

THE OMBUDSMAN IN THE OSCE: AN AMERICAN PERSPECTIVE



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Briefing of the
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ABOUT THE ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE

The Helsinki process, formally titled the Conference on Security and Cooperation in Europe, traces its origin to the signing of the Helsinki Final Act in Finland on August 1, 1975, by the leaders of 33 European countries, the United States and Canada. As of January 1, 1995, the Helsinki process was renamed the Organization for Security and Cooperation in Europe (OSCE). The membership of the OSCE has expanded to 55 participating States, reflecting the breakup of the Soviet Union, Czechoslovakia, and Yugoslavia.

The OSCE Secretariat is in Vienna, Austria, where weekly meetings of the participating States' permanent representatives are held. In addition, specialized seminars and meetings are convened in various locations. Periodic consultations are held among Senior Officials, Ministers and Heads of State or Government.

Although the OSCE continues to engage in standard setting in the fields of military security, economic and environmental cooperation, and human rights and humanitarian concerns, the Organization is primarily focused on initiatives designed to prevent, manage and resolve conflict within and among the participating States. The Organization deploys more than 20 missions and field activities located in Southeastern and Eastern Europe, the Caucasus, and Central Asia. The website of the OSCE is: <www.osce.org>.

ABOUT THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE

The Commission on Security and Cooperation in Europe, also known as the Helsinki Commission, is a U.S. Government agency created in 1976 to monitor and encourage compliance by the participating States with their OSCE commitments, with a particular emphasis on human rights.

The Commission consists of nine members from the United States Senate, nine members from the House of Representatives, and one member each from the Departments of State, Defense and Commerce. The positions of Chair and Co-Chair rotate between the Senate and House every two years, when a new Congress convenes. A professional staff assists the Commissioners in their work.

In fulfilling its mandate, the Commission gathers and disseminates relevant information to the U.S. Congress and the public by convening hearings, issuing reports that reflect the views of Members of the Commission and/or its staff, and providing details about the activities of the Helsinki process and developments in OSCE participating States.

The Commission also contributes to the formulation and execution of U.S. policy regarding the OSCE, including through Member and staff participation on U.S. Delegations to OSCE meetings. Members of the Commission have regular contact with parliamentarians, government officials, representatives of non-governmental organizations, and private individuals from participating States. The website of the Commission is: <www.csce.gov>.

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WEDNESDAY, DECEMBER 2, 1998

COMMISSION ON SECURITY AND COOPERATION IN EUROPE
WASHINGTON, DC

The briefing took place in Room 2200, Rayburn Office Building, Washington, D.C., at 10:05 a.m., Michael Hathaway, Chair, presiding.

Mr. HATHAWAY.. Since we are having this recorded this morning, we are going to have to open it with a certain amount of formality so that we have a proper record.

Good morning, welcome to a briefing on the Ombudsmen in the OSCE. This is a briefing by the Commission on Security and Cooperation in Europe. My name is Mike Hathaway, I'm the Chief of Staff of the Commission. On behalf of the Commission's Mr. , Senator Alfonse D'Amato, and Co-Mr. , Congressman Chris Smith, I want to welcome all of you to this morning's briefing.

The briefer this morning will be Mr. Dean M. Gottehrer. Mr. Gottehrer is currently a consultant on ombudsmen in human rights institutions for the United Nations Development Programme, the UNDP, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, and the United States Information Agency, and he has also served as President of the United States Ombudsmen's Association from 1993 to 1995.

Mr. Gottehrer has performed needs assessments for ombudsmen in Armenia, Azerbaijan, Jordan, Lesotho, Lithuania, Malawi, Moldova, Namibia, Russia, Tajikistan, Turkey, Turkmenistan, Uzbekistan, and the State of Minnesota.

Author of the "Ombudsmen and Human Rights Institutions in OSCE Participating States" 1998 report for the OSCE, he also served as a writer and editor of the International Ombudsmen Legislative Reference document for the International Ombudsmen Institute. He was a member of the Ombudsmen Working Group of the International Institute of Administrative Sciences in Brussels. He has served as Regional Director, State of Alaska Ombudsmen in Anchorage, and was a tenured Associate Professor in the Department of Journalism and Broadcasting at the University of Alaska in Fairbanks.

He has been a journalist with the Fairbanks Daily News-Miner, Psychology Today, and The Tulane Hullabaloo in New Orleans.

Mr. Gottehrer.

Mr. GOTTEHRER. Thank you very much. It's a great privilege and an honor to be with all of you today to talk about the ombudsmen institution in the countries of the Organization for Security and Cooperation in Europe.

As Mike pointed out, I come from the perspective of an American who has studied the laws that create the institution around the world, and visited the following countries of the OSCE: Armenia, Azerbaijan, Estonia, the Republic of Georgia, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkey, Turkmenistan and Uzbekistan, assessing whether those countries were ready to create an institution of an ombudsmen and working with

ombudsmen institutions that had already been created in some of those countries.

Ombudsmen institutions have spread since the Swedish Parliament first created the parliamentary Ombudsman in 1809. Many institutions were created after the dissolution of the Soviet Union, encouraged by the OSCE, the work of the UNDP, particularly in Eastern Europe and the CIS countries, the Council of Europe and its member states, among others.

The Ombudsman is a very flexible institution, adaptable to national and local government structures in a wide variety of countries. Ombudsmen function in different and diverse cultural climates in countries that are rich and those that are poor, and countries of varying religions and social structures and so on.

