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ARTICLE: The Federal Advisory Committee Act and Good Government

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SUMMARY:

... Issues concerning the Federal Advisory Committee Act (**FACA**), which governs agency solicitation of policy advice from outside groups, have arisen with greater frequency in recent years. ... Guidance provided to agencies by the OMB pursuant to the Unfunded Mandates Reform Act broadly interprets this exemption to ensure that "the process required by the Federal Advisory Committee Act is not . . . a hindrance to full and effective intergovernmental consultation." ... Such a subsection could instruct agencies to consider first the interests likely to be directly affected by an agency's ultimate approach to the issue with respect to which the agency seeks advice or recommendation, taking into account factors such as: (i) the interests that are most directly affected by that agencies' decisions, (ii) the interests that are most directly implicated by the specific statute(s) or regulation(s) under which the agency is contemplating action about which it seeks advice/recommendations, (iii) the interests that typically seek to influence agency decisions of a similar nature through participation in the kinds of agency decisionmaking processes employed once the agency decided to act in one way or another on the matter, and (iv) the identity of parties who have in the past indicated an interest in advisory-committee activities concerning related subject matter. ...

TEXT:

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Issues concerning the Federal Advisory Committee Act (**FACA**), which governs agency solicitation of policy advice from outside groups, have arisen with greater frequency in recent years. This is true in part as a result of regulatory initiatives that aim to include larger numbers of interested parties in regulatory decisionmaking processes. In this Article, Professors Croley and Funk first provide an overview of the history and basic structure of the **FACA**, and then consider the many legal questions surrounding the Act's purpose, scope, interpretation, and implementation. Along the way, they consider whether and how the **FACA** advances good-government goals such as openness and administrative efficiency. Their analysis is guided by the results of a survey of agency "advisory committee management officers," through which they sought to gather agencies' own views of the **FACA's** administration, as well as by contacts with the General Services Administration's Committee Management Secretariat, the agency which supervises all advisory-committee activities, and other agency personnel. Professors Croley and Funk conclude with a set of concrete recommendations for Congress, the White House, the courts, the GSA, and agencies that use federal advisory committees.

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Introduction

Passed during the "good-government" initiative of the early-and mid-1970s, the Federal Advisory Committee Act (the **FACA** or the Act) ¹ aims to keep Congress and the public informed about the number, purpose, membership, and activities of groups established or utilized to offer advice or recommendations to the President or to officers or employees of the federal government. ² As explained in more detail below, ³ the 1972 Act contains certain measures designed to ensure the even-handedness of such advice. For example, it requires that legislation authorizing the establishment of an advisory committee provide some means by which to achieve a "balanced" committee membership. ⁴ The Act also requires notice of the impending establishment of an advisory committee, so that interested parties may seek membership or, if they wish, monitor committee proceedings. In addition to these requirements, the **FACA** provides for several layers of advisory [*453] committee oversight by the President, Congress, the General Services Administration (GSA), and agencies themselves. These layers of oversight seek to guard against the establishment of unnecessary committees and the perpetuation of committees that have fulfilled their tasks. In short, on the surface at least, the **FACA** seems designed to further many "good-government" values--impartiality, openness, and administrative efficiency--much like its sibling statutes from the same decade, the Government in the Sunshine Act, ⁵ the Freedom of Information Act (FOIA), ⁶ and the Paperwork Reduction Act of 1980. ⁷

This is not to suggest, however, that agencies began to receive advice from nongovernmental entities only in 1972. Much to the contrary, the **FACA** was designed to formalize and routinize what was already an age-old institution, in part out of concern that some interests had come to enjoy unchecked and perhaps illicit access to federal executive decisionmakers. ⁸ As a House report outlining the need for some kind of governance structure for advisory committees explained, for example, the Antitrust Division in the early 1950s expressed concerns about the proximity of some industry advisory committee members to the issues about which they were rendering advice, concerns which led the Justice Department to issue a set of standards for agencies' use of advisory groups. ⁹ Meanwhile, the possibility of legislative standards for the organization and operation of advisory committees had been considered by Congress intermittently in the two decades preceding the Act, ¹⁰ with the earliest efforts of congressional control over "outsiders'" advice dating to 1842. ¹¹

