



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Collaborative Governance Minutes of Meeting – March 23, 2011

Committee Members

Jody Freeman, Chair (by video Skype)
Stephen Burns
Daniel Elliott
Philip Harter
Michael Herz (by telephone)
John Kamensky
Katie Nash (by telephone)
Miriam Nisbet
Sallyanne Payton (by telephone)
Alasdair Roberts

Project Consultant

James O'Reilly

Administrative Conference Staff

Paul Verkuil
Jonathan Siegel
David Pritzker
Reeve Bull

Invited Guests

Robert Flaak, GSA
Lorelei Kowalski, GSA

Public

Reamy Ancarrow, STB
Edmund Baird, Department of Labor
Vicki Ellis, EPA
Marilyn Kuray, EPA
Daniel Morgan, Phase One Consulting Group/DOT
Brian Murphy
Charles Pou, Charles Pou Dispute Resolution Services
Steve Rodick, Booz Allen Hamilton
Stephanie Ruitter, Union of Concerned Scientists
Sarah Shortall, Department of Labor
Michael Smallberg, Project on Government
Oversight
James Tozzi
Celia Viggo Wexler, Union of Concerned Scientists

The meeting commenced at 1:00 PM. The meeting was conducted by Committee Chair Jody Freeman, who participated via Internet video and telephone connection. Ms. Freeman opened the meeting by welcoming the committee members and others present to the first meeting of the Committee on Collaborative Governance. She invited Administrative Conference Chairman Paul Verkuil to speak.

Mr. Verkuil noted that the name of the Committee on Collaborative Governance was chosen to reflect developments in administrative law and practice that focus on working in collaboration with different levels of government and the private sector. He noted that ACUS members and others had reported substantial concerns about Federal Advisory Committee Act (FACA). The current study does not cover all of the FACA problems or even necessarily the most important, but the issues we will consider are ones that agencies should be addressing.

Ms. Freeman thanked Professor O'Reilly for embarking on a study of new issues for FACA, particularly the ways that new media or social media can be used in connection with federal advisory committees. She acknowledged that some committee members may have questions about the scope of the study and potential recommendations, but emphasized that this is an initial step, to address one part of the problem. The current focus will be on seeing whether the committee can arrive at a consensus on some issues concerning new media. This does not foreclose looking at the Act more broadly later on.

Mr. Siegel thanked Bob Flaak and Lori Kowalski of GSA's Committee Management Secretariat for their input and their cooperation with ACUS on this project. He then briefly addressed some administrative matters. The purpose of the committee's meeting is to try to prepare a recommendation for consideration by the full ACUS membership at its plenary session in June. The committee is free to determine how to utilize the research and conclusions contained in the consultant's report. This was followed by introduction of all persons present.

The committee's consultant on the FACA study, Professor James O'Reilly of the University of Cincinnati, first observed that of the major federal transparency statutes, FACA is the least litigated. The Freedom of Information Act has involved 5500 suits and the Sunshine and Privacy Acts are somewhat frequently litigated. The focus of his study was on identifying best practices and looking at challenges FACA poses to the use of 21st century media and to collaborative governance. He obtained data from committee management officers (CMOs) of several agencies, which closely follow GSA rules, and they did not seem to be asking for changes in the Act or regulations. He said that "customers" might give a different response, but they are more scattered than CMOs and it would be difficult to draw a statistically valid sample. He asked for the assistance of committee in finding "customers" who might propose specific changes.

His view is that some social network tools can be adapted to FACA; others are more exclusive and clash with the "culture" of FACA. Most people in the agencies simply find ways to deal with the statute or find ways to avoid it. He said that, indeed, the best practice is often to avoid the statute rather than engage with its intricacies, although this approach is perhaps not consonant with the spirit behind FACA when it was enacted in 1972. He summarized his findings as follows: (1) Any impetus for change is likely to be found among "customers," not CMOs or "designated federal officials" (DFOs); (2) complying strictly with the GSA regulations is a "best practice" if an agency has time and resources to comply meticulously; (3) if the purpose of the project is to reform FACA, the committee would need more justification than what he was able to find.

Mr. Bull then described a proposal to allow agencies to conduct "Ongoing Web Forum Meetings" under FACA. An agency would announce a "virtual online meeting" in the Federal Register at least 15 days before it commenced. The notice would include the web address for the forum plus starting and ending dates and times. The forum would be moderated by an agency DFO, who would review all comments received prior to posting. Committee members would submit comments directly to the DFO. The public could view all comments and documents and send their own comments to the DFO for posting. The committee chair would guide the discussion through regular postings.

Mr. Bull said that the Committee Management Secretariat had raised some issues about this proposal, including concerns about the "digital divide," the logistics of conducting such meetings, and the roles of the chair and the DFO. He expressed the view that a virtual meeting would increase overall public access, would resolve some issues about e-mail usage, and would reduce costs, mainly through elimination of travel. The proposed technique would not necessarily replace face-to-face meetings, but would be an additional tool for committees to use, as appropriate.

