

## *Shield for the Citizen*

QUENTIN L. QUADE  
AND  
THOMAS J. BENNETT

WHEN AGENTS of the U.S. Internal Revenue Service entered his cocktail lounge in August, 1959, Jimmy Mortell could not foresee that it would cost him a thousand dollars and nearly four years of conferences, appeals and litigation to prove himself innocent of cheating on his tax returns. Yet not until May, 1963, did a decision of a U. S. District Court leave him "almost sure" that he would not have to sell his modest business to pay taxes which he had rightly assumed were unjustly assessed against him.

Jimmy Mortell's case is unusual only in detail. In a nation whose central government alone employs two and a half million persons to administer a code of laws covering 8807 pages of print, in 50 titles, it would be miraculous if mistakes did not occur. And in this age of massive government involvement in the affairs of citizens, bureaucratic errors often mean disruption, even disaster, in individual lives.

There are, of course, channels of appeal for the aggrieved citizen—Jimmy Mor-

tell's case, as we shall see, was carried through two of them. But it has been suggested recently, and cases such as the Mortell tax suit serve as evidence, that the traditional routes of protest by citizens against both honest and not-so-honest bureaucratic error were developed in times when the bureaucracy was small and was entrusted with far fewer duties impinging directly upon the citizen. Whether the modern administrative apparatus requires a more efficient remedy, available at less expense to the citizen, is a matter of present concern to the United States Congress, and to the legislature of at least one state.

JIMMY MORTELL is the name used by James Catania, a Milwaukee tavern owner. The name derives from a boyhood talent for comedy: the young Jimmy, while a Milwaukee newspaper delivery boy, would amuse his neighbors with jokes and stories. His clowning produced calls of "Tell us more, Jimmy," and tagged him with the nickname of "Tell More," and finally

"Mortell." The grown-up Mortell's comedy bent was shaped by the development of a resemblance to Jimmy Durante—the big nose, the gravelly voice, and the "preposterous" turn of phrase. When he quit his tannery job in 1949 to open Mortell's Cocktail Lounge, he installed a picture of Durante over the bar, stocked the juke box with Durante records, and combined his bartending chores with impromptu imitations of "The Schnozz."

It was the imitations and the occasional singing-along with the juke box that led Internal Revenue agents, visiting the bar anonymously in 1959, to conclude that Mortell was not only a bartender but an entertainer. He therefore, they ruled, ought to have been paying a 20 per cent cabaret tax. IRS billed Mortell for \$2,596.72—\$1,860.52 in taxes for 1957-1959, \$465.17 penalties for failing to file the proper returns, and \$271.03 interest.

Unable to pay, Mortell requested a conference in the Milwaukee branch office of the IRS. The local agents were adamant in their position, but agreed to defer collection while Mortell engaged a lawyer and began the long appeals process.

The first step, taken March, 1960, after the local office formally had notified Mortell of his liability, was the requesting of a ruling from Washington on the applicability of the tax statute to cases like that of Mortell. Not surprisingly, the ruling, received in July, 1960, upheld the local office's interpretation of the law. Mortell received, on August 23, 1960, a "thirty-day letter" ordering him to pay within a month, or to file an official appeal with the next level of the administrative structure, the Appellate Division, also located in Milwaukee.

On September 10, 1960, a conference was held in the offices of the Appellate Division, at which Mortell's lawyer presented a formal protest. In February,

1961, the protest was rejected, thus exhausting the administrative procedures open to Mortell.

Still unable to pay the total amount, Mortell nonetheless was required to make token payment, and then to request a refund (which the Internal Revenue Service could formally deny), in order to establish the existence of a justiciable case before a federal court, the next available channel of redress. On April 28 Mortell paid, under protest, \$454.11, and three days later applied for the refund. It took three months for the IRS to disallow his claim.

On October 31, 1961, Mortell filed suit in the United States District Court in Milwaukee, and also began filing quarterly tax returns which computed, according to a formula developed by the IRS Field Office, that part of Mortell's time which could be classified as professional entertainment. Mortell was required to institute a bookkeeping system which would permit him to pay taxes upon his tavern's income between nine p.m. and closing time on Tuesdays, Wednesdays, and Saturdays, the period during which the IRS estimated that bar patrons were most likely to have been entertained by the unscheduled Durante imitations.

