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**THE PROTECTION OF INDIVIDUAL RIGHTS
IN THE UNITED STATES OF AMERICA**

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The United States of America has a reputation for the protection of individual rights through processes of litigation. The underlying theory of constitutional review, found in *Marbury v. Madison* is the foundation of this doctrine. Individuals can resort to the law courts to protect their rights. Judges and courts believe that protection of individual rights against governmental invasion is part of their responsibility. The number of law suits adds to this perception, as do the many television programs in which hard-working lawyers are shown protecting the rights of persons falsely accused of crime or oppressed by governmental action.

This court-based approach of Americans is sometimes contrasted to the approaches of other countries, in which administrative mechanisms or institutions like the ombudspersons being discussed today, are more prevalent. The contrast may be unfair. The United States has a number of institutions that promote the informal resolution of issues relating to the protection of individual rights. In this presentation, I will try to provide a sample of that range of responses and of their relationship to the legal process.

In reviewing these approaches, it is important to remember that they exist in the context of American law. In that context, the individual almost always has the right to resort to a law suit if the informal mechanism fails. That suit may be based on the Administrative Procedure Act or on basic principles of constitutional law. But ordinary litigation is usually a last resort. The possibility of litigation may, however, make both parties to the underlying dispute more prepared to use other means to avoid it.

In the following sections, I will review some of the alternative approaches to dispute resolution regarding individual rights, and their relationship to the litigation process. They fall into several categories.

Informal approaches from outside of the administrative process

There are a number of informal channels through which an individual affected by administrative actions can question that action. For actions at the level of the national government two of these are particularly significant. First are inquiries by individual members of Congress into specific matters. Second are formal committee investigations of a topic.

Inquiry by a member of Congress. An individual affected by administrative action may request a member of Congress (usually the member of the House of Representatives for the district in question or one of the Senators from the individual's state) to make inquiries about the handling of a particular matter. The member of Congress (or more usually a staff member) will contact the agency to ask for an explanation of the handling of the matter in question. It is not appropriate to make such inquiries in judicial or quasi-judicial matters, but it is appropriate in matters that involve administrative action or discretion. Executive departments treat these Congressional inquiries with a great deal of care. In most government departments, there is an Assistant Secretary (deputy minister) whose principal function is maintaining relations with Congress. This includes promoting the department's legislative program, but also includes coordinating response to congressional inquiries. In the jargon of bureaucrats, such inquiries are called "Congressionals." The agency usually sets a very short time limit for the staff to answer the questions; the answers are reviewed by more senior officials--frequently by political appointees, before they are returned. Although neither the government nor the individual department head is subject to a vote of no confidence in the United States' presidential system, the department is dependent upon Congress both for the enactment of its legislative program and for its annual appropriations. Thus it is important for the department to be able to explain to the

member of Congress the reasons that it took particular action or the reasons that it has refrained from taking any action at all. Arrival of a Congressional inquiry will almost automatically result in the involvement of an additional member of the department staff taking interest in the matter, and in their needing to formulate a reasoned and reasonable explanation of the decision in question. Nor can these inquiries be ignored or postponed; there is usually an effort to respond to them almost immediately.

The benefit of a Congressional inquiry is frequently that it raises the level of consideration of the matter in concern to a politically and administratively more responsible level. If a low-level bureaucrat has been in charge of a matter, arrival of a "congressional" will almost certainly mean that higher level bureaucrats must review the adequacy of the administrative proceeding, and even political officials of the department may become involved.

The system of Congressional inquiries works because of the strong sense of loyalty of members of Congress to their home districts and because of weak party discipline. Members will seek to inquire about the interests of all from their districts, and will not necessarily avoid asking hard questions even if their own party controls the department in question. The individual Congressional inquiry has no relationship to the judicial system. It simply serves as another alternative.

Formal Congressional oversight hearings. The second way in which members of Congress become involved in the process is through the conduct of formal Congressional oversight hearings. As part of their legislative functions, the appropriate committees of both houses of Congress have the right to conduct formal public hearings to discover how well government agencies are carrying out their functions. Formally, their purpose in doing so is to determine whether new laws are needed in order better to regulate the activities of the department. In fact, the hearings may expose abuses or errors that the department will seek to correct in order to avoid additional laws that will further limit their discretion and powers.

