THE FEDERAL ADVISORY COMMITTEE ACT IN OPERATION

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INTRODUCTION

The use of advisory committees in the United States government started when the government started. George Washington felt the need for advice sufficiently to form a cabinet and convene committees. The members of the president's cabinet are no longer simply "advisers," as they are also the chief executive officers in charge of the operation of their departments. When they meet with the president as a group, however, they are an advisory committee.

The delegates at the Constitutional Convention of 1787–1789 were well aware of the benefits of the advice of others to a head of state. They specified that treaties were to be concluded and major appointments made by the president "by and with the advice and consent of the Senate."

Since then, congressional legislation and executive action have caused the establishment of innumerable advisory committees to aid in the effective administration of programs and activities of the government. Today, even the most vociferous critics of the way advisory committees operate have continued to recognize the importance to the

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Report based on a study conducted under a contract with the Administrative Conference of the United States. None of the statements, conclusions and recommendations of the author of this report may be attributed to the Administrative Conference of the United States or any other part of the United States government. Recommendations arising out of this study were acted upon at the plenary session of the Administrative Conference on June 5–6, 1980.

government of advice from outside the ranks of federal officers and employees and members of Congress. When an early version of legislation to regulate committees was introduced in 1957, the report of the House Committee on Government Operations opened with express recognition of the value of advisory committees "as an aid to efficient administration" of the government.[1]

The report of the Special Studies Subcommittee of the House Committee on Government Operations, *The Role and Effectiveness of Federal Advisory Committees*, presented to the House of Representatives on December 11, 1970, concluded that such committees, "a common feature of government,"[2] are "a contribution by the governed to the government,"[3] and added:

> It provides a means by which the best brains and experience available in all fields of business, society, government and the professions can be made available to the Federal Government at little cost. Our Government and leaders are continually in need of advice on a variety of problems at all times in their attempts to find answers to the problems of our increasingly diversified and complex society.[4]

The same committee of the House, when it began studying the need for committee regulation in 1955, stated that "the theory underlying the use of advisory committees is so fundamentally sound that little or no opposition to the device is ever heard."[5] Most advisory committees "are productive organizations which make available to the Government talents which would be unavailable from any other source" was the conclusion in an interesting and deep study of the history and functioning of advisory committees, including a survey of the reactions of many persons who have served on committees, embodied in a doctoral thesis by Gerald J. Kluempke while a degree candidate at George Washington University.[6]

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[1]H.R. REP. NO. 576, 85th Cong., 1st Sess. 2 (1956), *reprinted in* SENATE SUBCOMM. ON ENERGY NUCLEAR PROLIFERATION, AND FED. SERV. OF THE COMM. ON GOV'TAL AFFAIRS, FEDERAL ADVISORY COMMITTEE ACT, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, 95th Cong., 2d Sess. at 45 (1978) [hereinafter SOURCE BOOK].

[2]HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMM., H.R. REP. NO. 91–1731, 91st Cong., 2d Sess. 4 (1970) [hereinafter 1970 H.R. REP. NO. 91–1731].

[3]*Id.*

[4]*Id.*

[5]SOURCE BOOK, *supra* note 1, at 45.

[6]Gerald J. Kluempke, Proposed Amendments to Federal Advisory Committee Act: Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Sen. Comm. on Gov't Operations, at 395–504 (1976) [unpublished doctoral thesis while degree candidate at George Washington University].

SCOPE OF STUDY

In principle, any group of individuals, however selected or constituted, that considers governmental matters and furnishes views and conclusions to government officials or agencies, is a governmental advisory committee. The Federal Advisory Committee Act (FACA),[7] however, is concerned only with "public advisory committees," that is, groups containing at least some members who are not government employees. Thus, a committee containing any number of officers of government is not covered by the Act unless its membership includes outsiders, representatives of the "private sector." The purely governmental group could be excepted because the Administrative Procedure Act (APA)[8] and the later Government in the Sunshine Act (Sunshine Act)[9] are expected to provide protection from arbitrary and ill-considered action within the government. Many of the procedures specified in the FACA for groups of outsiders "advising" the government have counterparts in the APA and Sunshine Act, guiding the "insiders." Similarly, the Freedom of Information Act (FOIA) of 1974 does for documents what the other two Acts do for meetings, that is, open them to the public.

A kind of advisory body that the FACA does not cover is the group providing "advice" to members of Congress, either to individual members or their committees.[10] Groups of private individuals who provide "advice" to congressional committees may be considered part of the legislative process, with public hearings and the opportunity for others to be heard, furnishing the kind of protection that the FACA, Sunshine Act and APA afford in the executive branch. Similarly, the FACA and the Sunshine Act expressly except the federal courts from their operation,[11] presumably on the assumption that the judicial process must be depended on to furnish procedural protection for anyone affected by it, and in recognition of the reaction that would occur if the collegial deliberations of federal courts were forced into the open. This report will deal with the value of these and other exceptions later.

This study will deal with groups of individuals, existing by whatever name and created by whatever means, whose views and conclusions go to officers (including the president), employees, agencies and bureaus of the executive branch of the government. The study will describe the

[7] 5 U.S.C. App. I (1976) [hereinafter FACA].
[8] 5 U.S.C. §§ 550–59 (1970).
[9] 5 U.S.C. § 552b (1976).
[10] FACA, *supra* note 7, § 3(3).
[11] FACA, *supra* note 7, § 3(3); 5 U.S.C. § 552b (1976).

various functions the groups perform and the areas in which advice is being received and used by the executive branch. It will explore the procedures being followed, whether or not prescribed by the FACA, to protect against abuse, and will conclude with suggestions for any procedural improvements that seem desirable.

PREVIOUS STUDIES, REPORTS, HEARINGS

The published literature on FACA is so voluminous and the commentaries so thorough that there is little more to be said about the need for reform and the remedies recommended.[12] This report will summarize the statements of need and the recommended reforms, and will then comment on the effectiveness of the process developed since passage of the FACA.

STATISTICS

The House and Senate committee members, in considering legislation regulating advisory committees, deplored the lack of accurate figures on the number of advisory committees operating within the government.[13] They estimated that the number in 1970 was something over 3,000,[14] but the lack of definition and absence of adequate registration made any count unreliable. After FACA was passed, the annual reports filed in accordance with the requirements of section 6 (c) of the Act have carried lists of all the committees registered with the Committee Management Secretariat in OMB or GSA, and have named those that were created or terminated during the year.[15] The

[12]A general bibliography on the FACA appears in the SOURCE BOOK, *supra* note 1, at 349–62.

[13]H.R. REP. No. 91–1731 (1970), *supra* note 2, at 13–14.

[14]*Id.* at 14.

[15]FACA, *supra* note 7, § 6(c) provides as follows:

> (c) The President shall, not later than March 31 of each calendar year (after the year in which this Act is enacted), make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

reports, however, do not list or mention advisory committees that are considered outside the FACA. Hence, there is no count of committees expressly exempted by statute or of groups that no agency considers within their responsibility under the Act.

At the start of 1971, there were about 1,800 committees listed during the hearings.[16] The Act requires every committee to terminate within two years unless expressly extended by executive act or by statute.[17] By the end of 1974 the number of committees was down to 1,242, with about 25,000 individual members. And by the end of 1978 it was 816, with about 18,000 members,[18] connected with about fifty departments and agencies.[19] In a letter of February 25, 1977, President Carter ordered "a governmentwide, zero-base review of all committees, with the presumption that all committees should be abolished except those (1) for which there is compelling need. . . ." The annual report for 1978 reported 263 committees terminated during that year, while 204 new committees came into existence. In six years the number of committees had been halved. Members of congressional committees and many witnesses before them have reflected a conviction that less is best.[20] Consequently, every reduction in number is considered progress. Whether that conclusion is justified will be the subject of later discussion in this study.

COST OF COMMITTEES

The 1978 Report listed a total of 4,146 committee meetings of all kinds during the year.[21] The Act requires the director of OMB to include "in budget recommendations" funds for the expenses of advisory committees.[22] A total of $68,405,002 of expenditures for committees was reported in the 1978 Report, down almost $5 million from 1977.[23] Most of the costs, of course, involved travel by many of the 22,348 committee members attending one or more meetings.[24] Some of

[16]*Hearings on S. 1637, S. 1964, and S. 2064 Before the Subcomm. on Intergov'tal Relations of the Senate Comm. on Gov't Operations*, 92d Cong., 1st Sess., pt. 1, at 12 (1971).

[17]FACA, *supra* note 7, § 14(a).

[18]FEDERAL ADVISORY COMMITTEES: THIRD ANNUAL REPORT OF THE PRESIDENT COVERING CALENDAR YEAR 1974, at 3–7 (1975) [hereinafter THIRD ANNUAL REPORT].

[19]FEDERAL ADVISORY COMMITTEES: SEVENTH ANNUAL REPORT OF THE PRESIDENT COVERING CALENDAR YEAR 1978, at 5–13 (1979) [hereinafter SEVENTH ANNUAL REPORT].

[20]*Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 3–6 (1976).

[21]SEVENTH ANNUAL REPORT, *supra* note 19.

[22]FACA, *supra* note 7, § 7(e).

[23]SEVENTH ANNUAL REPORT, *supra* note 19, at 2; FEDERAL ADVISORY COMMITTEES: SIXTH ANNUAL REPORT OF THE PRESIDENT COVERING CALENDAR YEAR 1977, at 2 (1978) [hereinafter SIXTH ANNUAL REPORT].

[24]SEVENTH ANNUAL REPORT, *supra* note 19, at 2.

those funds, although a relatively small part, were for the overhead expenses of managing the committees within the departments and agencies. Even the cost of maintaining the committee management officers[25] is relatively small, as most of them seem able to handle the management work in a small part of their working time. Most of their activities on behalf of advisory committees consist of mailings to members and preparing notices of meetings for publication in the *Federal Register*, plus supervising the annual reporting process.

HISTORY OF REGULATIONS

The absence of public control over the members of advisory committees has brought criticism from interests directly and indirectly affected by the committees' activities. An early example of protest is the suit to bar enforcement of codes established under the National Recovery Act of 1933 (NRA). The codes were drafted and promulgated by committees formed by trade associations in each affected industry. In the *Schechter* case, a wholesale dealer in chickens successfully challenged the program as an improper delegation of legislative authority.[26]

The increasing federal pervasion of all aspects of the economy and society has led to an increase in concern for the protection of the rights and interests of individuals and groups affected by federal regulation. As ever more government decisions have been influenced by advisory committees, more questions have been raised about the regulation of their use, composition and continuance. Individuals and organizations not represented, or inadequately represented, on the advisory committees have insisted that their views be heard by the deciding authorities. Increasing influence by industry groups traditionally inclined to engage in activities interfering with free trade led the Department of Justice in the early 1950s to propose standards to guide government agencies to avoid antitrust difficulties in dealing with advisory committees. Those standards have a remarkable similarity to the basic requirements of the FACA of twenty years later.[27] A few years later, bills were introduced in Congress, hearings were held and a bill reported to enact similar standards into statutory law.[28] The committee report accompanying one of those bills, H.R. 7390, stated that its purpose was to avoid a number of specified potential evils:

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[25]FACA, *supra* note 7, § 8(b), calls for an "Advisory Committee Management Officer" in every agency.

[26]Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[27]SOURCE BOOK, *supra* note 1, at 58.

[28]*Id.* at 44–65 and 75–107.

a. Evasion of antitrust laws: to prevent a kind of immunity by estoppel.
b. Committee activities aimed at enlisting "the support of the regulated in the process of regulation": a fox guarding a chicken coop syndrome.
c. Representatives of special interests, rather than the general welfare, exercising the functions of a board of directors usurping the "managerial functions which are the responsibility of the governmental agency": the classical conflict of interest.[29]

The committee recommended a bill that would "clothe these committees with official status and make their proceedings a matter of official record . . . from which the Congress may be kept informed and, therefore, may be better able to give intelligent consideration to the possible necessity for further legislation in this area."[30] Despite objections registered by nearly every executive department, the bill, H.R. 7390, was passed by the House on July 10, 1957, after a lengthy and informative debate and minor amendments.[31] In brief and fairly simple language, inserted as section 15A of the act amending the Administrative Expenses Act of 1946, the bill provided a pattern of regulation for advisory committees that later found its way into presidential executive orders and the FACA itself.[32]

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[29]*Id.* at 44–65.

[30]*Id.* at 48.

[31]103 CONG. REC. 11,247 (1957).

[32]H.R. 7390 would have amended the Administrative Expenses Act of 1946 by adding a new section:

> Sec. 15A. (a) No advisory committee or other advisory panel or group (hereafter in this section referred to as an "advisory committee") shall be established in a department unless, not less than thirty days before such advisory committee is established, the head of such department has transmitted to the Speaker of the House of Representatives and the President of the Senate (or if the Congress is not in session, to the Clerk of the House of Representatives and the Secretary of the Senate) a written report setting forth the following information:
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> (1) If a statute specifically authorizes or requires such advisory committee to be established, the citation of such statute; or if there is no such statute, the authority in law which is relied upon for the establishment of such committee together with the administrative determination that the services of such advisory committee are in the public interest and the reasons upon which such determination is based; and
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> (2) (A) The number of members on such advisory committee and the area of interest which each member will represent, (B) those members of the advisory committee who will serve without compensation, and those who will receive compensation, (C) the expenses of the advisory committee, or its members, or both, to be paid by the United States, and (D) how long it is anticipated that such advisory committee will function.
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> (b) Each advisory committee heretofore or hereafter established in any department shall be subject to the following minimum standards:
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> (1) The agenda for such advisory committee shall be formulated or approved by a full-time salaried officer or employee of the Government.

The Senate did not pass H.R. 7390, but in subsequent years there were, from time to time, efforts in the Senate to take some action on advisory committees. In 1969, a particular target was the Advisory Council on Federal Reports and its sixteen affiliated committees for which it "arranged" the appointment of members.[33] The council had been created to advise on the administration of the Federal Reports Act of 1942.[34] The prime motivation of that Act had been to relieve the burdens on industry, and especially small business, resulting from the proliferation of forms and questionnaires emanating from an ever increasing number of federal regulatory agencies. Regardless of the desirability for coordination of those activities, the senators who in 1969 proposed regulation of the Council and its related committees saw it as "one-sided," providing advice to the government only from representatives "of big businesses" and with the power "to withhold from the public information which it has the right to know . . . ."[35]

While Congress was moving toward statutory regulation of advisory committees, the executive branch was also starting to exercise increased internal control. In 1959 the Office of Management and Budget issued a bulletin entitled *Standards and Procedures for the Utilization of Public Advisory Commissions by Government Departments.*[36] Those

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(2) The meetings of such advisory committee shall be at the call of, and under the chairmanship of, a full-time salaried officer or employee of the Government.

