



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Collaborative Governance Minutes of Meeting – September 20, 2011

Committee Members

Jody Freeman, Chair (by video Skype)
Stephen Burns
Will Gunn (by telephone)
Michael Herz (by telephone)
John Kamensky
Miriam Nisbet
Patrick Patterson
Alasdair Roberts (by telephone)
Christopher Schroeder

Other ACUS Members

Jeffrey Lubbers
Alan Morrison (by telephone)

Administrative Conference Staff

Paul Verkuil, ACUS Chairman
Jonathan Siegel
David Pritzker
Reeve Bull

Public

Reamy Ancarrow, STB
Annmarie Boyd, FDIC
Angela Clark, SEC
Brian Murphy
Michael Smallberg, Project on Government
Oversight
Vincent Salamone, Office of Government Ethics
Peter Unger, A2LA
Celia 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 connection. Ms. Freeman opened the meeting by welcoming the committee members and others present. She invited Administrative Conference (ACUS) Chairman Paul Verkuil to speak.

Mr. Verkuil noted that the proposal on the Federal Advisory Committee Act (FACA) has gone through two versions, supported by extensive research and analysis. He expressed his appreciation for all the work. He said that the goal is to have a proposed recommendation from the committee on the December plenary session agenda. Mr. Siegel noted that the Conference was webcasting this meeting live and that it would continue to be available to the public online.

Ms. Freeman stated that she wanted to conduct the meeting efficiently, but also wanted to allow everyone time to participate. She explained the context of the draft recommendation now before the committee. The project initially was conceived narrowly, focusing on FACA in an era of changed modes of communication including new and social media, but the initial research showed a need to look more broadly and to consider issues of increasing transparency and decreasing procedural burdens. She noted that the methodology of the expanded study is well reflected in the description contained in Mr. Bull's report, and called on him to present a brief summary of the research he has led subsequent to the committee's last meeting in April and of the report he has prepared for the committee's consideration. As a procedural matter, she also asked for unanimous consent to allow public attendees at the meeting to participate in the discussion as appropriate, which the committee agreed to.

Research Methodology

Mr. Bull presented an overview of the research methodology for the entire project to date, noting that a very extensive effort has been made to acquire data in 5 phases, including direct contacts with dozens of people in and out of government.

1. Professor James O'Reilly's initial report was based largely on interviews with agency Committee Management Officers.
2. ACUS staff reviewed the FACA literature, reports, and pending bills in Congress, supplemented by interviews with selected FACA experts.
3. A survey was sent to government members of ACUS, with a request that it be forwarded to staff members who work with or otherwise utilize advisory committees, or to relevant general counsel staff. Copies of the request

were also distributed to public members of ACUS and to other interested persons, with an open-ended invitation to send ACUS any comments they might want to submit. Survey responses were received from 21 agencies, including those agencies that make the most extensive use of advisory committees. Overall, 59 agencies use advisory committees.

4. ACUS conducted a workshop on August 16, attended by approximately 50 participants, including numerous agency representatives with extensive experience in the use of advisory committees and members of non-governmental organizations that promote government transparency. Workshop participants were encouraged to identify the most salient issues. Several people mentioned delays in setting up new committees as a significant problem.
5. ACUS staff conducted additional interviews, with the aim of obtaining further information about issues raised in the survey and the workshop.

Proposed Recommendations

The committee then discussed a set of 10 proposed recommendations, contained in Mr. Bull's report (pages 66-67, available at www.acus.gov). Mr. Bull classified his recommendations into 3 categories:

1. Clarifying the scope of FACA. Does FACA deter the ability of agencies to confer with outside experts? Is it clear when FACA applies? How does FACA apply to the work needed to prepare for meetings? (#1, #2)
2. Reducing procedural burdens, which are caused mostly by multiple levels of review and attempts to obtain membership balance among different factors. It appears that external requirements from the Act or GSA regulations are not the cause of delay. (#3, #4, #5, #6)
3. Increasing transparency and objectivity without imposing too great a burden on agencies. (#7, #8, #9, #10)

Ms. Freeman asked committee members to consider recommendations 1, 3, and 10 first because they might involve the most extensive discussion.

