Stranger in a Strange World

The Ombudsman in the Federal Government

By Howard Gadlin and Samantha Levine

While preparing this article, the senior author received a phone call from a lawyer in the federal Department of Health and Human Services' (HHS) Office of General Counsel. The attorney was charged with defending the agency in an Equal Employment Opportunity (EEO) suit and, as part of discovery, was asked by the plaintiff's counsel for documentation of all complaints about the manager at the center of the case. The HHS attorney contacted the senior author because it was revealed that an agency employee had come to the author's office, the National Institutes of Health (NIH) Office of the Ombudsman, for help in addressing some issues with this manager. The lawyer wanted access to records about these meetings. The author explained, however, that people approach his office as an alternative to filing a complaint or a grievance, often with the hope of resolving a conflict. Not only are such inquiries not complaints, the author said, but they are confidential under the parameters of ombudsman practice. The lawyer countered that the concept of a complaint was construed more broadly in the EEO framework, and that he still wanted information on the ombudsman office's interactions involving this manager. The discussion continued for some time. Ultimately, the attorney was persuaded to back off and the confidentiality of the individual who visited the ombudsman office was upheld.

Such an episode illustrates one of the many challenges of functioning as an ombudsman in the federal government. (We use the term "ombudsman" in deference to its near universal usage everywhere in the world except the United States. Most practitioners believe that the original Swedish term is not gender-biased.) The attorney's assumption of the indivisibility of complaints and inquiries (which the authors believe is wrong, given other federal laws and policies) is among the misinformation that confronts every ombudsman program in the federal government. Furthermore, the combination of ambiguous and contradictory laws, and people who are ill-informed about the ombudsman function, create daily challenges for those who do this work. A brief review of the history of ombudsmen in the federal government reveals that such difficulties have long affected these programs, as have concerns over disparities in the interpretation and treatment of federal ombudsmen offices. But as more ombudsmen programs are created in the extraordinarily diverse agencies of the federal government, it has become increasingly critical that practitioners and policymakers find a common language and pursue shared goals to ensure that ombudsmen thrive and contribute to the healthy operation of the federal government.

The Early Days

The idea of creating ombudsmen offices in federal agencies first gained attention during the Civil Rights era with its emphasis on fostering justice and equality. In 1967, the American Assembly, a non-partisan public affairs forum, recommended that federal government entities create ombudsman functions to help equalize access to redress for citizens with grievances (David Anderson and Diane Stockton, "Federal Ombudsmen: An Underused Resource," *Administrative Law Journal*, 1991). The Administrative Conference of the United States (ACUS), which was created in 1968 to explore how to improve the functioning of the government, was another early champion of the ombudsman role and of alternative dispute resolution (William Funk, *http://www.abanet.org/adminlaw/news/vol21no2/acus_rip.html*). In 1969, the American Bar Association (ABA) House of Delegates passed a resolution urging the creation of ombudsman functions at all levels of the U.S. government (Anderson and Stockton, 1991). Also during this period, several U.S. political scientists and public administration experts became increasingly intrigued by the work of successful ombudsmen offices in Europe, where the model originated. These influential thinkers studied these systems and shared their findings in several books.

Yet, there was firm resistance in the United States to these recommendations. Legislative efforts in Congress to establish ombudsmen offices in some executive agencies received attention during the 1960s and 1970s, but ultimately were unsuccessful. The concerns of opponents included the fear that such offices would add cumbersome layers of federal bureaucracy, impose on the turf of elected officials responsible for serving the public, and cost too

much to operate (Anderson and Stockton, 1991). Still, a handful of federal ombudsmen offices were set up as temporary experiments or with the idea of institutionalizing the function within agencies; some lasted a year or two, others were able to take firmer root.