And yet, while the institution to which the **FACA's** passage gave discipline and organization has a long heritage, advisory committees before and since the Act have until recently been largely "Beltway" phenomena--established by and for agency officials inside Washington and with Washington-oriented memberships. Lately, however, advisory committees have been and are being established throughout the country. As a result, field-level agency personnel, as well as potential committee members in various regions, have of necessity become familiar with the **FACA**, thereby raising the important if uncelebrated Act's general visibility and, with that visibility, urgent questions about how it is (and should be) interpreted, applied, and [*454] administered. This recent development is partly a consequence of the Clinton Administration's effort to promote consensus-oriented regulatory decisionmaking, an initiative that finds expression, for example, in the Vice President's highly publicized National Performance Review, which explicitly calls on agencies to make greater use of negotiated rulemaking and alternative dispute resolution techniques to widen participation in regulatory decisionmaking. ¹² Still more recently, the President himself in a memorandum dated March 4, 1995, formally instructed all "Heads of Departments and Agencies" to "convene groups consisting of front line regulators and the people affected by their regulations" for "conversations that should take place around the country--at our cleanup sites, our factories, our ports." ¹³ The March 4 memorandum also contained what many agency personnel consider to be an important command: "NEGOTIATE, DON'T DICTATE." ¹⁴ So, too, former

Secretary of Labor Robert Reich encouraged his department and other agencies to rely more heavily upon consensus-based regulatory decisionmaking by, for example, appearing in a promotional video developed by the Department of Labor that urged agencies to experiment with negotiated rulemaking,¹⁵ a participation-and consensusbased decisionmaking process that, as the video observes, triggers the **FACA**.¹⁶

As if to teach by example, the White House established, in the early rounds of its 1993 health-care initiative, the President's Task Force on National Health Care Reform (Health Care Task Force), chaired by Hillary Rodham Clinton, to explore problems plaguing the nation's health care system and to consider various policy responses to those problems. Shortly thereafter, the Administration also assembled a Federal Ecosystem Management Advisory Team (FEMAT) to help assess and devise a resolution of the Spotted Owl controversy between environmentalists and the lumber industry in the Pacific Northwest, an effort which led to a "Forest Conference" attended by both the President and the Vice President.¹⁷

As events would have it, both highly publicized initiatives resulted in [*455] high-profile litigation under the **FACA**. Cases were brought challenging both of the initiatives because, interestingly enough, in neither instance did the groups formed to aid federal decisionmakers comply with the requirements of the Act. Thus, in *Northwest Forest Resource Council v. Espy*,¹⁸ the plaintiffs sought to enjoin the Interior Department's reliance upon the FEMAT's report and recommendations on the ground that the FEMAT constituted an advisory committee governed by the Act and was thus subject to the Act's requirements. Although the court agreed with the plaintiffs that the FEMAT was an advisory committee under the Act and that the FEMAT had not observed the Act's requirements, the court granted only declaratory relief,¹⁹ for reasons to be explained below. The Health Care Task Force met an even more favorable fate. In *Association of American Physicians & Surgeons, Inc. v. Clinton*,²⁰ the court held that the First Lady is a "de facto" employee of the federal government and that the Task Force was therefore not subject to the **FACA**,²¹ which specifically excludes from its reach groups composed wholly of full-time federal employees.²² However, while the court concluded that the Health Care Task Force itself was not subject to the Act, it also concluded that several "working groups" upon which the Task Force relied--which included many non-federal employees--were subject to the **FACA** to the extent they rendered substantive advice or recommendations to the Task Force itself.²³

The wider geographical relevance of the **FACA** and these recent high-profile **FACA** cases are not the only new developments that call for fresh analysis of the Act. First, new legislation, part of the Unfunded Mandates Reform Act of 1995,²⁴ has exempted groups previously subject to the Act from its requirements. As explained below, section 204 of Title II of that act exempts from the **FACA** meetings held between federal officials and elected officers of state, local, or tribal governments or their designates.²⁵ Congress has recently considered still further categorical exemptions from the **FACA**.²⁶ Such legislative efforts raise fundamental questions about the desirability of the **FACA** and the importance of its requirements, for whether exemptions to the Act are welcome depends in part upon how well the Act works, and how [*456] well it does not. To what extent, in other words, does the **FACA** advance its original good-government goals? That answer, in turn, requires some systematic understanding of how the Act is interpreted, implemented, and administered.