Most ombudsmen institutions are headed by one person, a few are headed by a group. Many call themselves ombudsmen, but other titles are also used. The word in some countries is seen as a foreign word, and so other countries have chosen other titles, but, essentially, the institution shares many characteristics.

The eldest ombudsmen institutions around the world receive and investigate complaints only about maladministration of government agencies. In recent years, and as part of the spread of the institution, particularly in the participating states of the OSCE, many Ombudsman institutions have been created to receive and investigate complaints about human rights violations.

This morning what I'd like to do is look at the history of Ombudsman and other national human rights institutions, particularly in recent years in the participating states of the OSCE, briefly discuss the role of ombudsmen and the OSCE participating states that have Ombudsmen institutions, describe some of the most essential characteristics of an Ombudsman institution designed to fulfill that role, and then answer any questions which you might have, or try to answer them.

Nearly 100 countries on all continents have created ombudsmen since that first one was appointed by Parliament in Sweden in 1809. Ombudsmen were later created in Finland and Denmark and began to spread around the world, first in New Zealand, then to Canada, the United States, and then to other European nations.

The idea of national institutions, such as Ombudsmen, to promote and protect human rights, was first discussed in 1946, two years before the General Assembly adopted the Universal Declaration of Human Rights, and that discussion continues today.

In the document of the Copenhagen Meeting of the Conference of the Human Dimension of the Conference on Security and Cooperation in Europe in June of 1990, the participating states affirmed that they "will facilitate the establishment and strengthening of independent national institutions in the area of Human Rights and the Rule of Law."

In the Conference on the Human Dimension of the CSCE in Moscow, in October of '91, "the participating states recognize(d) their common interest in promoting contacts and exchange of information amongst Ombudsman and other institutions entrusted with similar functions of investigating individual complaints of citizens against public authorities."

One of the most important discussions in all of this took place in Paris in October, 1991, at the First International Workshop on National Institutions for the Promotion and Protection of Human Rights. The workshop's conclusions, which have been called the Paris Principles, affirm that national institutions have competence to promote and protect human rights with as broad a mandate as possible, clearly set out in a constitution or legislative act.

Under the Paris Principles, a national institution comments on human rights matters

to government, parliament and any other competent body; promotes conformity of laws and practices with international standards; encourages implementation of international standards; contributes to international human rights reports; increases public awareness of human rights; and cooperates with other human rights institutions.

The Principles also recognized that national institutions in some countries have the competence to receive and act on complaints of human rights violations. National institutions may seek amicable settlements, inform complainants of their rights and how to seek redress, hear complaints or refer them to competent authorities, and make recommendations to solve human rights problems including by amending laws or other acts that obstruct the free exercise of rights.

Discussing the role of the Ombudsman, the Ombudsman is the complaint appeal department, a place to take a complaint about government, about a violation of human rights, when a person has sought other remedies without success and now has no other place to go.

Ideally, the Ombudsman is an independent, impartial, third party who receives and investigates complaints about agencies under the office's jurisdiction. An Ombudsman may make findings and recommendations to prevent human rights violations or to improve public administration and may report to Parliament and make investigative reports public.

I believe that the Ombudsman is a paradox. At one time, the Ombudsman is both powerful and powerless. The Ombudsman has a great deal of power to question and to investigate, but no power to make agencies do anything except answer questions and produce records or evidence. One of the office's strengths is that it depends on reason and persuasion to influence government and its actions, actions the government takes after being persuaded, ombudsmen have found, are more likely to succeed than those a government is forced to do.

The Ombudsman appointed by Parliament — known as the classical Ombudsman — has the following characteristics:

The authority to criticize all agencies, officials, and public employees generally except courts, legislative bodies and the chief executive.

Independence from control, except for the office's responsibility to Parliament, which exercises control primarily through appointment and removal.

Independence through a long term, generally at least five years, although some ombudsmen have terms as long as ten years, and there are a few who are actually appointed for life.

Freedom to investigate any act or failure to act by any agency, official or public employee with or without a complaint. Access to all government records relevant to an investigation.

The sole discretion to decide what to investigate and determine what criticisms to make or to publicize. Any agency, official, or public employee criticized by the Ombudsman will have advance notice of that criticism and the right to public a reply with the criticism.

Immunity for the Ombudsman, staff and former staff from being sued in civil court for any liability on account of their official acts.

The Ombudsman's powers, essentially, are these four:

1. To ask questions and compel people to answer them.
2. To compel people to produce records and other evidence in an investigation.

3. To persuade because they may not issue an order binding an agency.
4. To make investigations and reports public.

An Ombudsman conference on non-judicial mechanisms for protection of the fundamental rights of persons in the CSCE countries held in Madrid in 1992, described the characteristics of the Ombudsman institution. The group said the Ombudsman should be a parliamentary office, offering free services for people with complaints about maladministration or violation of human rights. It should be completely independent, its recommendations treated with the greatest respect and responded to, and no area of public administration should be outside the Ombudsman's jurisdiction. The Ombudsman should aim to improve administration and prevent injustice and have sufficient resources to deal with every complaint and to be well known.

The conference also conclude:

“While the primary objective should be to investigate and provide redress for the justified complaint of individual citizens, a secondary aim should be to amend or improve systems of administration which have made injustice possible, so that mistakes or injustice will not be repeated. The Ombudsman may suggest changes in the Law, but it is for the Government and Parliament to make such changes through the parliamentary process. Similarly, when the Ombudsman recommends redress, it is for the body which has created the injustice to provide the remedy.”