Nineteen months after filing suit, Mortell's case reached the top of the court's calendar and came to trial. After hearing evidence and argument, the jury required forty minutes to decide unanimously that Mortell was not liable for the taxes assessed for 1957-1959, and therefore, by implication, not subject for taxes during the years the case dragged on—taxes, which together with penalties and interest, would have exceeded \$6,000.

Mortell's lawyer now says that it seems unlikely, though it is a possibility, that the IRS will appeal the case to the United States Court of Appeals. Jimmy Mortell

has thus received the justice which he always felt was available in this nation of, in his words, "government from the people, of the people, and with the people." He has not yet been refunded his \$454—the wheels of the bureaucracy grind slowly. And he will never recover the \$1,000 he expended in lawyer's fees, nor receive recompense for the time and anxiety which his long bout with officialdom has cost him. He might have sued for compensation, but his lawyer has advised him that the additional expense is not warranted by the chances of success.

The Mortell case, and there are many like it, naturally suggests the question, ought there be a quicker, more efficient way for the citizen to get his rights? Ought there be a method of obtaining his rights at less expense? Is there a governmental institution available to help the citizen get his rights?

IT IS IMPORTANT to recognize at the outset that the existence of administrative error and even of a certain amount of administrative corruption cannot sensibly be erected into an attack upon the existence of the bureaucracy. Government is necessary, and in a democracy it is the one social agency formally charged with the discovery and implementation of that elusive quantity, the "general welfare." This concern with the general welfare has been interpreted in the modern state as a call for heavy involvement in social activities ranging from basic regulation of the economy to the education of children and the providing of social security.

It is possible to contend that government has become "too big"—only an examination of the functions of the several government departments and agencies can establish that. But whether "too big" or only "big enough," few would disagree that the organization of modern society

requires a government more extensive than that required by the America of 1900, or that governmental activities, for better or for worse, are likely to increase in size and complexity decade by decade.

The natural corollary of the growth of state functions is the modern administrative apparatus, which has the overall task of carrying out the broad dictates of the responsible political officials. The growth of bureaucracy is fundamentally necessary as a device for confronting genuine problems. Parkinson's Law to the contrary notwithstanding, the great preponderance of bureaucratic development has not been self-justifying and self-initiating.

But if bureaucracy as a general phenomenon is recognized as natural and necessary, the fact remains that the great administrative systems of our day present real problems. As the systems have grown larger, they have also been withdrawn from the public, and have become significantly depersonalized. The very ease with which we speak abstractly of "the bureaucracy" seems to testify to this. And, most important, the enhancing of administrative power and influence over day-to-day existence has significantly increased the possibility of administrative injustice.

The problem, then, becomes one of increasing the effectiveness of those devices which we use to keep the bureaucracy responsible—to prevent its acting in response to its own motivations rather than in obedience to the orders of the elected legislature. The problem also becomes one of finding such devices as will be consistent with the total fabric of American government. One cannot simply establish new offices with important political responsibilities without being confident that the new agencies will mesh with Congress, with the executive establishment and with the nation-state relationship. Such confidence ideally is reached in two steps: by

observing the operation of an office already well established in a governmental system similar to our own; and then by estimating its adaptability to the United States.

Some American political scientists and legislators, faced with the inescapable fact of bureaucratic growth, have recently turned their attention to an institution that originated in Sweden more than a century and a half ago. The *Ombudsman*, or Parliamentary Commissioner for Civil Liberties, established also in Norway, Denmark, Finland and New Zealand, already has generated sufficient American enthusiasm to motivate the introduction of bills both in Congress and in the state legislature of Connecticut. There is good reason to suppose, given the initial reaction to the proposal, that an *Ombudsman* for the United States may be a significant political issue.

What would an American *Ombudsman* accomplish? How would the office work? What are the foreseeable difficulties which need to be evaluated before going ahead with the idea? Before answering these questions, a review of the present American and foreign answers to the problem of big bureaucracy is in order.

American government could not have existed as long as it has without developing some mechanisms for controlling the bureaucrats—indeed responsibility has always been, since the days of Jefferson, the quality of American government which pleases us most. We have not always received top grades in governmental efficiency, but since the Constitutional Convention of 1787, Americans have felt that they are in little danger of being tyrannized by their own government. In order to establish that the *Ombudsman* would be something more than a frosting on the already huge governmental cake, it will have to be shown that the traditional agencies for the maintenance of bureaucratic re-

sponsibility are not adequate to deal with the increased dimensions of the problem.

