Winter 1986

When Americans Complain, by Walter Gellhorn; Ombudsman and Others: Citizen's Protectors in Nine Countries, by Walter Gellhorn

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BOOK REVIEWS


Since 1961, when the existence of the Scandinavian Ombudsmen seems for the first time to have been called to American attention, the idea of an official protector of people affected by the exercise of governmental authority has caught the professional and popular imagination. Legislation providing for such an official has been proposed in Congress and in California, Connecticut, Illinois, Michigan, New Jersey, New Mexico, New York, Rhode Island and Utah. Recently, the New York University Senate, and advisory body composed of the faculty, deans, and administration of the University’s fifteen schools, recommended that the students of each school should be permitted to elect an ombudsman (one of three professors nominated by the faculty) to hear student complaints. To date, neither Congress nor any state has adopted such a proposal. The elected Executive of Nassau County, Eugene Nickerson, claims to have appointed the first “ombudsman” in the country.

These books by Professor Walter Gellhorn—written with his usual clarity of language and style—should give impetus to the movement for the creation of American type ombudsmen. For with When Americans Complain, an expanded version of the Oliver Wendell Holmes Lectures delivered in March 1966, Gellhorn steps forth as the wisest

1. Aaron, Utah Ombudsman: The American Proposals, 1967 Utah L. Rev. 32. Professor Aaron sets forth the texts of the bills that have been proposed, id. 62-93, and compares the American proposals with existing ombudsman-like institutions abroad, id. 43-61.


3. N.Y. Times, Nov. 20, 1966, § 1, at 53, col. 1; id., July 13, 1967 § 1, at 25, col. 5. Actually, the “Ombudsman” was appointed to the office of Commissioner of Accounts. On November 7, 1967, Nassau County voters overwhelmingly rejected a proposal to set up the post of Ombudsman as such and give the incumbent a six year term and annual salary of 25,000 dollars. Although the proposal put to the voters would not have allowed the Ombudsman to investigate complaints against the police (the district attorney’s office, Judges or elected officials), the Policemen’s Benevolent Association conducted a strong and successful campaign against it. The Commissioner of Accounts, however, continues to act as a de facto ombudsman, in which capacity he can still investigate complaints against the police. N.Y. Times, Dec. 3, 1967, § 1, at 159, col. 2.
and most persuasive champion of the ombudsman idea in the United States.

The Scandinavian ombudsman is a parliamentary commissioner or agent empowered "to inquire objectively into asserted administrative shortcomings." He may launch an inquiry upon receiving a complaint against an official act or failure to act or instance of inefficiency, arrogance, or abuse. He may also do so on his own motion. He has authority only to report to the public the facts he has found and to recommend what, if anything, should be done about the matter. Though he must accept the framework of existing legislative policies in performing his duties, he may alert the legislature to the need for changes in these policies. Whether or not his conclusions and recommendations are accepted by administrative officials, the legislature, and the citizenry, depends entirely upon their merits and the respect in which he and his office are held.

Professor Gellhorn approaches his task of evaluation from the standpoint that increasing governmental activity to solve the problems of our complex industrial society serves to enlarge the freedoms of the ordinary citizen. He is not one, therefore, to flay the bureaucracy. "The general level of governmental performance in the United States," he thinks, "is so high that we can now sensibly consider how to make it more consistently excellent rather than merely tolerably good." He also insists that a good deal of the "bureaucratic inflexibility" which is the butt of popular criticism is itself the result of "creakingly cumbersome methods" imposed upon government as "safeguards against unchecked authority." So Gellhorn explores the ombudsman idea as a means of lessening "individual irritation" with government and "of strengthening personal protections without jeopardizing public policies." His target is "official mistake, malice or stupidity."

Gellhorn sees the ombudsman as supplementing, not displacing, the existing methods used to review the exercise of administrative authority. It is an interesting fact that in none of the nine countries he studied—Denmark, Finland, New Zealand, Norway, Sweden, Yugoslavia, Poland,

6. Id. viii.
7. Id. 1.
8. Id. 1-2.
9. Id. 8.
the Soviet Union, or Japan—are procedures for the exercise of administrative power as fully elaborated or are systems of judicial and legislative review of administrative action as developed and comprehensive as they are in the United States. Ombudsman-like institutions may have been created in these countries precisely for this reason. Yet countries with ombudsmen are beginning to look favorably upon the American system of judicial and legislative review, and we upon the ombudsman. There seems to be a felt necessity all over the world for a multiplicity of "protective mechanisms" against official misconduct.

Is legislative and judicial review of executive and administrative agencies in the United States so inadequate as to require an additional, ombudsman-like instrument of control? Yes, for a number of reasons, replies Gellhorn. The administrative procedures which have been prescribed to assure fair treatment of those affected by administrative action have exacted their price. They have deprived the intended beneficiaries of administrative action of the hoped-for "speed, informality, and finality of expert judgments." Contestants are often thoroughly exhausted by the administrative remedies they must exhaust before seeking judicial review and so they wearily drop cases that might be adjudged meritorious.