(3) Full and complete minutes of each meeting of such advisory committee shall be kept, which shall contain at a minimum, (A) the name of each member of such advisory committee attending such meeting, (B) a summary of the matters discussed in such meeting stating the viewpoints expressed, and (C) the conclusions reached by the advisory committee.

(4) The functions of such advisory committee shall be purely advisory.

(c) (1) The President is hereby authorized to issue such regulations, not inconsistent with the standards prescribed in subsection (b) or any other provision of law, as he may deem necessary for effective control of the use and activities of advisory committees in departments.

(2) The President shall cause to be prepared annually a public report detailing the membership of each advisory committee used by each department; the functions of each such advisory committee; and the extent to which the operations of each such advisory committee has not complied with the standards prescribed in subsection (b).

(d) This section shall not apply with respect to any advisory committee (1) which consists entirely of full-time salaried officers or employees of the Government, or (2) which is authorized by law to perform administrative or operative functions.

H.R. REP. No. 576, 85th Cong., 1st Sess., pt. 2 (1957), *reprinted in* SOURCE BOOK, *supra* note 1, at 71–72 (1978).

[33] *Hearings on S. 3067 Before the Subcomm. on Intergov'tal Relations of the Senate Comm. on Gov't Operations.* 91st Cong., 2d Sess., pt. 2, at 209 (1970) [hereinafter *Hearings on S. 3067*].

[34] 44 U.S.C. 3501–12 (1976).

[35] 115 CONG. REC. 31,237 (1969).

[36] *Hearings Before a Special Studies Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2d Sess. 29 (1970).

standards and procedures were formally incorporated into Executive Order 11007 of President Kennedy dated February 26, 1962.[37] That order contained "regulations" covering the "formation and use" of advisory committees; the regulations bear considerable resemblance to the provisions of the FACA of ten years later, both in scope and in the rules prescribed for "utilization" of the committees.

On March 2, 1964, two years after the issuance of Executive Order 11007, the Office of Management and Budget promulgated the first version of Circular No. A–63, entitled "Management of Interagency Committees."[38] True to its title, it only covered committees "composed of officers or employees of more than one department or agency of the Government," except that "public advisory committees" covered by Executive Order 11007 would also be covered by Circular A–63 if they had "members from two or more Federal agencies in addition to the public members." Later, Executive Order 11671 of June 6, 1972,[39] superseded E.O. 11007, and, anticipating passage of the FACA, prescribed regulations for all "Advisory Committees" very similar to those in the pending H.R. 4383. When the Act was signed into law on October 7, 1972, Executive Order 11686[40] was issued, revoking and superseding Executive Order 11671, and assigning presidential functions under the Act to the Office of Management and Budget. That assignment was reconfirmed by Executive Order 11769 on February 21, 1974,[41] but the functions were transferred to the administrator of General Services by Executive Order 12024 on December 1, 1977.[42] Meanwhile, Circular A–63 was being revised from time to time. A long and detailed version presented jointly by the OMB and the Department of Justice, and containing many interpretations of unclear provisions in the Act, was released for comment and published in the *Federal Register* on January 23, 1973.[43] (38 Fed. Reg. 2306.) Its origin was described by Deputy Assistant Attorney-General Mary Lawton in a forum on "Secrecy in Government" in 1974.[44] A year later, that version, greatly reduced, was promulgated. This version of A–63, dated March

[37]27 Fed. Reg. 1875 (1962).

[38]OMB Circular, No. A–63 Rev., § 3, 39 Fed. Reg. 12,389 (1974), *cited in* SOURCE BOOK, *supra* note 1, at 111–15.

[39]Exec. Order No. 11,671, 37 Fed. Reg. 11,307 (1972), superseded Exec. Order No. 11,007, 27 Fed. Reg. 1275 (1962).

[40]Exec. Order No. 11,671, 37 Fed. Reg. 11,307 (1972), revoked by Exec. Order No. 11,686, 37 Fed. Reg. 21,421 (1972).

[41]Exec. Order No. 11,769, 39 Fed. Reg. 7125 (1974).

[42]Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (1977).

[43]38 Fed. Reg. 2306 (1973).

[44]*Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess., at 152–53 (1976).

27, 1974, changed the title from a prescription of rules for "interagency committees" to regulations for "Advisory Committee Management." Minor additional revisions appeared in "Transmittal Memoranda" on July 19, 1974, February 5, 1976, and March 7, 1977.[45]

Detailed comparisons of the various executive documents with the statute will appear in other sections of this report, dealing with definitions and scope.

THE FEDERAL ADVISORY COMMITTEE ACT

The studies and hearings in congressional committees that led to the enactment of the FACA really started in 1957 when H.R. 7390 was considered by the House Government Operations Committee and introduced in the House of Representatives. A number of previous acts had contained sporadic attempts to exercise some control over advisory committees; they are described in a report of the Congressional Research Service that introduces the 1978 Source Book on the FACA.[46] During the hearings on the bills introduced in 1970 and 1971, the state of the advisory committee system in the federal government was repeatedly characterized as lacking "adequate guidelines, supervision or direction" and so numerous as to defy accurate counting.[47] The committees concluded, on the one hand, that there were too many "inactive, meaningless, obsolete and redundant committees," wasting staff and operating expenses, and on the other hand, that many committees were so powerful that they, in effect, constituted "a fifth arm of the government" on top of the legislative, executive, judicial and regulatory or administrative branches.[48]

The purpose of the legislation was described in the introductory remarks as having three principal purposes: to eliminate unnecessary committees; to govern the administration of those that remain; and to inform the public about the membership and the activities of the committees.[49] The various executive actions over the previous two decades had the same general purposes, but the members of Congress, after detailed hearings on the subject, concluded that self regulation by

[45]SIXTH ANNUAL REPORT, *supra* note 23, at 143; FEDERAL ADVISORY COMMITTEES: FIFTH ANNUAL REPORT OF THE PRESIDENT COVERING CALENDAR YEAR 1976, at 145 (1977) [hereinafter FIFTH ANNUAL REPORT]; THIRD ANNUAL REPORT, *supra* note 18, at 123.

[46]SOURCE BOOK, *supra* note 1, at 3–20.

[47]*Id.* at 225.

[48]*Id.* at 293; *Hearings on S. 1637, S. 1964 and S. 2064 Before the Subcomm. on Intergov'tal Relations of the Senate Comm. on Gov't Operations*, 92d Cong., 1st Sess., pt. 1, at 12 (1971).

[49]SOURCE BOOK, *supra* note 1, at 293–94.

the executive branch was not effective. So the Act was passed and signed into law as Public Law No. 92–463 on October 6, 1972.[50] While several bills amending the Act have been introduced,[51] the only amendment that has actually been enacted is a change in subsection (d) of section 10 to incorporate the exceptions described in the Government in the Sunshine Act instead of the exceptions of the Freedom of Information Act.[52]

A noteworthy feature of the expression of purpose in the Act itself is the almost complete absence of any express intention to cover two aspects of advisory committees that have become the chief targets of critics: the closing of too many meetings and the lack of balance in the memberships. The statutory statement of purposes refers to need to review the value of the existing and new committees; the importance of keeping Congress and the public informed about their activities; and the importance of "standards and uniform procedures to govern" the establishment, operation, administration and duration of advisory committees.[53] The rest of the Act, after defining the subject, sets forth those standards and procedures.

Definition

The definition of "advisory committee"[54] is crucial to a consideration of the subject, but it has been characterized by a judge confronted with

[50]FACA, *supra* note 7.

[51]*See, e.g.*, S. 1847, 95th Cong., 1st Sess. (1977); and S. 1329, 95th Cong., 1st Sess. (1977), *reprinted in* SOURCE BOOK, *supra* note 1, at 363 and 373.

[52]5 U.S.C. § 552b (5) (1976).

[53]Specifically, the findings and purposes of the Act, set forth in § 2, state:

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

[54]FACA, *supra* note 7, § 3.

a dispute over its meaning as "broad, imprecise . . . not a model of draftsmanship."[55] The definition reads as follows:

> (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—
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> (A) established by statute or reorganization plan, or
> (B) established or utilized by the President, or
> (C) established or utilized by one or more agencies,
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> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.[56]

Section 4 of the Act qualifies the definition to satisfy fairly obvious concerns.[57] Any group established by an act of Congress that specifically makes the FACA inapplicable is excepted by subsection (a). Under subsection (b), the Act is made inapplicable to all advisory committees "established or utilized" by the Central Intelligence Agency or the Federal Reserve System. Similarly exempted is any "local civic group . . . rendering a public service with respect to a Federal program" and any state or local group advising "State or local officials or agencies." By limiting the scope of the Act to committees "established or utilized" by the president or by an "agency" as defined in section 551(1) of Title 5 of the Code, Congress effectively left out committees advising arms of the Congress and the courts.

A key part of the definition of "advisory committee" is the expression "established or utilized." Superficially this means that the origin of the group is not material in determining whether it is an advisory committee covered by the act. It must be a "group," however, meaning more

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[55]Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975).

[56]FACA, *supra* note 7, § 3.

[57]FACA, *supra* note 7, § 4 states:

> (a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.
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> (b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—
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> (1) the Central Intelligence Agency; or
> (2) the Federal Reserve System.
>
> (c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

than one person, and someone must being them together. That act, whether done formally or informally, "establishes" the group. However, the Act does not expressly require the establishment to be performed by a government official or agency. Under the strict language of the Act, even a group formed by private industry becomes an advisory committee if it is "utilized" by the president or by one or more agencies of the government. There is internal evidence that the drafters contemplated only governmentally established groups; section 8(a), for example, requires agency heads to establish controls "for advisory committees established by that agency,"[58] and Executive Order 11,007 in 1962 expressly distinguished "industry advisory committees" from committees formed under government auspices.[59]

Whether Congress actually intended to extend the coverage of the Act to groups established entirely at private initiative and by private action remains in doubt and will be discussed later in this report.

ESTABLISHING COMMITTEES

The FACA prescribes the conditions precedent to the establishment of advisory committees by the government. Committees established by private action and then "utilized" by the government naturally did not conform with these prescriptions. The FACA rules governing the establishment of committees cover those created under congressional acts, as well as those established by the president and by other agencies of the government. Since later legislation normally supersedes earlier acts, however, the prescriptions in the FACA for congressionally created committees seem mostly precatory; indeed, later acts frequently expressly exempt new committees from all of the FACA or from such strictures of the Act as the openness of meetings and public access to minutes.[60]

The FACA prescriptions in section 5(b) for the creation of congressional established committees are incorporated by reference in the clause prescribing guidelines for the president, agency heads and other federal officials.[61] The emphasis in these prescriptions is clearly

[58]FACA, *supra* note 7, § 8(a) specifically requires that

> [e]ach agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Director under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jursidiction.

[59]Exec. Order No. 11,007, 27 Fed. Reg. 1875 (1962).

[60]*See, e.g.*, ERISA, 29 U.S.C. 1001 *et seq.* (1976).

[61]Section 5(b) provides:

on restricting the number of committees and undue influence by special interests. They seem to reflect more of a suspicion that advisory committees will have evil effects than that they will contribute to the efficient operation of government. Along with several other provisions of the Act prescribing steps to be taken in creating committees, they add up to significant discouragement of new committees.

For example, subsection 9(a)(2) requires formal, recorded determination by an agency head that creation of a new committee is "in the public interest." Agency heads must consult with the director of OMB and make "timely" publication of the determination in the *Federal Register*.[62] Thereafter, according to section 4(c), a committee may not meet or act until a detailed "advisory committee charter" has been filed with the office exercising governmentwide committee management functions; with the head of the agency to which the new committee reports; with the standing committees of the two Houses of Congress "having legislative jurisdiction" of the agency; and with the Library of Congress.[63] These requirements assure that groups conforming with

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In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

[62]According to § 9(a), an advisory committee is forbidden from being established unless it is either specifically authorized by the president or it is "determined as a matter of formal record, by the head of the agency involved after consultation with the Director, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law."

[63]Specifically § 9(c) provides that

No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Director, in the case of Presidential advisory

the statutory definition of "advisory committee" will not be casually or expeditiously created. In addition, section 14 requires reassessment of the need for each committee every two years; they terminate unless specified authority acts to renew them and again files a charter.[64]

Structure

A committee by any other name—"board, commission, council, conference, panel, task force or other similar group"—is still an advisory committee under the Act, regardless of the number of members or the structure of its organization. Once a group falls within the statutory definition, however, sections 5(b)(2) and 5(c) require it to contain a membership that is "fairly balanced in terms of the points of view represented and the functions to be performed."[65]

Among the recommendations in the Forty-Third Report of the Committee on Government Operations of the House of Representatives[66] was inclusion in advisory committees of more "non-expert" interested and knowledgeable "public members" and "environmentalists, consumers, geographic representatives and noninvolved persons," and it endorsed the requirement of Executive Order 11007 that "industry advisory committees"[67] be reasonably representative of the industries to which they relate. These recommendations are the chief interpretative legislative history of the provisions of the Act that call for "fairly balanced" membership "in terms of the points of

committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;
(B) the committee's objectives and the scope of its activity;
(C) the period of time necessary for the committee to carry out its purposes;
(D) the agency or official to whom the committee reports;
(E) the agency responsible for providing the necessary support for the committee;
(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;
(G) the estimated annual operating costs in dollars and man-years for such committee;
(H) the estimated number and frequency of committee meetings;
(I) the committee's termination date, if less than two years from the date of the committee's establishment; and
(J) the date charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

[64]*Id.*

[65]Section 5(b)(2), *supra* note 61; section (c) states that "[t]o the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee."

[66]H.R. REP. NO. 91–1731 (1970), *supra* note 2.

[67]*Supra*, note 59.

view represented and the functions to be performed by the advisory committee."[68] That is a guideline to be "followed by the President, agency heads, or other Federal officials in creating an advisory committee."[69] It also presumably means that a person who feels that his or her point of view is not represented on the committee can take action, such as seeking a court injunction against further functioning or advising until the proper balance has been created.

Another structural prescription in the Act is the requirement of "an officer or employee of the Federal Government to chair or attend each meeting."[70] Similarly, committees may not "hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government."[71] It is not surprising that groups established entirely by private initiative, including research universities, are disturbed when they hear that they may have to submit to this kind of supervision of their deliberations by a government officer whenever they intend to deliver a report that is to be "utilized" by the government.

Subsections 10(a)(1) and (2) of the Act basically require advisory committee meetings to be publicly announced in advance. "Timely" notice of all meetings, "except when the President determines otherwise for reasons of national security," must be published in the *Federal Register*, and sometimes in other media "to insure that all interested persons" receive advance notice.[72] Meetings may be scheduled only "at the call of, or with the advance approval of, a designated officer or employee of the Federal Government." The agenda must have similar official approval.[73]

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[68]*Supra*, note 61.

[69]*Supra*, note 65.

[70]FACA, *supra* note 7, § 10(e) specifically states that:

> There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

[71]*Id.* § 10(f), which provides that "Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee."