Experience has shown that the following characteristics are needed for an Ombudsman or human rights institution to be effective and credible:

- .A clearly defined legal basis to guarantee an independent and effective role;
- .The power to investigate without a complaint (usually called “own motion“ or “ex officio“ investigations);
- .Provision of adequate resources, including staff, equipment, premises and budget;
- .A strong educational and promotional capacity;
- .Headed by an individual or a group that inspires confidence among the population.

The overwhelming majority of the OSCE participating states have created national or state Ombudsman and human rights protection institutions as democratic ways to promote and protect human rights. OSCE and other international organizations and bilateral donor nations have supported these efforts.

Ombudsmen in the OSCE participating states, these countries have long — the following countries have longstanding Ombudsman or human rights protection institutions at the federal or state levels: Austria, Belgium, Canada, cyprus, Denmark, Finland, France, Germany, Great Britain, Greece, Iceland, Ireland, Italy, Malta, Netherlands, Norway, Portugal, Sweden, Switzerland, Spain and the United States. (A working group in Turkey is drafting legislation that would create a national Ombudsman. It will be interesting to see whether the changing government will have any effect on that. France will add an Ombudsman for children, to its already existing institutions.) Institutions in these countries have a variety of jurisdictions and competencies.

Canada, Italy, Switzerland and the United States do not have national Ombudsman institutions — their institutions exist on provincial, state and local levels. In Austria and Germany, the Ombudsman institution is composed of members of Parliament who constitute committees to receive complaints from the public and to get them resolved. For the most part in the remaining countries, the Ombudsman institutions are considered classical — that is, a legislative body appoints the Ombudsman with jurisdiction over the executive branch of government.

New Ombudsman or human rights protection institutions have been established in these 14 participating states: Bosnia and Herzegovina, Croatia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Slovenia, the Ukraine, and Uzbekistan. Discussion is active and legislation has been drafted and is being considered in Albania, Belarus and Estonia. The Parliament of Estonia is considering legislation that would add Ombudsman powers to that country's Legal Chancellor.

Discussions have taken place and interest has been voiced to consider creating Ombudsman institutions or working groups are developing legislation in Armenia, Azerbaijan, Bulgaria, and Kazakstan. In fact, I heard recently from the Ombudsman of Iowa that a delegation had visited his office from Bulgaria. While legislation was drafted some time ago, it's not being considered for the time being in Tajikistan, the civil war status of the country makes it very difficult to create such an institution and to have it be effective.

Discussions have taken place, but no legislation has been drafted in Kyrgyzstan.

No legislation is actively being considered to create institutions in Slovakia and Turkmenistan. The Czech Republic is the only country of the participating states that has rejected legislation to create an Ombudsman.

Essential characteristics, I'd like to talk on the most essential characteristics of ombudsmen. I've written a number of papers on essential characteristics and legislative provisions, and I'd just like to hit the highlights here. The irreducible minimum characteristics such an Ombudsman office must have are four:

- .Independence
- .Impartiality and fairness
- .Credibility of the review and investigation process
- .Confidentiality

Each of those characteristics then takes effect through provisions found in laws creating such ombudsmen. Let's look at the four.

A. Independence

1. The Ombudsman's Office is created in the Constitution or a law of the jurisdiction to establish its permanence.

The more difficult it is to change the legal basis for the Ombudsman's office, the more likely the office will be permanently established. As you might imagine, an institution that has the power to criticize the executive and find itself the target of criticism or find its existence to be unable if it is not created in the Constitution or law. Permanency creates stability for the office and credibility among the public. The Ombudsman is free to criticize without fear that the office will be abolished or unnecessarily restricted.

2. The Ombudsman acts as an officer of a legislative body or on behalf of the legislative body, and is independent of the organizations the Ombudsman reviews.

The Ombudsman is made a part of the legislative body to achieve functional and political independence from the organizations or agencies that the Ombudsman reviews. Ombudsmen are independent so that they may be impartial. their findings and decisions are based on examination and analysis of the facts and the law in each instance.

3. The Ombudsman is appointed or confirmed preferably by a super majority of a legislative body through a process designed to prevent political appointments.

Appointment or confirmation by a super majority ensures that the candidate is one who has wide respect and is seen as fair and impartial among different political parties, social and ethnic groups, and even parties that oppose one another or the government.

4. The Ombudsman has a fixed, long term of office and may be reappointed.

A long term — at least a year more than the longest term for members of the legislative body — removes the Ombudsman from political winds of the moment.

5. Removal of the Ombudsman is for cause and by a super majority of the appointing entity.

The removal process is often the reverse of the appointment process. Ombudsmen are subject to removal for specified causes. This guarantees that they will not be removed from political reasons or because the results of investigations have offended those in political power in the legislative body.

6. The Ombudsman has a high, fixed salary.

Ombudsmen investigate and make recommendations to the highest officials of government. They are paid at a level commensurate with that responsibility. Pay is often equated with judges, justices of supreme courts, or heads of ministries or government agencies.

7. The office has a budget funded at a level sufficient to carry out the purposes established in law and spends and accounts for its funds directly to the legislative body. Again, these are so that the Executive cannot control the Ombudsman.

An inadequately funded office will not be able to perform the functions required by law, and thus will lack true independence.

8. The Ombudsman has the sole power to appoint and remove staff.

The Ombudsman is an institution most often headed by one person or occasionally a board appointed or confirmed by the legislative body. Staff often perform work that is sensitive, delicate or confidential. The Ombudsman has the sole power to appoint and remove staff to ensure that they will have the Ombudsman's full confidence.

9. The Ombudsman is immune from liability and criminal prosecution for acts performed under the law.

The Ombudsman is an attractive target for the people criticized or served. Immunity allows the Ombudsmen to focus resources on receiving and investigating complaints rather than defending suits.

