

WHEN AMERICANS COMPLAIN. By Walter Gellhorn. Cambridge: Harvard University Press, 1966. Pp. viii, 239, \$3.95.

OMBUDSMEN AND OTHERS. By Walter Gellhorn. Cambridge: Harvard University Press, 1966. Pp. xiii, 448, \$6.95.

Tremendously enlarged governmental activity has been occurring during decades when mounting educational levels have encouraged citizens to think for themselves instead of supinely accepting whate'er befalls. Since more and more befalls and since citizens are more and more capable of saying they wish it had not, investigating and appropriately responding to demands and complaints have become major undertakings almost everywhere.

W. GELLHORN,<sup>1</sup> WHEN AMERICANS COMPLAIN 6 (1966).

Like the Texan who, when asked his destination by the airline ticket agent, replied, "Makes no difference, ah've got business everywhere," Professor Gellhorn's enterprise has been equally far-flung. With a twinkle in his eye and intellectual scalpel in hand, he has been to Denmark, Finland, Japan, New Zealand, Norway, Poland, the Soviet Union, Yugoslavia—and the United States. For he has been exploring the means by which, to use his words quoted above, man sets about the task of "investigating and appropriately responding to demands and complaints" of citizens about the activities of their governments.

Such thorough exploration has become a hallmark of this professor. It is not just his insistence on thorough research—of the conventional, dusty library variety. Of course he is extraordinarily well read, and virtually every relevant document worth citing can be found somewhere in a footnote. But his peculiar brand of scholarly curiosity also leads him outdoors—with clear vision, acute hearing, and lots of paper and pencils. We have come to expect such bizarre respect for empirical data from the scientific professions, but it still evokes considerable suspicion from that part of the legal fraternity whose search for truth leads them no further than the advance sheets. When Walter Gellhorn wants to find out about the role of the American Congressman in processing citizen complaints he doesn't read a court opinion or law review article on the subject. He doesn't even ask Congressmen, or send them questionnaires. He reads and tabulates their mail and records what they do about it.

*Ombudsmen and Others*<sup>2</sup> is the result of fifteen months of observations and interviews. It contains individual chapters on each of the nine countries visited, and a concluding chapter, "Common Strands in

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<sup>2</sup> W. GELLHORN, OMBUDSMEN AND OTHERS (1966).

the Fabric of Controls." For each country, Professor Gellhorn traces the historical development of the ombudsman or other complaint-handling mechanisms, their present-day functioning, and relation to other institutions. As a comparative study, the book is useful for what it indirectly tells us about our own system of processing citizen complaints—how we stack up against the rest of the world, what previously unknown alternatives are available to us, and what features we should tenaciously retain with pride. In addition, the book has obvious value to those in almost any profession or academic discipline who are seeking a better understanding of the individual countries involved. Moreover, because it contains much of the raw material Professor Gellhorn has drawn upon in writing *When Americans Complain*,<sup>3</sup> it makes as useful a companion volume for the reader as it did for the author.

*When Americans Complain* is a very readable and relatively short (239-page) volume of four chapters that undoubtedly will have wider readership and more general impact in the United States than its international companion, *Ombudsmen*. Originally presented as the Harvard Oliver Wendell Holmes lectures of 1966, the book is without question the most thoughtful and current analysis of governmental grievance procedures in the United States.

Because the book deals, by necessary implication, with the failings of government, Professor Gellhorn strains to disassociate himself from those who believe that "[p]ersons who go on the public payroll . . . vow secretly to be power-crazed, obtuse, venal, ill-mannered, and inefficient forevermore."<sup>4</sup> He believes that "the general level of governmental performance in the United States is so high that we can now sensibly consider how to make it more consistently excellent, rather than merely tolerably good. American public servants deserve much more applause than they usually get."<sup>5</sup> Preliminaries out of the way, he recognizes governmental abuses do exist and begins the task of exploring one of the more significant ways of making "governmental performance . . . more consistently excellent"—improving the processing of citizen complaints.