[72]Section 10(a)(1) and (2) provide that:

> (a)(1) Each advisory committee meeting shall be open to the public.
>
> (2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

[73]*See* note 71, *supra*.

When the meeting convenes, a "designated officer or employee of the Federal Government" must either chair the session or be in attendance, and that officer must have the authority to adjourn the meeting whenever it is determined to be "in the national interest."[74]

Every meeting "shall be open to the public" unless "the President, or the head of the agency to which the advisory committee reports," determines, with written reasons, that it is concerned with matters listed in subsection (c) of section 552b of Title 5, U.S. Code, the Government in the Sunshine Act.[75] The exemptions, until 1976, were those listed in the Freedom of Information Act as exempting documents from disclosure. Circular A63, supplementing the statutory requirements for the conduct of meetings, calls for open meetings to be "held at a reasonable time and at a place that is reasonably accessible to the public," and in a room of appropriate size to accommodate the expected number of public participants.

Meeting Procedures

To satisfy the congressional demand for better management controls and oversight, various sections of the FACA prescribe a multitude of procedures that all advisory committees must follow. Within the agency involved, there must be an "Advisory Committee Management Officer" (CMO) who will "exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency." The CMO is also custodian of reports and other papers of the advisory committees. The CMO arranges for publication of the notices of meetings, and handles the determinations that must precede a decision to close a meeting to the public.[76]

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[74]*See* note 70, *supra*.

[75]This clause, set forth in § 10(d), specifically provides that:

> Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.

[76]FACA, *supra* note 7, § 8 that:

> SEC. 8. (a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Director under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.
>
> (b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—
>
> (1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

The Act, in section 7(a), requires the director of the Office of Management and Budget to establish a Committee Management Secretariat (CMS), with responsibility "for all matters relating to advisory committees." That responsibility was transferred to the General Services Administration (GSA) by Reorganization Plan No. 1 of 1977,[77] and by Executive Order 12024 of December 1, 1977.[78] Pursuant to that order, GSA now maintains the Committee Management Secretariat. It receives and files copies of all committee charters and annual reports. In addition, it administers the annual "zero-based review" required by President Carter of all committees to determine whether they should be continued in existence.[79] The Act itself calls for all committees to terminate within two years of their establishment unless official action is taken to renew them or a statute creating them expressly provided for a longer duration.[80] In the former case the agency must prepare a detailed justification for continuance, and standard forms of reports have been prescribed by the CMS for that purpose. Section 14 of the Act lodges responsibility for "renewing" committees after the annual or two-year review in the president, for presidential committees, and in other officers of the government for other committees. The Committee Management Secretariat, by virtue of the transfer from OMB of the functions under section 7 of the Act, has the responsibility, as part of the annual review, to determine if each committee is "carrying out its purpose," and whether it should be merged or abolished.[81]

There will be further discussion of the operations under these directives later in this report.

CONGRESSIONAL OVERSIGHT

The FACA assigns responsibilities to the "standing committees of the Senate and of the House of Representatives having legislative jurisdiction" over the agencies to which advisory committees report.[82]

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(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

[77]Reorg. Plan No. 1, 42 Fed. Reg. 56,101 (1977).

[78]Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (1977).

[79]Circular A–63, Transmittal Memorandum No. 5, set forth in SIXTH ANNUAL REPORT, *supra* note 23, at 153.

[80]FACA, *supra* note 7, § 14.

[81]*Id.* § 7(b)(1–4).

[82]FACA, *supra* note 7, § 5(a), that:

In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the

The charter of each new committee must be filed with the relevant committees of the two Houses.[83] Thereafter, those committees are given responsibility, under section 5(a), to make "a continuing review" of the activities of the committees in their jurisdiction, to determine if they should continue in existence, if their responsibilities should be revised, and whether the committee performs a "necessary function."[84] Without any specific assignment in the Act, the Subcommittee on Budgeting, Management and Expenditures of the Senate's Government Operations Committee, when Senator Lee Metcalf of Montana was Chairman, probably exercised more "oversight" jurisdiction over the operation of the Act than all the other standing committees, despite the mandate that they keep committees within their area of responsibility under "continuing review."[85] After Senator Metcalf's death in 1978, interest in oversight diminished, and no general review was made by the Subcommittee in the next session of Congress. Conversations with congressional staff members indicate that other committees seem to have slight concern with their responsibilities under the Act.

THE SCOPE OF THE FACA

The scope of the Act is defined primarily in the "definitions" section.[86] In that and various other sections, some specific kinds of committees and some particular, named, groups are expressly omitted: (1) The Advisory Commission on Intergovernmental Relations, advising federal and state officials "on problems affecting more than one level of government," because of its "unique character," and the Committee on Government procurement, without explanation.[87] (2) Committees of the Federal Reserve System. (3) Certain local civic groups. (4) Committees established to advise Congress or the courts.

The express exemptions are reasonably clear. The problems of scope arise chiefly out of contentions that certain groups either are not

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activities of each advisory committee under its jurisdiction to determine whether such advisory committee shall be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

[83]FACA, *supra* note 7, § 9(c)(2).

[84]Sec. 5(a), *supra*, note 82.

[85]*Id.*

[86]FACA, *supra* note 7, § 2.

[87]H.R. REP. No. 92–1017, 92d Cong., 2d Sess. (1972), *reprinted in* SOURCE BOOK, *supra* note 1, at 274.

really "committees" or their activities and responsibilities bring them within specified exemptions.

PRIVATE SECTOR GROUPS

During the hearings that led to the FACA, testimony was presented on a number of committees that gave advice to the government but had been created by private organizations. Sometimes a government official had proposed or advocated the establishment of the committee, but it remained a private entity, with its members all named by the private interests. A conspicuous example was the Advisory Council on Federal Reports.[88] There appeared no tendency on the part of members of the subcommittee to exempt that kind of privately established committee while considering the need for regulation.

The most difficult problem concerns committees, by whatever name the group is called, that are clearly not "established" by any agency of the government, but are "utilized" when an agency officer, or the president, receives reports from them and gives them consideration in making decisions.[89]

Litigation has involved several examples of efforts to include private groups under the Act. Judge Richey of the U.S. District Court in the District of Columbia issued a memorandum opinion holding that meetings or representatives of the distilled spirits industry and of "consumers" who met with the Bureau of Alcohol, Tobacco and Firearms of the U.S. Treasury Department were covered by the FACA and must be open to the public and the press.[90] The judge held that the informality of organization could not be used as a "subterfuge" to avoid the open meeting requirements of the Act.

In *Lombardo v. Handler*,[91] the National Academy of Sciences had created a Committee on Motor Vehicle Emissions to carry out a contract to make studies and report findings to the Federal Environmental Protection Agency (EPA). The Academy held a federal charter by act of Congress, and had entered into contractual arrangements with the EPA to study and report on auto emissions. A nonprofit organization called Public Interest Campaign sought to attend meetings of the committee, but were refused admittance. All meetings of the committee were closed, and other provisions of the FACA were generally treated by the Academy as inapplicable. In the suit, the Academy took

[88]*Hearings on S. 3067*, *supra* note 33, at 211 ff.

[89]*See* p. 13 *supra*.

[90]Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974).

[91]397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

the position that its committees were not covered by the Act's definition of "advisory committee." The district court, speaking through Judge John Sirica, agreed, in an opinion that thoroughly reviewed the legislative history. It showed that the version of the legislation that passed the House would have included committees formed by organizations under contract to provide advice to the federal government.[92] The Senate version, however, did not include that kind of committee. In the conference, the present statutory definition was recommended to both Houses. A colloquy on the House floor explained that under the revised definition, the Act would not apply to the Academy, identified by name, despite the contractual relation to the EPA.[93] Consequently, in the opinion of Judge Sirica, "the legislative history of the FACA evidences an apparent intention on the part of Congress to exclude from the coverage of the Act generally groups providing advice to federal agencies pursuant to a contractual relationship, and specifically the committees of the National Academy of Sciences."[94] The judge added that the EPA was "utilizing" the Academy itself, under the contract, more than the committee. He then ruled that, for various reasons, the Academy was a private organization and not an "Agency" of the government whose committees would be covered by the Act.[95]

In *Consumer Union of U.S., Inc. v. Department of HEW*,[96] Judge John Lewis Smith reviewed the legislative history of the FACA and, relying on Judge Sirica's opinion in the *Lombardo* case, reached the conclusion that the purpose being served by committee meetings can determine the applicability of the Act to privately organized groups like those involved in the *AASHTO* and *Food Chemical* cases. The committee involved in the *Consumer Union* case, was appointed by organizations in private industry to meet with the Food and Drug Administration, a U.S. government agency. Because the purpose of the meeting, however, was to let the government officials consider and give agency views on an "ingredient testing program," rather than to receive advice from the private group, the meetings were held not "government advisory committee" meetings and therefore not subject to the FACA.

The *Lombardo* case has not been overruled, so it may still be considered authority for the proposition that committees formed by private, nongovernmental organizations do not become "advisory committees" under the Act simply by "utilization" by a government agency. Argu-

[92] *Id.* at 798.
[93] *Id.* at 799.
[94] *Id.* at 800.
[95] *Id.*
[96] 409 F. Supp. 473 (D.D.C. 1976).

ments to the contrary are still being made, however. In an exhaustive commentary on the FACA by Kit Cage and Samuel S. Epstein,[97] the authors argue that the exclusion of committees that are not "established" by government agencies constitutes "administrative whittling of the FACA's seemingly broad scope" and that Congress should expressly bring them under the Act. In some court actions, the arguments for inclusion under the present definition were successful. In *Center for Auto Safety v. Cox*,[98] the Court of Appeals for the D.C. Circuit affirmed a decision of the district court that the American Association of State Highway and Transportation Officials (AASHTO) was an advisory committee subject to "provisions" of the Act when performing "certain functions" for the Federal Highway Administration (FHWA). The lower court was instructed to "specify more clearly which provisions of FACA" apply to instances of "consultation between FHWA and AASHTO in the interest of obtaining advice or recommendations . . . ,"[99] indicating that the Act was divisible into provisions that are applicable and inapplicable to covered committees. The suit had been instituted by a nonprofit organization, Center for Auto Safety, interested in transportation issues but barred from attending closed meetings of AASHTO. Unfortunately, the court did not mention the *Lombardo* case, so it cannot be determined whether it was disagreeing with the same court's previous ruling when it stated that "when an administrator establishes or utilizes an advisory committee, he must comply with the provisions of the Act; it makes no difference whether the committee is his own creation or a pre-existing group."[100] The court included a footnote stating that the plaintiffs seemed primarily interested in the procedural provisions of FACA requiring open meetings and accurate recordkeeping as "those most logically applicable to advisory committees that are utilized by, but not created by government agencies."[101] The Act itself, however, does not indicate any intention to excuse the "utilized" committees from any of the prescriptions applicable to committees "established by" agencies. Even with the curtailed application of the Act, however, the highway officials decided that they could not operate under the constraints of FACA and the association was dissolved after the decision.

Support for the kind of divisibility of the Act that the court proposed in the *AASHTO*[102] case has appeared in respected quarters. In the field

[97] 123 CONG. REC. 7298 (1977).
[98] 580 F.2d 689 (D.C. Cir. 1978).
[99] *Id.* at 694.
[100] *Id.* at 693.
[101] *Id.* at 695.
[102] *See* note 98, *supra.*

of standard setting, a great deal of the research, drafting and promulgating is in the hands of committees established by the private industries involved in the products and practices to which the standards are to apply. The procedures of those groups have been explored in depth in a report by Robert W. Hamilton to the Administrative Conference of the United States.[103] Professor Hamilton concluded that "application of many of the provisions of the Federal Advisory Committee Act to such technical committees would be unfortunate."[104] For example, "the mandatory presence of a government employee with power to adjourn the meeting, total agency control over meetings and agenda of each committee, the mandatory deposit of committee records in the Library of Congress, and the mandatory two-year review of the existence of each committee by Congress and the OMB" appeared to him "completely inapt."[105] He agreed that the requirement for open meetings and balanced committee memberships "seem clearly desirable," but he believed that "many committees would refuse to cooperate with federal agencies if the Act were fully applicable to them."[106] He concluded that "the technical committees created by the voluntary standards—writing organizations are . . . not at all like the numerous committees created by federal agencies that were the principal target of the legislators."[107] As a result of this report the Administrative Conference of the United States recommended that Congress amend the FACA to explicitly exempt these "technical committees and standard setting organizations" from the FACA.[108] The basis of the recommendation could be satisfied, however, by exempting the committees only from some particular prescriptions, leaving the key requirements of open meetings and balanced membership in force. Whether or not legislation is needed for this step is discussed later in this report.

The American Industrial Health Council (AIHC) exemplifies the reasons for concern over undue influence by industry and the effort to control that influence by applying the label of "Government advisory committee." The Council was organized late in 1977, about a month after the U.S. Occupational Safety and Health Administration (OSHA) published in the Federal Register proposed new regulations for cancer-causing substances (carcinogens).[109] The reaction of the chemical

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[103]Hamilton, *The Role of Non-Governmental Standards—Mandatory Federal Standards Affecting Safety & Health*, 56 TEX. L. J. 1329 (1978).

[104]*Id.* at 1477.

[105]*Id.*

[106]*Id.*

[107]*Id.*

[108]Recommendation 78-4, 44 Fed. Reg. 1357 (1979).

[109]42 Fed. Reg. 54,148 (1977).

industry of the nation was to establish an "Ad Hoc Committee" expressly "to mount an offensive" (the words of newspaper accounts) or, in the council's own words, "to assist the U.S. Occupational Safety and Health Administration in developing a rational and practical standard for regulating carcinogens in the workplace."

Although an evaluation of the substance of the proposed OSHA regulation and the AIHC objections is not necessary for this study, a summary of the opposing positions may be helpful. OSHA's proposal would have abandoned the previous procedure involving a "substance-by-substance approach." Instead, all suspected carcinogens would be divided into four categories, and "model standards" for regulation would be applied in each category. The industry response primarily objected to the methods proposed for determining that a substance is sufficiently a carcinogen to warrant categorization and subjection to the proposed regulatory scheme. Their criticisms included, for example, the objection that OSHA "is indiscriminate in attributing significance to animal data and extrapolating those data to human exposure."

Within weeks after the publication of the OSHA proposal, representatives of a number of chemical and related industrial concerns responded by forming an unincorporated, loosely structured committee under the AIHC name. The office of the Synthetic Organic Chemical Manufacturers Association (SOCMA) in Scarsdale, New York, was used as headquarters and mailing address for the new group. Messages were promptly dispatched to many individual companies and to several trade associations in the affected industries, explaining the perceived emergency and urging them to join or participate in the new council. Within a couple of months the council was able to report membership of "over ninety companies and sixty trade associations."[110] The membership list included leaders like Abbott Laboratories, Aluminum Company of America, Allied Chemical Corp., Dow Chemical, U.S.A., E.I. du Pont de Nemours & Co., and ICI Americas, Inc. The resources of the group for "advising" the government on subjects of interest to the members must be recognized as virtually unlimited.

