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THE NEED FOR AN OMBUDSMAN IN STATE GOVERNMENT

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The ascendancy of administrative adjudication during the last thirty years has caused far-reaching changes in the operation of state government.

As the states have become concerned with the detailed regulation of many forms of personal and business activity to an extent undreamed of a generation ago, there have been created scores of administrative agencies to carry out the rapidly mushrooming regulatory programs. The result has been that in some respects the agencies have to a substantial extent displaced the legislatures and the courts in the actual operation of state government.

The typical pattern of much recent legislation in the states is an enactment which first describes an area of social or economic activity deemed to need regulation, and which then creates an administrative agency directed and empowered to adopt such rules as the agency believes will best serve the public interest in that area. Often, the governing statute does not state in meaningful detail any guiding standards to control the agency's action. The state legislature in effect says to the agency: "Here is the problem; deal with it as you think best." Determination of actual legislative policy — the operative rules to which the public must conform — is delegated to the agency.

The courts have also given place to the administrators. The "contested cases" decided by the agencies each year (in which adversary claims of private litigants are determined quasi-judicially) are probably of greater importance to more people than the matters decided by the courts. A determination by a state tax agency, for example, may add to the tax burden of thousands of taxpayers, in amounts aggregating millions of dollars in a single year. A decision by a state public service commission approving a rate increase for an electric or telephone utility may bulk larger, in point of dollars involved, than all the decisions handed down by the state supreme court during the year.

Theoretically, judicial review is available by appeal from the agency decisions. But far less than ten per cent of the cases decided by the agencies are actually appealed to the courts, and even in this handful of cases the scope of judicial review is extremely narrow. In many cases, the courts do not have the power to reverse, even though the judges believe the administrative decision is wrong.

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Clearly, administrative agencies have become a part of the American way of life. Agencies are depended on in most states for supervision and regulation of agriculture, air pollution, banking, civil rights, civil service, conservation, corporations, divorce proceedings, fair employment practices, fisheries, highways, horse racing, insurance, labor relations, licensing (a single state may have a score of agencies determining who may engage in a wide variety of businesses and pursuits, from driving a car to growing Christmas trees), liquor control, occupational permits (which may be required for barbers, contractors, druggists, optometrists, peddlers, plumbers, and many other occupations), parole of prisoners, public utilities, public welfare, railroads, revenue, securities, taxation, trucking, water resources, workmen's compensation, zoning, and literally dozens of other fields of activity.

Agencies determine what taxes the state's citizens will pay, whether employees are entitled to benefits if they are injured at work or if they lose their jobs, and whether the operator's license of careless auto drivers will be revoked. They decide how much consumers will pay for water, gas, and electricity. They have much to say about what wages a businessman must pay, the prices he may charge, the ways in which he can merchandise his products. Many men can avoid "court trouble", but few indeed can avoid the administrative agencies. Like death and taxes (both of which are now matters of administrative concern) the agencies reach everyone.

Despite the vast powers which have been delegated to state administrative agencies, comparatively little attention has been paid to their organization or methods of operation. As a result, some state agencies in their day-to-day operations fail to meet desirable standards of fair procedure. Each year, thousands of American citizens emerge indignant from an encounter with some agency representative who they assert has treated them impolitely or denied them what they deem to be their rights. But often the case does not involve enough to justify the expense of taking it to court, and the outraged citizen fumes in frustration, concluding dejectedly that "it's not worthwhile trying to fight city hall."

To cure this unhappy situation, a governmental mechanism which is new to America but which has worked well for more than one hundred years in some European countries (which have had a much longer experience with administrative law) is now being seriously considered by the legislatures of several states.

The plan involves the creation of a watchdog for the underdog. He is called an *Ombudsman,* an abbreviation of the Swedish "justitieombudsman", literally translated as an "agent of justice".

A research survey conducted by the writer for the American Bar Foundation disclosed many typical instances indicating the need for such an institution in state governments, and illustrating how the need could be met by the creation of an official Ombudsman.

Private Consultations

One of the most insidious problems that beset state administrative agencies arises out of the common practice of tolerating *ex parte* approaches to the officers charged with the responsibility for making decisions. In state courts, it is considered unthinkable for a party to a case to approach a judge privately in an attempt to influence his decision on a pending matter. But many administrative officials, exercising quasi-judicial responsibilities, take it for granted that the parties in interest will seek out such private consultations. Many administrative officials do little or nothing to discourage such approaches; some, indeed, take the lead in seeking them; and some lawyers consider it a part of their duty to utilize their personal acquaintance with agency members in an attempt to influence the decision.[1]

As a result, there is a danger that a license to open a liquor establishment, or a permit to establish a truck line, may be awarded not to the best qualified of competing applicants, but to the one whose cause is championed by an agent who has influence with an agency. The technique is pervasive; there have been instances where members of a state legislature — who pass on the appropriations to pay the salaries of agency members — undertake to influence decisions in pending cases.