The first chapter, "Confining Public Administration Without Crippling It," surveys the current alternative restraints against governmental abuse. The ombudsmen of Scandinavia, the procurators of the Communist countries, and the Japanese administrative inspection bureau are briefly described and contrasted. Of course, there are many institutions that provide a check against administrative abuse in addition to those expressly established for that purpose. Legislative and judicial review—

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<sup>3</sup> W. GELLHORN, *WHEN AMERICANS COMPLAIN* (1966) [hereinafter references to this book will be by page number only].

<sup>4</sup> 1.

<sup>5</sup> viii.

actual and as a potential threat—are also discussed. Professor Gellhorn comments generally that it is useful for ombudsmen to encourage administrators' attention to human relations; investigations protect public servants by pointing up how many complaints are groundless; the power of persuasion is usually adequate to reform; the ombudsman's individuality and personality are not essential to the effectiveness of the system; "prevention is far more important than cure"<sup>6</sup>; "the gravest danger in today's world . . . is flabby, erratic, ineffective execution of policies"<sup>7</sup>; and "external criticism gives rise to . . . the risk of complacency . . . [that] all's right with the world of public administration so long as somebody like an ombudsman is keeping an eye on operations."<sup>8</sup>

"Watchmen in Washington" (chapter two) deals with those institutions within America's federal government that exercise a check on administration. Congress heads the list. (" 'Why in the world,' a Senator recently asked, 'would anyone want to have another ombudsman in Washington? After all, we have 535 of them already, in Congress.' "<sup>9</sup>) Also included are the Administrative Conference, General Accounting Office, and Bureau of the Budget. Gellhorn emphasizes the importance of self-policing: "Outsiders' denunciation of botched work can never be as significant as anti-botchery efforts inside administrative ranks."<sup>10</sup> He then proceeds to analyze how it is (and is not) done by the Post Office Department, the Labor Department, the Immigration and Naturalization Service ("ferocity, not fairness seemed to be its watchword in times past"<sup>11</sup>), and the Department of Agriculture and its "Office of Inspector General" (Billy Sol Estes' contribution to the administrative process).

Professor Gellhorn concedes that "Washington's woods are full of external critics . . . [He] who wants to wail can be certain someone will hear him."<sup>12</sup> But he counters three major arguments against an American ombudsman: first, that Congress can do the job; secondly, that no other agency is readily at hand; and thirdly, that ombudsmen are only for little countries.

"Casework," Gellhorn argues, "does not work for three intertwined reasons: (a) it too often shortcircuits administrative processes that should be allowed to or, if need be, forced to run their course; (b) it too often aims merely at giving a Congressman an unearned credit; and (c)

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<sup>6</sup> 50.

<sup>7</sup> 52.

<sup>8</sup> 53.

<sup>9</sup> 57.

<sup>10</sup> 105.

<sup>11</sup> 115.

<sup>12</sup> 124.

it too infrequently includes thought about the future."<sup>13</sup> Secondly, "The Administrative Conference of the United States is particularly well suited, in structure and in concept, to analyze methodological problems and prescribe their solution."<sup>14</sup> Thirdly, "if a single ombudsman in the Scandanavian model cannot serve the requirements of a large country, perhaps more than one might be able to do so. At any rate, to despair of meeting a need because it is large has not been the American way in the past and should not become so in the future."<sup>15</sup>

The use of ombudsmen in "State and Local Governments" (chapter three) Professor Gellhorn believes to be a close parallel to its use by national governments of smaller nations. "As a matter of fact, it really is an excellent idea. It should be activated."<sup>16</sup> He points out that the states and cities together spend far more than the nondefense federal government and that "the individual is much more frequently touched by local and state governmental operations than by national."<sup>17</sup> Moreover, the state legislators are simply not equipped to provide the kind of service Congressmen can: "fewer than a third of the states set aside office space (let alone office staffs) for their legislators' use."<sup>18</sup> Governors' offices, attorneys general, and comptrollers do a little better—and the California Office of Administrative Procedure and New York State Division of Administrative Procedure Law merit special commendation. Whatever potential relief may be available, however, Professor Gellhorn believes that "one of the most pressing (and depressing) questions before Americans is whether government, especially at state and local levels, can capture and hold their confidence."<sup>19</sup> Consequently, "only when an impartial mind examines the matter complained about can the complainant's doubts be dispelled."<sup>20</sup> Especially appropriate for a state's ombudsman, he believes, are the numerous complaints of prison inmates.