Mr. Harter spoke about some of the larger issues with FACA that he had encountered through his extensive experience with negotiated rulemaking. He said that a previous ACUS recommendation had noted that FACA is a significant inhibition to collaboration, and that, in his view, the chartering requirement, in particular, is an anachronism that produces delays and frustration. He stated that one committee he tried to charter took a year to accomplish. He proposed doing away with chartering, but retaining the public access, openness, and recordkeeping requirements of the FACA, as well as retaining a balanced membership with a mix of interests. He also cited a need to look more closely at ethics requirements for advisory committee members. In short, he said, FACA has fundamental problems that have led to efforts to evade the statute.

Ms. Nisbet stated that it would be helpful at this point to clarify what the goal of the committee is if we plan to have a recommendation in June. She endorsed the idea that this should be seen as an initial step in addressing a very complex issue, but we need to be clear on the scope of the initial step and what a larger view would entail.

Ms. Freeman pointed out that the title of the project, "FACA in the 21st Century," is broader than what the committee is now addressing. She suggested that a recommendation with a more limited scope at this time should have a more focused title.

Mr. Elliott, addressing the virtual meeting proposal, stated that it is very appealing to the private sector to be able to have an opportunity to be present at committee meetings, to be in same room and to interact with the others. However, he said, the concept of a virtual meeting also has some appeal, especially if there is a need to act relatively quickly. The virtual meeting proposal could be used supplementally, but should not be used exclusively.

Mr. Kamensky, speaking about the role of the committee, said that there are many perceived or actual barriers to use of the idea of collaborative governance, and he hopes that the committee will have some opportunity to consider the broader scope of its activities. Chairman Verkuil responded that this could be an important discussion at another meeting, but he urged the committee to focus on the current project at the present time.

Ms. Freeman, returning to FACA, said she read the report as saying there are no real barriers to using the new technologies. People either avoid FACA or find ways to work within FACA, so she was not sure the committee has a basis for proposing a recommendation in June. Mr. O'Reilly responded that's why he wants to get the opinions of people other than CMOs because input from a "customer base" would give a better view of what people's problems are. Mr. Siegel stated that the committee could request further research, but this might well have the effect of delaying the recommendation.

Ms. Nisbet said that the preliminary draft recommendation before the committee at this time seems to make sense and to give some guidance on a practical issue.

Mr. Kamensky said that people running the system might see no problem, whereas those using it may have more of a problem. Mr. Harter added that it's critical to have the views of both managers and people who sit on committees. We need to examine these before we have sufficient data.

Mr. Verkuil offered the possibility of moving forward with just the virtual online meeting proposal. Ms. Freeman observed that it's important there be a felt need before we attempt to solve the problem. Ms. Nisbet said that this proposal might make logical sense, but it should be tied to some stated need for new media uses. At the very least, we certainly should not suggest that this is the only issue with FACA. Mr. Siegel noted that he basis for the virtual meeting proposal has been ACUS's experience operating as an advisory committee. Ms. Freeman said there may not be much of a demand for this sort of thing, so we would need to try to build a record of the need for this.

Mr. Roberts suggested three ways to frame the problem: (1) agencies could be using the new technologies but the thought has not occurred to them; (2) agencies would use the new technologies if they knew how to do so without running afoul of legislative requirements; or (3) agencies want to use new technologies but cannot do so because of perceived barriers. He asked Mr. O'Reilly which of these best describes the situation.

Mr. O'Reilly responded that the major perceived problem is the delay in putting together committees, but this is not generally the view of CMOs. He said that agencies want to experiment, but they are concerned that they will run afoul of FACA. There is also some wariness about breaking with traditional approaches.

Ms. Freeman emphasized that we need to identify the problem, and then explain how what we have solves it. Mr. Siegel suggested identifying the problem as the delay in using existing committees. Ms. Freeman questioned whether we could be confident that the consultant's limited survey covered a representative sample. Mr. O'Reilly said that to obtain a statistically valid survey of agency general counsels and also to survey some of the 65000 committee members to see if they think there are problems, would require much more time and effort.

Mr. Kamensky stated that it is people outside of the committee process who are trying to collaborate that are most affected, not the people who have existing advisory committees. The bigger issue may be clarifying when FACA applies and when it doesn't. Mr. Harter said that CMOs have a vested interest in the current system and therefore it is necessary to get viewpoints from the rest of the community.

Ms. Freeman said that there seem to be two goals: (1) the virtual meeting proposal aims at facilitating the use of emails for existing committees; and (2) fostering collaboration through the committee process.

Mr. Pritzker, who had composed the preliminary draft recommendations based on the consultant's report and Mr. Bull's memorandum on virtual online meetings, explained that he had tried to address points Ms. Freeman mentioned. Paragraph 1 asks GSA to clarify that the types of techniques the report discussed are permissible. Paragraph 2 is based on the virtual meeting proposal. Paragraph 3 urges GSA to train new CMOs on agencies' ability to use new technologies. Paragraph 4 encourages agencies to experiment with these uses. He suggested that we currently have enough of a basis to make the first four recommendations. Paragraph 5 recognizes that delay is a problem, and suggests that agencies try to identify ways to eliminate delay. Paragraph 6 addresses FACA's applicability to subcommittees. He pointed out that, in the past, if the Conference was prepared to announce its conclusions from a study without necessarily making formal recommendations, it had done so by adopting a statement of views instead of a recommendation.