AMERICAN ANSWERS to the problem of administrative irresponsibility may be classified as Congressional, Judicial, or private.

*Congressional.* The Congressman traditionally has been the first court of appeal for the disgruntled constituent. Dissatisfaction with a Veterans' Administration pension ruling, with a crop allotment or with Aunt Jenny's social security check often produces an irate letter to Congressman or Senator. In 1940, Representative Luther Patrick remarked that: "A Congressman has become an expanded messenger boy, an employment agency, get-ter-out of the Navy, Army, Marines, ward heeler, wound healer, trouble shooter, law explainer, bill finder, issue translator, resolution interpreter, controversy oil pourer, glad hand extender, business promoter, convention goer, civic ills skirmisher, veterans' affairs adjuster, exserviceman's champion, watchdog of the underdog. . . " and so on and on and on.

Constituent service is a burden on the time of Congressmen, who, faced with thousands of bills per session, have more than a full-time job just being legislators. But constituent service is a two-way street, and if it is often the most effective check the citizen has upon the bureaucracy, it is also one of the most effective contacts that the Congressman has with the voters. Any new proposals for the handling of citizen complaints against the bureaucracy would have to accomplish its objective without intruding between the Congressman and his voters.

Faced with a year-by-year increase in its primary job of making national policy, Congress has already begun the process of relieving itself of the retail business of making decisions in individual cases of

maladministration. The Legislative Reorganization Act of 1946 forbade the introduction of several classes of private bills, which until then had consumed thousands of man and committee hours. Some of these activities formerly handled by Congress itself were delegated to administrative organizations: for example, the correction of military records was assigned to boards within the Defense Department, and veterans' pension claims actions were allocated to the Veterans' Administration. By other Congressional acts the Bureau of the Budget has been assigned extensive pre-audit duties, the Civil Service Commission was granted quasi-judicial powers over civil servants, and presidential commissions have been permitted to undertake the overall criticism of administrative organization.

Although these reforms have helped, they have not solved the problem of the Congressman's twenty-five hour day. Estimates by Congressmen of the percentage of their time and their staffs' time spent in constituent service still hover around fifty per cent, a burden imposed upon legislators by no other modern democracy.

In addition, the handing over of Congressional responsibility for the policing of administrative agencies to the agencies themselves has an obvious disadvantage. In a system which requires each branch of government to check and balance each of the others, Congress requires tools of its own if it is to be the overseer of administration. An effective beginning was made with the passage of the General Accounting Act of 1921, aimed at lightening the load of the basic Congressional units while retaining independent legislative oversight of the administrative arm of government. The act assigned the primary job of budget drafting to the Bureau of the Budget, but at the same time the General Accounting Office was created as an agency

of Congress and charged, among other duties, with the postauditing of nearly all Federal Government expenditures.

The GAO was a valuable beginning, but of course it does only part of the job of overseeing the multiple activities of big government. It uncovers, and prevents, financial mismanagement, misuse of appropriated funds, and even individual misconduct in the use of Federal monies. But it does not attempt to supervise government operations that do not involve the spending of money, nor does it act as an investigator of private claims of maladministration.

Congress also oversees the activities of the administrative branch of government through its standing committees and the sometimes spectacular special investigating committees. But once again, these are not primarily mechanisms for the receiving of the complaints of the man on the other end of government: the governed. Congress thus is deprived of an important source of information about the bureaucracy, and the citizen is less able to utilize his most personal voice in government, the Congress.

*Judicial.* The federal courts are the most decisive checking mechanism available to the average citizen who feels that he has been injured by his government. Government agencies themselves may be sued in the Court of Claims, and individual officers of government may be sued in the regular court system.

The process of litigation, however, has some serious disadvantages for the injured citizen. For one thing, court calendars are crowded. In the Mortell case, there was a nineteen month lapse between the filing of the suit and the beginning of the trial. In the 86 District Courts the average time between the filing of a complaint and the beginning of trial was, in

1959, just under twelve months, and in some busy jurisdictions, for instance in New York City, the elapsed time averaged between two and four years.

Furthermore, not every citizen is able to risk the expense of an extended court case, and only a very small number of cases are able to attract the support of private litigation-supporting organizations such as the American Civil Liberties Union or the National Association for the Advancement of Colored People. It is true that every citizen has the right to take his case to court, and that the courts have been watchful guardians of the rights of Americans, but too often the time and expense of adjudication compel prospective plaintiffs, faced with a full-time, government-paid battery of lawyers, to accept injustice.