Municipal affairs, "a daily, felt element of the common man's life," should be, in Professor Gellhorn's judgment, "democracy's most flourishing flower";<sup>21</sup> and yet many citizens respond to them with cynicism ("You can't fight City Hall") and apathy. One of the most fundamental defects is "plain lack of information"<sup>22</sup>—a problem the Japanese meet with municipal "citizens counseling rooms" where people can receive everything from "worries advice" to investigations of dealings with the

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<sup>13</sup> 125.

<sup>14</sup> 128.

<sup>15</sup> 129-30.

<sup>16</sup> 132.

<sup>17</sup> 133.

<sup>18</sup> 135.

<sup>19</sup> 139.

<sup>20</sup> 141.

<sup>21</sup> 151-52.

<sup>22</sup> 153.

national government. Boston has a Complaints Division<sup>23</sup> and New York City a Commissioner of Investigation.<sup>24</sup> Central to understanding municipal complaints is their subject matter: requests for city action against other citizens; complaints regarding such requests (failure to act, overreaction); inefficiency in city operations (such as garbage collection); or inadequacy of programs (such as not enough housing).

Checking the mail of a New York City borough president, Professor Gellhorn discovered roughly half of the complaints dealt with housing. He gives considerable discussion to complaints involving police,<sup>25</sup> including police review boards and "policemen's almost hysterical resistance"<sup>26</sup> to them, and concludes (as the reader can by now predict) that a municipal ombudsmen system that includes jurisdiction over police complaints would best serve the public and their uniformed protectors. He recognizes that "deficiencies in housing, education, opportunities for employment—in short, discrimination and poverty—create the human relations problems that beset America's cities"<sup>27</sup> and that the poor man's principal dissatisfactions with welfare, housing and education go deeper than dissatisfaction with administrative procedures. Nevertheless, he believes there are problems appropriate to an ombudsman here as well.

It should not be surprising that Professor Gellhorn answers the question titling his final chapter—"Ombudsmen in America?"—in the affirmative. Formal proceedings, judicial and administrative, are few and costly. Intercession by outsiders (such as Congressmen) is often more in the nature of unquestioning advocacy than a quest to right wrongs after an evaluation of the merits. Internal auditing procedures are to be encouraged, and will improve administration, but are no substitute for an independent outsider's review of a complainant's case. An ombudsman could spot "obsolescent . . . inattentive . . . chronic non-administration."<sup>28</sup> Policies affecting classes of individuals could be challenged by an ombudsman as to their wisdom as well as to their legality. Individuals' complaints, worth investigating on their own, may also suggest more general reforms.

If there be a need for an additional check on government, what has the external critic, or ombudsman, to offer? How and why would such a system work in this country? Professor Gellhorn believes "that external critics function most effectively when governmental administration is already reasonably good and when a consensus of expectations already exists about ethical and qualitative standards in the public service," and

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<sup>23</sup> 160.

<sup>24</sup> 166.

<sup>25</sup> 170-95.

<sup>26</sup> 193.

<sup>27</sup> 182.

<sup>28</sup> 219-20.

that "both these conditions are met in the United States."<sup>29</sup> He dismisses the suggestion that a successful ombudsman requires the quality and personality of a single individual as (quoting another critic) "a lot of sentimental twaddle" and points to the impersonal reputation of the Harvard Law Faculty and the New York Court of Appeals. As for political independence, he believes that because "Americans are curiously self-disparaging . . . they might be inclined to imagine that the political detachment achieved in, say, Finland or New Zealand (about which they know little) could not possibly be duplicated in the United States (about which they are disposed to believe the worst)."<sup>30</sup> He thinks independence can be achieved, if for no other reason than that "the appointees . . . must be well approved figures—as they assuredly will not be if markedly partisan. Not even the dullest appointing authority could overlook so simple a proposition."<sup>31</sup> Why will the critic's advice be influential? "Powerlessness does not necessarily connote unpersuasiveness."<sup>32</sup> "[G]entle mediatory nudges have been enough to open closed minds to the refreshing breeze of common sense."<sup>33</sup> He concludes by quoting Benjamin Franklin's reply to criticism of a proposed reform: "The true question 'is not whether there will be no difficulties or inconveniences; but whether the difficulties may not be surmounted; and whether the conveniences will not, on the whole, be greater than the inconveniences.'"<sup>34</sup> Professor Gellhorn believes Franklin's standard is met so far as an American ombudsman is concerned. It is difficult to disagree with him.

