity involve large financial interests willing and able to employ counsel, build records and prosecute appeals fully. Any defects that exist in review of such cases are inherent in the delegation of decision making powers from all three branches of government to the administrative agency. An ombudsman is powerless to reverse such administrative determinations or to add much to the integrity of the administrative process and is therefore incapable of improving administration in this class of dispute. His participation in this class of cases could add only delay and confusion to the already complex process, and would likely be invoked only for such

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<sup>60</sup> A rare judicial comment comes from Arthur J. (then Mr. Justice) Goldberg: In Scandinavia that excellent institution called Ombudsman assists the ordinary citizen in seeing that the law is not administered with an evil eye or an uneven hand. He also assists the public official by clearing the air of unfounded charges. In both ways the Ombudsman helps safeguard the integrity of equal protection. The Ombudsman—or rather the idea it embodies—appropriately adapted to our governmental institutions, towns, cities, states, and even the Nation, could help in the realization of our ideal of equal treatment of all citizens by government officials.

Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 204, 215 (1964).

undesirable purposes.<sup>61</sup> There is accordingly no business for an ombudsman in this kind of dispute.

A second class of disputes is the *little case*. This class is not legally distinguishable from the former class for it includes a justiciable claim for which administrative appeal or judicial review is legally available. The distinction is practical. The little case typically involves a small, personal claim. The amount or value of the interest in controversy does not warrant the fees of counsel or the cost and delay of appeals. The need for any administrative award given may be so immediate that the claimant cannot afford the delay for review, if indeed the right of appeal is understood. Low fees may have limited effectiveness of counsel, which also may have contributed to the omission of material facts from the administrative record. In turn, the administrative determination may be fact-bound, that is, unfair but unreversible because of support in the record and great deference to the administrative determination of fact. Such defects in decision-making are not peculiar to administrative agencies, but would also occur in judicial resolution of the same kinds of disputes. This does little to satisfy the aggrieved citizen, however, and his dissatisfaction with government may be heightened by the fact that it was a bureaucrat rather than a judge who ruled unfavorably. In this class of disputes, an ombudsman cannot be expected to secure numerous modifications of administrative decisions, for the vast majority of such decisions are essentially correct. He may be expected to offer such complainants explanation and assurance which will tend to correct dissatisfaction based on misunderstanding and misinformation. He may occasionally persuade an agency to reconsider and alter its decision where an injustice has actually occurred. Together with the third class, the little case provides the business of an ombudsman.

The third class of disputes is the *non-case*. It includes all kinds of grievances which are non-justiciable, those for which no legal remedy has or can be fashioned. There is, for example, no precedent for an award, decision or judgment of apology, yet it would be an appropriate remedy in many instances. This class also includes grievances stemming from the failure to adequately present a claim for agency determination and those due to the failure to comprehend the nature of such a determination once it is made.

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<sup>61</sup> Ombudsman bills routinely excuse investigation when there is another, adequate remedy available to the complainant. Model act, sec. 11(a)(1); S.B. 243, sec. 118.07(A); S.B. 387, sec. 118.07(A).

The non-case is presently handled largely by the agencies themselves, although members of the executive and legislative branches, and outsiders, will occasionally become involved.<sup>62</sup> While the little case is fairly well understood, particularly by lawyers, very little is known of the dimensions of the non-case and thus there is a corresponding need for an ombudsman in this latter class.

### B. *The Little Case in Ohio*

Ohio administrative procedure is not atypical of that prevailing in other states.<sup>63</sup> The Administrative Procedure Acts defines "agency" and "adjudication" broadly,<sup>64</sup> and provides for notice and hearing in both rule-making and adjudication actions.<sup>65</sup> The hearing contemplated is not greatly dissimilar from a trial in the courts with respect to participation by counsel, cross-examination and admissibility of evidence.<sup>66</sup> Provision is made for appeal from the administrative ruling to the courts of common pleas, which function essentially as appellate courts, and therefrom as in other civil cases.<sup>67</sup> The scope of review is limited to determination by the courts of whether the administrative ruling is supported by reliable, probative and substantial evidence and whether it is in accordance with law.<sup>68</sup>

Several agencies are expressly excluded from the application of the act.<sup>69</sup> Of these, some like the Public Utilities Commission have no bearing on the need for an ombudsman because they typically handle only the big case. However, the Industrial Commission and the Bureau of Unemployment Compensation, which handle a great volume of small, personal claims, are excluded and are controlled by special procedural statutes. These statutes alter the basic scheme of the act by inserting administrative appeals<sup>70</sup> and by providing workmen's compensation claimants with a right to a jury determination

<sup>62</sup> See MOORE, *supra* note 3, at 73-101.