10. Ombudsman actions may not be reviewed in court except to determine the Ombudsman's jurisdiction.

Since no one receives anything by right from the Ombudsman and since the Ombudsman cannot issue a binding order to an agency, judicial review would serve mainly to harass and delay the Ombudsman. One goal in instituting such an office is to offer an alternative to litigation although complainants may later choose to go to court. However, when jurisdiction is in question, judicial review is appropriate if no other resolution can be found.

B. Impartiality and Fairness

1. The Ombudsman's political and other activities are restricted to remove the office from the political arena and make the Ombudsman accessible to complainants from any political group.

Ombudsmen are also restricted from earning income, to prevent them from being influenced by those who might pay them that other income. Ombudsmen often extend these restrictions to their staff.

2. Anyone may bring a complaint, preferably directly to the Ombudsman, without paying a fee or passing through an intermediary official.

There are two countries where you cannot go directly to the Ombudsman, in the United Kingdom and in France you must go to a member of Parliament first. No limita-

tions are placed on individuals or groups who may complain to the Ombudsman. While some Ombudsmen can accept complaints when the complainant has no personal interest in the issue under consideration, other Ombudsmen cannot. The Ombudsman decides which complaints may be heard and which complaints are investigated.

3. The Ombudsman may criticize any agency or person under the office's jurisdiction. They may make recommendations to resolve specific situations or prevent their recurrence. Investigation may find that the complainant was justified. The Ombudsman then may criticize any agency or person so that the public will know was responsible, and the Ombudsman may make recommendations to solve problems or to prevent them from happening again.

4. The Ombudsman is not an advocate for any individual or group although the Ombudsman may, after an investigation has been conducted, advocate for recommendations that would benefit a complainant.

Ombudsmen are impartial. They examine the facts and law of a complaint without having prejudged who is right. When they make recommendations to an agency that are not followed, they may advocate on behalf of those recommendations. But they are not advocates for complainants or agencies, rather for good administrative process and good government.

C. Credible Review and Investigation Process

1. The Ombudsman has general jurisdiction in the government that is broadly defined and not restricted to one agency or one particular type of grievance.

General jurisdiction Ombudsmen are not as subject to influence as those who look at only one agency or type of complaint. Ombudsmen generally do not have jurisdiction over those who appoint them, elected officials or judges. Some newly created Ombudsmen, particularly in the participating states of the OSCE, do, however, have some jurisdiction over the courts.

2. The Ombudsman may investigate grievances of anyone concerning any decision, recommendation, or any act done or omitted relating to a matter of administration, or by any organization or person over whom jurisdiction exists.

Almost all Ombudsmen are precluded from reviewing judicial decisions. Accessibility and latitude allow the Ombudsman discretion to focus resources effectively to respond to valid complaints. I don't know of any Ombudsman office that believes it has enough resources, so they need to be able to focus those resources in the areas where they'll do the greatest amount of good.

4. The Ombudsman may initiate an investigation without a complaint.

The authority to self-initiate an investigation allows the Ombudsman to act when information warranting an investigation comes to the Ombudsman's attention in the absence of a willing complainant.

5. Agency staff are required to cooperate with the Ombudsman and the Ombudsman is given access to record and agency premises; the Ombudsman has subpoena power or the ability to compel individuals to testify or produce evidence in countries where subpoena power does not exist.

6. After investigation, the Ombudsman has the responsibility to make findings and recommendations to organizations under the office's jurisdiction and has the ability to publish and publicize them.

The Ombudsman's report contains findings and recommendations to solve problems or to prevent them from happening again. Reports are sent to the subject of the complaint

and to the complainant. The Ombudsman may publish reports so that the office is accountable, and occasionally to try to influence the agency to implement recommendations where they have not been implemented.

7. The Ombudsman's findings are not reviewable.

Because the Ombudsman may not issue a binding order, no one may take the Ombudsman to court to appeal findings or to seek a review or modification of findings.

D. Confidentiality

1. The Ombudsman may maintain confidentiality.

Complainants may bring matters to the Ombudsman that are confidential by law, delicate or about which they wish the Ombudsman to do nothing. When an investigation requires or could result in disclosure, the Ombudsman may decide not to investigate if the complainant will not release the Ombudsman from that obligation of confidentiality.

2. The Ombudsman may not be forced to testify or produce records.

The integrity of the Ombudsman's confidentiality depends on this provision. This can also prevent complainants from using the office for discovery, which should actually be done under court rules.

The Ombudsman and Democracy

Even a well-structured and well-resourced Ombudsman office is a fragile institution. It depends for its success on government desiring to resolve fundamental and human rights violations or other administrative problems. It depends on people being willing to bring their problems to the Ombudsman. And finally, it also depends on the mass media being willing to inform the public when the Ombudsman makes a report and government refuses to follow the Ombudsman's recommendations.

If the price of liberty is eternal vigilance, the price of human rights protection is also eternal vigilance, and Ombudsmen are eternally vigilant.

Thanks for your attention and your patience, and I'd be happy to try to answer any questions that you might have.

Mr. HATHAWAY.. As usual, under these circumstances when you ask a question please identify yourself. There are microphones here, since this is being recorded.

Does anyone have any question they wish to ask?

Well, let me start with a question. Traditionally, elected legislators have had the function of responding to constituents' complaints, particularly about the function of their governance, and yet, the Ombudsman is a creative of the legislative. This seems like an inherent contradiction. Can you explain how this came about and how this works in practice, when there is a functioning democratic system in place?