If these criticisms of the courts are subject to quarrel, there is another criticism that is fundamental to the problem. The courts of necessity concern themselves with outright violations of law. In the modern state, however, it is possible for citizens to suffer at the hands of government without being able to point to the infraction of any statute, or even being able to invoke the authority of equity. Congress has found it necessary to delegate increasingly extensive discretionary powers to administrative agencies. While it would be difficult to suggest the withdrawal of such discretionary power, given the highly technical nature of many government activities—for instance the setting of rates for inter-state carriers—still it is quite proper for Congress, in insuring the rights of citizens, to check upon complaints of individuals that the discretion is being abused.

It should be pointed out further, in the evaluation of the federal courts as watchdogs of the bureaucracy, that the United States, noted since the days of de Toque-

ville as a nation of legalists, has lagged far behind most other democracies in the establishment of administrative tribunals. As will be described below, the typical European pattern has seen the establishment, as a corollary of administrative agencies, of tribunals devoted to hearing appeals from agency actions. In our country the pattern has been to permit independent agencies, which as their name implies are largely free of both executive and legislative control, to exercise adjudicative authority. We have established a minimum of special courts, such as the Court of Customs and Patent Appeals and the Tax Court. These latter are subject to the same limitations already ascribed to the regular court system.

*Private.* Our government has been rightly described as one characterized by multiple access points; that is, a government in which the citizen may attempt to influence policy at several points. The result has been the proliferation of interest groups that “lobby” continuously at every level of government. Many of these groups serve as fulcrums with which the individual citizen may move the vast bulk of government. A veteran, for example, who can interest the American Legion in his quarrel with the Veterans’ Administration, can certainly speak with a louder voice, at less cost to himself, than the hardy soul who undertakes the job alone.

The most important of the private organizations which go to bat for the aggrieved citizen is the mass communications industry, especially the newspapers. A cleverly written human interest story or an incisive exposé can produce redress of grievances in most dramatic fashion. Private bills in Congress that set aside the rules of the Immigration and Naturalization Service, or the re-opening of the cases of wrongly convicted prison-

ers have provided sensational examples of the "Fourth Branch of Government" at work.

Without belittling the work of the private organizations, it should be pointed out that their work, too, leaves the essential problem unsolved. First of all, their coverage is spotty. Not every citizen has access to an interest group which will fight his case. The individuals who have the poorest means for utilizing the existent grievance channels are often the ones least equipped to organize themselves into an effective interest group—one thinks of migrant workers. And interest groups often, because of financial limitations, are concerned with the case which will establish the precedent, the rule of law, rather than with the protection of the rights of each citizen. Newspapers, again for financial reasons, often concern themselves only with cases which have reader appeal. Many citizen grievances make dull reading, and the newspaper which makes citizen-service its guiding principle may find itself losing readers to the newspaper which orients itself to reader-appeal.

A second criticism of the private organizations is that they often are less interested in justice than in their members' interpretations of justice. The Congressman under pressure to exert his influence on behalf of a dissatisfied interest group may feel that the employees of the group serve as helpful additions to his own overworked staff, providing information, technical services, even funds. But he is also faced with the worrisome fact that the interest group does not owe its first loyalty to the Congressman himself, nor to the general welfare. To equip each Congressman with a staff adequate to fulfill the function now served by interest groups would necessitate a monstrous expenditure, but some Congressmen are beginning to feel that a single staff agency, administratively simi-

lar to the legislative reference section of the Library of Congress, would be a significant improvement.

In summary, it seems evident that while the traditional American techniques for the protection of citizens from abuses of administrative power were satisfactory before the twentieth century growth of the administrative state, there is today considerable room for improvement. Some children grow up feeling that the policeman is their natural enemy. Sensible parents, who are fortunate enough to live in a well-ordered community, teach their children that the policeman is their friend and protector. It should be so with the whole structure of government. It can only be so if we continually oversee the bureaucracy so that not only in its grand policies, but in each individual case, it is oriented to citizen service.

THE PHENOMENON of the burgeoning bureaucracy is not peculiar to the United States, but approaches universality in modern democracies. Accordingly, it will be worthwhile to examine briefly the methods of administrative control employed by some other democracies.