Moreover, not all administrative actions are subject to judicial review. Although Gellhorn urges legislatures to authorize "more extensive opportunities for [judicial] review than now exist," he is realistic enough to point out that even when such opportunities are available, they are often not utilized because judicial review is deemed too costly in time or money or inexpedient for some other reason. For the poor and weak in society, judicial review is a particularly inadequate remedy. Legislative supervision of administrative action, on the other hand, is ill-suited to deal "with alleged injustice to an individual as distinct from programs at large." For these reasons, the ombudsman "could possibly fill chinks in the protection of individuals against administrative irregularities." Gellhorn emphasizes the importance of permitting persons who

10. Since the books were written, the British Parliament has also designated an ombudsman. N.Y. Times Aug. 5, 1966, § 1 at 9, col. 2. The statement in the text applies to Great Britain as well.
12. Id. 8.
13. Id. 15.
14. Id. 15-16.
15. Id. 27-30.
16. Id. 31.
17. Id. 25-26.
18. Id. 143.
19. Id. 20-21.
20. Id. 40.
feel themselves aggrieved to go to the ombudsman even if judicial review is available, and he criticizes the New Zealand law for precluding access to the ombudsman in such a case.\textsuperscript{21}

At no point does Professor Gellhorn permit himself to become overly enthusiastic about the actual and potential achievements of an ombudsman-like institution. His judgments reflect good sense and an acute perception of the nature of modern public administration. He warns that:

\begin{quote}
[a]dministrative critics do not produce good government. They cannot themselves create sound social policies. They have no capacity to organize a competent civil service. They are at their best when calling attention to infrequent departures from norms already set by law or custom, at their weakest when seeking to choose among competing goals or to become general directors of governmental activity.\textsuperscript{22}
\end{quote}

For these reasons, ombudsmen should not deal with issues that concern the public at large; they should not try to suggest new governmental policies or attempt to evaluate "generalized failures of law administration."\textsuperscript{23} These are matters best left to the political process. The ombudsmen should concentrate upon alleged "omissions of specific duties owed to identifiable persons or groups."\textsuperscript{24}

This sage advice will be hardest to follow in the United States, as is already apparent in the experience of Nassau County. "Ombudsman" Samuel Greason, an eighty-year-old former judge and Republican, was asked by the Democratic Nassau County Executive who appointed him to investigate the anti-poverty program run by the Nassau Economic Opportunity Commission and particularly charges that the program was a source of political patronage, with big payrolls and no accomplishments.\textsuperscript{25} In his first report to the public, "Ombudsman" Greason disclosed that he found no proof of payoffs or abuses in the program.\textsuperscript{26} Immediately, the supervisor of the Town of Hempstead in Nassau County, a Republican, charged that Greason had not "dug deep enough."\textsuperscript{27}

Much is to be gained, however, from having an ombudsman focus on the impact of public policies upon individuals, even if he succeeds only in removing the minor irritations caused by the exercise of governmental

\begin{itemize}
  \item \textsuperscript{21} Id. 31 n.68.
  \item \textsuperscript{22} Id. 53-54.
  \item \textsuperscript{23} Id. 55.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} N.Y. Times, July 13, 1967, § 1 at 25, col. 5.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Id.
\end{itemize}
authority. In Nassau County, for example, the “Ombudsman” reported that the most common valid grievances he received concerned delays in getting welfare checks. Judge Greason also acted upon complaints by people who had their property foreclosed for failure to pay taxes yet had never been notified of the foreclosures because the letters to them were mailed to wrong addresses. He recommended that henceforth such letters be sent by registered mail and his recommendation was accepted.

Such activity by an ombudsman forces government officials to think of the effect of their actions upon individual human beings and helps to counteract the depersonalization which seems to be an inherent characteristic of modern government. At the same time, because experience shows that the ombudsman finds “only a minor fraction of complaints to be sustainable,” his office helps to increase respect for public service and the men and women engaged in it. The ombudsman is the bureaucrats’, as well as the citizens’, defender.

Professor Gellhorn does not see the Scandinavian ombudsman—the single “National Father Figure” rightsing wrongs with the help, at most, of a small professional staff, as the prototype for the United States. The large population of the United States and many of its states would generate “too many grievances for one man to review.” But Gellhorn thinks that collegial bodies, not dependent upon the ability and prestige of the single “ombudsman,” could do the job. Emphasizing that “no patented device has been approved for universal use,” Gellhorn distinguishes the kinds of ombudsman-like institutions which would be appropriate on the federal, state, and local levels.

“Washington’s woods are full of external critics of administration.” Federal administrative action is subject to review not only by Congress and the courts. The General Accounting Office, headed by the Comptroller General of the United States, “is blossoming into a highly

28. WHEN AMERICANS COMPLAIN 40-41.
29. N.Y. Times, supra note 25.
30. Id.
31. Id.
32. WHEN AMERICANS COMPLAIN 123.
33. Id. 44. This has also been the experience in Nassau County. The Ombudsman reported that he handled 490 cases in his first year of service and only one out of five was a legitimate complaint. N.Y. Times, supra note 25.
34. WHEN AMERICANS COMPLAIN 43.
35. Id. 230.
36. Id. 9.
37. Id. 48-50.
38. Id. 48.
39. Id. 50.
40. Id. 8.
41. Id. 124.
significant inspector and critic of public administration.” The Bureau of the Budget continues to advise agencies on how to improve their operations, though its principal concern is program planning and government organization and not so much the protection of ordinary citizens in their encounters with federal authority.