Recommendation #1 (concerning whether certain exemptions from FACA coverage should be eliminated). Mr. Lubbers stated that elimination of the subcommittee exception would create a problem for negotiated rulemaking if *Recommendation #6 (concerning, in part, amendment of the Negotiated Rulemaking Act to allow informal caucuses)* were not adopted. Mr. Kamensky inquired whether negotiated rulemaking is currently excluded from FACA coverage. Mr. Pritzker explained that the Negotiated Rulemaking Act says FACA applies except as modified in the Negotiated Rulemaking Act. Mr. Lubbers urged that #1 and #6 need to be linked. Mr. Siegel said the essence of #1 is that the bill now pending in Congress would eliminate certain exemptions, and that the purpose of #6 is to say that if Congress does that, then it would be necessary to apply the openness requirements to negotiated rulemaking committees. Mr. Lubbers pointed out that in negotiated rulemaking, caucusing may take place during the course of a full committee meeting, without an opportunity for prior notice.

Mr. Bull stated that GSA's concern about the preparatory work exemption proposed in #1 is that basing such an exemption on identifying anything that doesn't involve formal debate is too vague to be able to determine what should be subjected to full consideration by the full committee or parent committee. The full committee cannot simply rubber stamp the work of a subcommittee, and it is not clear exactly how to define the concept of preparatory work. Ms. Freeman mentioned that Mr. Harter (who was unable to participate in this meeting) had raised the question of how to define formal debate or voting by the full committee. She observed that GSA appears to be concerned about abuse, while Mr. Harter is concerned about vagueness, but any recommendation should not create a new problem.

Mr. Kamensky said that if we were starting with a blank slate on the question of how agencies should obtain outside expert advice, maybe we could find a better way than FACA so that we wouldn't be constraining further the ability of the government to get outside advice. The current draft doesn't step back far enough. We should lower the bar, to enable the agencies to obtain more easily the advice they need. Mr. Lubbers asked what he would preserve—openness? Mr. Kamensky replied: openness, fairness and balance. He said agencies should be allowed to presume they can seek advice instead of having to ask first for permission. The presumption should be that you can engage with outside experts,

instead of the opposite. Ms. Freeman noted that Mr. Harter says ACUS should advocate that FACA be terminated. She asked whether we are tinkering with FACA in too small a way.

Mr. Lubbers said he is not sure that the existing research is adequate to recommend that FACA be terminated. ACUS could conclude that FACA is outmoded, and recommend that Congress should consider deleting FACA; but in the absence of such an action, ACUS would be providing recommendations that would help reduce procedural burdens. Mr. Siegel said the committee should consider that there are now pending bills that would tighten the restrictions, particularly by elimination of existing exemptions from the coverage of FACA. Mr. Lubbers pointed out that Congress has in the past carved out exceptions such as for the National Academy of Sciences. Mr. Bull said that when they did this, they created other transparency provisions.

Ms. Freeman offered the possibility of drafting language such as Mr. Kamensky suggests, perhaps inserting a phrase like "it is important not to hamstring the government when it seeks advice." But if we recommend this, we would have to consider what the substitute regime would be. The current report does not establish a basis for doing that. She then asked whether the treatment in #1 of the other exemptions was appropriate. Mr. Kamensky said that they would just narrow an agency's ability to get advice.

Mr. Siegel offered a possible compromise, focusing on the chartering requirement, which Mr. Harter was concerned about. Mr. Bull said that FACA serves the goals of transparency, balance, and continued productivity of existing committees. The chartering requirement is the main tool for promoting productivity and is intended to clear out useless committees. Mr. Kamensky asked in what sense is an advisory committee independent? Mr. Bull replied that the advice given by a committee has to be independent of the agency's influence.

Ms. Freeman said it's possible to envision a simplified regime with sufficient openness to ensure that the advice given is in public view and to ensure that there is no capture by a few. Mr. Kamensky pointed out that the ACUS committee is accomplishing this now by being on the internet, with the backgrounds of participants identified.