The principal problems, of course, are not so much in deciding that something needs doing as in deciding what, where, and why, for whom, under what conditions, and at what cost. Professor Gellhorn recognizes these problems of definition and conceptualization but does not, I believe, give them sufficient emphasis. The techniques of cost effectiveness analysis are useful for this purpose, not (I would agree with Professor Gellhorn) because of the "cost" of a national ombudsman (which would scarcely rise to the level of budgetary significance as federal programs go), but because of the need for precise program definition and consideration of alternatives.

The problem at issue can be described as broadly as "serving the needs of isolated individuals confronting the large institutions of a modern industrial society." This statement may appear extremely broad on first examination, and yet how else can Professor Gellhorn's findings re-

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<sup>29</sup> 225.

<sup>30</sup> 227.

<sup>31</sup> 228.

<sup>32</sup> 229.

<sup>33</sup> 231.

<sup>34</sup> 232.

garding Congressional and a New York borough president's mail be interpreted?<sup>35</sup> What do people write about? They want information; they seek jobs; they ask for help in dealing with the military. These categories account for about three-fourths of the average Congressman's mail (exclusive of speaking invitations). Most of the borough president's mail is related to housing matters.

It is almost incidental that such matters involve government. (Indeed, often, they do not.) How, and why, can such complaints and inquiries usefully be distinguished from the housewife's constant negotiations with supermarkets, banks and department stores? How are they different from the employee's grievances against management, or the organization's dealing with its members (be it the National Association of Manufacturers, the National Maritime Union, a college fraternity, or the Bar Association)? In each instance an individual feels insecure, uninformed or grieved in his dealings with a seemingly overpowering institutionalized world. In each instance a healthy society demands that the individual be heard and cared for. We need checks and grievance procedures for citizens' dealings with large corporations just as fully as they are needed for government. And what ever happened to the proposal for a nongovernmental National Commission on Freedom of the Press, designed to provide a very modest oversight of the massive institution known as "the media"?

To what extent should the problem be conceptualized as a part of the problem of poverty? Those who are most seriously disadvantaged in an institutionalized society may turn out to be the same people who have the poorest health, the least education and cultural advantage, the highest unemployment rates, and the greatest exposure to crime. If that be the case (and many think it a reasonable hypothesis) Professor Gellhorn might better have titled his book and organized its contents around "When *Poor* Americans Complain." But when you look at the problem from this viewpoint, does the ombudsman solution shine as brightly as before? What is the evidence that the *major* causes of riots and misery in the ghettos of this land are a function of inadequate grievance procedures? Solutions to known deficiencies are perhaps more meaningful at this stage than additional procedures for expression of complaints about them. Is there likelihood that America's poor will be more likely to complain to an "ombudsman" than a Congressman, borough president, minister, welfare worker, or other influential friend? I doubt it. In any event, unless the ombudsman recognizes who it is he is serving and makes an effort to take on meaning in their lives, his contribution is apt to fall far short of our expectations and hopes.

What should we do "When Americans *Don't* Complain"? One rea-

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<sup>35</sup> 63-65, 70 n.25, 164 n.58.

son agencies assume a lethargic pose is that it is so comfortable. It does not produce complaints. Who complains when maritime subsidies go up another \$10 or \$20 million a year—or ten times that amount? Who complains when the FCC renews the licenses of stations providing little public service? Who complains about the quality of public utility regulation? Who complains when a corporation engages in unfair business practices, raises prices because of internal inefficiencies, teaches a corrupting sense of values through its advertising, or markets unnecessarily unsafe or otherwise harmful commodities? Occasionally few; usually nobody.