Not only is there a danger that unfair results may obtain in particular cases as a result of such *ex parte* approaches, there is an even greater danger that these tactics may undermine public confidence in the agencies themselves.

In only a few states are there specific statutory prohibitions outlawing *ex parte* communications to agency representatives, and while a number of state courts have strongly condemned the practice, it is not easy to bring a case to court because of the difficulty of proving that such improper approaches were utilized, or that they did in fact affect the agency's decision.

It is in just such situations that the office of Ombudsman can effectively protect the public interest. An Ombudsman, upon receiving a complaint, could compel the agency members and everyone else involved to testify under oath as to exactly what was said and done in such off-the-record consultations. If he determined that there was a just basis for complaint, the Ombudsman would take steps to persuade the agencies to stamp out the practice. If the agencies showed a disinclination to comply with his suggestions, he could publish an official report denouncing those who had transgressed the proper limits. Further, if his investigations disclosed a need for legislation to regulate the practice [such legislation exists in some states, patterned on the Model State Administrative Procedure Act], he

[1] *See* 2 F. COOPER, STATE ADMINISTRATIVE LAW 439-444 (1965). [Hereinafter cited as Cooper]

could make appropriate recommendations to the legislature. Such recommendations, coming from a high official, would command public support for reform.

Unfair Hearing Procedures

Some years ago, in one midwestern state, a barber who maintained his shop in a tiny hamlet many miles remote from the State Capitol received a notice to appear and show cause before the state board of barbers and cosmetologists why his license should not be revoked on charges that he failed properly to sterilize combs and brushes. On the day appointed, he duly appeared with half a dozen witnesses — prepared, he believed, to disprove the charges. But the chairman of the agency refused to hear the barber's proofs, declaring the secret reports from the agency's investigators established the barber's guilt so clearly that there was no need to receive any evidence.

A court, of course, would have reversed so outrageous a decision. But appeals to the court are costly and time-consuming, and this particular barber unhappily accepted a suspension of his license and closed his shop for several months, rather than seeking judicial review.

Had there been an Ombudsman available to act on the barber's complaint, relief would have been prompt and inexpensive. While the Ombudsman would not have had power to reverse the agency action, there can be no doubt that a mere threat of public disclosure would have persuaded the members of the agency to grant a rehearing and consider the barber's evidence — the least that due process demands.

Local zoning boards are peculiarly subject to political pressure. In one case which did reach a state's highest court, a manufacturing company purchased a plant-site in an area zoned for such plants, and applied for a building permit to which, under the zoning ordinance, it was entitled. But the owners of nearby residences demanded a public hearing, and voiced their objections so loudly and vociferously that the members of the zoning board (overwhelmed, as the court found, by the "impact of a completely committed audience reaction") denied the company the permit to which it was entitled. The court granted relief.[2]

But if an Ombudsman had been available, it is likely he could have persuaded the zoning board to do what the law required, without the necessity of an appeal to the courts. What is more, the effect of intervention by the Ombudsman would not have been restricted to this single case. If, by instruction and persuasion (and threat of publicity, if necessary) he had achieved improvements in the zoning board's procedures, the improvements would have redounded to the benefit of all parties appearing

[2] Certain-Teed Products Corp. v. Paris Township, 351 Mich. 434, 88 N.W.2d 705 (1958).

before the zoning board, including the hundreds of small property owners who could not afford court appeals.

Unfairness in hearing procedures sometimes results from the bias of the hearing officer. This is particularly likely to occur in cases where the agency acts as prosecutor as well as judge. In recent years, courts have had occasion to set aside administrative orders where it was found that the chairman of the agency, assuming charge of the prosecution of the case, assigned one of his subordinate employees to sit as hearing officer and determine whether the chairman had proved the charges he was pressing.[3] Obviously, the subordinate could not act with judicial independence and impartiality in such a case; if he decided against his boss, his career might be imperiled.

In one case, where charges of professional misconduct brought against a physician were being heard by a board composed of other doctors, one of the members of the board — after listening to testimony for two days — announced that he had heard enough, and asked leave to cast his vote and be excused so that he could get back to his medical office. The chairman of the board ruled that no votes could be cast until the defendant's testimony had been heard; and the impatient member regretfully resumed his place.[4] A semblance of fairness was thus preserved; but is it realistic to assume that the defendant received what a Federal Court of Appeals has described as the constitutional right of a defendant to have a trial before a tribunal "imbued with the desire to accord to the parties equal consideration"[5]?

In cases like this, where lack of training and failure to appreciate the responsibilities entailed in the exercise of quasi-judicial functions inhibit proper performance on the part of administrative officers, an Ombudsman could perform a valuable educational function.

It is not ill-will so much as lack of experience that is chiefly responsible for inept performance on the part of state administrative officers. The Ombudsman could do much to correct this deficiency. He would be an individual "learned in the processes of law and government and having a distinguished intellectual standing in his profession" (to quote the langauge of current legislative proposals for the establishment of such an office). He would be paid a salary equal to that of a justice of the state's supreme court, and his office would carry a status and prestige comparable to that of the State's highest judicial officers. Suggestions for procedural improvement coming from such an officer would be gratefully accepted by administrative officials.