Mr. Schroeder addressed Department of Justice experience with advisory committees. DOJ doesn't use advisory committees much; and when they do, the law enforcement exception usually applies. DOJ comes in when defending agencies in litigation; most of the problems come from judicial decisions, not from the text of FACA. He expressed a concern with getting rid of the subcommittee exemption and replacing it with a way to do preparatory work. He said that under the existing rules, we now have an understanding of what the subcommittee exemption means, and it's a proxy for the idea of the preparatory work principle. If this were replaced with a preparatory work exemption, then this would open new areas of uncertainty, and years of litigation would likely follow. This, he said, is the federal programs defense's viewpoint, though maybe there are clean ways to do this. From the DOJ perspective, it's important to see what the statute would actually say about, say, bringing contractor committees or nonvoting members under FACA. If we are going to recommend this, at some point we would have to see the specific language. The subcommittee exemption works well enough now; let's be careful about what would replace it.

Recommendation #3 (concerning achieving balance in committee membership and centralizing the committee formation process within the agency). Although the suggestion to centralize the approval process was intended to simplify that process and to reduce delay, Mr. Kamensky was concerned that centralizing creates a monopoly. He said the alternative is to presume that a proposed committee is OK. Mr. Pritzker noted that agency respondents indicated that what they haggle about is committee membership. Mr. Kamensky expressed the view that the people who need the advice are best situated to make that choice and that the draft doesn't get at that. Ms. Nisbet observed that the recommendation draft falls more into best practices than calling for a rethinking. Mr. Verkuil recalled that the concerns voiced at the workshop emphasized that the delay comes mainly from the layers of review in the agency, and not from GSA review. Much time is spent on balance and determining who will be chosen.

Mr. Bull stated that the statute is vague on what balance means, as are the GSA regulations, though GSA provides some helpful guidance. What the recommendation is getting at is that in the first instance you determine what is relevant to the particular committee's mission; then look at what is desirable, and consider too the resources available. This should be a 2-step process. Mr. Kamensky said that having a central focal point may be OK for the review process, but the presumption should be that the committee can get underway.

Mr. Lubbers observed that Mr. Morrison's comments (submitted prior to the meeting) suggested that the charter should address the mission of the committee and this would shape the balance considerations. The idea was suggested of having a deadline after which formation of the committee would be presumed to be OK. This would create some internal pressure so formation of the prospective committee wouldn't languish.

Mr. Schroeder asked whether any agency is doing this well, which could serve as a model. Mr. Bull said that his research focused more on identifying the problems rather than this question. He mentioned EPA as an example of an agency that requires balance on a large number of factors. Mr. Kamensky noted that some large organizations use wikis to obtain simultaneous review where multiple reviews are needed. Mr. Schroeder asked whether chartering and membership decisions are conducted simultaneously. Mr. Bull said he believes that chartering usually precedes the designation of members and that the formal chartering tends not to be the cause of delay.

Ms. Freeman suggested we could advise agencies to focus on the priority factors for balance. Mr. Burns said that maybe there is too much overthinking on committee balance. Lawyers need to be there, but they shouldn't have input on who the members are. He suggested that maybe the proper focus should be on the larger questions of diversity. Mr. Patterson said we could be plainer in how we say that the consideration of balance can be handled more efficiently and that maybe this is really a drafting issue. Ms. Freeman agreed and recommended that at the conclusion of the meeting, it would be best to form a drafting subcommittee to incorporate the outcome of the committee's discussions in a new draft.

Recommendation #10 (concerning applicability of ethics requirements). Mr. Bull explained that the aim here is to get rid of troublesome labels for different types of committee members. "Special government employees" (SGEs) are subject to various ethics standards; "representative" members are not. The latter have a known inherent conflict, but their input is still desired. Mr. Bull mentioned two reports by GAO in 2004 and in 2008, which indicated that problems flow from the identification of which members are representative members. For example, someone "representing" a field such as toxicology, but without a specific financial or other interest, should not be considered to be a representative member of the committee. He suggested that what we are really getting at here is that some members should be subjected to ethics requirements and some not. He therefore suggested labeling "type I" and "type II" members, according to whether application of ethics requirements is appropriate. Mr. Lubbers said that the suggested solution is too complicated. He said that the original representative concept was about points of view and trying to place such members in the same category as persons with a bias goes too far. Also, it's a pejorative label.