The first federal ombudsman office, the Ombudsman for Business, was created in the Department of Commerce in 1971 and a few additional positions were established in the executive branch over the following 20 years. Many of these were external ombudsmen, who addressed concerns and complaints from outside the agency (i.e. the public and/or regulated communities). Some agencies began installing internal, or workplace, ombudsmen to handle disputes between, and grievances from, employees. In 1977, the Smithsonian Institution established one of the first federal workplace ombudsmen programs (Leah D. Meltzer, "The Federal Workplace Ombuds," *Ohio State Journal on Dispute Resolution*, 1998). These offices were designed, in part, to provide an alternative to formal administrative or litigation processes that were considered by many to be "adversarial, inefficient, time consuming, and costly" (Government Accountability Office, "The Role of Ombudsmen in Dispute Resolution," 2001). By 1990, there were external ombudsmen in at least a half-dozen agencies, such as the Internal Revenue Service (IRS), the Food and Drug Administration (FDA), and the Environmental Protection Agency (EPA). These offices were created either by agency orders, which offered less protection from the changing whims of political appointees, or by statute, which provided some defense against "changing priorities within the agency" (Administrative Conference of the United States, prepared by David R. Anderson and Larry B. Hill, "The Ombudsman: A Primer for Federal Agencies," U.S. Government Printing Office, 1991).

In the 1990s, a significant push came for the development of alternative dispute resolution (ADR) programs in many federal agencies. A major reason for the development was the deepening concern over the skyrocketing costs and amounts of time associated with overwhelming levels of federal litigation. The resulting conversations and policy debates focused on the promise of ADR, which advocates argued would save the government time and money as well as improve its ability to serve the public and its own employees. Congress subsequently passed three significant laws – the Administrative Dispute Resolution Acts of 1990 and 1996, and the Alternative Dispute Resolution Act of 1998 – that required every agency to adopt a policy encouraging use of ADR in a broad range of decision making (Interagency Alternative Dispute Resolution Working Group, "Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government," 2007).

As alternative dispute resolution programs proliferated throughout the federal government, federal agencies continued to "experiment" with the ombudsman concept (Meltzer, 1998). In 1990, amid a push at the highest level of the U.S. government to explore ways to improve the performance and function of the federal system, ACUS recommended that all government agencies that interact frequently with the public consider establishing an ombudsman service to handle grievances from citizens (Anderson and Hill, 1991). The same year, Anderson and Stockton's report on federal ombudsmen offices concluded that:

> The experiences of several federal agencies show that an effective ombudsman can materially improve citizen satisfaction with the workings of the government, and, in the process, increase the disposition toward voluntary compliance and cooperation with the government, reduce the occasions for litigation, and provide agency decision makers with the information needed to identify and treat problem areas.

Even in the context of widespread advocacy for alternative dispute resolution, however, the ombudsman concept was somewhat marginalized. In the same year as the ACUS report urged adoption of the ombudsman concept, the Administrative Dispute Resolution Act (ADRA) promoted the use of ADR processes and provided partial confidentiality protection. But the ombudsman role was never mentioned in the Act. Instead, the great majority of dispute resolution programs, especially those directed toward handling workplace disputes, were created around the process of mediation. Not until the Act was amended in 1996 was "use of ombuds" listed as one of the "alternative means of dispute resolution" and, to this day, the language in ADRA is tailored to the essential features of mediation-based programs. As a result, it is not always clear whether the activities of ombudsmen offices are covered by ADRA, a situation that contributes to some of the confusion that exists around the ombudsman concept.

Nonetheless, a byproduct of this unprecedented emphasis on ADR was, in addition to an explosion of mediation programs, the creation of new ombudsmen offices, both internal and external, in the executive branch. By 1996, the Coalition of Federal Ombudsmen (CFO) was born with an inaugural roster of 11 members (Coalition of Federal Ombudsmen, "Historical Perspective," *http://federalombuds.ed.gov/history.html*). Although there is no full census of current ombudsmen programs in the federal government, there are known ombudsmen officers of various types in about 40 federal agencies.

There are two major types of ombudsmen programs in the federal government: (1) the classical public-sector ombudsman, ideally established by a legislature to address citizen complaints of maladministration, and (2) the organizational or workplace ombudsman who addresses conflicts and disputes among agency employees and managers. There are also a smaller number of "advocacy" ombudsmen offices that act as impartial investigators of complaints but also advocate on behalf of those who are served by or interact with a federal program or agency (e.g. U.S. taxpayers with grievances against the IRS). All ombudsmen handle individual complaints and are also expected to explore those complaints as a means to identify and understand systemic problems in the administration and functioning of an agency.