Second, Executive Order (EO) 12,838,²⁷ one of the first steps toward regulatory reform taken by the Clinton Administration, instructs agencies to reduce their reliance upon advisory committees by as much as one-third.²⁸ EO 12,838's implementing directive, Office of Management and Budget (OMB) Circular A-135, "Management of Federal Advisory Committees," further restricts agencies from creating advisory committees by capping the number of advisory committees that each agency may maintain.²⁹ This Order raises similar questions about the Act: Are fewer advisory committees better, or should agencies be instructed instead to use more advisory committees? Here again, answering the question first requires some broad understanding of the Act, its successes, and its failures. What is more,

because EO 12,838's instruction is in some tension with the Administration's promotion of consensus-based regulatory decisionmaking--for many consensus-based decisionmaking techniques may well trigger the **FACA** thereby requiring the creation of an advisory committee--attention to the Act is necessary in the interest of determining whether consensus-based decisionmaking should as a policy matter be promoted under the Act or instead through exceptions to it.

In fairness, the mixed signals sent by the Administration are not simply the result of myopia. Rather, they constitute one concrete manifestation of a classic tension--familiar to students of administrative government--between principles favoring openness, participation, and accountability, on one hand, and those favoring administrative speed, efficiency, and sure-footedness, on the other. In short, "good government" encompasses different values that can lead, as the White House's directives do, in different directions. Thus, any argument about whether the **FACA** furthers its good-government aims requires some initial specification of the principles encompassed by that concept and of the proper balance between any such principles that come into conflict with one another. While a close analysis of the competing elements of good government is beyond the present scope of this Article, it will along the way identify the several good-government goals that seem to underlie the **FACA** (avoiding government waste and special-interest bias, and encouraging participation and accountability, for example), note how some trade-offs between or among them may be inevitable, and, most importantly, identify several specific reform possibilities that might minimize necessary trade-offs among the Act's underlying principles. [***457**]

This Article's primary aims, though, are to provide a comprehensive overview and a general evaluation of the seldom-studied Federal Advisory Committee Act, designed especially for policymakers, practitioners, and agency personnel.³⁰ In so doing, it employs three methodological approaches: legaldoctrinal analysis, an agency survey questionnaire, and what might be called "investigative empiricism." First, this Article analyzes the **FACA** case law to ascertain exactly which interpretive questions the courts have answered, which they have not, and where different courts agree or disagree with respect to the Act and its regulations. It thus provides a comprehensive treatment of **FACA** law. Second, this Article relies on the results of a survey questionnaire sent to all agencies' "Advisory Committee Management Officers," soliciting basic information about agency administration of the Act and providing a vehicle for gathering agencies' views about both which aspects of the Act warrant careful study and where improvements to it might be made. As much as anything, the survey, which contains many qualitative questions as well as some quantitative questions, reveals how agencies view the Act, and its results helped to shape this Article's focus. A copy of the survey questionnaire, along with a summary of the survey results, is appended to this Article, and relevant references to those results are provided along the way.³¹ Third, and just as importantly, this Article relies on informal personal contacts--by mail, by telephone, or in person--to solicit different parties' views about the interpretation, implementation, and administration of the Act. Such personal contacts included the GSA Advisory Committee Management Secretariat, the Interagency Committee on Federal Advisory Committee Management,³² the chair of the Federal Advisory Committee Management [***458**] Association,³³ Advisory Committee Management Officers from various agencies, Department of Justice lawyers who litigate **FACA** cases on behalf of the government, personnel from the policy and solicitor's offices of the Department of Labor, and congressional staff with a special interest in the Act. Other contacts included representatives from several nationally known public interest groups who have litigated **FACA** issues the most, as well as representatives of the National Governors Association and the National Association of Counties, whose views about the Act and its implementation were also solicited. All of these sources informed the analysis that follows.

Part I below provides a brief primer on the **FACA**, summarizing its history (I.A.) as well as its basic structure and core requirements (I.B.). Part II examines the many questions and issues recently raised in connection with the Act, considered in nonexclusive categories that include

constitutional issues (II.A.), issues concerning the identification (II.B.), creation (II.C.), and utilization (II.D.) of advisory committees, and finally issues concerning **judicial review** of claims brought under the Act (II.E.). Based on the analysis provided in Part II and informed in part by the survey results, Part III contains general conclusions, together with several specific recommendations--aimed at the Congress, the White House, the courts, the GSA, and agencies themselves--about how the Act may be better interpreted, applied, and administered.