Ms. Freeman asked exactly what the problem is that we are trying to solve. Referring to the GAO reports, Mr. Bull cited the potential for abuse. He also noted that open government groups are interested in having access to waiver information when waivers are granted. So the problem, Ms. Freeman observed, is that the "representative" category is overused as an escape valve; but we still want to have conflicts known when they arise.

Mr. Salamone said that both GSA and OGE responded to the 2004 GAO report. OGE issued legal advisories and upgraded its program review capacity. He said that OGE sends program reviewers to an agency to ensure it is doing the classification properly. He said GSA may also ask questions if they see any issues. He mentioned a conference in the preceding week to educate agency officials on classification designations. He said the process is improving and there is now a lot more guidance on this than in the past. Making guidance available goes back to the Kennedy Administration, but there is a lot more now. Ethics isn't just about conflicts of interest; acceptance of gifts and other behavior are also covered. SGEs are subject to ethics rules, but only to a relatively limited group of those rules. This concept goes back to 1962 when it was first used as a recruitment aid, but there has been some evolution. The concept, he said, is that the SGEs provide limited service, and therefore should have reduced ethics requirements.

Ms. Freeman asked whether this solves GAO's 2004 problem. Mr. Salamone said that when Congress creates an advisory committee, it often doesn't give enough information in the legislation that created the committee to make clear what the status of members should be. He is not saying that there isn't an issue, but there has been some real progress on designation of committee members. The GSA regulations advise that when an agency creates an advisory committee, its staff should consult with the agency's ethics officer. He added that since 2005, the status of these members has been disclosed publicly on GSA's FACA database.

Ms. Freeman asked whether the committee wants to preserve any of #10. Do our data reveal a current problem that agencies can fix other than putting waivers on the website? Mr. Bull said there might be some people who couldn't easily

be classified as representatives, but whose advice would still be valuable. His major concern is that the representative designation is subject to abuse, and it doesn't cover the universe of those whose input would be valuable, though they have a potential conflict. He believes it is not clear that the definition of representative addresses this.

Mr. Lubbers suggested perhaps this part of the recommendation should be limited to Mr. Salamone's point about Congress or the President making clear how members of committees they create should be classified.

Recommendation #2 (concerning a proposal for virtual meetings conducted via the Internet over an extended period of time). Mr. Bull explained that the goal here is to recognize explicitly that agencies may use the virtual meeting procedure and to make clear that it is legal. Committee members indicated their approval. Ms. Freeman suggested adding a sentence that experimentation with this procedure should be monitored and tracked to see if there are problems with its use.

Recommendation #4 (concerning clarification by Congress of the intended mission, duration, budget and preferred membership balance for statutorily established committees). It was suggested that Congress make clear whether members of such committees are to be designated as representatives or SGEs. It was also suggested that this recommendation be extended to committees established by the President. Mr. Morrison's suggestion to delete the limiting language "to the extent possible" was agreed to.

Recommendation #5 (concerning elimination of the cap on the number of advisory committees). This was agreed to by the committee.

Recommendation #6 (concerning amendment of the Negotiated Rulemaking Act). This recommendation was intended to be responsive to Mr. Harter's urging to take negotiated rulemaking out of FACA. It was observed that the reference to the use of standing committees for negotiated rulemaking might reduce the burden of chartering, and perhaps the benefits of using standing committees could be linked with #3. Ms. Freeman said that the idea is not the wholesale exemption of negotiated rulemakings from FACA, but rather to make clear in the draft that the openness requirements should remain. There was general agreement to go with a reworded alternative #6A, recommending amendment of the Negotiated Rulemaking Act to exempt that process from FACA, but to retain the openness requirements for the full committee while allowing caucuses or other meetings of subgroups to be conducted privately.