After the first year, marked by hasty preparation of position papers, reports and studies, steps were taken to adopt a more formal structure. A certificate of incorporation under the New York Not-for-Profit Corporation Law was executed on April 9, 1979, on behalf of the "American Industrial Health Council, Inc." The certificate was signed by officers of E.I. du Pont de Nemours & Co., Shell Oil Co., Dow Chemical Co., and Diamond Shamrock Corp. Officers of eight com-

[110]AMERICAN INDUSTRIAL HEALTH COUNCIL, BACKGROUND INFORMATION, March 1978.

panies, including all of those named with the incorporators, were designated as the first board of directors. Among the purposes of the incorporated council is "to cooperate with and assist, for the benefit of its members, United States government bodies and other significant organizations and governmental bodies and persons to insure that legislative and regulatory standards and practices are scientifically sound and economically effective in dealing with chronic health effects." It would be fair to say that those are a lawyer's method of saying that the purpose is "to lobby about health risk regulation." It also suggests an intention to seek to induce government agencies to "utilize" the council in the process of drafting and promulgating regulations.

The bylaws provide that "any corporation, firm or individual engaged in industry or commerce in the United States with an active interest in chronic health effects who, as a member of this Council agrees to pay membership dues . . . is eligible for regular membership in the Council." Any "interested" trade or business association was made eligible for "Association membership." Other provisions of the bylaws contain all the standard provisions for corporations; there is nothing unusual in the bylaws. For example, there is no provision relating to opening meetings to nonmembers, making public the minutes, or publishing notices of meetings, which would have indicated a feeling of responsibility to operate as though the FACA applied.

The AIHC, through its committees, members and associates, presented voluminous documents and testimony to OSHA at a hearing in May, 1978, on the controversial proposed regulation. Other groups, of course, were heard from as well. A little over a year later, OSHA was preparing to issue the proposed regulation in its final form, which, as a result of public comment, will differ from the draft published in 1977.

The chief effect of classifying the AIHC as a government advisory committee instead of treating it as outside the FACA definition, is that, if within the Act, all the activities of the council or its subdivisions concerning the proposed carcinogen regulations would have had to conform with the Act: A "charter" would have had to be approved and filed (the articles and bylaws would hardly qualify); the meetings would have had to be preceded by a public notice over the name of a government official; a government official, with power to adjourn the meetings, would have had to be present, or actually preside, at the meetings; the minutes of the meetings would have had to be filed in designated places; the meetings would have had to be open to the public, unless an exemption could be applied, which is doubtful; and the membership of the Council would have had to be "balanced." The last requirement

would mean that a group of private companies and individuals could not freely decide who would be members of a structured organization established by them to formulate positions and recommendations to be considered (utilized?) by a government agency. Obviously, an interpretation of the FACA that has that result would be unacceptable to the affected organizations and individuals.

On the other hand, the activities of the AIHC, and comparable other organizations, are constantly cited as examples of undue influence of business and industry in areas of major concern to consumers and environmentalists, who seek to make them conform to FACA procedures as a measure to balance the influence. That kind of "private" group, not "established" by a federal government agency, was involved in *Lombardo v. Handler*,[111] brought by Public Interest Campaign, an educational and charitable organization concerned about air pollution, to open up a committee of the National Academy of Sciences, deemed nongovernmental; *Food Chemical News, Inc. v. Davis*,[112] brought by a publisher of information on food and health against a government official who met behind closed doors with groups of private industry representatives; and *Consumers Union of U.S., Inc. v. Department of HEW*,[113] brought by a consumers' organization to force a government agency to open meetings held with an association of private industry representatives. During the hearings on the FACA bill before the House Committee on Government Operations on November 4, 1971, the Illuminating Engineering Society was cited by a witness[114] as exercising excessive influence on regulatory agencies in setting standards for the intensity of light needed for various activities in public buildings. All of these instances emphasize the dilemma of reconciling undue industry influence with undue interference with liberty to organize and to speak for private interests.

UNSTRUCTURED, AD HOC GROUPS

Controversy and litigation have surrounded meetings of still another kind of group: the "one-shot meetings," as they have been described by several commentators.[115] The most significant examples

[111]397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert denied*, 431 U.S. 932 (1977).

[112]378 F. Supp. 1018 (D.D.C. 1974).

[113]409 F. Supp. 473 (D.D.C. 1976).

[114]*Hearings on H.R. 4383 Before the Subcomm. on Legal and Monetary Affairs of the House Comm. on Gov't Operations*, 92d Cong., 2d Sess. 24 (1971).

[115]*Oversight Hearings Before the Subcomm. on Budgeting, Management, & Expenditures of the Senate Comm. on Gov't Operations*, 93d Cong., 1st and 2d Sess. 5 (1973).

were the subject of a suit brought by Ralph Nader to gain admittance to a series of biweekly meetings convened in the White House by the Assistant to the President for Public Liaison.[116] Invited to the meetings were individuals representing major business organizations, senior citizens, professional service firms, church groups, youth and other private sector groups. The purpose of the meetings was to "increase the flow of information between the private groups and the top Executive officials, including the President." Each meeting involved a different group. Mr. Nader was denied admission and sought a declaratory judgment and injunction to require the president's office to comply with the open meetings and other provisions of the FACA.

The executive branch, from the time of passage of the Act, has sought an interpretation of the Act's definition of "advisory committee" that would not apply the Act to the kind of meeting involved in the *Nader* case. In the tentative draft of Circular A–63, presented on January 23, 1973, by OMB and the Department of Justice for public comment[117] a guideline was proposed for interpreting section 3(2) of the Act that limited the definition to groups "with fixed membership, usually selected by a federal official" and having "an organizational structure."[118]

The Department of Justice, presumably speaking for the executive branch, consistently adhered to that guideline concerning ad hoc groups. This was confirmed by the testimony of Deputy Assistant Attorney General Mary C. Lawton at the hearings on bills (S. 2947 and S. 3103) to amend the FACA on March 8, 1976, before a Senate subcommittee.[119] Her prepared statement contained this comment:

> Section 2 of the bill would add to the definition of "advisory committee" an express reference to "any ad hoc groups." We have interpreted the existing Act as applying to ad hoc, as well as continuing, advisory *Committees*. See 6(c) of the Act.
>
> The question here is the meaning of "ad hoc group." One possible interpretation, though not the one we have followed, is that the term includes a one-time, informal meeting between a Federal official and a group composed of private persons. If this is the intent of the amendment, we object to it.[120]

The final form of Circular A–63 and its supplements, however, did not contain any interpretation comparable with the draft of subpara-

[116]Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975).
[117]38 Fed. Reg. 2306 (1973).
[118]38 Fed. Reg. 2307 (1973).
[119]*Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess., at 85 (1976).
[120]*Id.*

graphs (a) and (d); it merely repeated the statutory definition. The draft guidelines, referring to groups with "fixed membership" and having "an organizational structure (e.g., officers) and a staff," would have clearly excluded the kinds of groups involved in the *Nader* case. In deciding that those groups were not covered by the FACA, Judge Gesell quoted the guidelines in the 1973 draft of Circular A–63 and the failure of Congress to voice objections to that construction. He said that "the Act was not intended to apply to all amorphous, ad hoc group meetings . . . not formally organized" and with "little or no continuity."[121] The breadth of the holding is somewhat limited by the statement that the meetings were not only unstructured and informal, but also were "not conducted for the purpose of obtaining advice on specific subjects indicated in advance." They seem, nonetheless, to have been convened to provide advice.

The definition of "advisory committees" is fuzzy as to the intent of Congress to include or exclude private groups "utilized" by government, but not established by any government agency, and "one shot" meetings of unstructured groups. While there are evidences that they were to be included under some preliminary versions of the Act,[122] and some members of House and Senate committees wanted certain of them included, the weight of the evidence is that the ultimate conclusion was to exclude them. This is supported by Judge Sirica's analysis in the case involving the National Academy of Sciences[123] and Judge Gesell's ruling on the White House meetings.[124] The Academy, with its federal charter and contractual relations, is clearly nearer to being a government agency than most private organizations. If it is not an "agency," as the court agreed, and its committees are not "advisory committees" under the Act, surely other, more remote, groups are perforce outside the Act. Similarly, if meetings of prestigious people in the White House are not under the Act, "one shot" meetings at lower levels would be similarly excluded.

Exemptions from Openness

Activities and meetings of committees that are outside the scope of the FACA because not within the statutory definition of "advisory committee" are, of course, free of any of the prescriptions and restrictions of the Act. The meetings, minutes and other records of groups

[121]Nader v. Baroody, *supra* note 116, at 1233.

[122]*See* Marblestone, *The Coverage of the Federal Advisory Committee Act*, 35 FED. BAR J. 119, 121–25 (1976).

[123]Lombardo v. Handler, *supra* note 111.

[124]Nader v. Baroody, *supra* note 116.

that do come within the definition and therefore are subject to the provisions of the Act, are exempted from the requirement of public access in certain specified circumstances. Section 10(d) of the original Act states that the open meeting provision in subsection (a)(1) of section 10 and the public access requirement in subsection (a)(3) do not apply to any meeting "which the President, or the head of the agency to which the advisory committee reports, determines is concerned with matters listed in section 552(b) of Title 5, United States Code"—which is the exemption section of the Freedom of Information Act.[125] In 1975, Congress included in the Sunshine Act (section 5(c)) an amendment to section 10(d) of the FACA that substituted the Sunshine Act's exemptions for the FOIA's, and limited the exemptions to a "portion of an advisory committee meeting" determined to be within one of those exemptions.[126]

Two exemptions that affected advisory committees when the FOIA language was applicable were eliminated by the change to the Sunshine Act: (1) the exemption for "interagency memorandums or letters which would not be available to a party other than an agency in

[125]FACA, *supra* note 7, § 10(d).

[126]5 U.S.C. App. I, § 10(d) (Supp. V, 1975). The following are the present FACA exemptions, as they appear in the FOIA:

(b) This section does not apply to matters that are—

(1) (A) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the indentity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

litigation with the agency," and (2) documents containing "geological and geophysical information and data, including maps, concerning wells."[127] The latter could obviously be adequately protected in a meeting context by other exemptions.

The former has been the subject of litigation over the proper interpretation of the language, and in *Wolfe v. Weinberger* it was held that an advisory committee cannot also be an "agency," so that documents received by the committee could not become interagency memoranda covered by the exemption.[128] Like the exemption involving geological data, the removal of the exemption for interagency documents does not seem likely to affect advisory committees significantly.

The changes are chiefly aimed at making the language of the exemptions more appropriate for meetings than for documents, which were the focus of the FOIA provisions. The addition of the permission to close a meeting, if opening it would be likely "to disclose information the premature disclosure of which would . . . be likely to significantly frustrate implementation of a proposed agency action,"[129] offers a shaky possibility of avoiding one of the primary complaints about the FACA. Many members of committees have felt that deliberations leading to their final conclusions cannot be sufficiently candid, flexible and thorough if their preliminary views are made public. They feel that advance publicity often makes it impossible to abandon a position. If that feeling can be shown to be likely to frustrate a committee's effort to issue a unified report, perhaps the exemption in subsection 9(B) would provide a way out. An "Interpretive Guide to the Government in the Sunshine Act" warns that public airing of differences among members of a collegial body always presents "these possibilities of frustration," but they are "inherent in the open meeting principle and, at least absent special circumstances, are not grounds for involving exemption 9(B)."[130]

The argument that deliberative sessions seeking a consensus of advisory committee members may be closed was debated in *Schechter v. Weinberger*.[131] The court sustained the position in part. In "oversight" hearings held before Senator Lee Metcalf's subcommittee on November 29, 1973, the Senator entered into the record a letter he had sent to the secretary of HEW protesting against the closing of committee

[127] 5 U.S.C. § 552b(5) and (9) (1970).

[128] 403 F. Supp. 238 (D.D.C. 1973). *See also* Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975); Wu v. NEH, 760 F.2d 130 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

[129] 5 U.S.C. § 552b(c)(9)(B) (1976).

[130] R. BERG AND S. KLITZMAN, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT, at 24 (1978).

[131] 506 F.2d 1275 (D.C. Cir. 1973).

meetings "to protect the free exchange of internal views."[132] He added that there may be situations of emergency where such confidential documents and internal deliberations "between Federal officers" may be necessary, but should be severely limited.[133]

The emergency situations or "special circumstances" that might permit closing a meeting under 9(b) could also bring into play another special exemption written into the FACA. The Act requires that "timely notice" of each meeting of an advisory committee shall be published in the *Federal Register* "except when the President determines otherwise for reasons of national security."[134] The failure to give notice of a meeting is about as effective a means of excluding the public as locking the doors. In a situation where a committee, and especially a presidential commission studying and advising on a matter of grave national import, feels that after all the data are collected and hearings concluded, it needs private deliberations to implement its planned course of action, the combined force of exemption 9(B) and of the president's discretion in subsection 10(a)(2) could justify the requisite in camera deliberations.

CATEGORIES OF COMMITTEES

The advisory committee medium is used in almost every function of the federal government. The list of committees by title in the annual reports reveals the variety in their purpose. In this report, detailed descriptions will be given only of the operations of some representative examples of committees performing diverse functions. A very helpful description of the strengths and weaknesses of particular kinds of committees was given by Professor David S. Brown to the Special Studies Subcommittee of the House Committee on Government Operations.[135]

Advisory responsibilities of committees can be separated into the following functional categories, and any of them may be assigned additional "operational" responsibilities: for policy advice; for technical advice; for fact finding; for evaluation of proposals and applications; for advice in personnel selection.

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[132] *Oversight Hearings on Pub. L. No. 92–463 Before the Subcomm. on Budgeting Management & Expenditures of the Senate Comm. on Gov't Operations*, 93d Cong., 1st & 2d Sess. 20–21 (1973–1974).

[133] *Id.*

[134] FACA, *supra* note 7, § 10(a)(2).

[135] *Hearings on Presidential Advisory Committees Before a Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2d Sess., pt. 2, at 52 (1970) [hereinafter *Hearings on Presidential Advisory Committees*].

Operational Committees

A committee in any of the five functional categories may be assigned an "operational" as well as "advisory" responsibility. "Operational" may be defined, in the words of section 9(b) of the FACA, as the power to make "determinations of action . . . or policy" for matters that come under committee consideration.[136] Under that section they must be given "solely advisory functions" unless Congress or the president expressly gives them other functions. The theory of the FACA, however, as expressed in the "Findings and Purposes," is that the functions of committees covered by the Act "should be advisory only."[137] In practice, committees exercising "operational" functions have been treated by the agencies as outside the scope of the FACA.[138] That interpretation does not seem to be required by the provisions of the Act, but the legislative history gives it some support.[139] The sponsors of the Act seemed to feel that committees exercising operational responsibilities were more like government agencies than advisory committees. Agencies have not been required (by the Sunshine Act) to function and deliberate "in the sunshine" unless they are "headed by a collegial body of two or more members . . . or any subdivision thereof. . . ."[140] A subdivision of that kind of agency, in the form of a committee but with decision-making powers, would be a "collegial body" covered by the Sunshine Act and subject to the open meeting prescriptions of that Act. To require other "operational" committees, not part of "agencies" as defined in that Act, to conform with the prescriptions of the FACA would be unlikely to inhibit their effectiveness any more than committees covered by the Sunshine Act.