Mr. GOTTEHRER. I assume by your last "functioning democratic system," we are talking about Western democracies, particularly the United States, Canada, similar circumstances.

I work for a legislative Ombudsman in the State of Alaska, and the 40 members of the House and 20 members of the Senate are in many instances very zealous in pursuing constituent complaints. And, of course, conventional wisdom is you tend to your constituents, if you wish to be reelected.

There are circumstances, however, where it's really nice to be able to hand it off to somebody else, and I speak now from the perspective of also having worked as a staffer for one of those members of the House of Representatives of the State of Alaska. When you know that your complainant or your constituent is going to get a response that the constituent is not very happy with, it's nice not to have to do it, and we, indeed, received complaints or complainants referred over to us from members of the state legislative,

where they knew that they were going to have to say something to the constituent if we didn't exist that the constituent would not be very happy about.

There is also, within the law on the State of Alaska Ombudsman, and this is true in other Ombudsman institutions, there are things that the Ombudsman can get access to that members of the legislative do not have access to. So, for example, in the State of Alaska, just to give you an example that I'm familiar with, members of the state legislative have no power to examine the records of the Child Protective Service of the State of Alaska. They also do not have the power to examine the records of the Child Support and Enforcement Division in the State of Alaska.

People used to ask me, what do you get the most complaints about, and I'd say, well, wherever a citizen rubs up against government we get complaints. If it's about money and children we get a lot of complaints, and if it's about money and children we really get a lot of complaints. A member of the state legislature cannot look at the records of the Child Protective Service in the State of Alaska, and so when parents are concerned that their child was taken in a way that they were not very pleased about, who can go and look at the records, only the Ombudsman. It's either that or trust the agency. They don't like to trust the agency, especially if the agency is the one they are complaining about, and they don't trust that the agency has, indeed, followed the law, and the agency has the right to grab their kids, or in the case of Child Support Enforcement, to grab their money. And so, placing the Ombudsman within the legislative context adds additional oversight power to the Executive Branch, gives that power to the Legislative Branch through an Ombudsman, who then has the power to look at confidential records, to force those people to testify if they are unwilling to, or to allow them to testify under subpoena if you don't want anybody to look as though they are cooperating with you, we've done that.

And, if the legislature will take ownership of the Ombudsman as an additional oversight agency, the Ombudsman then becomes another part of the Legislative Branch of government.

Mr. HATHAWAY.. Next question.

Mr. GORE. How would you compare — I'm Chadwick Gore with the Commission — how would you compare the independent counsel that we have in the United States with the federal level Ombudsman?

Mr. GOTTEHRER. Well, the independent — I'm not all that familiar — I'm only about as familiar with that law as by watching what's going on on television, reading it in the press, but it seems to me that in the independent counsel situation, first of all, you don't have people going in complaining, you don't have individuals with individual problems seeking redress through the independent counsel.

You could compare it, perhaps, to some of the functions that Ombudsmen have to initiate investigations without a complaint, to look at, in some countries the law is very specific that the Ombudsman has the power to investigate corruption. With very few exceptions, probably, I haven't counted them, but my guess is less than five Ombudsmen have the power to actually prosecute officials. Many have the power to refer a matter over to the prosecution. The State of Alaska Ombudsman has the power to take the matter directly to the Grand Jury. We've only done that once in 20 some years, and probably, you know, during the time we were there we would have only done it if we didn't have confidence in the Attorney General, if we felt that there was something that was of a sufficiently important nature that we couldn't trust the Attorney General to investigate it and make a good decision and take it to a Grand Jury if it needed to be, we could have taken

something directly to the Grand Jury. That is an unusual provision, not all Ombudsmen can go directly to the Grand Jury.

But, the primary — in the Western context, Western democratic context, the primary function of an Ombudsman is to look after maladministration in government, and that can cover all kinds of levels. Usually, you don't have the power, however, to investigate elected officials, and that's, perhaps, where the independent counsel has an advantage over an ombudsmen. We do not investigate the governor, if people have redress they could remove him, the legislature could impeach him. We did have the power to investigate his staff and did conduct investigations on complaints about staff abuses of power, and did in some instances find that there had been some abuses of power in the Governor's office, not at the Governor's specific direction, however.

We had a complaint, in Alaska there's a community that's not on the road system, where they talk periodically about building a road to it, and like so much of Alaska, half the community wants a road and half the community doesn't want a road, so the road has never been built.

Governor Hickel at one point decided that the road was going to be built. The Commissioner for Transportation went ahead and started activities to build the road. We received a complaint about the Commissioner's activities. We asked questions and we discovered that this was being done at the specific direction of the Governor personally. Close case, we don't investigate the Governor.

Mr. HATHAWAY.. Okay.

Next question?

Well, I have another one. Let's make a segue into the question of the Ombudsman institution in developing democracies. In the OSCE participating states, what are the contributions that you've seen Ombudsman institutions make to the creation of functioning democratic institutions/

Mr. GOTTEHRER. That question is both easy and difficult to answer.

I am not going to talk about the Western democracies, I'm going to talk about those 14 countries that I listed. Some of those Ombudsman institutions have been in existence a great deal longer than others.

The first one that was established was the Polish Ombudsman, actually created in 1989 before the fall of the Soviet Union. Several polls have told me that they thought the Polish government didn't really know what it was doing when it created that institution, and that it grew far beyond what they had originally intended it to do, and has actually done quite a bit.