I. The Federal Advisory Committee Act: History and Structure

A. The Historical Backdrop

As mentioned, groups that advise the President or others in the Executive Branch have been around nearly as long as the nation itself. ³⁴ Nevertheless, there is a common understanding that the great growth of advisory **[*459]** committees occurred after World War II, generally in response to the increased government regulation occasioned by the New Deal and perhaps by increased government and industry cooperation during the war. ³⁵ This increase in outside advice naturally inspired some concerns. Initially, the concerns involved antitrust problems that might arise from collusion within advisory groups composed of business members, which prompted the Justice Department to issue its Guidelines in 1950. ³⁶ Those Guidelines required that: there exist either statutory authority or a specific finding of necessity by an agency head before an advisory committee could be created; agencies rather than advisory committees would determine the committees' agendas; meetings would be called and chaired by a full-time government employee; there were to be complete minutes of each meeting; the committees were to have no decisional power; and the persons on the committees should come directly from business rather than from trade associations. ³⁷

The Guidelines were merely recommendations, however, and apparently they were largely ignored. ³⁸ As a result, legislation was introduced in Congress in 1957 to make the Guidelines mandatory. ³⁹ Although the House passed a bill, the Senate preferred to rely on executive oversight. ⁴⁰ Accordingly, in 1959, the Bureau of Budget (BOB) issued a directive that essentially restated the Justice Guidelines. ⁴¹ In 1962, President Kennedy issued EO 11,007, ⁴² which again in large part continued the Justice Guidelines. ⁴³ That Executive Order expanded the scope of the guidelines, applying not only to advisory committees created by an agency, but also to any private committee, "but only during any period when it is being utilized by a department or agency in the same manner as a Government-formed advisory committee." ⁴⁴ EO 11,007 also recognized "industry advisory committees" as a special form of advisory committee subject to particular requirements, such as a verbatim transcript of meetings. ⁴⁵ At the same time, it provided for general waivers of coverage for non-industry advisory committees, if an agency head found that such would serve the public **[*460]** interest, and for waivers for industry advisory committees from the transcript requirement and the ban on trade-association employees being members, if the head of the agency found they would interfere with the effective functioning of the committee. ⁴⁶ It furthermore strengthened the antitrust protections by prohibiting industry advisory committees from collecting information concerning the current or future activities of identified companies, and it responded to concerns of proliferation of committees by requiring each committee to terminate after two years unless specifically renewed by the agency head. ⁴⁷ Like the BOB directive and Justice Guidelines before it, EO 11,007 did not apply to Presidential advisory committees. ⁴⁸

Advisory committee issues then lay dormant until 1970, when the Government Operations Committees in both the House and Senate held investigatory hearings on the subject. In the House, the initial focus was on "the alleged duplicativeness, wasteful expenditures, and limited impact of Presidential Advisory Committees." ⁴⁹ Later, the Committee expanded its inquiry to include all advisory committees. ⁵⁰ In the Senate, the focus was on the alleged undue influence by industry acting through advisory committees on certain agency programs.

⁵¹ The hearings continued into 1971, and bills were introduced in both the House and Senate.

⁵² After passage of separate bills by each house, a conference committee reported a bill that both houses passed into law. ⁵³

B. The Act's Main Requirements

The **FACA** reflects the concerns expressed by the congressional committees that considered the various bills. One general concern was government waste. The sheer number of committees, estimated at the time as being approximately 3,000, ⁵⁴ led some to believe that many were unnecessary. Moreover, Presidential committees were noted for costing substantial amounts and yet producing reports useful as little more than paperweights. ⁵⁵

[*461] As a result, and as the Supreme Court later noted in *Public Citizen v. Department of Justice*, "the **FACA** was born of a desire to assess the need for the '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.'" ⁵⁶ The Act is designed in part to allow for easier accounting of the number and expense of advisory committees, and to facilitate terminations of committees that have outlived their usefulness.