Most presidential commissions are created to make available to the president the factual background of a particular problem and to offer the conclusions and recommendations of a group of persons of diverse backgrounds but with the competence to give helpful advice on the particular problem. The value of their work has often been hard to measure. Professor Brown's conclusion is that the success of presidential and other committees depends in part on the qualifications of committee members to perform the assigned functions and in part on the attitudes of government officials toward them.[141] He concluded that

[136]FACA, *supra* note 7, § 9(b).

[137]*See* note 53, *supra.*

[138]*Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 87 (1976).

[139]S. REP. No. 92–1098, 92d Cong., 2d Sess. (1972), *reprinted in* SOURCE BOOK, *supra* note 1, at 151.

[140]5 U.S.C. § 552b(a)(1) (1976).

[141]*Hearings on Presidential Advisory Committees, supra* note 135, at 47.

the chief value of the committees was their serving as "a useful symbol of the legislator's, the administrator's, and the civil servant's interest in consulting those he is expected to serve."[142]

Committees for Policy Advice

Presidential Commissions

Most of the presidential advisory committees are established to help the president and his administration to formulate policies. The following is a list of the committees that seem to fall primarily into this category as of December 31, 1978:

General Advisory Committee on Arms Control and Disarmament
National Advisory Committee for Women
National Commission for Manpower Policy
National Commission for the Review of Antitrust Laws and Procedures
National Commission on Neighborhoods
President's Commission on the Holocaust
President's Committee on Science and Technology
President's Council on Physical Fitness and Sports
President's Export Council
United States Advisory Commission on International Communication, Cultural and Educational Affairs

The value of the presidential committees for providing advice to a president is obvious. A group of carefully selected persons of all relevant backgrounds is invited to meet together, usually with the responsible government officers present. During the life of the committee, they are able to consider the points of view of all segments of the nation's society. The president and his advisers obtain a thorough and balanced finding of facts and recommendation.

Occasionally, of course, the ideal pattern is flawed. That is most likely to result from the committee's producing a report and recommendation that proves to be unacceptable to the president. The Commission on Obscenity and Pornography, with a remarkably balanced membership, issued several reports, based on scientific research, that will clarify the subject for years to come.[143] The permissiveness of the conclusions and recommendations of the commission, however, resulted in flat, though silent, repudiation by President Nixon. This kind

[142] *Id.* at 52.

[143] *See, e.g.*, STATEMENT OF CHARLES H. KEATING, JR., COMMISSIONER, COMMISSION ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY & PORNOGRAPHY (1970).

of repudiation was cited by the House Committee in 1970 as an added reason for enacting regulatory legislation that would prevent such a glaring waste of money. "Many committee reports and recommendations may be excellent and of great use, but if they receive little or no consideration they have little value," said the House Committee in 1970, citing eight earlier, prestigious presidential commissions.[144] Actually, a conclusion that all eight had great value is equally valid. Their reports contain volumes of carefully sifted factual material and authoritative opinions. They have proven to be of help in all kinds of ways to those seeking solutions to the problems involved in the commissions' work. The presidential repudiation, often arising out of contemporary political considerations, could not cause the results to be valueless and the expenditures to have been a waste of taxpayers' money, even if, like the Obscenity Commission, they cost nearly $2 million.[145]

Political considerations can have effects other than mere burial of a report. When an interim report was made to President Carter in 1978 by the National Advisory Committee for Women, the manner of presentation by the presiding member was so offensive to the president that the substance of the report was wholly obscured in the political recriminations that ensued. This demonstrated the likelihood that members of committees dealing with sensitive policy matters will be more effective if they are not only well qualified by their experiences and background, but can also produce outcomes that can withstand the pressures of strong political winds.

The Warren Commission on the Assassination of John F. Kennedy is probably the best known of the recent Presidential Committees. There is no doubt of the value of the volumes of factual data developed by the Commission.[146] The continuing controversy over the principal conclusion of the Commission, however—that only one person was responsible—shows how difficult it is for a commission to settle factual issues, regardless of the prestige, competence, and balance of its members.

During the hearings in 1970 before the House Special Studies Subcommittee chaired by Representative John S. Monagan of Connecticut that led to his introduction of the bill that led to FACA, a detailed description of the operations and procedures of the National Commission on the Causes and Prevention of Violence, created in 1968, was

[144]H.R. REP. No. 91–1731, 91st Cong., 2d Sess., (1970) *cited in* SOURCE BOOK, *supra* note 1, at 214.

[145]*Hearings on S. 1637, S. 1969 and S. 2064 Before the Subcomm. on Intergov'tal Relations of the Senate Comm. on Gov't Operations*, 92d Cong., 1st Sess., pt. 1, at 6 (1971).

[146]*See* REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY (1964).

presented by Lloyd N. Cutler, the Executive Director of the Commission.[147]

The experience of that Commission, created before the FACA was enacted, provides a guide to the way such a committee operated. Its membership was unquestionably "balanced." While it held many open hearings with opportunity for the public to present views, however, the deliberative and drafting sessions of the membership were not open to the public. They were held before the FACA or the Government in the Sunshine Act was enacted, and its methods reflect the strongly held views that committees cannot operate effectively in public. This subject is treated separately elsewhere in this report.

Other Policy Advice Committees

The utility of a lower level advisory committee in the policy area, established in an agency rather than the White House, and the way the FACA affects it, can be seen in the Secretary of State's Advisory Committee on Private International Law. In 1963 the United States formally became a member of the Hague Conference on Private International Law and the Rome Institute for the Unification of Private Law. Congress authorized appropriations to pay for U.S. participation.[148] Those international organizations had long been engaged in an effort to bring some certainty and unformity in the rules of law applicable to transactions among private persons and organizations in different countries. They arranged international conferences for drafting and proposing uniform legislation or multilateral agreements to bring about effective uniformity of result when issues arise in the various participating countries. Examples of subjects covered are recognition of divorces; sales of goods; enforcement of judgments; extraterritorial service of process; hotelkeepers' relations with guests; and products liability.

In order to help in the formulation of a United States position on each proposal of the two organizations, the Secretary of State established an advisory committee. The American Bar Association, the American Law Institute, the Association of American Law Schools, the American Branch of the International Law Association, the American Society of International Law, the American Society for the Comparative Study of Law, the Conference of [State] Chief Justices, the National Conference of Commissioners on Uniform State Laws, the Judicial Conference of the United States, and the U.S. Department of Justice, in response to the secretary's invitation, named representatives to serve

[147] *Hearings on Presidential Advisory Committees, supra* note 135, at 88.
[148] 22 U.S.C. § 269(g) (1970).

on the committee. The Department of State was represented by the deputy legal adviser, who acted as chairman. Each of the representatives had special experience in the field of private international law; several were the leading writers and scholars in the field. Before and during meetings where the committee discusses particular subjects, expert consultants have been invited to comment on the draft agreements or statutes. For example, in the discussion of the hotelkeepers' contract, counsel for the major hotel chains and for travel agencies were invited to attend and participate in the discussions, as were representatives of consumer and public interest organizations. "Balanced" participation was assured.[149]

After the FACA was passed, the Advisory Committee on Private International Law was duly recognized as covered by the Act and operated under its constraints. No ill effects have been perceived, and the Department of State can feel more secure that it has given every interest a fair hearing. A charter was filed at each place specified in the Act.[150] The charter included a statement that all meetings would be open to the public unless the published notice stated otherwise. The possible grounds for closing a meeting were cited as "5 U.S.C. 552b," which lists all the exceptions to open meetings allowed under the Sunshine Act. They include closing meetings "in the interest of foreign policy," which gives the Advisory Committee enough leeway to close a meeting during a discussion of a United States negotiating position on a controversial policy question. The privilege is seldom invoked, and interested members of the public and of foreign diplomatic missions have attended some of the meetings.

The activities of this Advisory Committee have produced U.S. delegations to international conferences armed with learned analyses of the fields of law involved.[151] It has developed specific proposals for drafting revisions based on thorough consideration of drafts by the nation's best qualified commentators and by those likely to be most affected by the results of the deliberations.

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[149]For a list of the participants in the work of the committee *see* SUBCOMM. ON ENERGY, NUCLEAR PROLIFERATION, AND FEDERAL SERVICES OF THE SENATE COMM. ON GOV'TAL AFFAIRS, FEDERAL ADVISORY COMMITTEES, INDEX TO THE MEMBERSHIP OF FEDERAL ADVISORY COMMITTEES LISTED IN THE SIXTH ANNUAL REPORT OF THE PRESIDENT TO THE CONGRESS COVERING CALENDAR YEAR 1977, (1978) [hereinafter FEDERAL ADVISORY COMMITTEES, INDEX], pp. 210–211.

[150]A copy of the charter, as required by law, is on file in the office of the Committee Management Secretariat, General Service Administration. It is a typical example of the kind of charter that meets the requirements of the Act.

[151]*See, e.g.*, Nadelmann, *Clouds Over International Efforts to Unify Rules of Conflict of Laws*, LAW & CONTEMP. PROB., at 54 (Spring 1977).

Technical Committees

The deep involvement of the government in health, environmental, nuclear and similar matters that are the special realm of trained scientists has created a need for expert technical advice in many agencies. The names of some of the committees alone testify to the need for expertise in providing advice; for example: Clinical Psychopharmacology Research Review Committee; Federal Insecticide, Fungicide and Rodenticide Act Scientific Advisory Panel; Advisory Committee on the Medical Uses of Isotopes; and Lunar Sample Analysis Advisory Committee.[152] The advisory committee device provides the government with the advice of the best qualified scientists at a minimum cost, since they are compensated, if at all, only during the time actually spent in the work of the committees.

One major problem is the inevitable consequence of seeking the services of the best qualified specialists: because of their special qualifications, they are certain to be heavily involved professionally and financially in the area in which their advice is sought. This must lead to conflicts of interest. It emphasizes the importance of careful attention to "balance," to obtain "a diversity of qualified opinions and interests," in the words of Professor Henry J. Steck in a statement prepared for the Senate Committee on Government Operations in March, 1977.[153] In testimony the year before, Professor Steck was particularly critical of committees established by the Food and Drug Administration, which are composed largely of scientific and medical doctors, employed more in academic institutions than in industry.[154]

The operation of a committee providing advice on a highly technical, scientific and health matter is exemplified by a meeting of the Scientific Advisory Panel created under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[155] The Scientific Advisory Panel was established by section 25(d) of the Act.[156] The administrator of the Environmental Protection Agency is required by that section to submit proposed regulatory action to "an advisory panel for comment on health and the environment." The panel is referred to in section 6(b)[157] as "the Scientific Advisory Panel pursuant to section 25(d)." The requirement

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[152]SEVENTH ANNUAL REPORT, *supra* note 19, at 49–89.

[153]*See* note 177, *infra*.

[154]*Hearings Before the Subcomm. on Reports, Accounting & Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 129–30 (1976).

[155]7 U.S.C. § 136–136y (1976).

[156]7 U.S.C. § 136w(d) (1976).

[157]7 U.S.C. § 136b(2) (1976).

of that advice may be waived only when "necessary to prevent an imminent hazard to human health."[158]

A notice of an open meeting to be held on February 14 and 15, 1979, of a subcommittee of the panel appeared in the *Federal Register* on January 29, 1979, the agenda being "Label Development" and "Experimental Use Permits."[159] On February 7, another notice appeared, announcing that a "regular meeting of the Panel" would "formally convene" in the afternoon of February 14 at the EPA office to complete review action for "conclusion of the rebuttable presumption against registration (RPAR) or pronamide."[160] The purpose of that session was explained, during the meeting, as providing an opportunity for more public comment on a proposed regulation, and in particular by a manufacturer of pronamide. Five members of the panel were present, and about twenty-five other people were in the room.

The meeting started with a description of the regulation that was being recommended to the Administrator by the panel. A representative of the manufacturing concern, who was accompanied by several scientists and a lawyer for the firm, was seeking modification of the recommended regulation. The presentation by the concern demonstrates the nature of the proceedings. Documents already before the panel purported to show that:

1. The substance should not be deemed a carcinogen because the only evidence was that it sometimes caused liver cancer in male mice;
2. The time that must elapse between application of pronamide to transplanted lettuce and alfalfa and harvest, in order to reduce the residue to one part per million, can be forty-five days instead of the proposed sixty days;
3. The requirements of both prescribed packaging (i.e., water soluble bags) and protective clothing for applicators is not necessary;
4. The proposed label that it is "For commercial use only; not for home use" should be amended; and
5. There was no persuasive evidence that milk in market baskets contained excessive traces of the substance even if the cows had eaten alfalfa sprayed with the formula.

The members of the panel, who had heard or read all the scientific evidence in the panel's files, commented on the presentation, and, after discussion, stated their conclusion that they would recommend the regulation as drafted.

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[158] *Id.*

[159] 44 Fed. Reg. 5712 (1979).

[160] 44 Fed. Reg. 7809 (1979).

The curricula vitae of the members of the panel were impressive; their affiliations were: Secretary, Boyce Thompson Institute for Plant Research at Cornell University; Chairman, Department of Epidemiology and Public Health, University of Miami School of Medicine; Professor of Pharmacology and Toxicology, University of Kansas Medical Center; Professor of Biology, Entomology and Environmental Studies, Department of Entomology, University of Illinois at Urbana-Champaign; Director, Center in Toxicology, Vanderbilt University School of Medicine; and Professor and Chairman, Department of Pathology, School of Medicine, University of California.[161] All were scientists with elaborate credentials in education, scholarship, publications, positions held and consulting affiliations, with particular relevance to pesticide technology. Three had doctorates of both medicine and philosophy. There could be no question of their competence or, from the published biographies, absence of financial interest in any involved substance or business. They were selected intentionally because of their lack of involvement in business, which meant, of course, that the panel lacked one aspect of the "balance of interests" that the FACA prescribes for advisory committees generally. The FIFRA provides that the members of the panel are to be appointed by the Administrator from among six nominees of the National Institutes of Health and six of the National Science Foundation.[162] There was no requirement of members from "consumers" or industry. The Administrator is to "promulgate regulations regarding conflicts of interest" among members of the panel. Obviously, a panel "balanced" with some members from the industry that manufactures the substances being controlled, however, would involve some conflicts of interest. In this kind of committee, the FACA requirement of balance clashes with efforts to avoid conflicts of interest. Perhaps full disclosure of all involvements is an adequate prophylaxis.