<sup>63</sup> Compare OHIO REV. CODE ANN. §§ 119.01-.13 (Page 1953), *as amended*, (Page Supp. 1967) with Model State Administrative Procedure Act, 9c Uniform Laws Ann. 174 (1957). See GELLHORN & BYSE, *supra* note 10, at 1231-32 & n.3.

<sup>64</sup> OHIO REV. CODE ANN. §§ 119.01(A),(D) (Page Supp. 1967).

<sup>65</sup> OHIO REV. CODE ANN. §§ 119.03, .06-.07 (Page 1953).

<sup>66</sup> See OHIO REV. CODE ANN. § 119.09 (Page 1953).

<sup>67</sup> OHIO REV. CODE ANN. § 119.12 (Page Supp. 1967).

<sup>68</sup> *Id.*; e.g., *Henry's Cafe, Inc. v. Board of Liquor Control*, 170 Ohio St. 233, 163 N.E.2d 678 (1959).

<sup>69</sup> OHIO REV. CODE ANN. § 119.01(A) (Page Supp. 1967).

<sup>70</sup> OHIO REV. CODE ANN. §§ 4123.516 (Page 1953), 4141.28(H)-(J) (Page Supp. 1967).

of their right to participate in the fund.<sup>71</sup> They change the scope of review in unemployment compensation cases to a determination of whether the administrative decision was unlawful, unreasonable or against the manifest weight of the evidence.<sup>72</sup> The Workmen's Compensation Act also limits the matters which may be reviewed by providing that a decision in any injury case, other than the extent of disability, is appealable.<sup>73</sup> The Supreme Court of Ohio has interpreted this provision as barring appeals in occupational disease cases, thus making the agency determination final in this increasing source of claims.<sup>74</sup>

The foregoing example of restricted judicial review of Ohio administrative decision is perhaps not entirely representative, but it is a severe restriction in a fertile area of small cases, and other instances exist.<sup>75</sup> From the outline given, it can be seen that the Ohio act is generally intended to preserve procedural due process while imparting to the administrative determination a degree of finality which is greatest, even total, in the little case. Undoubtedly, such statutory and judicial limitation on review is an economic necessity, inherent in the delegation of decision-making powers to administrative agencies. Complete duplication of the agency's work in the process of judicial review would defeat the basic utility of agencies in relieving the other branches of government from specialized casework. Nevertheless, the legal finality accorded administrative determinations in little cases, together with the practical finality resulting from the cost and delay of the multiplicity of appeals necessary to reach the courts in such cases, means that judicial review is simply not available to Ohio citizens in many little cases, and is inadequate to correct abuses of discretion in others.<sup>76</sup>

The question is whether an Ohio ombudsman could improve on the present division of decision-making responsibility between agencies and courts in little cases. If he were only to substitute for

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<sup>71</sup> OHIO REV. CODE ANN. § 4123.519 (Page Supp. 1967).

<sup>72</sup> OHIO REV. CODE ANN. § 4141.28(O) (Page Supp. 1967).

<sup>73</sup> OHIO REV. CODE ANN. § 4123.519 (Page Supp. 1967).

<sup>74</sup> *Szekely v. Young*, 174 Ohio St. 213, 188 N.E.2d 424 (1963). See also *State ex rel. Marshall v. Keller*, 15 Ohio St. 2d 203, 239 N.E.2d 85 (1968).

<sup>75</sup> E.g., in *Hercules Galion Products, Inc. v. Bowers*, 171 Ohio St. 176, 168 N.E.2d 404 (1960), the court held the provisions for direct appeal from decisions of the Board of Tax Appeals did not make the court a "super" board of tax appeals. See also *Bd. of Revision v. Fodor*, 15 Ohio St. 2d 52, 239 N.E.2d 25 (1968).