Yet, federal ombudsmen programs are as variable as the agencies in which they serve. A 2003 survey of independent advocacy agencies in the federal government identified two advocate ombudsmen and 15 classical ombudsmen in the federal government. The size of the offices and the caseload levels were greatly disparate. A program like that of the IRS Taxpayer Advocate (begun in 1979) had a staff of more than 2,300 employees in fiscal year 2002 and handled approximately a quarter of a million cases. Then there is the Federal Aviation Administration's Aviation Noise Ombudsman (established in 1997), which is a collateral duty (part-time) position within the FAA and received 98 inquiries from the general public in 1998.

Among the larger external programs are those within the Department of Education (Student Loan Ombudsman), EPA (Hazardous Waste Ombudsman and Asbestos and Small Business Ombudsman), the Federal Deposit Insurance Corporation, and the FDA. A new addition to the list is the Department of Homeland Security (DHS) Office of the Citizenship and Immigration Services Ombudsman.

More than 20 federal agencies are served by internal ombudsmen who handle workplace conflict, discrimination complaints, and myriad other issues. Internal ombudsmen offices exist within agencies such as the U.S. Capitol Police, the Department of Housing and Urban Development, and the International Broadcasting Bureau. Some agencies, like the EPA and DHS, have both internal and external ombudsmen to serve multiple constituencies. One of the larger internal ombudsmen programs is housed within the NIH, an organization of 20,000 employees. The NIH Office of the Ombudsman, of which the senior author is the director, has six full-time ombudsmen and handles more than 700 cases a year, many of them involving complex scientific matters and conflict among scientists. By comparison, the EPA Region 10 (Pacific Northwest) organizational ombudsman is a solo practitioner who serves 1,100 employees and handled 117 cases in 2007.

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The Challenges of Being an Ombudsman in the Federal Government

Adapting ombudsmen programs to the diverse cultures and organizational missions of different federal agencies has resulted in tremendous inconsistency in how agencies define and structure the role of the ombudsman, how ombudsmen officers interpret their role, and how the ombudsmen function is viewed and treated by agency leadership. Some see this variability as testimony to the wide appeal of the ombudsman concept because it shows the creativity of those who are trying to adapt the role to suit different organizational purposes. For example, one topic of debate is whether ombudsmen should mediate disputes. Many officers believe ombudsmen should only review alternatives, not actively mediate, with individuals who seek out their assistance. Others, perhaps a minority, offer mediation as one of several modes of intervention. Still, some argue that this divergence suggests the dilution of the ombudsman concept.

It doesn't help matters that the ombudsman community itself is somewhat internally divided. Several years ago, when the ABA was formulating its "Standards for the Establishment and Operations of Ombuds Offices," the ombudsmen associations participating in the effort were unable to reach agreement on its critical components. For instance, there were differences regarding the standards by which concepts such as "neutrality," "impartiality" and "confidentiality" would be implemented. One organization ultimately withdrew from the process and refused to endorse the standards, citing concerns that the definition of ombudsman deviated too broadly from the interpretation of an ombudsman as an official who investigates complaints. This is among the most abiding, and sometimes bitter, differences that exist within the ombudsmen community. For classical ombudsmen, investigation is their most important, and indeed their defining, function. But for organizational ombudsmen, formal investigation is subordinate to more informal and neutral means of addressing complaints and conflicts.

There are also important differences in how ombudsmen are established and the protections they are afforded. These differences have a major impact on the scope and authority of ombudsmen offices. Classical ombudsmen are often established by the legislature, have their terms of reference defined by statute, and report outside of their agency. However, in some instances, classical-type ombudsmen are established by administrative decree and report within their agency. In such cases, there is a concern that these ombudsmen might not enjoy full independence from political or other leaders. Organizational ombudsmen are typically established by upper management, in some cases with consultation from other stakeholders within an agency (Meltzer, 1998). These ombudsmen typically report to those within the agency who authorized the office.

Interestingly, while these differences have been the source of considerable conflict and organizational estrangement among the general ombudsmen community, they have not created rifts within the ranks of ombudsmen in the federal government. Perhaps because they comprise a small community, federal ombudsmen seem united by their differences and have come together in efforts to find common ground and to establish common protections for their role in the federal government. To wit, members of the Coalition of Federal Ombudsmen, along with the Federal Interagency ADR Working Group Steering Committee, jointly prepared an annotated supplement to the ABA's "Standards for the Establishment and Operation of Ombuds Offices." The supplement addresses key issues such as recordkeeping, independence, and confidentiality specifically for federal ombudsmen.