The Polish Ombudsman is the largest office of all the ones that I mentioned at the moment. The Russian one has the potential for being absolutely the largest if they get decent funding and really try to cover the country in any kind of meaningful way. And, some of them are very small and very poorly funded, so I have that difficulty of dealing with both effective institutions and those that have not yet really established themselves.

In the effective institutions, the kinds of things that you will read, if you look at their annual reports, are many of the kinds of things that you might expect, complaints about individual situations. The situations vary from country to country. In those countries that are going through privatization, when I was in Georgia just about everything we talked about had to do with privatization of apartments, and somehow or another many of those complaints revolved around documents that were allegedly forged.

I never, in all the time I was in Alaska, had any complaint about a forged document,

that was not something within my experience. But, in Georgia I half suspect that some of the people who are custodians of documents are willing to sell copies so that others can go out and use White Out and come back with a document that you won't find any official records anywhere and, indeed, that was one of the cases where I talked with — they had me talk with some of the complainants, I talked with a woman who claims that the document that was used to deprive her of her apartment was a forged divorce decree. So, I had to start thinking about, well, how would you go about proving whether or not that document was forged, and, you know, then we started talking about what you could do to investigate that kind of thing.

A lot of what is being done is to move into areas where human rights violations are, perhaps, rampant. The Ombudsman of Georgia, to take another example from that country, has worked probably harder than many of the Ombudsman in other countries to try to get political prisoners released, and just recently in a number of instances I've seen reports from the Georgian media on the internet that some of the people are going to be released, and are going to be pardoned. That's probably the most significant, if you look at all of them that I know about, there are probably a lot more that I don't know about because it's hard to keep up on all of those situations.

What each of these institutions has to do to establish itself is very difficult, because at the same time the country is — at the same time the Ombudsman is trying to establish the institution, the country is trying to establish its democracy, and so the Ombudsman has the difficulty of creating credibility by being able to go to a government agency and talk about things that people in that agency aren't used to talking about with outsiders, let alone just the common ordinary citizen. I've had conversations with Ombudsmen in various countries about how to go about doing this.

One of the things I suggest to them is to do it before you have a complaint against the agency, go in and talk to every minister you think you are going to get complaints about, try to establish relationships within those agencies that you do have the power to go in and look at their records, you do have the power to go and talk to their people, you do have the power to make recommendations, and you do have the power to make all this public if they don't go along with your recommendation.

I think that the Ombudsman is a democratizing institution when it is operated in that way, and I think all of the Ombudsmen that I know are working in that direction.

Mr. HATHAWAY.. Thank you.

Next question.

Mr. GORE. Yes, I have — did you — what's the status of the German Ombudsmen?

Mr. GOTTEHRER. Germany is one of those countries where they have a Petitions Committee in the Parliament, and I think the German Petitions Committee is composed of about 40 parliamentarians who receive complaints, investigate them, and they function like an Ombudsman.

Germany also has a military Ombudsman. At the time Germany was debating whether or not to reestablish armed forces, there was great fear that, you know, if they reestablished the armed forces in Germany it would again be out of control and nobody would have any power, so they created a legislatively- based military Ombudsman. The military Ombudsman of Germany is appointed by the Bundestag, and has the power to investigate — to receive and investigate complaints about the military.

Mr. GORE. Would religious groups in Germany, that were having problems, go to the Petitions Committee then, and do you know if they have?

Mr. GOTTEHRER. They could, I don't know if they have. I have not read the most recent reports. the Petitions Committee issues an annual report, as does the military Ombudsman in Germany. Germany and Austria are the two places where members of Parliament serve in the Ombudsman function.

Mr. GORE. Are you aware of any religious groups or organizations going to the Ombudsman in Austria, or in any of the other countries that we are talking about?

Mr. GOTTEHRER. I am not aware of any place where — but that may be more a reflection of my ignorance, you know, my lack of knowledge. It's very difficult to keep up with all of these Ombudsmen and all of the various situations.

In some instances, their annual reports are not completely translated into English. I suspect that there will be complaints on religious matters to the Ombudsman of Uzbekistan at some point. There's a great deal going on in that country, abusive freedom of religion that is eventually going to wind up in her bailiwick. I'm surprised it hasn't come already, and I would be very surprised if it doesn't come relatively soon.

But, she is still relatively — it's still a relatively young institution, and the publicity is slowly getting out. That institution doesn't have as much staff as it really needs, and I've recommended that they need to at least double their staff, in order to be able to handle the complaint load that they are going to get.

And, religion is an area that will bring, I think, quite a few complaints in many of the countries. In the Baltics, it's ethnic minorities, particularly the Russians, with complaints about language laws and things of that sort. And, in Georgia, as I mentioned, it's privatization which is a very big area of the complaints, prison. All across many of the countries prisons are a significant area of concern. Religious freedom is an area of concern, where I believe they will get large numbers of complaints.

It's important to remember that Poland, being the oldest institution, is only ten years old, and many of these institutions are not all that well established because they aren't all that old yet. The Ukraine and Romania are very recently established institutions. Russia has had significant problems in creating the institution to begin with, finding a person to head it, and my understanding is that they don't have the financial resources dedicated to the institution yet that it's going to need if it's really going to be able to function in the Russian Federation and receive complaints. I mean, that will be the largest Ombudsman institution in the world, by virtue of the size of the country and the number of people. And, you know, how they are going to cover all of that remains to be seen.