Each of the Congressional committees has a staff that will assist it in developing the material to be presented in the oversight hearings. To take one example, recent oversight hearings relating to the collection of taxes revealed abuses by some tax collectors. The response was twofold. First, new laws were passed, limiting the powers of these tax officials. Second, the Internal Revenue Service administratively changed some of its own procedures in an effort to show Congress that even more stringent legislation was unnecessary.

These formal Congressional hearings also have no direct relationships to administrative or judicial appeals in pending cases. They can, however, result in a change of the law. The changed legal rules may then alter the applicable rules for everyone.

Informal approaches from inside the administrative process

There are a growing number of mechanisms within the administrative process that aim at the resolution of challenges without formal judicial intervention. Two can be discussed here.

Dispute resolution mechanisms. One of the new means of examining administrative actions is through informal "dispute resolution mechanisms." A new program in the Internal Revenue Service is a prime example here.

The Internal Revenue Service collects most of the domestic federal taxes in the United States. Disputes about the amount of tax due naturally arise. The Internal Revenue Code, a

federal law, contains elaborate appeals to resolve these disputes; the Regulations, a set of administrative rules, provide even more detail. Generally, the taxpayer files a tax return and pays the self-assessed tax. An audit may follow, in which the government auditor will examine the return and may levy additional taxes. The taxpayer may appeal that decision to more senior officials within the Internal Revenue Service, and then seek judicial review in the Tax Court or the District Court, with appeals to the Court of Appeal following that. In summary, it is a highly developed bureaucratic and judicial structure.

The Internal Revenue Service has now created a Dispute Resolution Service, outside of these formal mechanisms, to deal with certain kinds of problems. In some cases, ordinary tax agents applying ordinary procedures, may be unable to reach a fair and reasonable result. The Dispute Resolution Service may be able to review the actions of the agent (or, commonly, of several agents in several different offices dealing with the same individual) to reach a proper resolution of the matter.

This is an application of notions of *Alternative Dispute Resolution (ADR)*, a growing concept in the United States. ADR attempts to use the informal mechanisms, such as mediation and conciliation, rather than formal ones, such as arbitration or adjudication, in the resolution of disputes. This approach is being used increasingly in the private sector, but is now spreading into the public sector, as well.

There is usually no formal relationship between such alternative mechanisms and formal administrative and judicial review systems. If the ADR process does not resolve the matter to the satisfaction of both parties, the individual may ordinarily proceed to formal litigation or appeal. These are two separate tracks.

Inspectors-General. Each government department is required by law to have an Inspector-General. The duty of the Inspector-General is to uncover and correct fraud, corruption or mismanagement. The function of this office is much more toward the efficient operation of the department in accordance with law than toward the protection of the rights of individuals in disputed cases.

Since the Inspectors-General are government officials within the department, they have access to all of the records and personnel of the department. Thus they share some of the attributes of the ombudsperson. They can use legal process to compel public officials to answer questions about the performance of their work and can provide protection of confidentiality to sources who reveal misconduct to them.

If they do discover illegal activity or mismanagement, one important by-product may be the correction of errors in other situations. Again, their function does not replace the formal appeals processes in individual cases, but rather supplements it.

Advisory Commissions

Another institution that is significant in protecting individual rights is the Advisory Commission. Advisory Commission may be either temporary or permanent. Temporary commissions are appointed to examine particular questions or problems and to make recommendations (usually for new legislative action). Permanent commissions are established by law.

One permanent commission of particular importance is the United States Civil Rights Commission. An outgrowth of the struggle for racial equality in the United States, it was established in 1957 and now operates under a 1983 revision of its basic charter. (42 U.S.C. §1975 through 1975d.) It investigates underlying causes of inequality and the deprivation of civil rights and the makes recommendations for remedies to solve these problems. It has no direct power to enforce the civil rights laws; enforcement functions are assigned to other agencies. Despite its limited jurisdiction, the Civil Rights Commission has had a major impact on the development of United States policies regarding human rights. This is both because of its permanence as an institution and because of the prestige of many of the members who have served as members.