In some instances, responsibility for unfair hearing procedures must be imputed to the commissioners in charge of the agency, rather than to their

[3] State ex rel. Ellis v. Kelly, 145 W.Va. 70, 112 S.E.2d 641 (1960).

[4] Brinkley v. Hassig, 130 Kan. 874, 289 P. 64 (1930), *appeal dismissed*, 282 U.S. 800 (1930).

[5] Inland Steel Co. v. NLRB, 109 F.2d 9, 20 (7th Cir. 1940).

staff assistants. Under typical administrative procedures, testimony is taken before a hearing officer; this testimony is then stenographically transcribed, and the commissioners are charged by statute with the duty of examining this transcript and arriving at a decision based upon their examination of the transcript, in light of exceptions filed by the parties to the recommendation of the hearing officer. But cases have been taken to court in which the commissioners have issued a formal decision before the testimony was even transcribed.[6] Obviously, they could not have considered the transcript, for it was not in existence when they made their decision. There are other like cases where a formal, mimeographed decision was released to the press within a few minutes after the close of oral argument — a fair indication that the oral argument was a waste of time, for the decision had obviously been prepared before the oral arguments were begun.

It is true, of course, that these are pathological cases. Most agency members do the best job they can, most of the time. But the American tradition calls for the elimination of all instances of unfair procedure. Parties should have an opportunity to introduce their evidence in orderly, dignified proceedings. The evidence should be weighed impartially. The decision should be made solely on the basis of the evidence introduced in the record, and should be made by officers who know what evidence the record contains. This ideal is, unhappily, far from realization at the present time.

An Ombudsman could do much to bring the actual performance of the agencies more closely into line with the standards to which they are expected to adhere. He would be under a duty to receive and consider every complaint that a citizen had been subjected to unfair procedures, at any level of state administration — police, school officials, or tax assessors, as well as the more prestidigious agencies. He would be under a duty to make investigations on his own motion, as well as to act on complaints.

In his investigations — because of his statutory right to examine all the documents in the agency's files (including those marked "secret" or "confidential") and his power to compel testimony under oath — he could discover facts as to the actual practices of agencies which are now undiscoverable.

When he encountered unfairness in procedure, he would invite the agency officials to "reason together" with him, urging them to follow his suggestions for improving their procedures. If his suggestions were not accepted, he would expose the offending officials to the glare of publicity and the embarrassment of an official reprimand. If even this did not work — and experience in other countries indicates that such publicity is an efficient

[6] T. J. Moss Tie Co. v. State Tax Comm'n, 345 S.W.2d 191 (Mo. 1961); Weekes v. O'Connell, 304 N.Y. 259, 107 N.E.2d 290 (1952); Walker v. DeConcini, 86 Ariz. 143, 341 P.2d 933 (1959).

sanction — he could procure the institution of disciplinary proceedings against officials who had violated any applicable law or regulation, and could sponsor remedial legislation in the state legislature.

Impoliteness

An Ombudsman would not be concerned solely with charges of grave misfeasance (in such matters as *ex parte* approaches or unfair hearing procedures). His jurisdiction would extend to what is probably the most common of all complaints against public employees — protests that a citizen had been rudely or impolitely treated.

If a state trooper insulted a person to whom he was issuing a traffic violation ticket, or if a clerk in a tax office displayed a sullen attitude, or if a social worker adopted a domineering or patronizing attitude toward welfare recipients — in all these cases, complaint could be made to an Ombudsman. Such cases would not present a serious problem. If investigation disclosed justification for the complaint, a quiet suggestion — backed up by the possibility of an official public reprimand — would doubtless be all that would be required.

Of more serious concern to the Ombudsman would be situations where officially sanctioned agency policies were at odds with ideals of public administration. He would be concerned, for example, with charges of police cruelty, or charges that inmates of public institutions were maltreated, or charges that a department of public welfare adopted gestapo tactics in investigating, say, the private behavior of women receiving public aid as dependent mothers.

Delays

That "justice delayed is justice denied" is just as true in the administrative agencies as in the courts. Current history shows that in a number of states justice is denied in agency proceedings as a result of delay.

Suppose, for example, that the revenues of a small rural electric company are too low to cover its operating expenses, and so it applies to the state public utility commission for permission to increase the rates charged customers. The evidence introduced at the hearing establishes clearly the need for relief. But no grant of permission to increase rates is forthcoming from the commission. Three months, or six, or even a year may pass by; the petition is still officially "under consideration." Normally, in this situation, the courts cannot intervene until the commission has made its ruling. In the meantime, the rural electrical company is approaching the brink of bankruptcy, with no effective means of obtaining the relief to which it is entitled.