This latter protection is now assumed—apart from the courts—principally by individual Congressmen. The advice of political scientists that Congressmen stop being errand boys for their constituents has been “spectacularly unheeded.” Gellhorn estimates that more than 200,000 complaints about administration reach congressional offices in the course of a year. To obtain more reliable information than now exists about congressional “casework,” Gellhorn sampled the mail of ten representatives from all sections of the country. The results of his valuable investigation are not favorable to the current practice of casework on behalf of constituents.

Gellhorn doubts the claim that the “mere possibility of correspondence between constituents and congressmen ‘keep[s] bureaucrats on their toes.’” The problems raised by constituents “rarely come to the notice of the Congress as a whole or even of its standing committees” but “are usually disposed of episodically in individual congressmen’s offices, without significantly changing the patterns of administrative policy or behavior.” A great deal of such congressional activity is aimed “not so much at justice for the constituent as at advantage for the congressman.” I would add that the practice of constituents’ casework also helps to substantiate the unfortunate popular assumption that the federal bureaucracy will yield to influence and pressure.

An additional cost of this congressional effort has been the increasing diversion of the Legislative Reference Service of the Library of Congress from its primary duty as the most important research facility available to Congress “until now it is also an adjunct of the legislators’ constituent relations staff.”

As an alternative to the present system of constituents’ casework, Congressman Henry S. Reuss of Wisconsin has proposed a bill to set up an Administrative Counsel of the Congress who would be appointed jointly by the Speaker of the House and the President pro tempore of the

42. Id. 101.
43. Id. 103-04.
44. Id. 73-74.
45. Id. 93.
46. Id. 62-63.
47. Id. 86.
48. Id.
49. Id. 126.
50. Id. 84.
The Administrative Counsel would be empowered—but only at the request of a member of Congress—to:

review the case of any person who alleges that . . . he has been subjected to any improper penalty, or that he has been denied any right or benefit to which he is entitled . . . or that the determination or award of any such right or benefit has been . . . unreasonably delayed, as a result of any action or failure to act on the part of any officer or employee of the United States.52

The conclusions and recommendations of the Administrative Counsel would be reported to the member who referred the matter to him and the member, in turn, would report to his constituent on the outcome of the case. The congressman would not be precluded from pursuing the case further if he were dissatisfied with the outcome nor would he be required to use the services of the Administrative Counsel in the first place. The Reuss bill would also authorize the Administrative Counsel to set forth in his annual report to Congress “such recommendations for legislation or further investigation as he may deem appropriate.”

Professor Gellhorn sympathizes with the aims of the Reuss bill but he discerns its weaknesses. He accepts the fact that Congress will not adopt any proposal that might jeopardize members’ “hopes of constant reelection,” which they think depend in part upon their successful handling of constituents’ requests.53 Nevertheless, he thinks the Reuss plan keeps the congressman too much in the very center of the picture and unduly limits the jurisdiction and powers of the Administrative Counsel.54 As a result, the kind of person who should be Administrative Counsel “might not be tempted to so restricted and subservient a post.”55

Despite Representative Reuss’ efforts to placate his colleagues, his proposal has gotten nowhere because “[i]ntertia and fear have discouraged taking even a small step that might lessen constituents’ dependence on legislators.”56 Gellhorn is still persuaded that, in time, the sheer volume of casework confronting congressmen may force adoption of an ombudsman-like institution along the lines of Reuss’ plan.57

It should be recalled at this point that Congress has created a new agency for external criticism of administrative practice—though not for

53. When Americans Complain 87, 93.
54. Id. 90.
55. Id. 92.
56. Id.
57. Id. 94.
the handling of individual complaints—which the President has only recently begun to activate. The Administrative Conference of the United States set up by President Kennedy, in which Professor Gellhorn was a leading spirit, recommended establishment of a permanent Administrative Conference. In response, Congress passed the Administrative Conference Act in August 1964. Only a few weeks ago President Johnson appointed Professor Jerre S. Williams of the University of Texas Law School as Chairman of the Conference. Why the President waited so long is a mystery about which Gellhorn does not speculate.

The Administrative Conference, Gellhorn explains, would have decided advantages over the ombudsmen systems now in use abroad. The federal administrative agencies, represented in the Conference, would take part in the studies and discussions leading to the recommendations affecting them. They are more likely, therefore, to be receptive to such recommendations than to those of a single ombudsman. Ombudsmen have not been conspicuously successful in gaining acceptance of their general recommendations, including their suggestions for legislation. Gellhorn attributes this failure to their isolation and inability to pre-test their ideas in a forum of equally competent experts such as the Administrative Conference would furnish. The Administrative Conference would also help to strengthen intra-agency grievance handling machinery which, to Gellhorn, offers “large hope for continuing advances in the art and science of government.”