Mr. Burns stated that it seems there are some structural issues with FACA overall, but it's 2011, not 1972, and agencies are now being encouraged by the administration to use electronic outreach. Setting forth guidance on how agencies can operate would itself be useful, even without empirical research on the demand for this. Just having the information available on how to use new media within FACA would itself be useful.

Mr. Roberts expressed the view that paragraphs 5 and 6 of the preliminary draft recommendations are of a different character from 1 through 4. He suggested deleting 5 and 6 and moving paragraph 4, which urges agencies to experiment with creative techniques of using new media as a means of reducing costs and obtaining broader sources of useful information, to the beginning of the recommendation.

Mr. Siegel observed that the consensus seems to be more that we need more research, not that the recommendations are wrong. Moreover, the fact that people are trying to avoid FACA is a problem in and of itself. So, part of purpose should be making FACA more streamlined so that people no longer feel the need to evade it. Mr. Siegel also noted that paragraph 6, suggesting that the subcommittee exception be retained, comes out of Mr. O'Reilly's research: CMOs consistently said that Congress should not, as it has considered doing, repeal the subcommittee exception.

Mr. Pritzker added that when he drafted the recommendations, he had in mind ACUS's recent history, involving a month of negotiations with GSA on how the charter should look, and one of the points raised was how to treat subcommittees. This was another motivation for saying that repealing the subcommittee exception would exacerbate things even further.

There was further discussion of whether our aim is to facilitate existing committees to do their work better under FACA or to enable agencies to adopt new technologies that they either don't know about or don't know how to integrate with the requirements of FACA. It was also suggested that having GSA provide examples of safe harbors would be very helpful, perhaps just emphasizing where new technologies are not presenting FACA problems.

Ms. Freeman summed up the continuing discussion by saying that if the committee's view is to try to improve existing committees by enabling their use of new technologies while still working within FACA, then we have modest steps for improving the statute. The first 3 recommendations are helpful in this regard (striking 5-6). Also, we might want to do some additional research as a basis for an introductory narrative and the rationale for the recommendation. The consensus was to follow this plan and to move paragraph 4 to the top.

Ms. Freeman then asked: what are the major questions with FACA, beyond the use of new technologies, and what can be done to provide ways to allow people not currently part of committees to engage in collaboration? If we're going to say "this is the first step of what's to come," we need to give some sense of what's to come. Chairman Verkuil answered that this would be up to the discretion of committee. Mr. Siegel recalled that at the Conference's plenary session in December, FACA was repeatedly emphasized as a problem.

Ms. Freeman then invited comments from members of the public attending the meeting.

Ms. Shortall (Department of Labor, counsel to three advisory committees) suggested inviting to these meetings people "closer to the trenches" in the operation of FACA, and allowing public comments throughout the meeting, not just at the end. With respect to supplementing Mr. O'Reilly's research, she recommended calling people listed in the Federal Register as DFOs. She added that CMOs are very busy, so they really don't have time to consider new social media, etc. She is strongly opposed to repealing the subcommittee exception. With respect to new technology, no one has time for this due to problems with the existing FACA; a lot of the delay is within the agencies and the requirements of FACA, not with GSA. Mr. O'Reilly could interview some of the people in the trenches, and GSA might have some thoughts on this as well. The best means of selling the virtual meeting proposal is that it would reduce costs, though the time investment would probably be about the same.

Ms. Wexler (Union of Concerned Scientists) urged the consultant to work with the public interest group community. FACA is a public oversight statute, and the public needs to have access to what's going on. They do not want to overburden agencies, but the evasion of FACA is problematic. Use of new technologies can both decrease evasion and increase public participation. Her organization would be willing to pull together public transparency experts.

Mr. Morgan (Phase One Consulting Group) suggested reaching out to Senior Accountable Officials for Open Government, who would tap into practitioners, etc. OIRA's memo on social media and applicability to the Paperwork Reduction Act was very helpful for DOT. Something similar on FACA would make agencies much more likely to experiment with use of new technologies.

Mr. Rodick (Booz Allen) suggested that the committees would get better feedback informing better regulations if it were easier for people to participate. He suggested not focusing just on the minimal compliance burdens of FACA; streaming meetings, for example, may be viewed as more work by some, but it should be noted that it improves public input.

Mr. Tozzi stated that FACA is neither a public participation nor a collaboration statute. The main purpose of FACA is to obtain good advice. Promoting widespread participation can sometimes be in tension with this objective. Allowing large public participation was never a purpose of FACA.

Mr. Morgan noted that the use of new technologies can enhance transparency, and it's important not to lose sight of that.

Ms. Freeman noted the committee's goal of making existing uses better and more economical. The next steps for the FACA project are to reconvene the committee in about one month to review whether the recommendations we are shaping now are right, and look at any available additional research.

The meeting was adjourned at 2:50 PM.