In cases involving a disagreement between a corporation and the state corporation commission as to the amount of franchise tax or privilege fee due from the company, it is not uncommon for the final administrative

decision to come as much as two years after the due date of the tax. In the meantime, if the corporation has refused to pay more than the amount it believes due, it may be technically in default and liable to proceedings to revoke its charter, or it may be disabled from bringing suit in the state courts. Threats to impose these disabilities have been utilized as a means of coercing companies into settlements.

While in some cases, such as those cited above, delay may be utilized as a weapon to achieve extra-legal results, in the great majority of cases delay results merely from lethargy. Neither civil service employees nor political appointees normally have an instinct for speed. There is no reward for pressing cases to a speedy decision; life is more enjoyable if the business at hand is attended to in a leisurely manner. ["What if the case load does pile up?" the civil servant is likely to ask. "It may convince the legislature that we need more employees in the agency."]

Whatever the cause for undue delay, an Ombudsman would be able to provide remedies that are not now available either through the legislature or in the courts. By examination of records and taking the testimony of employees — and by attending agency staff meetings and sitting in as an official auditor to check the actual operations of the commission staff — he could determine whether the delay was inevitable (reflecting, say, a lack of sufficient manpower) or was the result of indolence, or was deliberate. If he found the agency was doing the best it could, but needed more manpower, he could present persuasively documented recommendations to the legislature. If he found the delay was caused by inertia or laziness or by improper motivation, his suggestions for improvement would in all probability be respected and adopted by the agency heads, faced as they would be with knowledge that non-compliance might lead to public exposure, or public reprimand, or even prosecution.

Public Information

All agencies develop policies or informal rules of decision to implement the statutes they administer. These policies and criteria not only serve to interpret the statutory enactments; they are the actual determinants of decision. Often they are reduced to writing (in the form of staff memoranda, or manuals, or handbooks, or "operations instructions" or staff bulletins) but, although written, they may be treated as confidential documents and not made publicly available. The reasons for this lack of public information are hard to pinpoint.

Some agencies say that they fear that if they fixed exact lines distinguishing the legal from the illegal, there would be those who would be encouraged to go to the very brink of illegality, and that this would ill serve the public interest.

Critics of the agencies charge that more often the lack of public information stems from a desire of the agencies to avoid committing them-

selves to any fixed or definite rules. If fixed criteria of decision were announced, a public clamor would be raised if the agency departed from those criteria in the decision of a particular case; hence, it would be more difficult for agencies to change their policies, and it would be more difficult to conceal inconsistencies between successive decisions in like cases.

Whatever the reasons for the lack of public information as to agency policies and rules of decision, the results of this lack are serious. It leads to situations where those subject to an agency's jurisdiction are unable to ascertain the rules to which their conduct must conform. Attorneys are unable to predict with any degree of confidence what decision the agency would reach on particular facts. They cannot discover what arguments would be persuasive to the agency in particular case situations, and may fail to bring to the attention of the agency facts which might be determinative of the outcome.

The conduct of public business should be public. Individuals are entitled to know the rules and policies by which their cases will be decided. A number of states have enacted statutes seeking to guarantee this right, but too frequently there are no effective means of making this guarantee effective.[7]

Here again, an Ombudsman could readily fulfill the need. By exercise of his powers of office, he could compel disclosure of the secret rules and other policies or criteria of decisions, and on his own authority could cause them to be published.

Extending or Modifying the Legislative Intent

It has been a long time since the N.L.R.B. ruled that an act of a ship's captain in suppressing a mutiny could be punishable as an unfair labor practice (the decision was reversed by the Supreme Court, with the pointed observation that an agency may not seek to effectuate the policies of the particular statute it administers so single-mindedly as to ignore other and equally important legislative objectives).[8] But through all the intervening years, a tendency has been observable in state as well as federal agencies to magnify their stature by seeking to extend their jurisdiction to the furtherest possible limit — often pressing it beyond the limits that the courts are willing to sustain.

The empire-building tendencies of administrators (*i.e.*, their inclination to broaden their jurisdiction beyond the limits intended by the legislature) was described in graphic terms recently by a judge from the cattle raising country who declared, in striking down an administrative rule, that it was ". . . simply a case where a board has decided that a field is open for

[7] *See* COOPER, *supra* note 1, at 170, 171.
[8] Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942).

regulation, has lassoed this field, and then looked for authority upon which to hold onto its prized steer."[9]

Likewise, there has been a consistent tendency on the part of the agencies to set up and give effect to policies beyond or even at variance with those of the statutes they are created to administer.

Although it is well-settled law, as stated by one court, that "an administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment,"[10] the reports of the State appellate courts disclose a discouragingly impressive number of cases in which agency determinations have been reversed because the agency attempted to alter or enlarge the terms of the governing statute.