Professor Gellhorn hopes that someday the Chairman of the Administrative Conference “might very possibly become a sort of American ombudsman for broad aspects of administrative functioning,” analyzing methodological problems and prescribing their solution, while an Administrative Counsel might act as a “bureau of retail casework” to “salve individual hurts.” This is probably the shape of the future. But the division of function Gellhorn envisages between Administrative Conference and Administrative Counsel would have its disadvantages. The Conference Chairman would be deprived of experience in salving individual hurts which could contribute to his knowledge of the need for reforming certain broad aspects of administrative functioning. And his

60. 5 U.S.C., § 1045 (1964).
61. WHEN AMERICANS COMPLAIN 98.
62. Id. 98-99.
63. Id. 99-100.
64. Id. 105-121.
65. Id. 97, 129.
efforts at broad reform would proceed without the kind of awareness of their impact upon the individual that he would gain if it were also his job to salve individual hurts.

Possibly, the agency representatives and practitioners appointed to Conference membership would supply the Chairman with the perception that comes from an intimate acquaintance with individual cases. But may it not be more sensible to assure such understanding by entrusting the duties of Administrative Counsel and Administrative Conference Chairman to the same person? If Congress established an independent Administrative Counsel, his functions inevitably would overlap those of the Administrative Conference Chairman. Would not two such posts diminish the stature and attractiveness of each for able men?

I do not think it would matter if the person combining the functions of Administrative Counsel and Administrative Conference Chairman were appointed by the President rather than jointly by the Speaker of the House and the President pro tempore of the Senate. Any Conference Chairman, though appointed by the President, must remain an external critic if he plays his role properly. And no Administrative Counsel, though appointed by the Speaker and the President pro tempore, would play his role properly if he thought his allegiance to Congress required him to assume an attitude of hostility to the independent agencies and the Executive establishment.

The Scandinavian-type ombudsman is more needed and suitable on the state and local levels of government. Professor Gellhorn emphasizes the fact that biennial legislative sessions and the relatively rapid turnover of state legislators, their low pay, meager personal staffs, and inadequate, often non-existing, office space make it impossible for state legislators to handle constituents' casework to the same degree as United States congressmen. He examines and evaluates the various types of grievance-handlers, other than courts and legislatures, which now operate on the state and local levels—the governor and his staff, the state attorney general, auditors, controllers and similarly titled officials, New York City's Commissioner of Investigation, and police review boards. (His analysis of the police review board alone is worth the price of the book and should be required reading for every mayor and police chief in the country.) Gellhorn concludes that "an ombudsman-type official, with authority to examine the entire range of municipal administration, holds more hope for the future than does a special tribunal for trying citizens' complaints against individual policemen." There is special need for bringing the welfare, housing and educational, as well as police, authorities

66. Id. 134-35.
67. Id. 192.
under the scrutiny of such an official but this should be done in addition to, not as a substitute for, the provision of legal services for the poor and more compassionate legislative policies.

I wish I could be as enthusiastic about every aspect of Ombudsmen and Others as I am about When Americans Complain. The longer book succeeds in giving us an excellent picture of what ombudsmen actually do in each of the nine countries studied. But Professor Gellhorn’s attempt to place the ombudsman in a larger political-governmental framework in each country is not so successful. I was particularly disturbed by his account of the situation in Yugoslavia, Poland, and the Soviet Union and will take Yugoslavia as the principal example.

Adjectives aside, says Gellhorn, referring to “communist” to describe Yugoslavia and “capitalist” to describe the United States, “Yugoslavia and the United States are significantly alike in outlook.” Both countries “are seeking the good life for their people and both are essentially pragmatic in their searching.” “Professedly ‘communist’ in philosophy, Yugoslavia is increasingly ‘democratic’ in practice.”

To support these assertions, Gellhorn points to the following features of Yugoslav government and society. Each of the six republics comprising the Socialist Federal Republic of Yugoslavia, like each state of the United States, “has a separate constitution and a considerable measure of government autonomy.” Municipal bodies or “communes” exercise political power at the local level. Each level of government has an elected representative assembly which in turn elects the chief executive officials for that level. President Tito and the Vice President were elected by the Federal Assembly.

In recent years, economic and social decision-making has been left, “to a very marked degree, in non-governmental hands”—that is, in the hands of the so-called “working organizations” which “are in essence self-managing cooperatives made up of persons directly linked with an economic establishment or other activity.” Sometimes, government intervention in the affairs of these “working organization”—“free enterprises under a different name”—is “even more cautious than in

68. Id. 195, 204, 208.
69. Id. 199-204.
70. OMBUDSMEN 290.
71. Id.
72. Id. 256.
73. Id.
74. Id.
75. Id. 257.
76. Id. 259.
the United States.”77 “[C]ontroversy between officials on the one hand and ‘private parties’ with substantial resources on the other is a socially acceptable possibility.”78