<sup>76</sup> The ground of abuse of discretion is apparently no longer a standard for reversal of an administrative decision in Ohio. *Ganson v. Board of Liquor Control*, 70 Ohio L. Abs. 242, 127 N.E.2d 890 (C. P. 1953).

administrative or judicial review, then he would function as a super-agency or special court, and improvement would be questionable. However, the proposed ombudsman is not such a substitute, but is unique to the present system. Unlike the courts, he would have initiative and investigatory powers aimed at the discovery of fact independent of adversary proceedings. Having no revisory jurisdiction, his method could be quite summary. Unlike the agencies, he would appear less bureaucratic and he would be under no duty to reach a decision. Accordingly, review by the ombudsman in the little case would be cheap, but uncertain. It would seem that certainty is possible only through full judicial review, and that is too costly in many little cases. It would also seem that an ombudsman would offer a source of redress where none is presently available, and where there is a great volume of transactions between Ohio citizens and agencies—the little case.

Examination of the process in the little case tends to obscure a function of an ombudsman which is perhaps more important than that of providing a cheap, alternative form of appeal. Ombudsmen have been successful in other nations despite their limited power to correct administrative error because they have been able to secure satisfaction for aggrieved citizens. Such satisfaction comes not only from cases where ombudsmen have been able to persuade administrators to change an unjust determination, but also from cases where all that was needed to redress the complaint was an explanation by the ombudsman or the agency of the determination made, or just the assurance of an independent critic that it was correct.

The cost, and possible loss of appeals in small, personal claims are not readily written off as an expense of doing business. The personal nature of many such little cases creates unreasonable expectations in both the substance and the manner of its disposition. The legalese and red tape developed by many agencies in handling large numbers of little claims does nothing to dispel the conviction of the claimant that an adverse ruling was unjust. The explanation or assurance of an ombudsman can add some sugar to this bitter medicine of defeat. Ombudsman is an investment in both the legal and mental well-being of citizens doing business with administrative agencies.

The substantive restrictions on judicial review of administrative agency decisions in Ohio would seem to make judicial review impractical in many small cases, and review by an ombudsman accordingly appropriate. It is difficult to say whether these alone would warrant



the cost of an ombudsman, but it is clear that there would be business for an Ohio ombudsman.

Where the grievance of the citizen in the little case actually pertains to the manner rather than the substance of the administrative determination—*e.g.*, where inadequate explanation is given—it is a non-case.

### C. *Non-Cases in Ohio*

Classification of grievances as non-cases reflects the fact that they are not supported by legal rights. Accordingly, there is no statutory provision for judicial review of administrative action giving rise to such non-justiciable disputes in Ohio or elsewhere. This kind of dispute exists largely between persons rather than parties, but it becomes important to government when it is between citizens and employees of government agencies, particularly when it is related to the citizen's acceptance of an agency decision in a legally cognizable case.

The administrative agency lacks the reputation for independence and the formality of courts in resolving claims, and is thus less convincing to the citizen. Moreover, it has been given the thankless job of administering expanding programs of government services involving great numbers of relatively small value transactions and great public contact. Each disappointed beneficiary of such programs has a potential non-case. The reports of foreign ombudsmen contain many instances where they have satisfied complaints by explanation or assurance, or have secured a change in administrative processing to forestall recurring grievances of this kind.<sup>77</sup> There is very little American data on this class of grievance,<sup>78</sup> and none in Ohio, but it is apparent that the agencies themselves are resolving such non-case complaints when they are voiced.

In an effort to determine what non-case business an Ohio ombudsman might have, I surveyed those Ohio state administrative agencies which appear to have substantial public contact.<sup>79</sup> The response was incomplete, and with one exception, there were no records

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<sup>77</sup> See, *e.g.*, ROWAT, *supra* note 15, at 18-22.

<sup>78</sup> See MOORE, *supra* note 3, at 70-73, 100.