A few typical (and admittedly extreme) examples will illustrate the point:

A state labor mediation agency, empowered only to assist in the negotiation of labor-management agreements, undertook to conduct an election to determine whether a union represented a majority of the company's employees, although it was without power to conduct such an election.[11]

An agency revoked the license of the proprietor of a liquor store on the grounds that the existence of a chute through the rear wall of the store, through which packages could be delivered, violated a statutory provision that a liquor store should have only one main entrance.[12]

Tax agencies assessed business property on a proportionately higher basis than residential property, despite a statutory requirement that all assessments must be on a uniform basis.[13]

A board of optometry prohibited advertising of a type that was permitted by the controlling statute.[14]

A licensing agency refused to grant a license unless the applicant agreed to meet specified conditions which the agency had no authority to impose.[15]

A liquor control board refused to license liquor sales in a shopping center, although this was permitted by statute,[16] and imposed restrictions on the transfer of a license which the statute did not authorize.[17]

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[9] Lewis v. State Bd. of Health, 143 So. 2d 867, 877 (Fla. 1st Dist. Ct. App. 1962), *cert. denied,* 149 So.2d 41 (Fla. 1963).

[10] County of Los Angeles v. State Dep't of Pub. Health, 158 Cal. App.2d 425, 438, 322 P.2d 968, 975 (2nd Dist. Ct. App. 1958).

[11] Arnold Home, Inc. v. Labor Mediation Bd., 338 Mich. 315, 60 N.W.2d 905 (1953).

[12] Terry v. Evans, 189 Tenn. 345, 225 S.W.2d 255 (1949).

[13] State v. Alabama Power Co., 254 Ala. 327, 48 So.2d 445 (1950); People ex rel. Dallas v. Chicago, B. & Q. R.R., 26 Ill.2d 292, 186 N.E.2d 335 (1962); Union Pac. R.R. v. State Tax Comm'n, 232 Ore. 521, 376 P.2d 80 (1962).

[14] Stone v. Harris, 6 Wis.2d 634, 95 N.W.2d 764 (1959).

[15] *E.g.,* Baker v. Commonwealth, 272 S.W.2d 803 (Ky. 1954); Barry v. O'Connell, 303 N.Y. 46, 100 N.E.2d 127 (1951); Phillips v. McLaughlin, 82 R.I. 224, 107 A.2d 301 (1954); Cloverleaf Kennel Club v. Racing Comm'n, 130 Colo. 505, 277 P.2d 226 (1954).

[16] Swalbach v. State Liquor Authority, 7 N.Y.2d 518, 200 N.Y.S.2d 1, 166 N.E.2d 811 (1960), *motion for reargument denied,* 8 N.Y.2d 934, 204 N.Y.S.2d 1025.

[17] Obradovich Liquor License Case, 386 Pa. 342, 126 A.2d 435 (1956).

A tax agency refused to permit a public utility company to use an accounting system which it had been ordered to use by the public utilities commission.[18]

A school board dismissed a teacher for reasons not permitted under the statute.[19]

Relief can be obtained through the courts where an agency exceeds its jurisdictional limits, or adopts policies which alter or extend the intent of the governing statute. In most of the cases cited above, appeals were taken and the courts granted appropriate relief.

But here, as in other cases of poor administration, the chief concern is with the cases which are not taken to the courts, and where agencies proceed, unchallenged, to carry out policies at odds with the legislative purpose. It is in these cases that the Ombudsman would be particularly effective.

It is here, too, that he would face his greatest challenge. He could not reverse agency decisions. Nor could he (unless specifically authorized by statute) perfect appeals to the courts. But he would be under a duty to investigate, to state his views, and to expostulate with the agency if he concluded the agency was exceeding its proper role. He would have the right to bring the issue to public attention, by publicly criticizing the agency's policies. If this were not effective, he could ask the legislature to take remedial action. Through some combination of these functions, he could achieve a broad measure of reform in most cases.

Summary of Ombudsman's Functions

Creation of the office of Ombudsman would provide an effective means for examining, on behalf of citizens and of the legislature, instances of alleged maladministration by public officials.

The means would include: (1) the power to discover (by examination of records, by taking the testimony of administrative officials, and by visiting their deliberative sessions), the policies actually followed by the agencies, and the details of their operating methods; (2) the duty to form an opinion as to the validity of charges that an agency's powers were being abused, misused, or not used; (3) the privilege of consulting with agency officials, urging upon them the desirability of amending their rules or changing their procedures; (4) the right to publish findings, criticizing or reprimanding administrative officials whose performance fails to meet desirable standards; and (5) the power to make official recommendations to the state legislature for remedial legislation.

By skillful employment of these techniques, the Ombudsman could

[18] Detroit Edison Co. v. Corp. & Sec. Comm'n, 367 Mich. 104, 116 N.W.2d 194 (1962).