*Britain:* The fundamental avenue of control in Great Britain is the tradition of ministerial responsibility, which holds the relevant Government Minister immediately accountable before Parliament for the acts of civil servants operating within his Department. The tendency in this relationship is for Ministers to be acutely concerned with the acts of the administrative officials, because these actions, if they are abusive of civil rights or amenities, will have unhappy political repercussions for the Government and party responsible.

But in addition to this primary condition, the British have two other general techniques for maintaining the responsibil-

ity of bureaucratic action. In some areas of actual dispute, the offended party can appeal administrative decisions to the regular courts. This is the case when questions of legality are raised. But of more constant utility is the system of administrative tribunals. These tribunals are organized within each administrative department, their chairmen are selected by the Lord Chancellor, and the other members of the tribunals are selected by a Council appointed by the Lord Chancellor. The tribunals are to guarantee that the methods by which decisions are made within administrative departments are not arbitrary and lacking in circumspection. Particularly, they are to provide opportunity for interested parties to challenge the bases of administrative methods. Overseeing the actions of the tribunals is the Council on Tribunals, established in 1958. The Council is charged with the protection of civil rights as they are influenced by the decisions of administrative tribunals.

Hinged around the system of ministerial responsibility, the British techniques for insuring public control over the administrative apparatus seem to operate quite effectively. The British practice, however, has little apparent applicability to the United States where presidential lines of authority over and responsibility for the civil service tend to be blurred and incomplete. Far more important is the fact that the British executive establishment itself is continuously dependent upon the legislature for its existence, and is therefore, from Prime Minister to clerk, under the eyes of its master. The American Chief Executive acknowledges no legislative mastery, and would indeed be inclined to resist direct Congressional encroachments upon its independence.

*France:* In France there are two distinct court systems. The first, the so-called regular law courts, are devoted to ordinary civil and criminal cases. This corresponds

to one aspect of the British-American judicial tradition. But in the French tradition, the common-law courts have no jurisdiction over actions by the executive element of government including the administrative system. To overcome this deficiency, the French, beginning shortly after the Revolution of 1789, created a separate, integral system of administrative courts, capped by the *Conseil d'Etat*, to adjudicate all cases involving conflicts between different public authorities, or between public authorities and citizens. The French *Conseil d'Etat*, with its subordinate courts organized regionally throughout the country, has done a generally excellent job of protecting and preserving the rights of the individual citizen in his relation to the bureaucratic structure. But it is even more foreign to American tradition than is the British practice and even less likely to have utility for this country. The classical American notion of the equality of all men—including officials—before the law is so deeply entrenched that any attempt to alter it by establishing a separate court system devoted to administrative law would undoubtedly be futile.

*The Ombudsman:* If the British and French approaches to the problems of big bureaucracy are of limited relevance in the American context, the Scandinavian *Ombudsman*—Parliamentary Commissioner for Civil Liberties—would admirably fit into our system. The Swedish originators of the office have not institutionalized the system of ministerial responsibility to Parliament. The heads of administrative agencies, rather than being members of Parliament, are, as in the United States, only indirectly dependent upon the legislature. And the notion of a separate body of administrative law has had no more success in Scandinavia than in the United States.



The experience of no other country is directly translatable into American terms but, as was mentioned above, it is helpful to observe an institution with a long and successful history. Evaluation of the *Ombudsman* institution then becomes the relatively simple job of identifying the difference between the two systems and estimating the changes caused by, and necessary in, the American milieu.

In each of the five nations having an *Ombudsman*, he is appointed by the national legislature, his term of office being the same as the life span of the legislature itself. In Sweden, for example, the *Ombudsman* holds office for four years. In each of the five *Ombudsman* countries, however, he is not only eligible for re-appointment, but the strong presumption is that, given good behavior, his re-appointment will be nearly automatic.

Although the job of an American *Ombudsman* would be the overseeing of the bureaucracy, in both Sweden and Finland the courts, too, are subject to his scrutiny. Denmark and New Zealand forbid their *Ombudsman* to meddle in court affairs, and given the American tradition of judicial independence this no doubt would be the U.S. pattern.

None of the present *Ombudsman* countries are federal structures, as is the United States. The Swedish central government with its local subdivisions exercises, for example, the whole governmental power. This obviously varies from the U.S. division of powers between national and state governments.

Jurisdiction over the armed forces may be included in the *Ombudsman's* authority—the Danish *Ombudsman* exercises such jurisdiction. Since 1915, Sweden has had a second *Ombudsman*, who devotes himself exclusively to cases arising from the armed forces.