Fact Finding

Committees in the "fact finding" category, are usually those charged with determining the facts giving rise to a special incident, such as an accident or a popular outcry. Committees giving technical advice are, of course, partly "fact finding." This category of committee generally is expected, in addition, to advise on remedies and policies that will ameliorate the situation or prevent an undesirable recurrence. Examples are the President's Commission on the Three Mile Island incident

[161]The panelists and their affiliations are identified in FEDERAL ADVISORY COMMITTEES, *supra* note 149, at 241.

[162]7 U.S.C. § 136w(d) (1976).

(1979) and the National Commission on the Causes and Prevention of Violence (1969). The former was charged with determining the cause of the breakdown and threats to public safety of the nuclear energy plant at Three Mile Island in Pennsylvania. The latter was created in 1968 following the assassinations of Robert F. Kennedy and Martin Luther King, Jr., and was operating when the Chicago disorders of the summer of 1968 occurred. In its own words its charge was to make "a penetrating search for the causes and prevention of violence—a search into our national life, our past as well as our present, our traditions as well as our institutions, our culture, our customs and our laws."[163]

The members of the Commission on the Causes and Prevention of Violence were described by Lloyd Cutler, its executive director, as a group which "did box the political compass and include representatives of virtually every group and segment of thought in the country,"[164] including four "distinguished" members of the House and Senate. The chairman was Dr. Milton Eisenhower, and all the members "worked very hard" and "developed an independence of thought and really an independence of being directed or influenced by those who had appointed it."[165]

The Violence Commission, after eighteen months of work, published its reports and fifteen separate volumes of staff research and investigative reports. Mr. Cutler's testimony before the subcommittee considering the regulation of advisory committees in 1970 contains an excellent summary of the processes and effectiveness of this kind of commission. It also reveals some of the reasons for the continuing criticism of the advisory committee process:

> What are the results of the enormous expenditure of time and effort which went into the total work product of the Eisenhower Commission?
>
> In trying to answer this question I would draw a distinction at the outset between the findings of a presidential commission and its recommendations. Presidential commissions have two quite different kinds of functions. One is to present significant facts about national problems to the members of the public and their elected leaders, and the other is to make policy recommendations to officials at various levels of government. In order to assess correctly the results of a presidential commission I think it is important to look at each of these two functions separately.
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> * * *
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> In stressing the independent significance of Commission fact finding I do not want to leave you with the impression that I consider Commission policy recommendations to be an exercise in futility. On the contrary, I think that the governmental response to Commission recommendations has been

[163] *Hearings on Presidential Advisory Committees, supra* note 135, at 114.
[164] *Id.*
[165] *Id.*

more constructive than has been generally recognized and could be even better if appropriate kinds of follow-up groups could be established for the major presidential commissions.

* * *

. . . the Commission swiftly and unanimously reached agreement on the fundamental conclusions drawn from its study—that the causes of violence are deeply rooted in our institutional failures to correct social injustice as well as in the weakness of the law enforcement system, and that the prevention of violence required a two-pronged approach aimed at making resort to violence unnecessary as well as unrewarding. That is why we called our final report "To Establish Justice, To Insure Domestic Tranquillity." To achieve these twin goals, we recommended, first, that national priorities should be revamped so that expenditures for general welfare purposes could increase relative to military expenditures, and, second, that we sharply increase our investment in the criminal justice system and transform it from a nonsystem of overlapping and uncoordinated agencies into a well-managed and efficient whole. In December of 1969, we published our final report, consisting basically of a summary statement of conclusions together with the edited versions of the separate papers we had issued over the preceding months.

* * *

But it remains true that, on the whole, Commissions burst on the scene and then pass from public view like comets, only to appear again in much the same form years or even decades later. The reports of the 1930 Wickersham Commission, the 1965 Katzenbach Commission and the 1969 Eisenhower Commission differ merely in details so far as the subjects of crime and law enforcement are concerned, not in the central thrust of their analyses and recommendations. As Kenneth Clark so vividly reminded us, the report of the Kerner Commission largely mirrored the reports on the 1919 riot in Chicago and the Harlem riot of 1935. One of the scholars we consulted remarked, not wholly in jest, that we should study the violence induced by the frustrations resulting from the publication of so many excellent prior reports and the public failure to respond.

We have no ready solution for this problem. In our own report we recommend that the President request a group of leading private citizens to constitute themselves as a National Citizens Justice Center, to serve as a continuing presence to examine the workings of the criminal justice system and as a catalyst for achieving the reforms we so urgently recommended. Perhaps much could be gained if the British tradition were adopted here. In Britain, the publication of each Royal Commission report is usually followed within 6 months to a year by the publication of a Cabinet white paper setting forth the Government's views on the Commission's recommendations and the Government's proposals, if any, for action. Although 6 months have passed since our final report was filed, the administration has so far made no public response. Perhaps we would also benefit by creating a private committee consisting of the chairmen of the most important past Presidential commissions, whose combined prestige and experience in studying the critical problems of our time might enable them to awaken the conscience of the country, and give focus to our national will.[166]

[166] *Id.* at 113–18.

Concern over the failure of the government to profit from the work of fact-finding commissions has often reappeared. The General Accounting Office, in 1977, reported to the House Committee on Government Operations that a "better followup system is needed" to "deal with recommendations by study Commissions."[167] Its report repeated the following recommendations of two years earlier:

> Our review showed that greater benefits could be obtained from the work of special study commissions—which the Government often uses to get advice on national problem areas or issues—if an effective system were established to promptly and fully follow up the commissions' reports and recommendations.
>
> We recommend that OMB provide the necessary leadership in the executive branch to establish effective followup systems on study commission recommendations.
>
> OMB concurs with this report's purpose and goal and the need for increased efforts by all branches and levels of government to consider study commission recommendations.

Because of the high cost of presidential fact-finding committees, such as the Violence Commission, and the paucity of tangible results from their reports, members of Congress developed a questioning attitude toward the creation and continuance of advisory committees generally. Amidst the criticisms of the numbers, the inefficiency, the secrecy and improper influences connected with advisory committees, the sponsors of remedial legislation have frequently inserted caveats, like Senator Metcalf's emphasis in introducing the FACA bill, that "many of the numerous advisory committees, boards, commissions and similar groups have provided a useful and beneficial means of furnishing expert advice, ideas and diverse opinions."[168] Repetition of that conviction has helped to prevent throwing out the baby with the bath.

EVALUATION OF PROPOSALS AND APPLICATIONS

Advisory committees have long been extensively used in the process of evaluating applications by individuals and private organizations for grants of government funds for scientific, scholarly and professional projects. Generally the funds being sought were specifically authorized and appropriated by Congress to permit the research or professional activity to be accomplished in the private sector rather than within agencies of the government. Sometimes the authorizing legislation contains specific directions for the evaluation of applications. An ex-

[167]U.S. General Accounting Office, Better Education Needed to Weed Out Useless Federal Advisory Committees, Washington, 1977.

[168]*Hearings on Presidential Advisory Committees, supra* note 135, at 117–20.

ample is the Board of Foreign Scholarships, with the responsibility of "selecting students, scholars, teachers, trainees and other persons to participate in the programs authorized" under the Fulbright Act[169] and the later Mutual Educational and Cultural Exchange Act of 1961.[170] The board each year passes on several thousand applications for educational and scholarly exchange grants. In other cases the granting agency establishes one or more committees with the special responsibility of reviewing and making recommendations on—not selecting—applicants. Typical examples are the committees of the National Endowment for the Humanities, which reported 149 closed meetings of that kind of committee in 1978.[171]

The standard system of evaluation of grant applications, exemplified by those described above, is "peer review." Sometimes the document involved, such as an application for funding or a manuscript seeking publication, will be sent to a few selected individuals, with qualifications in the field, for separate "peer" evaluation. When the "peers" are brought together by a government agency for collegial consideration, they become an "advisory committee." Almost universally, that kind of advisory committee has operated behind closed doors, and their deliberations have been withheld from public scrutiny. The Board of Foreign Scholarships, because it "selects" rather than recommends grantees, has been treated as an "operational" committee and for that reason exempt from the open meeting requirements of the FACA. The Humanities Endowment's committees and numerous committees established in the National Institutes of Health, however, are recognized as covered by the Act. Their meetings are all closed under the authority, cited in the published announcements of the meetings, of the statutory provisions permitting exclusion of the public where needed "to prevent a clearly unwarranted invasion of personal privacy" in both the FOIA, which applied under the original FACA, and the Sunshine Act, which now applies. A court decision has rejected a contention by a public interest group that documents involved in peer review are not protected by the FOIA exemption for matters of personal privacy.[172]

One peer review operation that has held open committee meetings is the Agency for International Development Research Advisory Committee. For example, the meeting on January 9, 1979, held in the Pan

[169]50 U.S.C. App. I, § 1641 (1970).

[170]22 U.S.C. § 2451 *et seq.* (1976).

[171]SEVENTH ANNUAL REPORT, *supra* note 19, at 103.

[172]Washington Research Project, Inc. v. Dep't of Health, Educ. and Welfare, 366 F. Supp. 929 (D.D.C. 1973), *aff'd on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

American Health Organization building in Washington, considered applications by scientists at various institutions for new or renewed funding of research projects for agricultural improvement in several countries. One involved research at the University of Florida into "the potential of associative biological nitrogen fixation with the objective of significantly reducing the need for fertilizer nitrogen in grass crops." The discussion among the committee members, practically all experienced scientists, was lively, penetrating and learned. No one seemed inhibited in criticizing techniques and results because the meeting was open and the minutes would be available to all those involved in the proposed study. An adverse recommendation by a subcommittee was fully exposed. It was interesting that a vote on the same subject at a previous meeting was "nine in favor and eight abstentions."

The open meeting policy of the AID in considering scientific research applications does not necessarily indicate that other peer review groups could operate effectively in the open. The discussions of the relative qualifications of applications by individuals for scholarly activities tend to become very personal and subjective. There is no doubt that many of the members of committees evaluating that kind of application would feel seriously inhibited about candid expressions of opinions on applicants' scholarly capabilities and personal adaptability for projects if they knew that their statements were being heard by the applicants and their evaluations would be recorded in open minutes. The opinion of those who are asked to serve as "peer reviewers" is almost unanimous that their collegial deliberations and individual evaluations must be kept from public view. The Undersecretary of HEW, in a statement presented to the Senate Committee on Government Operations on March 10, 1976, expressed that department's conviction that an agency must have "the discretion to close a portion of a meeting" to preserve the "candor and confidentiality" that are essential to "the free exchange of views."[173] A characteristic discussion of the matter appears in the statement prepared by Professor Henry Steck for the hearings on FACA amendments in September, 1977:[174]

> As the Conference Report indicates, and as you will remember from last year's hearings, the subject of NIH peer review committees is an extremely complex one. NIH is rightly concerned with the integrity and quality of decisions made by its peer review structure and with the problem of premature disclosure of clinical trial data. . . . Similarly, the National Endowments for the Arts and for the Humanities have indicated that opening their review

[173] *Hearings Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 611, 627 (1976).

[174] Prof. H.J. Steck, Unpublished Statement on S. 1847, S. 2088, S. 1329 and S. 1838 to Amend FACA, State Univ. of New York at Cortland, Sept. 29, 1977.

panel system under FACA would, as Ms. Nancy Hanks put it, "effectively destroy public participation in the Endowment's grant review process and would leave grant award decisions solely in the hands of Federal administrative personnel." I believe that a case for exemptions can be made out for review type panels or committees. Congress itself has recognized this principle in Section 110 of the National Cancer Act. As the Conferees on the Sunshine Act recognized, there are legitimate competing interests involved and it is not easy to balance, on the one hand, a respect for the privacy and work of an individual researcher and the need for a thorough assessment of a proposal by a jury of one's peers, and, on the other, a public interest that fiscal information and decisions regarding research priorities not be withheld from the public. As I suggested last year, "perhaps our attention ought to be properly addressed to finding a way to balance the public's right to know, the public's right to accountability, and the imperatives of an effective grant review system." Accordingly, it may be that statutory exemptions ought to be built into FACA itself in this and other cases where Sunshine Act exemptions seem to produce difficulties. Rather than struggling with construction of 9(B) and its availability or non-availability in a category of cases, it might be better for this Committee to draft an exemption designed to balance the competing interests with respect to peer review or other review systems. In doing so one would need to define the areas of disclosure, the extent of non-disclosure, and the mechanisms that assure adequate accountability. In short, where non-disclosure is permitted by closing a meeting there should be effective safeguards built in. The best approach, I would think, would be through building a statutory exemption into FACA itself. Such an exemption could then either supplement or replace 9(B).

Professor Steck included in his statement a quotation from a report of a Congressional Conference Committee, indicating their qualified acceptance of the principle that peer review deliberations may be closed:

> The conferees, however, are concerned about the possible effect of this amendment upon the peer review and clinical trial preliminary data review system of the National Institutes of Health. The conferees thus wish to state as clearly as possible that personal data, such as individual medical information, is especially sensitive and should be given appropriate protection to prevent clearly unwarranted invasions of individual privacy. While the conferees are sympathetic to the concerns expressed by NIH regarding its committees, funding recommendations and analysis of preliminary data, the conferees are equally sympathetic to concerns expressed by citizens' groups that important fiscal and health-related information not be unnecessarily withheld from the public.

If peer review meetings and minutes are closed, the applicants and representatives of groups interested in the proper administration of grant programs may have no means of knowing why an application was rejected or whether it was given due and fair consideration. Some agencies make a practice of revealing reasons to rejected applicants, without naming the reviewers on whom reliance was placed.[175] Requir-

[175] *Id.* at 22.

ing agencies to open their peer review proceedings to that extent may be the best middle ground between open meetings and tight secrecy. The National Endowment for the Humanities has regularly divided the meetings of its council into open and closed sessions. A comparable division could be applied in the case of peer review activities, with a limited opening of documents to the scrutiny of applicants, revealing reviewers' reasons for recommendations, but without names of reviewers. The Board of Foreign Scholarships could similarly open its "advisory" sessions, while keeping the review of applications closed.

Regulations issued under the authority of section 7 of the FACA could presumably effect these results.

PERSONNEL SELECTION

The Committee for the Selection of Federal Judicial Officers, the President's Commission on White House Fellowships, the Presidential Advisory Board on Ambassadorial Appointments, and the United States Circuit Judge Nominating Commission, are examples of committees giving advice on personnel selection. Their purpose almost always calls for closed meetings for the same reasons as the peer review committees: they deal with matters of personal privacy, and all members of the committees are likely to feel that candor and depth of inquiry will suffer if they must speak and deliberate in public. A balancing of interests between the need for thorough consideration of nominees and the restraining effects of publicity probably comes out in favor of closed meetings. For this kind of meeting, the literature and testimony do not seem to contain arguments to the contrary.