Mr. Herz said he was not sure it makes sense to amend the Negotiated Rulemaking Act without amending FACA. Mr. Kamensky said that the two acts are under the jurisdiction of different Congressional committees, and Mr. Lubbers commented that it would likely be easier to amend the Negotiated Rulemaking Act than FACA.

Recommendation #7 (concerning the posting of committee documents online). There was general agreement to the principle, though there was some discussion of whether this should include all e-mail messages. Mr. Siegel suggested not simply putting everything that the committee sees online, but rather being guided by section 10(b) of FACA.

Recommendation #8 (concerning live webcasts of meetings and posting recorded broadcasts online following meetings). Mr. Kamensky advised deleting the word "consider" and the references to costs and benefits because the technology needed has become relatively inexpensive. Mr. Bull noted that some agencies say webcasting is not so simple, and there may be a section 508 issue (accessibility of information technology to persons with disabilities).

Mr. Patterson said that the EEOC doesn't face this issue because the agency has a history of not using advisory committees, but they have faced this in connection with open Commission meetings. He said they have been unable to find an economically feasible way to webcast Commission meetings, in part because of the need for captioning. Mr. Pritzker suggested inserting advice to GSA to facilitate doing this. Mr. Schroeder said that costs have to be considered some way. Mr. Siegel noted that #8 applies only to open committee meetings.

Recommendation #9 (concerning offering the public an opportunity to comment on proposed committee membership lists). Mr. Herz suggested publishing a preliminary slate from which members would be drawn. Mr. Schroeder reported that the National Academy of Sciences operates this way. Also, this recommendation is in tension with speeding up the process. Mr. Kamensky asked whether it adds a layer of legitimacy. Mr. Schroeder said that NAS has had some problems with giving people a crack at undermining the legitimacy of the committee at the outset.

Ms. Wexler stated that the reason this recommendation has been advanced is that conflicts of interest are not always disclosed by potential committee members. There is often a focus on competency and financial conflicts or financial ties. She said that the wording should be selected carefully, but the benefit of crowd sourcing in this context is valuable. Mr. Burns reported that for statutory committees at the NRC, they don't announce who is under consideration, but they do announce upcoming vacancies and invite suggestions.

Mr. Salamone stated that agencies have the option of requesting approval from OGE to use a substitute form if the 450 doesn't fully address the needs of the agency. For example, the 450 goes back one year; an agency can require going back further. Ms. Wexler said that her group doesn't think there is a deficiency in what agencies ask; the problem is with respondents thinking some matters in their background are not covered. Mr. Salamone explained that SGEs must file their Form 450 before the first committee meeting; but prior to this, agencies may be relying on resumes for professional qualifications plus consultation with agency ethics officers. Ms. Freeman suggested that Mr. Bull get some input from NAS and that we should make clear that the purpose of the recommendation is to fill gaps in information about professional credentials or financial conflicts. There was also some discussion of whether public comments on prospective committee members would be open to the public under FOIA.

Mr. Lubbers commented that President Obama has banned registered lobbyists from serving on advisory committees; but perhaps the recommendation should take a position on permitting them as representatives. Mr. Herz said that the American Bar Association's Section of Administrative Law and Regulatory Practice supports this. It was agreed that a copy of the ABA letter on this subject should be obtained, as well as some information about the basis for the President's policy, and circulated to the committee.

Next Steps

Ms. Freeman repeated the plan to have a drafting subcommittee produce a new draft for full committee consideration and she asked members to inform staff if interested in participating. She indicated that there would be one more committee meeting on this project during the last two weeks of October. Mr. Siegel reminded the committee that the ACUS Council will be meeting on November 9 to consider recommendations proposed by ACUS committees and to set the agenda for the December plenary session. Therefore, an October meeting of the committee will be the last opportunity before that date for the committee to work on the recommendation.

The meeting was adjourned at 3:45 PM.