Sergei Kovalov, who was the first Ombudsman in Russia, Russia is an interesting example, they had an Ombudsman before they had a law, then they had a law and the Ombudsman, now they have an Ombudsman and a law and no money. We are hoping that it will all come together where they will have a law, an Ombudsman, and money to do the job, but Kovalov, when I visited Russia, had put together a plan for a staff of about 216, with regional offices across the country, linked together by computers, and quite an ambitious plan that the U.N. was willing to try to undertake and to help with financing of the computer infrastructure, but Kovalov eventually was fired by the Duma and resigned his post with Yeltsin.

It took them a while to pass the law, and then a while longer to appoint. So, when I pointed out that these are fragile institutions, they are, and sometimes it takes them a while to get established, and a while for people to understand what the institution is and to begin to bring complaints to it.

The older institutions are receiving complaints at what I believe is a reasonable rate

of complaining. The younger institutions are still getting the word out in their country of what is their office all about, they still receive large numbers of people bringing complaints that are not within their competence. You always receive a significant number of people coming to you with, you know, in Alaska it was landlord/tenant, we had no jurisdiction to deal with landlord/tenant problems, we sent them to the Attorney General's office, where they had a brochure on landlord/tenant law.

In the participating states of the OSCE, you know, it's neighbor against neighbor, it's workplace complaints, things that are clearly outside the jurisdiction and competence of the office. They get a lot of those, and so part of what they need to do is educate the people of the country as to what their function really is, and that takes time. And, you never, ever eliminate those people coming to you who don't understand what you are and what you do. But, I think at this point in many of the countries it's a sizeable number, and some of the people who would be people who come to complain don't know that that office exists and that that is the place to take those complaints.

Everywhere I go I try to meet with human rights NGOs, and urge them to bring complaints to the Ombudsman. In some countries, NGOs can complain to the Ombudsman, they don't have to complain as individuals. The laws are very clear that NGOs can bring complaints to the Ombudsman. In other countries, you have to be the individual affected by the act of the government in order to bring, but I try to encourage NGOs to get the word out to their membership, and to bring complaints to the Ombudsman, and when I talk particularly to the international human rights NGOs, Amnesty International and Human Rights Watch, I urge them to bring the difficult complaints to the Ombudsman. It's the only way that institution is going to get tested and established, is to bring the complaints about religious freedom, complaints about political freedom and political prisoners, complaints about conditions in prisons. Prisons are going to probably prove to be, I think, the most difficult area for Ombudsmen in that part of the world to deal with, because most of what needs to be done requires money, and that's very difficult. Ombudsmen don't have printing presses.

Mr. HATHAWAY.. Next question.

Let me ask you a slightly different one. The thrust of United States policy in the OSCE countries bases compliance with OSCE principles at the head of our list of objectives. We are ultimately advocating democratization and assistance with the creation of Rule of Law states.

In the context of creation of Rule of Law states, how do you see these developing Ombudsman institutions interacting with the judicial systems, and with the need to create really representational constituent service-oriented legislative branches? Is there some danger that people will resort to your institution rather than making the courts function or making the legislatures function? Because, after all, what we are trying to produce here is administrative regularity and transparency in government actions and decisions.

Mr. GOTTEHRER. Very good question.

The Ombudsman is the essence of the Rule of Law. I mean, what you do is, you take a complaint, you look for the facts, you look for the law, and you look to see whether or not the law was followed. So, in that sense, the Ombudsman is at the heart of the Rule of Law, trying to make sure that the country is following the Rule of Law.

Will people go to the Ombudsman instead of going to other institutions, thus, allowing those other institutions to continue not to function in a democratic way? There's a number of ways I could answer that. First off, the flip way is not unless those countries

give Ombudsmen institutions one heck of a staff, which so far has not proved to be the case. Even the largest institution, the Polish one, I think it's approaching 200 now, and I still hear Professor Zilinski complain that they don't have enough staff, so I suspect that one of their problems is that they didn't include a provision in their law limiting the time by which a complaint must come, and so I understand they've gotten complaints about events that took place in the previous century, and that can get to be — try talking with the people who made those decisions.

I don't think people will go to the Ombudsman if the other institutions are functioning. I think the Ombudsman can be helpful in trying to get those other institutions to function to a greater or lesser degree, depending upon the institution and depending upon the country, and depending upon the power that the Parliament has given the Ombudsman in creating the institution.

Some Ombudsman institutions do have the power to look at the administrative acts of the court system. I know of no — well, I was going to say I know of no Ombudsman who has the power to review the decisions of a court, and that is in one sense accurate. About as close as they come is that a couple of Ombudsman institutions can ask the court to reexamine their decisions. They can't say, you were wrong. They can't recommend, as they could in other instances, a different decision. About the closest they can come is to suggest that the decision be reexamined.

Ombudsman institutions with some competence or jurisdiction over the court system exist only in those countries, with two exceptions, exist only in those countries where the court system has not yet fully developed as an independent branch of — third branch of government. The two exceptions, interestingly enough, are Sweden and Finland.

The Swedish Ombudsmen have the power to prosecute judges who aren't doing their job, and, in fact, the idea of an investigative report grew out of the Swedish Ombudsmen's experience, early on they were prosecuting judges who weren't doing their job, they eventually conducted investigations and they would find, you know, maybe there was something that went wrong here but it's not prosecutable, so they were writing a report to explain why they didn't prosecute, and that eventually became the investigative report that Ombudsmen issue.

The Finnish Ombudsman — the Swedish Ombudsman has not found it necessary to prosecute any government official in recent years. I understand, from some Swedes that I have talked to, that the fear of criticism by the Ombudsman is probably worse than being accused of sexual harassment, if one can imagine that. People will do anything, go to any length not to be criticized publicly by the Ombudsman in Sweden.