The names of the members of these committees are listed in the Index prepared for several years by the Senate Committee on Government Operations. This gives an opportunity to complain if anyone feels that a proper "balance" has not been maintained in making selections. The list of members in the December 1978 edition of the Index does not reveal any obvious instances of imbalance. It does reveal many names of great prestige and suitability, and due regard for ethnic and geographical distribution. The names of W. Averell Harriman, William Scranton and John Hope Franklin, for example, are listed under the Advisory Board on Ambassadorial Appointments. Erwin N. Griswold, Joseph D. Tydings and Coleman Young are among those listed under the Circuit Judge Nominating Committee.

ADMINISTRATIVE INTERPRETATION

Interpretations of the FACA, and particularly the portions defining its scope, have been made repeatedly, both formally and informally, by administrators and their legal advisers. The most conspicuous example

is the published draft of a revision of Circular A–63, which appeared early in 1973, about three months after the Act was passed.[176] It reflected the opinions of officers of the Office of Management and Budget and the Department of Justice on the way the Act should be implemented. Significant passages are quoted under the heading, "Unstructured Ad Hoc Groups," in this report. When the final versions of the 1973–1974 revision of Circular A–63 was promulgated, however, most of the interpretive provisions had disappeared, replaced by simple repetition of the words of the Act.[177]

The Act gave the OMB, through the "Committee Management Secretariat," the responsibility "for all matters relating to advisory committees" and for prescribing "administrative guidelines . . . applicable to advisory committees."[178] The Department of Justice has the overall responsibility of providing legal advice to other departments and agencies. Under Reorganization Plan No. 1 of 1977,[179] the Committee Management Secretariat was transferred to the General Services Administration, so that the administrative responsibilities given to OMB under section 7 of the Act are now lodged in GSA. Consequently, the responsibility for administrative interpretation presumably now resides in GSA, with the counsel of the Department of Justice.

There have been numerous interpretations of the FACA based on consultations among the Department of Justice, the Committee Management Secretariat and various inquiring agencies. Varying consequences have resulted from those consultations. Naturally, many times the Justice Department's opinion has been accepted and implemented by the affected agencies. If the question presented has arisen from an agency's unwillingness to accept an interpretation from a private source, and the Justice Department agreed with the latter, the Justice Department has a means of enforcing its view. It can advise the agency that, if a court action is started, the agency's position will not be defended by the government. The agency would risk a judgment for attorney's fees if it failed to accede to the claimant's demand.

When a conflict of interpretation arises between an agency and the secretariat, a different situation exists. An interesting example arose in 1977 while the secretariat was still in OMB, in connection with the "Contingent Employee Liability Insurance Panel." That group had been established as a "panel" of the "Advisory Committee of the Pension Benefit Guaranty Corporation," which in turn had been cre-

[176]38 Fed. Reg. 2306 (1973).
[177]THIRD ANNUAL REPORT, *supra* note 18, at 123.
[178]FACA, *supra* note 7, § 7.
[179]*See* note 77, *supra*.

ated by section 4002(h) of the Employee Retirement Income Security Act of 1974.[180] Paragraph (8) of subsection 4002(h) expressly states that the FACA "does not apply to the Advisory Committee established" by subsection (h). The officer in charge of the Secretariat in OMB noticed that the Pension Benefit Guaranty Corporation had not filed a charter for the panel and followed other procedures applicable to advisory committees. The secretariat, consequently, inquired as to the reason for the failure to conform to the Act. The corporation, through its general counsel, replied that the panel was "no more than a creation of the Advisory Committee," established to advise the committee only, and did not give advice to the corporation. Accordingly, it was argued, the panel was not "established or utilized" by an "agency," but only by the exempt committee.[181] The difference of interpretation has not been resolved, and the result is that, like all other advisory committees exempted from the Act, the panel and the committee have not been listed in the annual reports among the advisory committees in existence each year, and no material of either group is on file at the secretariat.

THE PROBLEMS PERCEIVED

The legislative history of the FACA in hearings, reports and debates is ample, and is supplemented by court decisions and scholarly writings on the subject of advisory committees. When members of Congress have looked at the subject, they have seen a vast and fluctuating number of committees and people influencing governmental operations and activities without much direction or control. In February 1971, when Representative John Monagan of Connecticut, who chaired the Special Studies Subcommittee of the House Committee on Government Operations, introduced H.R. 4383, he referred to the "lack of organization within this fifth branch of government" and the need for "restructuring the Federal Committee system."[182]

On the other hand, the critics of the system among the public interest groups and consumer advocates were complaining chiefly about secrecy and lack of "balance" in the membership of committees, giving special industry interests undue influence. They saw representatives of big business meeting regularly behind closed doors and turning out

[180]29 U.S.C. § 1302(b) (1976).

[181]Exchange of Correspondence Between Henry Rose, General Counsel of Pension Benefit Guaranty Corporation, and William Bonsteel, Committee Management Secretariat, OMB, On February 10, 1977, April 1, 1977 and Sept. 13, 1977.

[182]SOURCE BOOK, *supra* note 1, at 259.

reports and recommendations that were influencing government action against the interest of consumers, small business and other outsiders.

All of those concerns have continued to be expressed even after the enactment of the FACA. This study is an attempt to evaluate the validity of the persisting complaints about the creation and use of advisory committees and to propose measures that will remove as many of the faults as possible while enabling the government to continue to reap the benefits of the system.

AMENDING THE FACA

Only one amendment to the FACA has passed Congress since the enactment in 1972.[183] Several other proposed amendments, usually tightening regulations, have been the subject of hearings before congressional committees.[184] Almost every proposal has been uniformly opposed by departments and agencies of the executive branch. Amendments pending in 1979, however, have more of an administrative focus, and do not raise the same kind of issue.

The single amendment that has been adopted changed the list of exemptions originally incorporated in section 10(d) by reference to the FOIA to a reference to the Sunshine Act.[185]

In March 1976, the Senate Subcommittee on Reports, Accounting, and Management of the Committee on Government Operations held extensive hearings on two proposed amendments: S. 2947, introduced by Senator Metcalf, chairman of the subcommittee, and S. 3013, introduced by Senator Percy, a member of the subcommittee.[186] The Metcalf bill was aimed at the various alleged loopholes of the FACA, all of which were fully aired during the hearings. For example, the charge had been made that "ad hoc" groups were being formed for single meetings deemed outside the Act. Therefore, the definition section was to be amended by expressly including "any ad hoc groups" in the definition. Similarly, it was reported that committees with "operational" duties were being considered outside the Act because not purely "advisory." Consequently, the definition was to be amended to include groups with "operational" responsibilities "other than providing advice and information." In other sections, committees in some specific agencies were added and some were excluded.

[183]5 U.S.C. App. I, § 10(d). (1976).

[184]*See* note 51, *supra*.

[185]Pub. L. No. 94–409, Sec. 5(c) (1976).

[186]*Hearings Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. (1976).

The second target of the bill was the alleged lack of balance in advisory committee membership. The amendments would have required that members be "publicly solicited" and that one-third be "drawn from citizens in private life who shall represent the interests of the public . . ." These changes were strongly advocated by witnesses who cited such horrible examples as the National Industrial Pollution Control Council, which had industry members only and held closed meetings. After the FACA was enacted it "withered away."[187]

Another part of the bill would have required reports to Congress on progress made in carrying out "accepted recommendations" of presidential advisory committees. This amendment must have been motivated by the repeated charge that presidential commissions appear and reappear "like comets," at great expense, without leaving much effective results behind.

For several years, the only list of members of all federal advisory committees has been the Index prepared for the Senate Committee on Government Operations. One of the amendments proposed in S. 2947 would have made the president responsible for maintaining such a list and having it published in the annual reports required by section 6(c) of the Act. The Index contains over 50,000 entries on over 1000 pages; it would use a lot of appropriated funds.

Other provisions of the proposed amendment filled in gaps in the existing requirements of the Act. One of the most upsetting to agencies was a suggested requirement of "a complete audio or audio and visual recording" of every closed advisory committee meeting, to be deposited at the Library of Congress no more than twenty-four hours after the completion of the meeting, obviously too short a time for a typescript to be made, although the bill called for such a typescript if any committee member requested it.

A final portion of S. 2947 contained elaborate provisions for making and reporting agency determinations to close meetings, with a detailed grant of jurisdiction to U.S. district courts to hear complaints in camera about plans to hold closed meetings.

The chief aim of S. 3013 was to require public reporting of "any nonappropriated funds or any thing of value for the support, operation, or maintenance of any advisory committee and the source" of any such funds or things of value.[188] It also would have required reports showing committee recommendations and "the length of time each committee recommendation was pending or not acted upon."[189]

Neither of these bills made significant progress toward enactment.

[187] *Id.* at 117.
[188] *Id.* at 19.
[189] *Id.* at 19–20.

In the first session of the 96th Congress, two bills were introduced containing provisions affecting the FACA as part of a general overhaul of regulatory and rulemaking procedures. Both were referred jointly to the Committees on the Judiciary and Governmental Affairs, the latter having legislative jurisdiction in the advisory committee area.

S. 262 was introduced by Senator Kennedy and several other senators, including members of the subcommittee concerned with the FACA. Its only reference to FACA is a requirement that the Administrative Conference, under its new charter, issue "advisory guidelines, and otherwise provide guidance and assistance to any agency" which is subject to the Federal Advisory Committee Act. This kind of function, it may be noted, is already being carried on, to a certain extent, by the Administrative Conference, which has caused to be published "An Interpretive Guide to the Government in the Sunshine Act," giving help and advice to all agencies covered by that Act.

S. 1291, also introduced by Senator Kennedy, contains two references to the FACA. The first authorizes any agency proposing rulemaking to "create an ad hoc advisory committee which is not subject to any requirements of the Federal Advisory Committee Act except the requirements in section 10(a) and (b)," which call for open meetings and for minutes and other documents to be available to the public. Thus, they would be exempted from the requirement of filing a charter, and some other administrative details.

The second reference to the FACA in S. 1291 adds a clause to subsection 7(a) to remove from the Committee Management Secretariat all responsibility "for committees established or utilized by one or more agencies." This appears to be a misprint, because, if committees established by "one or more agencies" are removed, what is left? Perhaps "two or more agencies" was intended, but why? Other provisions of the bill would make minor changes in administrative details of the act.

CONCLUSIONS

1. Advisory committees are an important arm of the government. They provide a means of providing expert, technical and scholarly advice from experienced and representative individuals who are not regularly available as officers and employees of the government. The only alternative means of obtaining advice and information on the scale now covered by advisory committees would involve the recruitment of thousands of consultants at maximum rates of compensation. The cost would far exceed the current expenditures for travel and per diem of all the members of the advisory committees.

2. The overwhelming majority of "advisory committees" are operating strictly in accordance with the FACA. The regulations of the Act are not interfering with the efficiency and effectiveness of the vast majority of committees subject to the Act. In a few instances, the restrictions and prescriptions are unduly restrictive, but amendment of the Act is not necessary or desirable.

3. (a) The scope of the Act, measured by the statutory definition of "advisory committee" and administrative interpretations, (i) leaves out numerous committees that, in the view of critics, should be included, (ii) embraces several kinds of activities that other critics believe should be exempted from the provisions of the Act, or at least certain parts of the Act, and (iii) creates doubt as to the intent of Congress to include or exempt various kinds of groups operating near, with, or for government agencies. The scope should be clarified, preferably by administrative interpretations that carry out the intent of Congress.

The most important clarification involves groups of private citizens or organizations not formed by action of any government agency or not formally structured and not convened more than once, even if their activities result in advice, reports and recommendations that are considered and used by government officials and agencies. The line between the kind of "committee" that should be covered by the Act and that Congress intended to embrace within the Act, and those groups that are not and need not be covered by the Act, or by all its provisions, is blurred and uncertain. Even if no definition can clarify every situation, the bulk of the doubt could and should be removed by a clearer statement of scope.

(b) In redefining the scope of the Act, there should be a clear resolution of the question of the place of committees that are not exclusively "advisory." The present practice, which follows the original draft (1973) of the OMB-Justice Department guidance circular,[190] is to consider as outside the scope of the Act any group that exercises any "operational" function, even though it resembles an "advisory" committee in every other way. That interpretation stems in part from the words in the "Findings and Purposes" in section 2(a)(6) of the Act, that "the function of advisory committees should be advisory only . . . ."[191] A satisfactory solution might be to exempt the "operational" activities from those parts

[190]38 Fed. Reg. 2307 (1973).
[191]FACA, *supra* note 7, § 2(a)(6).

of the Act that are inappropriate for that kind of function, but apply it fully to the strictly "advisory functions." On the other hand, operational committees are so much like government agencies that perhaps the principles of the Sunshine Act should be applicable. Why not expressly have the FACA apply? Any of the activities of this kind of committee that call for confidentiality, such as deciding matters involving personal privacy, can be closed to the public under the same exemptions as apply to advisory committees and collegial agencies pursuant to section 552b(c) of the Sunshine Act.

(c) The files of the Committee Management Secretariat and the annual reports on advisory committees do not contain records or information about committees that are not deemed to be covered by the FACA. This includes committees expressly exempted from the Act by statutory enactment and those not "established or utilized" by a government agency, although they operate and deal with the government in many respects just as the covered committees do. The FACA does not require conformity with the Act of any group other than an "advisory committee" as defined in the Act. Similarly, Circular A–63 does not reach beyond the defined groups, although it does call for due filing of a charter of "each advisory committee" including "committees 'utilized' as advisory committees, though not established for that purpose." That still leaves out groups outside the statutory definition.

The absence of a centralized record of groups that influence government action by means of reports, interviews or other forms of "advice," but are not under the Act, means that some of the aims of the FACA are being frustrated. Paragraph (5) of the Act's "Findings and Purposes" states that "the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees."[192] A method of informing the public whenever a government agency receives and considers "advice" from an exempted group would further that purpose and would eliminate much of the risk that powerful, well-financed groups will exercise influence without having their activities revealed to interested and affected parts of the public. If that kind of "advice" is deemed worthy of attention and consideration, a notice of its receipt, with a description of the group submitting the material, could be published in the *Federal Register*. It must be noted, however, that

[192]*Id.* § 5.

"advice" received from individuals and organizations that would not be under the FACA anyway, because not a "committee," is probably not significantly different from advice from groups that can be called "committees." Many individuals and organizations have as much influence as committees, although groups are likely to represent a wider constituency. In both cases, the agencies should be sensitive to the importance of affording an opportunity to respond and comment for groups and interests with different or opposing points of view. The agencies should adopt methods of alerting the latter to the receipt of reports or other forms of advice that are receiving consideration, and of providing means for them to submit timely responses.