The Yugoslav law on general administrative procedure champions the principle of legality and protection of the citizen’s rights—particularly the citizen’s right to be heard, the right to have the decision that affects him based on all the facts, and the right to appeal.79 Article 159 of the 1963 Yugoslav Constitution subjects about ninety percent of all types of administrative proceedings to judicial review.80 Furthermore, the authority which article 159 grants to preclude judicial review “in exceptional cases” may itself be limited by article 150. That article provides that the “constitutional courts, pursuant to law, shall also safeguard the rights of self-government and other basic freedoms and rights established by the constitution whenever these freedoms and rights have been violated by any decision or action and other court protection has not been provided.”81 “The courts pass on the validity of administrative procedure as well as on the substance of administrative decisions, and they do so with apparent vigor.”82 The Constitutional Court created by the 1963 Constitution “can pass on the constitutionality of all federal laws and regulations . . . and can decide how to protect ‘basic freedoms and rights established by the Constitution’ if they have been jeopardized by ‘an individual decision or action of the federal organs.’”83 “The ‘independence of judiciary’ is widely regarded as an established fact. . . .”84

At the same time, ombudsman-like institutions have also been established to correct administrative errors. The public prosecutor guards against defective administration.85 The Federal Executive Council has set up a Bureau of Petitions and Proposals to reinforce the right granted to all citizens by article 37(7) of the 1963 Constitution “to

77. Id. 260, 261.
78. Id. 264.
79. Id. 265-67.
80. Id. 270.
81. Id. 270 n. 35.
82. Id. 271.
83. Id. 273.
84. Id. 269-70 n. 34.
85. Id. 280.
86. The Federal Executive Council, according to article 225 of the 1963 Constitution, is “the organ of the Federal Assembly which is entrusted with political-executive powers within the framework of the rights and duties of the Federation” and is “responsible for the execution of the Federation’s policy” as established by the Federal Assembly. Id. 257-58. The President Designates an Assembly member to be President of the Council and he, in turn, “proposes other assemblymen for election to” the Council, “which also has additional ex-officio members (including the presidents of the executive councils of the six republics).” Id. 257.
petition and present proposals to the representative bodies and other organs, to receive an answer to them, and to undertake political and other initiatives of general concern." And the President and Vice-President of Yugoslavia "maintain their own grievance bureaus, wholly independent of the Executive Council's complaint-processing machinery." 88

Gellhorn's concluding observations are limited to criticizing what he sees as Yugoslavia's "constant pressure to localize administration and its supervision" and its deplorable, "almost obsessive clamor against 'bureaucracy.'" 89 Not once does he think it significant for his purposes to say that Tito's Yugoslavia remains a one-party (Yugoslav League of Communists) dictatorship. He mentions the League of Communists only to say that though "at one time" it "dealt somewhat imperiously with government organs," it "no longer presumes to handle complaints and suggestions about administration, but routinely refers them to the cognizant administrative organ or to the Bureau of Petitions and Proposals." 90 Nowhere does Gellhorn venture into a discussion of the state of civil liberties in Yugoslavia, a question which interests him greatly in evaluating the work of the ombudsmen in the Scandinavian countries and Japan. 91

"Reality," Gellhorn wisely comments, "is not invariably governed by texts." 92 But his sense of realism seems to have forsaken him in Yugoslavia. No adequate appraisal can be made of the Yugoslav situation without an awareness of the relationships between the ruling political party—the League of Communists—and the various governmental and administrative organs in the country. The role of the party cell structure within the various state organs escaped Gellhorn's notice.

Professor Gellhorn tells us that he tried to keep abreast of events in the nine countries he covered until the forepart of 1966. 93 Developments in the latter part of 1966 cast grave doubt on the validity of his view about Yugoslavia.

Gellhorn writes that each of the six republics in Yugoslavia, like each state of the United States, has "a considerable measure of autonomy." 94 There are separate republics in Yugoslavia for Serbs, Croats, Slovenes, Macedonians, and Montenegrins and a separate governmental

87. Id. 282-83.
88. Id. 287.
89. Id. 291-94.
90. Id. 286.
91. For example, Gellhorn strongly criticizes the Finnish Ombudsman for not showing greater concern for civil liberties in Finland. Id. 87-89.
92. Id. 268.
93. Id. ix.
94. Id. 256.
region within Serbia for the Albanians. Yet even in 1964, Vladimir Bakarich, the Secretary-General of the Croatian League of Communists charged in Nin, a Belgrade weekly, that "centralism" or "Yugoslav integralism" had "completely superseded the constitutionally proclaimed national federalism."95

The Fourth Plenum of the Central Committee of the Yugoslav League of Communists, meeting at Brioni in July 1966, deposed Aleksandar Rankovic, then Vice-President of Yugoslavia and ostensibly elected by the Federal Assembly, from his offices as Vice-President, organizational secretary of the League of Communists, and Chief of the State Security Service (Yugoslavia's secret police) and expelled him from the League of Communists.96 Official reports of the July 1966 and October 1966 Plenums of the League of Communists charge Rankovic with being the principal saboteur of the reforms intended to achieve the economic and social decentralization which Gellhorn saw as evidence of "Yugoslav democratization."97

The Plenum reports say that the State Security Service headed by Rankovic has "created a network of collaborators within workers' organizations and even within the League of Communists of Yugoslavia."98 "This network very often interfered with the entire activity of enterprises, including even investment policy and the placement of key personnel."99 The State Security Service also "managed to penetrate every branch of government and every sector of public life except the army (which has its own security service, the counter-intelligence corps)."100 Tito himself condemned the State Security Service as "a system which has put our entire society under oppression."101 The "obsessive clamor against 'bureaucracy'" in Yugoslavia, which Gellhorn deplores, masks the clamor against the possibility of a return to Stalinism.