[19] Laba v. Newark Bd. of Educ., 23 N.J. 364, 129 A.2d 273 (1957); Lowenstein v. Newark Bd. of Educ., 33 N.J. 277, 163 A.2d 156 (1960); 35 N.J. 94, 171 A.2d 265 (1961).

make significant progress toward (1) eliminating improper *ex parte* approaches to administrative officials and the employment of political pressures; (2) guaranteeing fair hearing procedures; (3) protecting the public from undue delay; (4) requiring agencies to clarify vague statutory standards, and to publish their rules, policies, and criteria of decision; and (5) discouraging the pervasive tendency of administrative agencies to extend their jurisdiction unduly and to give effect to policies which extend or are at odds with the legislative intent. In all these ways, the Ombudsman could protect the interests of the private parties appearing before the agencies.

The agencies themselves would also benefit from his recommendations. Since his suggestions would be based on his specialized experience and knowledge, and his overall view of the system, he could assist agencies in (1) reducing inefficiency; (2) avoiding procedures which are unduly cumbersome; and (3) concentrating on the formulation of overall policies rather than deciding each case on an *ad hoc* basis, temporizing with problems rather than seeking an underlying solution.

The state legislature would also be a beneficiary. Legislators could direct complaints from their constituents to the Ombudsman, rather than undertaking to make their own investigation of alleged bureaucratic abuses. They would benefit also from the circumstance that the Ombudsman, on the basis of his broad knowledge and experience, could make incisive recommendations for the clarification, amendment, or initiation of legislation.

The Ombudsman, in short, would provide a continuous and informal procedure for dealing with administrative malfunctions. He could discover remedies for many of the common ailments of bureaucracy such as slowness, rudeness, and obtuseness. He would afford a means of helping to keep administration prompt, inexpensive, and flexible, at a minimum cost to the government and no direct cost to the citizen.

How Office of Ombudsman Would be Organized

The legislative proposals introduced recently in several state legislatures, while varying widely in detail, embody a common approach and exhibit a similarity of pattern. They illustrate, in composite, a typical organizational structure for the office of Ombudsman.

Qualifications. A basic necessity to the successful functioning of his office is the requirement that the Ombudsman be an individual whose personal attainments are so high as to command the respect of the legislature, the general public, and the agency officials. Typical statutory provisions directed to this end require that the Ombudsman must be "learned in the processes of law and government," and that he be "a person of distinguished accomplishments in the field of legal scholarship and administrative law." To make it possible to induce men of such stature to accept the office, it is normally provided that the Ombudsman's salary

shall be equal to that of the justices of the state supreme court. The intention of these legislative proposals is that the office of Ombudsman should carry as great a prestige as that which attaches to membership on the highest court of the state.

Appointment. It is recognized, in the pending legislative proposals, that the Ombudsman should be free of all taint of partisan politics. Thus, in the California bill, it was provided that the Ombudsman should be nominated by a special committee consisting of the chief justice of the supreme court, the attorney general, the president of the state university, and two persons appointed respectively by the presiding officers of the two branches of the state legislature. The Illinois bill provided for appointment by the governor, but required the consent of two-thirds of each house of the state legislature, thus assuring that the nominee have substantial bi-partisan support. Typically, it is recognized that the Ombudsman should have the security of a long term in office. Thus the California and Illinois bills provided for six-year terms, and contemplated the reappointment of the Ombudsman for as many as three successive terms. Most of the bills prohibit the Ombudsman from engaging in any political activity.

Powers. The legislative bills provide that the Ombudsman shall receive complaints concerning any administrative action or omission of any state agency; that he shall in his discretion determine whether or not such complaints deserve investigation; and that he may in his discretion initiate investigations on his own motion.

He is given broad powers to assure that his investigations be thorough, and that no relevant information be withheld from him. Typical provisions to assure these objectives authorize him to compel by subpoena the taking of oral testimony under oath and to compel the disclosure of any records or documents that he deems relevant to the inquiry.

If it is his conclusion that the procedures or policies of the agency should be altered, he is empowered to make appropriate recommendations to the agency. If his recommendations are not complied with, or if his investigation discloses misconduct, or breach of duty, or other actions which he deems improper, he may make an official report to the legislature and cause the same to be published for the information of the public. If the agency still fails to take remedial action, the Ombudsman may recommend remedial legislation to the state legislature.

Standards. The objectives which the Ombudsman would seek to attain are well described by the provisions of the Connecticut legislative proposal setting forth the standards which should control his recommendations. It declares that the Ombudsman should take appropriate action when in his opinion the administrative action or omission being investigated is:

1. Contrary to law;
2. Unreasonable, unjust, oppressive, or discriminatory;
3. Based wholly or partly on a mistake of law or fact;
4. The result of exercising discretionary power for an improper purpose or on irrelevant grounds or arbitrarily.

Why an Ombudsman is Needed

The case for the enactment of legislation providing for an Ombudsman in state governments was well put in a recent article by Jesse M. Unruh, the Speaker of the Assembly of the California Legislature, who wrote: "What remedies are open to the ordinary citizen against the action of a large public agency? Against arrogance and delay there is no appeal. The great majority of actual administrative decisions carry no formal right of appeal. Where there is provision for appeal . . . the process is likely to be costly and cumbersome. . . . We need to find some bridge between the citizen and his government. . . ."[20]

The Ombudsman can provide such a bridge.