<sup>79</sup> The survey was made by questionnaire mailed with an explanatory letter to the directors or other heads of fifteen Ohio agencies. The agencies were informed that the general results were intended for publication in an academic article on the handling of minor complaints, but to avoid prejudiced response, the subject of ombudsman was not mentioned. Minor boards, bureaus and commissions, and those bodies functioning essentially as staff to legislative or executive officials were not contacted.

of complaints<sup>80</sup> available. Several agencies furnished estimates of their non-case business, and all that responded furnished helpful narratives of their complaint handling procedure. The results presented here are not exhaustive and possibly are not entirely representative. They are what a few agencies say is happening and may therefore be less than objective, but without apology they are all that is available. The principal defects in the data gathered, the lack of records and the failure of several important agencies to respond, do not destroy the value of what was found. What is needed to determine the existence of non-case business in Ohio is not a complete account but a sample measure of such business from which it might reasonably be determined whether there is sufficient business of this class, together with business from little cases, to warrant an ombudsman.

Of fifteen agencies surveyed, nine responded and three furnished statistical data based on estimates of personnel familiar with the overall operation of the agency. One of these three maintained a formal card file system to account for complaints received. Because of large differences in the nature and volume of public contacts between the agencies, and their somewhat dissimilar responses, aggregation of results is not instructive. The data from the three agencies will therefore be tabulated:

Agency <sup>81</sup> :	"A"	"B"	"C"
Annual citizen's complaints: <sup>82</sup>	3521	1500	200
Source—citizen—written:	2945	1250	125
—telephone:	516	200	50
—visit:	60	50	25
—legislative:	25	60	20
—executive:	20	15	25
—other state official:	100	5	20
—federal:	15	15	2
—attorneys:	20	200	50
—others:	150	15	100
—mental patient, prisoner:	nominal	nominal	to 5%

<sup>80</sup> The agencies were asked to include as a *complaint*, any expression of dissatisfaction by a citizen or business organization to the agency, whether written or oral, formal or informal, irrespective of its merit or validity, and irrespective of the power of the agency to provide a remedy. They were also asked to exclude appeals taken within the agency or to the courts.

<sup>81</sup> In an effort to avoid self-effacing answers, the agencies were assured their particular responses would not be identified. Although the findings contain nothing derogatory, but rather reflect generally commendable attitudes, the limited anonymity will be preserved by alphabetical designations.

<sup>82</sup> See note 80 *supra*.

Nature—erroneous action		[numbers inaccurately reported] <sup>83</sup>	
—matter within agency power:	—	50%	75%
—matter set by statute:	—	50%	25%
—inaction or delay:		[numbers inaccurately reported]	
—in fact complete:	—	30%	20%
—action pending:	—	30%	12%
—some delay:	1%	10%	25%
—no action requested:	—	5%	25%
—request incomplete:	1%	10%	12%
—discrimination:		[numbers not comparably reported] <sup>84</sup>	
—social, racial:	1%	1.5%	1%
—economic:	98%	73%	2%
—unspecified:	1%	10%	97%
—mistreatment:		[numbers not comparably reported]	
—rudeness:	35	25	10
—no assistance:	— <sup>85</sup>	70	10
—no explanation:	35	25	10
—not determined:		[numbers inaccurately reported]	
—lack of information:	0	50	70
—incomprehensible:	few	10	50
—concerns another agency:	90%	10%	10%
—“crackpot”:	200	50	100
Disposition—none needed:	0	25	10
—explanation—written:	2945	1000	150
—oral:	576	100	40
—right of appeal explained:	3521 <sup>86</sup>	140	100
—action revised or taken:	0	150	0
—procedure revised:	0	25	2
—referred to other agency:	all	50	10

Agency “A”<sup>87</sup>, which had a card system on complaints, is responsible for supervising the operations of county agencies. It is the county units which have jurisdiction over virtually all matters pertaining to individual citizens. Accordingly, the vast majority of complaints were referred to the local agencies for resolution, and no

<sup>83</sup> Apparently due to an ambiguity in the question format, the numbers reported in these categories did not correlate to totals reported. Percentages were given by agency “B”, and the numbers given by the other agencies were converted to percentages for comparison purposes.