Professors Neal and Fick thought that the removal of Rankovic and his group "tipped the scales decidedly in favor of the liberals, who can now consolidate their gains and move forward into new areas of political reform."102 It had been reported, in fact, that President Tito called the July 1966 Plenum to consider his proposals to end exclusive party

97. Id.
98. Bailey, supra note 96, at 17. See also Neal and Fick, supra note 96, at 30, 34.
99. Id.
100. Id.
101. Id.
control of national administration and give elected officials and technicians the dominant role in government. This expectation has not materialized.

The directors and subdirectors of factories continue to be party members and each factory has a party committee as well as a workers' council; the former is dominant. Tito himself wrote in September, 1966 that

[t]he role of the League of Communists is not declining, as is being said abroad and by our class-enemies at home. On the contrary, its role grows and will continue to grow. It will have to grow as long as the consciousness of our ordinary citizens has not elevated itself to that point where it will no longer be necessary for the Communists to guide them. The withering away is a long process, and it does not mean the withering away of the Communist ideology but rather the growth of the consciousness of the citizens. The withering away of the role of the Communists as an organization is accomplished by the strengthening of the consciousness of the whole social structure, and thus it will be less necessary for the League of Communists to be the teacher. But now we must be teachers.

The subsequent trial and imprisonment of Mihajlo Mihajlov sharply etched what Tito had in mind and refuted the optimistic interpretation that Professors Neal and Fick put on Rankovic's fall from power in the summer of 1966. Mihajlov, who is thirty-three years old, was a member of the Faculty of Philosophy at the University of Zadar and a literary critic until his clash with the regime. Following a trip to the Soviet Union in 1964, Mihajlov wrote a series of articles entitled Moscow Summer, 1964. The first installment was published in the January 1965 issue of the Belgrade literary monthly Delo without incident. The second was published in February 1965 and aroused almost immediate Soviet protest, apparently because of its blunt references to Soviet slave labor camps and their legacy. On February 11, Delo was ordered banned; that same day Marshal Tito branded Mihajlov a "reactionary." The New

103. Raditsa, supra note 95, at 7.
106. Moscow Summer has been published in the United States by Farrar, Straus, and Giroux with a foreword by Myron Kolatch and an introduction, notes, and biographical sketches by Andrew Field.

The above account of Mihajlov's difficulties is that given by the editors of the Unspoken Defense of Mihajlo Mihajlov, THE NEW LEADER, May 8, 1967.
Leader published the first two parts of Moscow Summer, 1964 in its March 29, 1965, issue and the third part, which never appeared in Yugoslavia, in its June 7, 1965, issue.

As a result of these events, Mihajlov was dismissed from his post at the University; he was brought to trial, convicted, and given a five month suspended sentence. In September 1966 Mihajlov was again arrested and placed on trial for "spreading false information for the incitement of the people" because he published two other articles in The New Leader,107 which never appeared in Yugoslavia, and attempted to start opposition journals in Yugoslavia. He was tried, found guilty, and on September 23, 1966, sentenced to one year in prison. In the course of this trial, Mihajlov was not permitted to present the defense which The New Leader subsequently published.

Mihajlov was serving this one year sentence when he was arraigned on April 17, 1967, on virtually identical charges plus the additional charge of having contact with Yugoslav emigres. He was tried, found guilty, and sentenced to four and one half years in jail and, after he completes his term, to four years of refraining from public activity. His colleagues in the effort to establish independent journals were also arrested, convicted, and imprisoned.108

Mihajlov's picture of Yugoslavia today contrasts vividly with that presented by Professor Gellhorn. Mihajlov sees Yugoslav society as totalitarian because the League of Communists continues to monopolize social-political life in Yugoslavia.109 Replying to the accusation that he had expressed doubt that Yugoslavia was a "Socialist society," Mihajlov wrote:

I cannot consider a society to be Socialist if one insignificant minority of 6-7 percent has all the rights, which is the case with the League of Communists, and the overwhelming majority of the population has no rights at all in the social-political setup. We do not even have the rights given to Negroes in the United States—those of political association and the right to fight legally for their own constitutional guarantees.110

Mihajlov insisted that "only political democracy can guarantee every other kind of democracy"111 and that "[e]conomic liberalization

110. Id. 6.
111. Id. 7.
alone (which economic reform is expected to produce) is no guarantee against a Stalinist revival if it is not accompanied by political democratization."  