Another example of reconciling the aims of the Act with the need for some flexibility is the "one-shot" group. The problem posed by the inadequacy of the Act's definition of "advisory committee" has been demonstrated by the effort throughout the government to simplify and shorten administrative regulations. An agency task force that has drafted a new set of regulations, but is not ready for the preliminary publication for comment, has often sought reactions from various private individuals and organizations with experience in the subject. For that purpose, small groups of people have been invited to convene with the government drafting groups to go over the proposed revision. After consideration of the group's comments, the revision is made ready for the standard public notice of the proposed regulation. If these groups are covered by the FACA, the spontaneity and flexibility of the process is lost. The need for a "charter," for advance notice of the meeting, and for demonstrable "balance" among those invited would make this kind of meeting impractical. In practice, agencies have assumed that these unstructured, one-time, ad hoc groups are not under the Act, and Judge Gesell's opinion in the *Nader* case supports that conclusion.[193]

4. The circumstances that warrant the closing of meetings from public attendance need reexamination and some clarification. Some abuses of the privilege of holding closed meetings have been alleged; whether the charges have been substantiated is uncertain. In any event, additional administrative guidelines, drafted in the spirit of the FACA, would remove some of the uncertainty as to the justification for declaring meetings closed. If proposed guidelines are adopted after public announcement and hearings, future administration of the system would be more harmonious.

[193]*See* note 116, *supra*.

5. A similar need for clarification arises out of the requirement of subsections (b) and (c) of section 5 of the Act that the president, agency heads and other federal officials shall be guided, in creating advisory committees, by the principle that the membership will be "fairly balanced in terms of points of view represented and the functions to be performed" by the committee. Doubt has existed, for example, whether this means that various political, ethnic, geographic, educational, and societal points of view are to be represented, or that the members should have a balance of relevant training, experience and professional competence. The legislative history contains volumes of evidence as to how particular members of Congress and committee witnesses felt on this subject. No solution is likely to set all the criticisms at rest, but there could be something more precise than the simple admonition of "balanced membership" that appears in paragraph 10 of Circular No. A–63.[194] One means of achieving the desired balance of membership, for example, would be timely publication of a notice of the intention to appoint an advisory committee, with a request for applications and suggestions of names. Such a system would have the added advantage of providing agencies with lists of qualified and interested candidates for membership.

6. The only present recourse for members of the public who are excluded from a closed committee meeting, or who feel unrepresented because membership is "unbalanced," is to apply to a court for some kind of injunctive relief. No government office now considers that clear responsibility for enforcing the requirements of the Act has been delegated to it. The Act, in section 7(c), expressly gives the director of the Office of Management and Budget the responsibility of prescribing "administrative guidelines and management controls applicable to advisory committees." This seems to give power to the director to issue guidelines such as those in Circular A–63 and as are needed to clarify other responsibilities under the Act. Executive Order 12024 of December 1, 1977, transferred to the administrator of General Services "all the functions vested in the President" by the Act and brought into effect Reorganization Plan No. 1 of 1977, transferring the responsibility of OMB for prescribing guidelines.[195]

Issuing guidelines and enforcing them do not necessarily belong in the same agency. A measure of executive enforcement of the provisions of the Freedom of Information Act and the Privacy Act has been lodged, by order of the Attorney General, in the Office of Information Law and Policy in the Office of the Associate Attorney General in the

[194]THIRD ANNUAL REPORT, *supra* note 18, at 130.
[195]*See* note 42, *supra*.

Department of Justice. The order calls for the director of the Office to "coordinate" requests for FOIA releases of information; to advise executive agencies on questions relating to interpretation and application of the FOIA; and to "coordinate the development and implementation of and compliance with" the policy of the FOIA and Privacy Act. Denials of requests for records under the FOIA are to be subject to consultation through the office "before litigation ensues." After the start of litigation, responsibility shifts within the Department of Justice to the Civil Division.

Adding the FACA to the other two Acts in the Department of Justice's order, should provide a satisfactory means of administrative review of disputes among an agency, the GSA or a member of the public. The ultimate sanction in each case, when the agency and Office of Information Law and Policy disagree, would rest with department's method of deciding whether it will defend the agency's position if it comes before a court.

7. A systematic review of the recommendations of committees, particularly the major presidential fact-finding and policy-advising commissions, is needed. This was a major concern expressed by Lloyd Cutler when he noted the desuetude that often follows a report by a prestigious committee, such as the Eisenhower Commission on the Causes and Prevention of Violence.[196] Similarly, the General Accounting Office, in its 1977 report, recommended an OMB follow-up system to see that the effort of these commissions is not wasted. OMB is obviously a logical agency to exercise that responsibility. Indeed, the FACA expressly creates a Committee Management Secretariat within OMB to be "responsible for all matters relating to advisory committees." All the FACA responsibilities of the Committee Management Secretariat have been transferred by executive action to the General Services Administration, although the OMB budget examiners still evaluate the need to continue advisory committees as a regular part of their annual review of every departmental and agency budget. Perhaps the Secretariat, wherever it is located, can add a follow-up responsibility to its other functions under the Act. If this occurred, a substantial increase in its staff would be required.

RECOMMENDATIONS

Amend or supplement Circular No. A–63 as follows:

(a) Change subparagraph b of paragraph 4, the definition of "advisory committee," to read as follows:

[196] *Hearings on Presidential Advisory Committees, supra* note 135, at 117.

b. "Advisory Committee" means, consistent with section 3 of the act:

(1) any committee, board, commission, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof which is:

(A) established by statute or reorganization plan, or
(B) established or utilized by the president, or
(C) established or utilized by one or more agencies in the interest of obtaining advice or recommendations for the president or one or more agencies or officers of the federal government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the federal government.

(2) A committee is "established" by statute or reorganization plan when the statute or plan expressly states that the particular advisory committee is or shall be created. A statute or plan that only authorizes the creation of a committee does not "establish" it.

(3) The words "established or utilized" in the definition of "advisory committee" do not apply to a committee or other group unless it is (i) created by action of the president or of an agency, and (ii) has members appointed to convene, formulate advice, provide information or report to the president or an agency for more than a single session. The definition, however, includes committees and other groups that exercise some operational as well as advisory functions.

(b) Change paragraph 5 of Circular No. A–63 by adding a new subparagraph c as follows:

c. Whenever a difference of opinion arises between an agency or an advisory committee and a person outside the government concerning the applicability or interpretation of any portion of the Act, the question, if not resolved to mutual satisfaction between the parties, shall be referred to and considered by the Office of Information Law and Policy of the Department of Justice. The decision of that office shall constitute the position of the government, binding on the agency or advisory committee, in any litigation of the question that may ensue.

(c) Add a new paragraph in section 10 of Circular A–63 stating that the "Comprehensive Review" required by that section shall include a review and report of actions taken by appropriate agencies to implement recommendations of advisory committees whose work has terminated with a report containing proposals for future governmental action.

Appendix

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION 80–3

Interpretation and Implementation of the Federal Advisory Committee Act

The Federal Advisory Committee Act was enacted in 1972 in response to a wide range of criticisms concerning the activities and influence of advisory committees operating within and alongside government agencies. The need for the large number of committees in existence was questioned, and there were complaints over lack of adequate public information concerning their purposes, their membership, the course of their deliberations, and the extent of their influence. In addition, fears were expressed that committees were often inadequately balanced to reflect the spectrum of interests affected by their recommendations. Finally, the government seemed frequently to fail to implement, or even to respond to, important recommendations offered by prestigious committees after protracted and expensive research, hearings and study.

It cannot be expected that FACA in operation would have wholly silenced the criticisms which led to its enactment. Yet, the conference's study does indicate certain positive results from FACA, including more careful evaluation by government of the need for establishing or continuing advisory committees, more attention paid to their makeup and responsibilities, and more openness in their deliberations. We are not prepared to recommend at this time any major revision of the statute, either to embrace more activities by committees and similar groups, or to reduce the coverage and requirements of the Act. However, there are areas where clarification and perhaps some narrowing of coverage would ease problems of administration and remove artificial barriers to communication between the agencies and the interested public. In addition, a more vigorously coordinated implementation of FACA by the executive branch would provide more guidance to the agencies and the public and a more consistent application of FACA within government and in the courts.

1. The Federal Advisory Committee Act directs the Office of Management and Budget to "prescribe administrative guidelines and management controls applicable to advisory committees." This authority has since been transferred to the General Services Administration by Reorganization Plan No. 1 of 1977, and Executive Order 12024. Neither OMB nor GSA has made adequate use of

this statutory authority to assist the agencies in resolving difficult questions involving the coverage of the Act, particularly the applicability of the Act to ad hoc and informally established advisory groups. As a result, courts have been faced with the need to resolve such issues without the assistance of authoritative administrative guidelines. Accordingly, GSA, in consultation with OMB and the Department of Justice, should undertake a revision of the guidelines at present contained in OMB Circular A–63, so as to provide greater assistance to the agencies, and, in particular, to deal with the problems of classification of committees experienced under the Act (see paragraph 2, below). The proposed guidelines should be made available to agencies and the general public for comment before they are finally issued, and upon issuance the guidelines should be widely published. Where a legal dispute concerning the applicability of the Act to particular advisory bodies cannot be resolved between the agency and GSA, the dispute may be submitted to the Department of Justice for resolution pursuant to Part 1–4 of Executive Order 12146.

2. The most serious problems regarding the coverage of FACA have involved the applicability of the Act (a) to groups convened by agencies, on an ad hoc basis, without formal organization or structure or continuing existence, to obtain views on particular matters of immediate concern to the agency, and (b) to privately established groups whose advice is "utilized" by an agency.

a. Uncertainty as to the applicability of FACA to one-time or occasional meetings between ad hoc groups and government officials has tended to discourage useful contacts with the private sector. It is impractical to require such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that the Act is not applicable to ad hoc, unstructured, noncontinuing groups and that GSA's guidelines should make this clear. Coverage of such groups would not further the purposes of the Act.

b. The conference believes that the definition of "advisory committee" is limited to committees either established by government action or affirmatively supported and "utilized" by the government through institutional arrangements which amount to the adoption of the group as a preferred source of advice. GSA's guidelines should make this clear.

c. Agencies should be sensitive to the desirability of making available to the public advice or information obtained from private or ad hoc groups not covered by FACA when the agency is considering action based on such advice or information.

3. Advisory committees frequently are useful in furnishing expert technical and scholarly advice to the government, often at little or modest cost, and in providing a valuable channel of communication between the government and the private sector. FACA has been successful in bringing about the elimination of many unnecessary advisory committees. It continues to serve a constructive purpose in requiring agencies and GSA periodically to evaluate the usefulness of each advisory committee, but such a review should be objective and should not be premised on any assumption that fewer advisory committees is a desirable goal in and of itself.

SEPARATE STATEMENT OF ALEXIS C. JACKSON

Government Member, Administrative Conference of the United States

The consideration and study of the Federal Advisory Committee Act by the Administrative Conference has been a valuable and necessary exercise. However, I do have some reservations and additional comments to make regarding Recommendation 80–3, ¶¶ 2(a–c).

Recommendation 80–3, ¶ 2(a) causes substantial concern. We in the Department of the Interior have consistently interpreted the Advisory Committee Act to include so-called ad hoc committees. We have based this interpretation on the clear statutory language of section 3 of the Act together with the spirit of openness in government embodied in the Act. We believe our interpretation to be well-founded. When the courts have been presented with the question of the applicability of FACA to ad hoc committees they have, with only one exception, ruled that the committees are *not* exempt from the Act. In the one case where an ad hoc committee was held to be outside the Act, *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975), the decision reflected the possible constitutional consequences of restricting meetings within the office of the president, together with the very loose nature of those meetings.

The recommendation to exclude ad hoc committees administratively is fraught with problems. If our interpretation is correct, the General Services Administration (GSA) would be powerless to amend the statute by its own interpretation. Any such attempted interpretation would lead only to confusion and ultimately to litigation by members of the public who have been excluded from viewing or participating in such meetings. It is likely that such litigation would be directed at the agencies that utilize such committees—not GSA.

Moreover, even if authorized, the recommendation invites abuse. Agencies seeking to circumvent the requirements of the Act would merely characterize committees as ad hoc. If an additional meeting or meetings are required, the agency could simply call another excepted ad hoc meeting. In the interest of a free and open democratic government, the chartering of all advisory committees should not be viewed as an overwhelming burden, even those which last for only several hours. The burden is in the artificial barriers imposed by GSA in the consultation process.

Similarly, I feel constrained to take issue with Recommendation 80–3, ¶ 2(b). The case of *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir., 1976), *cert. denied*, 431 U.S. 932 (1977), suggests a far more liberal interpretation of the term "utilize" than contemplated by the Recommendation. So does *Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978). These cases foreclose the suggestion contained in the recommendation, ¶ 2(b). I believe GSA could assist agencies by more clearly defining "utilize" in its guidelines.

Recommendation 80–3, ¶ 2(c) underscores the need for careful consideration of the issues presented in the matter of FACA's interpretation. Paragraph 2(c) contains the mere precatory suggestion that agencies should be "sensitive" to the need for making advice received from ad hoc committees available to the public when considering action based on such advice. This might be read as a retreat from previous conference expressions, see Recommendation 77–3, regarding making publicly available the substance of communications from outside the agency in pending rule-making proceedings.

To conclude, I am not troubled by the interpretation the courts have given FACA. I do believe, however, that the chartering of committees should be facilitated by GSA rather than hindered by it. The consultation process originally contemplated was designed to be just that—consultation—and not one of final determination of whether a committee ought to be established. That determination is reserved to the agency head. If this original concept were to be reborn, agencies could more effectively and supportively comply with the Act.

As I read them, Recommendation 80–3, ¶¶ 2(a) and 2(b) seek to change the coverage and scope of the Act. This, of course, contradicts the preamble of Recommendation 80–3 which states "We are not prepared to recommend . . . any major revision to the statute. . . ." In view of the stated intention, we believe the conference should reconsider Recommendation 80–3, ¶¶ 2(a–c) and adopt a revised recommendation (attached) in accordance with the views outlined in this statement.

If on the other hand, the conference does not revise Recommendation 80–3 ¶¶ 2(a–c), the substance of its proposal should be submitted for legislative action.

ATTACHMENT TO SEPARATE STATEMENT OF ALEXIS C. JACKSON

Suggested Revision of Recommendation 80–3, Paragraphs 2(a–c)

2(a) Ad hoc groups which meet with government officials on a one-time or occasional basis are advisory committees under FACA. It is therefore necessary for such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that conformance to the Act will be facilitated by GSA adhering to a consultant's role as contemplated in section 9(a)(2) of the Act rather than a role of determining whether a committee should be established.

2(b) The conference believes that the definition of "advisory committee" includes committees either established by government action or supported and "utilized" by the government through consideration by the government of the committee's advice. GSA's guidelines should make clear the application of the term "utilize."

2(c) Advice or information obtained from private or ad hoc groups in an ex parte manner is not sanctioned. To the extent that agencies do receive such

advice or information, the Administrative Conference believes that agencies should make such advice available to the public, particularly when the agency is contemplating action (such as rule making) which may be based on or use such advice or information.