Typically, the *Ombudsman* receives his

information from two sources. Most important is the citizen complaint: an informal letter (in some countries accompanied by the equivalent of a two or three dollar fee, to eliminate the first level of cranks) setting out the basic facts of the complaint. The *Ombudsman* has complete discretion at this point to disregard a complaint as inconsequential or foolish. Such discretion is necessary since the office is, at least in its early days, an attraction for chronic complainers. Professor Stephan Hurwitz, the first Danish *Ombudsman*, reports that roughly 50 per cent of the complaints he receives are dismissed at first reading. Refusal by the *Ombudsman* to consider a case does not, of course, affect the right of the citizen to pursue other channels of complaint.

The second information source of the *Ombudsman* stems from his power to undertake inspection visits of the various administrative units, during which visits he can examine random cases of administrative action. Visits are usually announced twenty-four hours in advance, thus making them essentially surprise inspections.

The enforcement powers of the *Ombudsman* are of three kinds: publicity, prosecution, and recommendation to the legislature. He is in no sense a "superbureaucrat," able to force his views upon every administrative agency. The institution of a power so vast would change the whole character of government in any nation, providing a locus for abuses far more serious than those which the office is designed to cure.

Publicity has been the most effective tool in the *Ombudsman's* array. The Danish *Ombudsman* reports that his authority to make his recommendation public has almost always produced agreement on the part of erring administrators. In fact, during the first five years in office, 1954-1958, Professor Hurwitz had no occasion to re-

sort to a recommendation of prosecution.

The *Ombudsman* in Sweden and in Finland is himself granted, nonetheless, the power to initiate prosecutions in the regular court system if he is met with bureaucratic unwillingness to consider favorably his recommendations. The Danish *Ombudsman* may, if he chooses, recommend prosecution to the administrative authorities.

Both the right to shine the light of publicity on administrative activities and the ability to initiate prosecution are aimed at the righting of immediate wrongs. The *Ombudsman* has, however, another weapon, potentially of at least equal value in the protection of civil liberties. He is, in each of the countries cited, charged with reporting regularly to the legislature on the activities of his office. He may include in that report recommendations for amendments to existing legislation, or for new legislation designed to eliminate violations of citizens' rights.

AN AMERICAN OMBUDSMAN? Obviously Sweden, Finland, and Denmark are far smaller than the United States, and while their political systems, particularly in the case of Sweden, bear some similarity to our own, the differences are also great. It is necessary, therefore, to shift the discussion explicitly to America and to evaluate the appropriateness of the *Ombudsman* to this country.

First, as to size, it seems reasonable to suppose that the *Ombudsman's* staff, to be effective in a country of 180 million, would need to be considerably larger than the staffs which serve the Scandinavian countries. It might be argued that the creation of a new bureaucracy is a poor solution to the problems of an already vast government. But the experience of each of these countries would seem to indicate that even a tenfold increase in personnel would

still result in a very small staff. The Danish *Ombudsman*, for example, employs eight, including clerks. To place the problem in perspective, it should be noted that our General Accounting Office employs some 6,500 persons. An American *Ombudsman* would be based in Washington, and would probably have regional subdivisions under him, perhaps co-extensive with the eleven civil service regions. Nonetheless, it is inconceivable, if the experience of the other nations can be taken as a guide, that the total staff of an American *Ombudsman* would exceed two hundred.

As to the jurisdictional limits of the proposed American *Ombudsman*, it has already been noted that the federal structure of American government automatically precludes an officer of the national government becoming an integral part of the state-local governmental structures. The *Ombudsman* would concern himself with the works of the national bureaucracy exclusively. There is no reason, of course, why state governments might not themselves experiment with the office, and the pioneering investigations by the Connecticut legislature may well point the way for the national government.

A further jurisdictional limitation upon the proposed U.S. *Ombudsman* would, as previously noted, result from our tradition of judicial independence. A Congressional appointee's meddling with judicial affairs is, in terms of legality, no more improper than is Congressional overseeing of the executive establishment. But it would be repugnant to the spirit of the American system, because of the comparative freedom of the judiciary from the kinds of abuses of which the administration often stands accused.

