



Recommendation 80-3

Interpretation and Implementation of the Federal Advisory Committee Act

(Adopted June 5-6, 1980)

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.

Recommendation

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



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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, non-continuing 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.



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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.

Citations:

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Separate Statement of Alexis C. Jackson

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



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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), *affd*, 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 ¶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 rulemaking 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 (below) in accordance with the views outlined in this statement.



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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

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.

(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."

(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 rulemaking) which may be based on or use such advice or information.