The nature or substance of a complaint is not simply classified. There is no ready agreement on proper categories and individual complaints overlap some of those fashioned here. These findings are presented, however, because they give some idea of the relative numbers of different kinds of complaints.

<sup>84</sup> Some percentages reported, but correlation with totals not apparent. See note 83 *supra*.

<sup>85</sup> The classification is a term of art in this agency, and got a misleading response.

<sup>86</sup> Automatically done in all cases.

<sup>87</sup> See note 81 *supra*.

other action was taken by the state agency. While this agency furnished the most accurate data on the source of complaints, it could give little information on their nature as it did not actually resolve them. It nevertheless documented over 3500 individual grievances in the year ending July 1, 1968.

Agency "B" is more typical. It is a traditional, executive agency, engaged in providing indirect government services. It estimated receipt of over 1500 complaints annually, with some of every nature specified. Over two-thirds of these grievances concerned economic discrimination, which is likely to be fact-bound for purposes of review. It also reported dispositions in every category, but the greatest number of complaints were resolved with an explanation.

Agency "C" is a purely regulatory agency, engaged principally in licensing and enforcement functions. Its main adverse public contact is with licensees whose legal remedies are ordinarily adequate, either because they fall within the big case category or because they are chargeable as a business expense. It nevertheless estimated over 300 annual complaints of all kinds. Disposition of these was made almost entirely by explanation or by advising the complainant of his rights of appeal.

The narrative descriptions of the complaint handling methods that were furnished by these three agencies, and by the other agencies which responded but were unable to provide data, reflected a variety of more or less formal procedures. Differences were primarily related to differing office organization, and were not significant. None maintained a central complaint department although complaints were routinely sent to a single officer, division, or kind of division. Complaints were usually investigated by personnel familiar with the subject matter, but were then referred to a supervisor, often to the administrator or director personally, for response. All agencies reported that they followed-up and answered every complaint.

In addition to the data tabulated, agencies "B" and "C", which actually resolved all complaints received, stated respectively that "only a very few" and "15%" of the complaints received were of the type for which an appeal within the agency or to the courts was both available and ordinarily taken. Accordingly, only 50 or so of the more than 1800 complaints reported by these two agencies were justiciable in practice, and the vast majority were little cases or non-cases, appropriate for review by an ombudsman. These same agencies reported 5% and 15% of their respective complaints were found to

have some merit and to warrant some corrective action, however minor.

Despite the limitations noted, the results of this survey reflect the basic dimensions of minor grievance handling in three widely different kinds of Ohio agencies. It is perhaps a fairly representative sampling of the quantities and qualities of non-cases in Ohio. The narrative statements received from half of the dozen remaining agencies which appear to have substantial numbers of transactions with individual citizens reflect similar methods and do not suggest that the quantity, sources, nature or disposition of complaints in other agencies would be greatly different.

The survey shows over 5000 complaints annually in three of fifteen relevant agencies. The vast majority of these are non-cases and a substantial number have some merit. The greatest numerical disposition of these complaints is made with an explanation or the giving of information, and there is some indication that agency decisions and procedures are changed in a few cases.

It may be unsafe to project these findings mathematically to all Ohio agencies, and it certainly cannot be inferred that such totals as there may be would comprise the casework of an Ohio ombudsman. Many such complaints would never be made to an ombudsman, and the disposition of the agency in many or even most of these instances may be entirely satisfactory. But an agency is highly interested in maintaining its own position and is clearly adverse to complaints directed at it. Its opinion on the merits of a non-case is not particularly convincing even if essentially correct. An ombudsman would offer an avenue of redress through independent, disinterested criticism which is not presently available.