PROPOSED OMBUDSMAN ACT

Section 1 *Short Title*

This Act shall be known and may be cited as the Ombudsman Act.

Section 2 *Definitions*

For the purposes of this act:

(a) "Person" means any person, firm, corporation, association or group of persons;

(b) "Agency" means any state board, commission, department, or officer other than the Legislature or the Courts;

(c) "Administrative Action" means any action by an agency, and includes any rules, regulation, interpretation, advisory opinion, policy, practice, release, ruling, order, decision, and any action taken with respect to licenses;

(d) "Operation" means the organization and internal administration of an agency;

(e) "Omission" means any failure or refusal of an agency to take administrative action;

(f) "Ombudsman" means the officer appointed as hereinafter provided.

Section 3 *Office of The Ombudsman*

There is hereby created in the State Government an Office of Ombudsman. The Ombudsman shall be a person learned in the processes of law and government and distinguished by his accomplishments in the fields of legal scholarship and administrative law. He shall be chosen without regard to political affiliations. He shall not have been a member of the Legislature during the two years preceding his appointment as Ombudsman and shall not be eligible for election to the Legislature during his tenure or for two years thereafter. He shall not hold any office for reward or profit within the government of the State or any political subdivision

[20] J. Unruh, *The Need for an Ombudsman in California*, 53 CALIF. L. REV. 1212, 1213 (1965).

thereof during his tenure or for two years thereafter. He shall not engage in any occupation for reward or profit outside the duties of his office duing his tenure. He shall be paid an annual salary equal to that of an associate justice of the Michigan Supreme Court. He shall also be entitled to receive reimbursement for expenses actually and necessarily incurred by him in the performance of his duties. He may appoint such officers, employees, agents, and consultants, as he may deem necessary, prescribe their duties, fix their compensation, and provide for reimbursement of their expenses within the amount available therefor by appropriation.

Section 4 *Selection And Appointment*

There is hereby created the Commission For The Selection Of Candidates For The Office of Ombudsman. The Commission shall consist of the Chairman of the Law Revision Commission, who shall act as Chairman, the Chief Justice of the Supreme Court, the Attorney General, the President of the State Bar, the Lieutenant Governor, and the Speaker of the House of Representatives. The Commission shall select not less than two nor more than four qualified candidates for the Office of Ombudsman and shall submit the names of the candidates to the Governor. The Governor shall appoint one of the candidates so selected and, upon confirmation of the appointment by the Senate, the Ombudsman shall assume office.

Section 5 *Term of Office*

The Ombudsman shall hold office for a term of six years from the first day of January in the year of his appointment and until his successor has been appointed and has qualified. He may from time to time be reappointed, but in no case shall any Ombudsman hold office for more than three six-year terms. The Ombudsman may at any time be removed from office by concurrent resolution of the Legislature for neglect of duty, misconduct, or disability.

Section 6 *Functions, Powers and Duties*

The Ombudsman, with the assistance of his duly authorized officers, employees, agents, or consultants, shall have the following functions, powers, and duties:

(a) The Ombudsman may investigate, upon the complaint of any person affected thereby or upon his own motion, any administrative action or omission or operation. If he elects not to investigate a complaint, he shall inform the complainant, in writing, of his reasons therefor;

(b) The Ombudsman may decline to entertain a complaint or decline to undertake to investigate a complaint or decline to continue the investigation:

i. If in his opinion the complainant or complainants have an adequate remedy under existing law or administrative practice;

ii. If the complaint relates to a matter of policy as determined by the Legislature and not of execution of the policy;

iii. If in his opinion investigation is unnecessary;

iv. If the subject matter of the complaint is in his opinion trivial, or the complaint is frivolous, vexatious or not made in good faith;

v. If the complainant or complainants had knowledge of the matter complained of for a period of more than one year before the complaint is received by the Ombudsman;

(c) The Ombudsman shall determine whether any administrative action or omission or operation which he has investigated is or was unreasonable, unjust, oppressive, or discriminatory, or based upon a mistake of fact or law, or based upon a law or regulation which in itself or in its application is unreasonable, unjust, oppressive, or discriminatory; or, in the case of the exercise of discretionary power by an agency or officer or employee thereof, whether the power was exercised for an improper purpose or arbitrarily or upon irrelevant grounds or considerations or without stating the reasons therefor when such a statement is required;

(d) Whenever his investigation discloses that any administrative action or omission or operation is or was unreasonable, unjust, oppressive, or discriminatory, or based upon a mistake of fact or law, or based upon a law or regulation which in itself or in its application is unreasonable, unjust, oppressive, or discriminatory; or, in the case of the exercise of discretionary power by an agency or officer or employee thereof, that the power was exercised for an improper purpose or arbitrarily or upon irrelevant grounds or considerations or without stating the reason therefor when such a statement is required, the Ombudsman shall recommend to the appropriate authority such action as will rectify the matter complained of or investigated, giving his reasons therefor, supported by the relevant information obtained in the course of his investigation. If the authority fails to follow the recommendations or to take such other action within a reasonable time as the Ombudsman deems to be adequate or appropriate to rectify the matter, the Ombudsman may publish such comments on the matter as he deems advisable. The Ombudsman shall in any event inform the complainant or complainants in such manner and at such time as he deems proper of the results of his investigation;