The Finnish Ombudsman tells me that he has prosecuted officials in his country in recent years, I think two or three in the last year, and so in those countries where the Ombudsman has jurisdiction or competence over the court system, it's the administrative part, and trying to get the court system to function. Ombudsmen are very happy when government functions the way it should, it means less complaints, that means they can go on and focus on those areas where it's not working the way it should.

I think Ombudsmen will be less successful at getting legislatures or parliaments to function as truly independent legislative bodies, because Ombudsmen are creatures, generally, of those bodies. The principal I've always said is, you don't criticize the people who appoint you or you won't be reappointed, so you shouldn't be — you know, you shouldn't be in the business of criticizing the Legislative Branch of government. There are some few Ombudsmen that do have powers, the State of Alaska Ombudsman was one of them, over

the administrative acts of the Legislative Branch of government. I can think of, during the time I served in the Ombudsman's office, I can think of maybe one complaint that we got about an administrative act of the Legislative Branch of government. I just don't see that they are going to really be helpful, that needs to be somebody who is outside the Legislative Branch working with it. The international organizations, I think, can be extremely helpful in doing that, but I think the Ombudsman can be very helpful in setting the tone in the Executive Branch of government, working with the ministers, and the presidents, and prime ministers and cabinets of ministers, to open up agencies that have not been previously opened up, and to shine a little sunlight in places where it hasn't been seen in decades. And, I think that leads to democratization.

Mr. HATHAWAY.. Okay.

If you could come forward, either to a table or to the standing microphone, and identify yourself.

Ms. TAYLOR. Thank you very much. I'm Susan Taylor, with the Human Rights Office for the Church of Scientology here in Washington, D.C., and I just have three quick questions, very practical.

Can the Ombudsman office in various countries assist in facilitating dialogue?

Do you want me to ask you one at a time?

Mr. GOTTEHRER. Sure, because I can only answer one at a time.

Yes, the short answer is yes. Many Ombudsman institutions, particularly, the establish democracies, saw their function for a long time of receive a complaint, investigate a complaint, issue a report, make recommendations, and that's the traditional link.

In recent years, with burgeoning numbers of complaints, particularly, about systems that are broken, Ombudsmen have done much more of what we now call systemic investigations. We had an institution, an agency in the State of Alaska, that could not communicate with its public. It took six months to get a phone call returned, two years to get a letter answered. The system was broken. I mean, we could fix each one of those little — I mean, we could get through, because they would talk to us, they had to, but we fixed each one, didn't fix the system, so we just said, look, we've got to get this system fixed.

We went and talked with the agency head, and eventually got them more staff, and they answered 90 percent of the phone calls in ten rings, and, you know, not six months.

There are other situations where you do enter into a long discussion with an agency and, perhaps, with its public. For example, again in a systemic investigation that was conducted by the Ombudsman of the Province of Alberta into child care, the Province of Alberta licenses child care centers in the province, and there were a lot of questions about that process and whether or not people were getting through who shouldn't be licensed to do child care. He held public hearings, you can hold public hearings. Many laws specifically allow for the Ombudsman to hold public hearings. I've always urged Ombudsman, if the law doesn't say it, and there's nothing there that prevents it, you can go ahead and do it. And then, there is an awful lot of back and forth, especially when you get into a situation, perhaps, where the complainant and an agency are in great dispute, and maybe it isn't clear who is right and who is wrong, to go in and to just start talking about it.

When Ombudsmen ask me how to fashion recommendations that are accepted, I usually suggest that they ask the agency first, because often agencies know what they need to do and for one reason or another are not allowed to, or cannot, or do not have the resources, when the Ombudsman says they need it, they get it. This guy had been complaining about not having enough staff to the legislature for a long time, and nothing every

happened until we came in and said, look, we're getting all these calls from people who aren't getting their calls and letters returned.

And finally, when there is an area of national interest, perhaps, Ombudsmen have undertaken to conduct conferences and to examine areas where there might be large numbers of human rights violations, and to conduct — even a systemic investigation would be a massive undertaking, and that, perhaps, the best way is to draw attention of the legislative body and the public to what's going on, to conduct a conference on it.

So, for example, again, when I was in Georgia, there was talk about, how do we deal with all these street kids? We just can't deal with that. I said, well, one way you might do it would be to have a conference and invite everybody and start to focus some public attention on it, and then you, perhaps, could conduct an investigation that resulted in a list of good recommendations to the Parliament of Georgia on how they might do that.

You certainly can facilitate discussion.

Ms. TAYLOR. Great, thank you.

My last two questions, is there some kind of a list or a publication with how to contact various Ombudsmen in different countries, and then thirdly, is there an Ombudsman at the EU level?

Mr. GOTTEHRER. Let me answer that last one, there is an EU Ombudsman. His name is Jacob Soderman. You can find him on the internet. His site is actually in all the languages of the EU.

The finding of all the other Ombudsmen is a little bit more difficult. The International Ombudsmen Institute, which has its headquarters in Edmonton Alberta at the University of Alberta, produces a directory of Ombudsmen. It's the only one that exists at the moment, but it's not complete and its only revised once a year.

If you have somebody that you are trying to find, I'm probably the best person to talk to.

Ms. TAYLOR. Thank you.

Mr. GOTTEHRER. You are welcome.

Mr. HATHAWAY.. Okay.

Are there anymore questions?

I think with that then we will close this morning's briefing. I thank Mr. Gottehrer for coming and making his very informative presentation this morning, and thank you all again.

(Whereupon, the above-entitled matter was concluded at 11:12 a.m.)