Hearings and reports of the Civil Rights Commission may reveal abuses in individual situations. While its purpose is the improvement of the law in general, not the resolution of individual complaints, such disclosure may have an impact in the individual instance. More importantly, the Commissions addresses patterns of discrimination and suggests remedies that may be incorporated into law. Even if the past discriminatory practice is not addressed, a new legal standard adopted as a result of the Commissions activities, may provide a basis for eliminating that practice in the future.

Governmental agencies for the enforcement of civil rights

The United States also uses formal administrative bodies that use non-litigation methods to attempt to resolve individual rights matters. One example can be examined here. It is the Equal Employment Opportunities Commission.

Equal Employment Opportunity Commission (EEOC). Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e and following) guarantees individual equal employment opportunities. No one may be discriminated against in the provision of employment on the basis of race, sex, national origin, or certain other characteristics. When this law was passed there was some controversy about how it should be enforced. Would enforcement be left to private litigation, making it available only to those who were willing to pursue lengthy law suits? Or should it be relegated to a governmental agency, which would perhaps become immobile in bureaucratic overload? The outcome was a novel hybrid organization. The law created the Equal Employment Opportunity Commission (EEOC).

Individuals who believe that they have been the subject of discrimination may file a complaint with the EEOC. The EEOC has six months (180 days) to conduct an investigation of the matter and to seek resolution of the case on an informal basis. The EEOC investigation is important for several reasons. First, the Commission has resources and access to materials that may be unavailable to the private complainant, with support from the federal budget and the staff of investigators. Second, the Commission may be in the position to seek a compromise settlement of the matter with the employer in question; indeed it can enter into a conciliation agreement, if the offending party is willing to do so. Third, if the matter reveals a broad pattern of discrimination, the EEOC may take over all further proceedings on behalf of all of the affected parties, not just the ones who filed the original complaint, thus seeking a broad-scale resolution. If the EEOC does not pursue the case itself, it must give the complaining party a "right to sue letter" at the end of the six month period. This permits the individual to initiate a private law suit. The EEOC initially serves a role of conciliator and mediator, attempting to find facts and to reconcile the differences between the parties. If these efforts fail, it will either become an active participant in the process and pursue the case itself or will stand aside and allow the private parties to resort to private litigation.

In carrying out this function, the EEOC has adopted a number of "guidelines" for determining whether discrimination has occurred. Unlike other agencies, the EEOC does not have the authority to issue rules and regulations. It may only apply the underlying anti-discrimination provisions of the Civil Rights Act. The guidelines explain to employers those actions that will constitute discrimination (and those that will not). The guidelines will be followed by the EEOC investigators in examining the case and by its staff in deciding whether to initiate a commission-directed prosecution. If the parties remain unable to resolve the case, it will go to court and be decided in accordance with the statute. In court guidelines, unlike regulations, are not binding rules of law that the judges must apply. The judges apply only the statute. The guidelines do, however, provide an expert interpretation of the implications of the statute by an agency charged with its enforcement, and will have substantial weight in the court's decision of the matter.

In this case there is an intertwining of the EEOC approach and the litigation approach. First, filing of a claim with EEOC is a prerequisite to filing a private law suit. Second, there is an automatic period of ---- months in which the individual party cannot proceed while the EEOC is investigating the matter. Third, the guidelines issued by the EEOC will govern its own disposition of the case and will provide strong advice to the courts, if the case ever proceeds that far.

The United States Supreme Court has recently recognized that the equal employment opportunity provisions of the law apply also to the employment decisions of federal agencies. In doing so, it expressly stated its expectation that use of the EEOC machinery, rather than immediate resort to litigation, would cause controversies to be resolved more rapidly.

Conclusions

Legal remedies and other less formal approaches to the protection of individual rights need not be mutually exclusive. Indeed, they can be mutually reinforcing. The existence of informal dispute resolution mechanisms permits controversies about government action to be resolved through those channels without resort to litigation. But the legal process provides two important roles. As those efforts at informal resolution are proceeding, all parties must conduct their negotiations not on the basis of their political influence or power, but on the basis of knowing that a formal litigation that will decide on the strict rule of law, may be the ultimate recourse; this may induce a heightened flexibility and reasonableness in seeking a satisfactory resolution. And if those efforts fail, it does provide a final forum in which a clear resolution of the claims can be obtained.