He pointed out that he was being sentenced to prison for the opinions he expressed in his writings, even though article 34(2)(6) of the 1963 Yugoslav Constitution guarantees "the right of every citizen to discuss the work of state bodies and autonomous social bodies and organizations dealing with subjects of public interest, and the right to express their opinions regarding such work." His attempt to establish independent journals of opinion, for which he was also being punished, was specifically protected, he insisted, by articles 39 and 40 of the 1963 Yugoslav Constitution which guarantee "freedom of opinion and association . . . freedom of the press and other forms of information, freedom to speak freely and discuss publicly, freedom to assemble and hold public gatherings."  

None of the ombudsman-like institutions in Yugoslavia, of which Gellhorn writes, came to Mihajlov's aid. And so Mihajlov closed his unspoken defense by quoting the following words Milovan Djilas had written December 31, 1953, in Borba, the official organ of the Yugoslav League of Communists:

In my opinion the judiciary must . . . be freed of the recent Party intervention in its work; otherwise it cannot avoid (however good its intentions) undermining democracy insofar as it continues to conform in its work to political and ideological standards, or even to local criteria. The judiciary must become an organ of the state and the law—which means the people—not an organ of political interest or opinion from the Party ranks. . . . How long shall we use ideological instead of legal arguments? How long will decisions be based on dialectical and historical materialism instead of the law?  

Undoubtedly, the tendency toward "liberalization" is stronger in Yugoslavia than in any other communist country in Europe. But the question is still open whether or not this tendency can ever be reconciled with continued one-party rule by the League of Communists. By setting up the so-called "working organizations," described by Gellhorn as "self-managing cooperatives," the Tito regime sought to provide a substitute for a multi-party political system. They have proved to be a completely inadequate substitute. The prospects for the development of democracy in Yugoslavia hang precariously in balance. There is yet no

112. Id. 16.  
113. Id. 11.  
114. Id. 16.
basis for concluding, as Gellhorn does, that Yugoslavia is "increasingly 'democratic' in practice." For the test of democracy is not the extent to which the economy is decentralized but the degree of political and cultural freedom that is tolerated.

Gellhorn's analysis of the situation in Poland is also unsatisfactory. He begins by saying:

Perhaps unduly influenced by the political rhetoric of our times and the over-easy generalizations of editorialists, many intelligent Americans suppose that the peoples of countries in the "Eastern Bloc" are governed despastically, with small opportunity to voice (let alone to seek redress of) grievances. A study of administrative processes in Poland in the autumn of 1964 shows that at least in that member of the Eastern Bloc this supposition is ill-founded.116

But surely the fact that the Polish people may be able to voice grievances and even to seek to redress them does not necessarily mean that the Polish United Workers' (Communist) Party exercises power any less absolutely or less despastically. Indeed, to give the people such an opportunity may help the Party to maintain its absolute authority. The crucial question concerns the areas of life in which this opportunity is given and taken.

For example, even a tyranny may be well-advised to establish machinery to receive and act upon citizens' complaints about the administration of the social security system, location of bus stops, working schedules during daylight savings time, transport service to passengers and shippers, delays in delivering money orders sent by mail, selling stamps that do not adhere to envelopes, leaving tenement houses in disrepair, and similar matters which Gellhorn notes are the subjects of such complaints in Poland. Satisfying these complaints does not in any way threaten the continuation of tyrannical rule. But quite a different matter is at issue when citizens' complaints begin to touch the politically sensitive nerves of the ruling regime.

Recently, The New York Times carried a dispatch from Warsaw by Jonathan Randal.110 It reported that Nina Karsow, a twenty-seven-year-old Jewish woman, was found guilty on October 26, 1967, of harming state interests in violation of article 23 of the so-called small penal code of Poland because she possessed illegal anti-state papers and recordings and was preparing material for publication abroad. Miss

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115. OMBUDSMEN 296.
116. N. Y. Times, Oct. 27, 1967, § 1, at 15, col. 1. The above account is Mr. Randal's, often verbatim.
Karsow remained mute throughout the closed-door trial, which began October 2, in protest against the decision barring public proceedings.

The presiding judge made public the nature of the charges for the first time when he read the verdict. Miss Karsow was charged with having in her possession a diary whose contents were said to be anti-state, a pamphlet entitled *What Is Socialism?* that was described as hostile to the regime, a pamphlet on the life of university students said to have presented it in a false light, two tape recordings of a musical score and lyrics also said to be hostile to the state, and a brochure by Jacek Kuron and Karol Modzelewski said to call for the overthrow of the Polish Government. Kuron and Modzelewski were philosophy professors at the University of Warsaw who were expelled from the Party and jailed in 1965 for having circulated an open letter criticizing the lack of democratic procedures in the Party's decision-making. They were released from prison early in 1967 and testified at Miss Karsow's trial.

Miss Karsow was sentenced to three years in prison. Immediately after the sentence, Mr. Szymon Szechter, a blind Soviet army veteran and historian and Miss Karsow's employer, charged that she had been the victim of anti-Semitism, police brutality, and torture. He spoke to Western reporters and Warsaw University students gathered in the dark courthouse hallway after the police had prevented him from saying goodbye to Miss Karsow.