Evaluating Ombudsmen Programs in the Federal Government

In the early years of the ADR boom, it was argued that ombudsmen programs would improve the functioning of federal agencies. Although there are no hard data to confirm this faith, there is a general sense that these programs have been successful. To some extent, this belief is founded in reasonably positive customer satisfaction survey results that some offices have collected. But it would be difficult to find concrete evidence that ombudsmen programs have identified and helped to correct deeper problems within federal agencies, in part because there are so many other organizational factors that contribute to systemic change. In addition, as Carolyn Stieber observed in her article, "57 Varieties: Has the Ombudsman Concept Become Diluted?," "Few ombudsmen, even in the classical offices with the widest jurisdiction, typically deal with major issues…" (*Negotiation Journal*, 2000). Still, she offers some hope when she notes that "in identifying persistent problem areas, major or minor, and recommending changes of a substantive or procedural nature, any ombudsman can have considerable impact."

As one who has worked as a federal ombudsman for almost 10 years, the senior author believes that the great variability in the formation, functioning and quality of ombudsmen programs prevents the programs from attaining the highest possible level of achievement and effectiveness. Should more consistency emerge, the ombudsman role in the United States could share the same status and public respect that ombudsmen enjoy in many Western European countries, as well as Australia and New Zealand. Ironically, the seemingly easy acceptance of divergent ombudsmen practices by ombudsmen in the U.S. federal sector may be among the obstacles preventing the elevation of the impact and status of the field in this country.

The responsibility for some of that inconsistency lies with the agency authorities who establish ombudsmen functions. At times, it is almost as if top executives see a set of problems and say "I have an idea: why don't we establish an ombudsman to handle this?" Often, these executives are attracted to the general idea of a trusted official who can address complaints and problems, but these leaders are unfamiliar with the essential features of the ombudsman concept. The senior author is often asked to consult on establishing ombudsmen programs, but is struck by the resistance on the part of leaders to many of the required components of such offices. The leaders may be uncomfortable with the prospect of empowering an ombudsman to be truly independent, reluctant to offer confidentiality protections, hesitant to support someone who will objectively examine agency actions and transactions, and uneasy about permitting unrestricted access to agency records. In some cases, an agency may appoint an ombudsman without carefully defining the terms of reference for the position and without doing the preparatory work necessary to create an organizational climate in which the ombudsman could succeed. Taken together, these factors may be a recipe for failure.

Unfortunately, every time a poorly established ombudsman office fails to meet expectations it undermines people's respect for the concept and makes it more difficult for existing ombudsmen to promote the function. How can one defend the idea of the ombudsman when another office has fallen short of expectations, serving only as a mildly effective complaint department handling relatively minor concerns? Yet, determining whether an office was improperly designed, established at too low a level, the victim of faulty reporting lines within an organization, or staffed by someone lacking the skills and stature to be effective may appear like exaggerated defensiveness. To avoid further failures, then, it is incumbent upon all of us in the conflict resolution field to educate decision makers about the ombudsman concept and promote the due diligence required to establish effective, useful ombudsmen programs.

However varied the extant ombudsmen programs might be, it is important to remember why the ombudsman concept caught on in the first place. The words of Carolyn Stieber, at the conclusion of her criticism of the inconsistency among programs, say it best:

> Common threads run through the conceptual fabric of every ombudsman's office—all aim to humanize administration, to support fairness, accountability, and equity. All ombudsmen can be approached in confidence. No ombudsman has enforcement or disciplinary powers. All depend on the power of persuasion, as well as the credibility of the office which leads individuals to trust it. Although the process in achieving objectives of fairness and accountability may differ, the product is the same: a chance for ordinary people, those without power or prestige, to be heard and to get fair treatment ("57 Varieties: Has the Ombudsman Concept Become Diluted?" *Negotiation Journal*, 2000).

This is indeed a rather lofty goal; it can only be achieved if ombudsmen themselves rigorously pursue unambiguous and consistent definitions of their role and standards of practice. These unequivocal meanings will provide clear boundaries between the work of ombudsmen and the other officials and programs responsible for the effective functioning of government agencies.

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