The powers that have been granted to the European *Ombudsman* would encounter two legal objections which, like the jurisdictional restrictions, spring from our Con-

stitutional division of powers. Quite necessary for the efficient operation of an *Ombudsman*, first of all, is the ability to require the opening of all pertinent administrative records. In a system in which the executive—as chief of the administrative structure—is equal to and independent of the legislature, might not the executive simply refuse to grant the *Ombudsman* access to its files?

In considering the objection, it must be borne in mind that our government is not only a *legal*, but a *political* structure. While the executive might legally refuse access to files (executive and Congressional interpretations of this aspect of separation of powers have varied, both historically and recently), it would be politically near impossible. Given the concerns of the *Ombudsman*, the argument of national security would rarely be pertinent, and refusal for any other reason would appear to place the executive in the position of shielding administrative error or corruption. The importance of public opinion is at least as great in America as in the other democracies, and the *Ombudsman's* ability to focus light upon a particular bureau would be, as in Scandinavia, his best weapon.

The second question involves the power of the *Ombudsman* to initiate prosecutions in cases where voluntary acquiescence by administrators is not forthcoming. The Justice Department is the prosecuting agency of American government, and the Constitution arms Congress with no such power. The Constitutional difficulties raised by a suit brought by the agent of one independent branch against the agent of another independent branch are beyond the scope of this paper, but it ought to be noted that the Danish *Ombudsman* has proclaimed himself to be adequately equipped even without the power of prosecution. In Denmark the *Ombudsman* is

entitled to recommend prosecution to the appropriate administrative agency. The bill introduced by Rep. Henry Reuss of Wisconsin, proposing an American *Ombudsman*, would grant him no independent power of prosecution.

Two other important criticisms might be raised concerning the proposed *Ombudsman*. First, might not the *Ombudsman*, serving at the pleasure of Congress, become a “political football”? Might not an *Ombudsman* appointed by a Democratic Congress, for example, go “headhunting” in a Republican-controlled administration? The seeking out of scandal solely for partisan purposes would be abhorrent to the idea of the office, and would quickly end its utility and probably its existence. Or, might not the *Ombudsman* get too close to maladministration at a high level and be “called off” or even dismissed by his Congressional principals?

This danger is nullified by two factors. First, the *Ombudsman* could be to some extent both limited and protected legally: in Scandinavia, for example, the legislative act creating the office forbids the legislature to interfere in any specific case. He also has the power to appoint and to dismiss his own staff.

Once again, however, the primary safeguard would be political, not legal. The man chosen to be the *Ombudsman* ideally would be a figure of unimpeachable public reputation. The parallel in American history is the case of George Washington who, before the infant republic had a reputation of any sort, lent his own prestige to the government. One has no difficulty thinking of half a dozen Americans who, while not Washingtons, enjoy unassailable national reputations for integrity.

The final potential criticism of the *Ombudsman* concerns the already mentioned problem of the Congressman-constituent relationship. While admittedly a burden

for the busy Congressman, the ability to act as errand boy for constituents has traditionally been a source of political strength for him, and a way of maintaining contact with the needs of the people he serves.

There is no reason to suppose that the *Ombudsman* would impair that relationship. The existence of the office of the *Ombudsman* would in no way limit the ability of the Congressman to concern himself personally with those cases which strike him as important, and within his sphere of competence. Indeed, the Congressman would be able to serve his constituents better, if he could guarantee each of them that his case would receive a complete, impartial investigation by an agency of the Congress itself. The Reuss bill, in fact, takes cognizance of the importance of the Congressman-citizen relationship by requiring that complaints to the *Ombudsman* be channelled through the Congressman.

THE UNITED STATES, in common with all modern democracies, has, and probably cannot escape, a huge, complex bureaucracy. The bureaucracy does jobs which we

have assigned it through our democratic legislative processes. But because of its size, and the complexity of its tasks, it is inevitable that errors will occur, and given the number and importance of bureaucratic impacts upon the lives of individual citizens, such errors can work hardships sometimes approaching the level of tragedy.

The United States has always had avenues through which the citizen can seek redress of grievance against bureaucratic error or fault, but a review of the traditional appeal agencies indicates that today they are often slow and costly. New experiments are called for, and we are fortunate when we are able to use the experience of other democracies to lessen the uncertainties of such experiments.

It cost Jimmy Mortell a thousand dollars and four years of appeals to show that a bureaucratic error had occurred. Any one of us might be placed in a similar position. We need to act to protect ourselves. Congress should consider carefully the proposal before it for the establishment of a Congressional Commissioner for Civil Liberties—an American *Ombudsman*.