Mr. Szechter said that Miss Karsow, a graduate in Polish philology from the University of Warsaw, was arrested in August, 1966 and "convicted for the simple fact of having wanted to think freely." "That's what freedom is in people's Poland. Tomorrow I can be where she is now and I am not afraid." Mr. Szechter charged that during questioning, a police captain had "grabbed Nina by the throat and tried to strangle her and yelled in her face, 'You little madwoman, we'll get you! We know everything about you. Even your mother had rejected you, you lousy Jew'." Mr. Szechter also charged that during the fifteen and one half months Miss Karsow was imprisoned before trial, she slept on the cement floor of her jail cell. The windows of the cell were painted out and the only illumination was provided by an electric light bulb too weak to read by. Warm blankets sent her reached her only after the end of the 1966 winter. She was not permitted to receive any correspondence. Mr. Szechter further charged that Miss Karsow had been subjected to these inhumane conditions because she had allegedly violated prison rules. "She couldn't make her bed by herself or cut sausage." But he explained that this was so because Miss Karsow had lost partial use of her limbs from injuries received when her parents jumped with her from a Nazi death train taking them to Treblinka extermination camp
near Warsaw in 1943. Mr. Szechtter said that a doctor had examined Miss Karsow and determined that "she was in such delicate health that she was incapable of standing trial."

Professor Gellhorn was made aware of the presence of the Party and its secret police in minor ways. Several persons with whom he wished to speak declined to talk in places in which they suspected listening devices might record the conversation or in which their meeting with an American might be too conspicuous. He encountered "incessant interference" with and censorship of his mail. Yet his overall judgment remains charitable. Poland has not "reverted to being a police state." It is simply that Poland is not "monolithic."

Within the United Workers' Party, "conservative and progressive elements compete for control much as they do in the Republican Party and the Democratic Party in the United States." Although in late 1964 "a somewhat uneasy advantage lies with what might be characterized as the liberals"... "neo-Stalinist elements" have a "continued grip" upon "the State's security apparatus." As a result, "many Poles are still unconvinced that, as the Constitution assures them, they may freely and safely complain about any and all governmental behavior of which they disapprove."

This is the place to reiterate Gellhorn's saying that "reality is not invariably governed by texts." The Russian Procuracy was created by Peter the Great not only to enforce the laws "but also to protect the population from overbearing officials." Yet the procurators did not protect the people from Czarist despotism. Since at least 1936, when the Soviet Constitution was adopted, Soviet citizens, as Gellhorn notes, "have had a generally worded statutory right to complain to almost everybody about almost anything." Yet the Constitution—proclaimed by Stalinists as the most democratic in the world—did not prevent Stalin from ordering the slaughter of tens of millions of people, with the resulting utter degradation and helplessness of the individual in the Soviet Union.

But Gellhorn is optimistic even about future prospects in the Soviet Union. "Post-Stalin leaders have sought to restore respect for law," he writes and to this end, "they have fortified personal rights against

117. OMBUDSMEN at 312-13.
118. Id. 313.
119. Id. 314.
120. Id. 312.
121. Id.
122. Id.
123. Id. 314.
124. Id. 345.
125. Id. 342.
The Procuracy, in particular, “has considerably reinforced ‘socialist legality’.” However, the evidence which Gellhorn adduces to support this conclusion does not gainsay Professor Harold J. Berman’s view—noted by Gellhorn that “it remains true that the Procuracy is helpless to enforce Soviet Law against the wishes of the Party leadership, and, moreover, that its efforts are usually directed against those abuses that the Party leadership desires to eradicate.”

Nevertheless, Gellhorn concludes that “legality as it bears on individual interests, quite apart from the supposed ‘interests of the State’ may have become an abiding concern and not merely a momentary tactic” of the Soviet leaders. Again, this conclusion can be tested by subsequent events. And it appears to be fragile indeed in the light of the trial and imprisonment of Soviet writers Yuri Daniel and Andrei Sinyavsky on charges of having published anti-Soviet works abroad. This act of repression has been followed by arrests, imprisonment, and secret trials of other writers and students who came to the defense of Sinyavsky and Daniel.

Certainly the ice of totalitarianism is breaking and thawing in the Soviet Union and throughout Eastern Europe. But it is not incumbent upon intellectuals in the West to underestimate the continued suppression of freedom by the ruling Communist regimes. Our understanding and support should be extended to the courageous and lonely men and women who risk persecution in the fight for freedom against these regimes. We do them a great disservice by blurring the line between their democratic and libertarian aspirations and the realities which they seek to displace.

CARL A. AUERBACH  


Anyone interested in the history of the New Deal will find this an exciting collection of materials. For it reveals the way in which Franklin

126. Id. 347.
127. Id.
128. Id. 349 n. 33.
129. Id. 366.
130. For parts of the transcript of the trial of Daniel and Sinyavsky, see the N.Y. Times, April 17, 1966, § 6 pt. 1 (magazine), at 20.
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