(e) Whenever his investigation discloses any breach of duty or misconduct of any officer or employee of an agency, the Ombudsman shall make a report thereof to the agency, the Attorney General, the Governor, and the Legislature;

(f) The Ombudsman may make public all reports or recommendations issued under the provisions of this Act;

(g) The Ombudsman may issue subpoenas to require any person to testify and to furnish any information and to produce any

documents, papers, or other evidence which relate to any matter under investigation and which are in the possession or under the control of that person. If any person who has been properly served refuses or neglects to appear and testify, or to produce the documents, papers, or other evidence requested, the Ombudsman may petition the Circuit Court in the county in which the hearing or investigation is being conducted for an order requiring the person to attend and testify or produce the documentary evidence. The Circuit Court shall hear the petition and may enter an order requiring the person to obey the subpoena. The Court may compel obedience to its order by attachment as for contempt;

(h) The Ombudsman shall have power, without prior demand or the issuance of a subpoena, to examine all files and records of any agency, and to attend any meeting or executive session of the members of any agency;

(i) The Ombudsman may consult with and cooperate with officials of agencies having duties and responsibilities concerning administrative practices and procedures;

(j) The Ombudsman may consult with and cooperate with persons, organizations, and groups concerned with administrative practices and procedures of agencies;

(k) The Ombudsman may determine who may attend any hearing held by him and whether any transcript of such hearings shall be made public, except that any witness shall be entitled to have counsel present while the witness is being questioned;

(l) The Ombudsman may undertake any studies, inquiries, surveys, or analyses he may deem relevant through his office or in cooperation with any public or private agencies including educational, civic, and research organizations, colleges, universities, institutions, or foundations;

(m) The Ombudsman may apply to any Circuit Court for a declaratory judgment whenever a question arises as to the authority of the Ombudsman to conduct an investigation or issue any report or recommendation under the provisions of this Act;

(n) The Ombudsman may adopt, amend, and rescind any rules and regulations (not inconsistent with the provisions of this Act) which he finds necessary or appropriate to carry out the provisions of this Act.

Section 7 *Testimony To Be Privileged*

Except on the trial of a person for perjury in respect to his sworn testimony, no statement made or answer given in the course of an investigation by the Ombudsman shall be admissible in evidence against any person in any subsequent judicial or administrative proceeding. No evidence in respect to proceedings before the Ombudsman shall be given in evidence against any person. Every person shall have the same priv-

ileges in relation to the giving of information, the answering of questions, and the production of documents and papers as witnesses have in the Courts of this State.

Section 8 *Limitation On Jurisdiction Of The Courts*

No proceeding or report of the Ombudsman shall be challenged, quashed, or called into question in any Court, except as they contravene the provisions of this Act. No proceedings, civil or criminal, shall lie against the Ombudsman or against any persons holding any office or appointment under the Ombudsman for anything such persons may do, report, or say, in the course of the exercise of their functions under this Act unless it is shown that they acted in bad faith. The Ombudsman, and any such person, shall not be called to give evidence in any Court or in any proceeding of a judicial investigation of his functions.

Section 9 *Offense Of Obstructing The Ombudsman*

Any person who, without lawful justification or excuse, wilfully obstructs, hinders, or resists the Ombudsman in the exercise of his powers under this Act, or who refuses or wilfully fails to comply with any lawful requirement of the Ombudsman under this Act, or who wilfully makes any false statement to or misleads or attempts to mislead the Ombudsman in the exercise of his powers under this Act, shall be guilty of the offense of obstructing the Ombudsman. Anyone convicted of this offense shall be fined not more than (————) and/or sentenced to imprisonment for a term of not more than (————).

Section 10 *Prior Rights And Remedies Not Affected*

The provisions of this Act are in addition to the provisions of any other enactment under which any remedy or right of appeal is provided for any person, or any procedure is provided for the inquiry into or the investigation of any matter, and nothing in this Act shall limit or affect any such remedy, right of appeal, or procedure. The powers conferred on the Ombudsman by this Act may be exercised notwithstanding any provision in any enactment to the effect that the administrative action or omission or operation shall be final or that no appeal shall lie in respect thereof.

Section 11 *Reports*

The Ombudsman shall report annually to the Legislature. His report, which shall be a public document, shall contain his recommendations regarding legislation and administrative procedures based upon the information which has come to his attention in the course of his activities.

Section 12 *Severability*

If any provision of this Act, or the application of such provision to any person or circumstance is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

Section 13 *Appropriation* (Optional)

The sum of (————), or so much thereof as may be necessary, is hereby appropriated for the administration of this Act.