How many of the kinds of problems Professor Gellhorn treats are a function of faulty communications? How is the citizen to find out how to deal with his Internal Revenue Service or Selective Service Board, file a police complaint, get the streets cleaned—or avoid paying usurious interest, collect on a “guarantee,” or start a union grievance proceeding? He has to be told. And how are most people informed about most such general matters today? By radio and television. Is the broadcasting industry doing its job adequately? What more could it do—especially in reaching the poor? How many misdirected inquiries are made by people who don’t know what telephone number to dial? Would single numbers, nationwide, be useful—for emergency information, or for those seeking employment? Do we need an “ombudsman” to better perform these information services? Probably not; even if we do we must inform the citizenry about *his* existence—and telephone number.

How much of our concern about the adequacy of government services is, in fact, a function of inadequate budgets and inadequately trained personnel? To the extent that is the problem there are far more effective remedies than ombudsmen. The FCC has assigned two investigators to do the field investigations on 14,000 complaints annually from throughout the United States. This is one instance in which some additional GS-9 investigators could do far more good than a Presidentially appointed ombudsman. Many of the FCC’s complaints, petitions for waiver and exceptional treatment, and hearings are a function of a lack of articulated general policy. A few pages of simple declarative sentences could clean up much of the FCC’s “backlog” and attendant complaints (direct and by way of Congressmen).

What is the role of the mass media in the process of checking governmental abuse? To what extent would an ombudsman be dependent upon public disclosure and discussion by newspapers and broadcasters? To what extent do (or could) the media perform the ombudsman’s role? Professor Gellhorn has noted that “Polish newspapers have become investigators as well as reporters of complaints, and serve actively as the



people's tribunes."<sup>36</sup> The practice is catching on in the United States as well. A number of metropolitan dailies represent that their "The Action Line" (a telephone number) columns "solve problems, get answers, cut red tape, investigate complaints, and stand up for your rights." Their printed inquiries and responses would tend to indicate they are doing just that. Although this kind of newspaper participation comes closest to the ombudsman's role, it is not the media's only or most powerful weapon.

The media's potential for a check upon government—legislative and executive—is potent. The threat of an exposé is a meaningful restraint on abuse. There are columnists and reporters who make their professional reputations following up government employees' complaints and leads and rumors—without the procedural prod of citizens' complaints. Most journalists—and most publishers—are independent of political forces in a way that no ombudsman could be. However, reliance upon the press has its drawbacks. Reporters have no legal obligation to follow up on any given story. Owner and advertiser pressure make some stories difficult. Print and broadcast outlets are often undermanned, or not staffed with writers of the necessary competence to handle a given story. Their principal standard must be "newsworthiness"—a standard not necessarily most appropriate to an ombudsman. Nevertheless, I have much more faith in the media as a citizens' protector than does Professor Gellhorn.

Moreover, in my judgment, Gellhorn does not give adequate attention to the necessary dependence of an ombudsman upon the media. If his reports are ignored by the mass circulation broadcast and print media, or given very modest coverage, the ombudsman (who has been conventionally stripped of all powers save persuasion anyway) will be almost totally impotent in representing the public against the forces of the powerful congressional committee-government agency-public relations-trade association-lobbyist-trade press "sub-governments" of my experience—to borrow a concept developed in Douglass Cater's *Power in Washington*.<sup>37</sup> I do not mean to suggest that the ombudsman-media relationship problem has no solutions. It does. But I believe the issue needs more attention than Professor Gellhorn has given it.

But such qualifications on one's general enthusiasm for these books are almost trivial compared with Professor Gellhorn's substantial contribution. He has spent a lifetime caring deeply about good government and suggesting, and effecting, ways to make it better. He has done substantial original research in putting these books together. He has

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<sup>36</sup> 8.

<sup>37</sup> D. CATER, *POWER IN WASHINGTON* (1964).

brought a proposal to America's marketplace of ideas that, I believe, is going to be purchased in some form at some time. In any event, the ombudsman concept will compete actively in that marketplace for many years (and not just because it is one of those words you don't forget once you remember what it means to begin with); for in Walter Gellhorn it has found an advocate whose crisp and often eloquent prose guarantees lasting as well as widespread sympathy.

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