The non-case in Ohio would appear to provide hundreds, and perhaps thousands of grievances annually which are appropriately the business of an ombudsman.<sup>88</sup>

## VI. CONCLUSIONS

Unquestionably, subsisting Ohio administrative law leaves some citizens with small, personal claims without any practical form of appellate remedy for an adverse administrative determination of

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<sup>88</sup> The New Zealand Ombudsman received 799 complaints, investigated 444 of these, and recommended some remedial action in 56 of 351 completed investigations in the year ending March 31, 1967. The Swedish J. O. handles about 1200 complaints a year, 15-20% requiring some remedial action. ROWAT, *supra* note 15, at 11, 17.

their little case. The real question is whether existing remedies are so inadequate to secure the welfare and satisfaction of Ohioans as to warrant reform. Similarly several thousands of non-justiciable complaints are made yearly to Ohio agencies by citizens aggrieved in some personally important manner. Again, the real question is whether the existing methods of resolving these disputes are so defective as to warrant reform. The reform proposed is the establishment of an ombudsman in Ohio, an institution by its nature adapted to deal with kinds of disputes in which review is legally or economically inadequate at present.

Two factors would seem determinative of the desirability of an ombudsman in Ohio. One is the need for such an institution. Resort to an ombudsman is voluntary and alternative to appeal or the direct presentation of a complaint to an agency. All that can be shown here is that appeal in many little cases is impractical under Ohio law, and that there is a great volume of non-case complaints now handled by the agencies themselves with the inherent shortcomings of self-criticism. Whether Ohioans with these kinds of grievances would apply to an ombudsman would depend as much upon the publicity and reputation for success achieved by the office as upon its designed capability. There is clearly a great potential business for an Ohio ombudsman. Whether this potential warrants the reform comes down to one's own experience with the value of existing redress in little cases and non-justiciable disputes.

The second factor is the feasibility of an ombudsman in Ohio. Feasibility of a state ombudsman depends upon the statutory basis of the office and upon the public and the official acceptance of the institution. In the virtually unanimous opinion of commentators and many state legislative draftsmen, the model act contains the essential elements necessary for the successful adaptation of the institution to American state government. Based on the model act, the Ohio bills appear to preserve the three essential constitutive characteristics of successful foreign ombudsmen, independence, great fact-finding capability, and absence of compulsory, revisory powers. Although there are important distinctions between each of the Ohio proposals, and the model act, which merit consideration, it would appear that an enactment substantially like either of the two recent bills would provide a sound legal basis for an Ohio ombudsman.

The acceptance of an ombudsman, his services, opinions, and recommendations, by Ohio citizens and governmental officials is more

difficult to predict. The statutes proposed would tend to assure the requisite independence and at least invite the kind of case selection, investigation, reasoning and recommendations that would secure public and official trust, reliance and utilization of an ombudsman. The necessary qualities of fairness and discretion cannot, however, be legislated. The choice of an ombudsman would require great care, particularly with the initial appointment.<sup>89</sup> It would be he who sets the pace and establishes the critical reputation of the office, while the public and administrators watch with unreasonable expectation of successes or failures. The risk that an intemperate incumbent might destroy the utility of ombudsman has not been realized in other countries, and is probably not great in the American state, but it should be recognized in considering adoption.

An ombudsman might also fail to satisfy supporters who expect too much of the office. It must be recognized that an ombudsman would not be able to placate every aggrieved citizen or convince every erring administrator of an injustice.<sup>90</sup> The force of persuasion is limited and simply not sufficient to settle some kinds of administrative disputes. The point of ombudsman is that it works with consensus rather than compulsion. Where compulsory power is necessary to achieve the result, an ombudsman will fail. There is a substantial danger that an ombudsman might be adopted with an unreasonable expectation of what he might accomplish. If, as a result, the wrong measure of success is applied, the reputation of the office would be depreciated and maximum utility lost.

Should these risks materialize, the value of the institution would be diminished, but the nature of the office is such that it could fail only in becoming partially effective or simply uneconomical. Since an ombudsman has little authority, a bad one could cause little disruption of the administrative process but would instead receive fewer complaints and little attention. As a reform, ombudsman is relatively cheap<sup>91</sup> and fail-safe. It would appear to offer a decided improvement to the existing Ohio administrative process. The proposal merits the most serious consideration.

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<sup>89</sup> See GELLHORN, *AMERICANS* 132.

<sup>90</sup> See *id.* at 224-32.

<sup>91</sup> The New Zealand Ombudsman serves 2½ million people with a staff of four, and reports that 10 million, Ohio's population, could be served with expansion. G. SAWYER, *OMBUDSMEN* 32 (1964).