Accordingly, section 5(a) of the Act requires each standing committee of Congress to make a continuing review of all advisory committees under its jurisdiction to determine whether they should be abolished or merged with another committee, whether their responsibilities should be revised, and whether they perform necessary functions not already being performed elsewhere. ⁵⁷ Similarly, the President is to report annually on the activities, status, and changes in the composition of advisory committees in existence during the preceding year. ⁵⁸ The report is to include information on the cost of advisory committees, a list of advisory committees that the President has abolished, and a list of statutorily created committees for which the President has recommended abolition. ⁵⁹ The **FACA** also requires the Administrator of the General Services Administration, who is given general management responsibility over advisory committees, ⁶⁰ to make an annual review of all advisory committees to determine whether they should be abolished or merged. ⁶¹ Finally, agencies themselves are required to keep financial records for their advisory committees, and GSA is to keep the financial records of presidential advisory committees. ⁶²

The Act also restricts the creation of new advisory committees. For instance, when considering legislation to authorize the establishment of a new advisory committee, standing committees of the House and Senate must first determine whether or not the functions could be performed by an agency or an existing advisory committee. ⁶³ And like the Justice Guidelines and EO 11,007 before it, the **FACA** requires that no new advisory committee be established unless the President or a statute specifically authorizes its creation, or the head of an agency determines "as a matter of formal **[*462]** record, . . . after consultation with the Administrator . . . [that such establishment is] in the public interest in connection with the performance of duties imposed on that agency by law." ⁶⁴ To ensure that new advisory committees meet these standards, the **FACA** also prohibits any advisory committee from meeting or taking any action until its charter has been filed with the Administrator (for presidential advisory committees) or with the head of the agency to which the committee will report, as well as with the standing committees of the House and Senate with jurisdiction over the agency. ⁶⁵ The Act also sets a two-year limit for all advisory committees, except for those statutorily created with a different period, though it allows the President or agency head to extend a committee's term for an additional two years. ⁶⁶ While there is no limit on the number of two-year extensions that may be granted to a committee, advisory committees that are extended, including statutory advisory committees, must file new charters. ⁶⁷

Reducing government waste was not, however, Congress's only concern. Of at least equal importance was the worry that special interests had captured advisory committees and were thus exerting undue influence on public programs. The particular focus of the initial Senate

hearings in this regard had been the Advisory Council on Federal Reports and its subgroups. ⁶⁸ The BOB had created that advisory committee to advise it with respect to the implementation of the Federal Reports Act of 1942, a predecessor of the Paperwork Reduction Act. ⁶⁹ In response to complaints concerning unnecessary and burdensome government reporting and record-keeping requirements, Congress provided in the Federal Reports Act that the BOB would review and approve or disapprove all proposed agency requests for information from the private sector. ⁷⁰ The BOB asked five leading national business organizations to appoint representatives to a group--the Advisory Council on Federal Reports--upon which it could call for advice on proposed federal reporting and record-keeping requirements. ⁷¹ The Council formed standing committees concerned with particular industries and consisting of representatives from those industries. ⁷² This design was criticized "as 'one-sided,' providing advice to the government only from representatives 'of big businesses' and with the power 'to withhold from the public information [*463] which it has the right to know . . .'" ⁷³ Nor was the Advisory Council on Federal Reports the only committee criticized. William Rodgers' study of the National Industrial Pollution Control Council--an advisory committee created by President Nixon to "allow businessmen to communicate regularly with the President, the Council on Environmental Quality, and other governmental officials and private organizations which are working to improve the quality of our environment" ⁷⁴ --concluded that the Council's contribution to two environmental initiatives was to supply "invaluable inside-track opportunities for those who would redirect governmental policy" ⁷⁵

Such undue influence stemmed from at least two different aspects of advisory-committee practice. First, committee membership often reflected only one point of view. EO 11,007, for example, had expressly approved of industry advisory groups, which were defined as groups "composed predominantly of members or representatives of a single industry or group of related industries, or of any subdivision of a single industry made on a geographic, service or product basis." ⁷⁶ Second, advisory groups operated in relative secrecy. EO 11,007 did not require committee meetings to be open to the public. ⁷⁷ It did require committees to keep minutes of their meetings, ⁷⁸ and it also required industry advisory groups to keep verbatim transcripts, ⁷⁹ but as noted the transcript requirement could be waived by the head of the agency upon a determination that it "would interfere with the proper functioning of the committee or would be impracticable, and that a waiver . . . would be in the public interest." ⁸⁰ Apparently, such waivers were often sought and obtained. ⁸¹ Moreover, at least as indicated by Rodgers' study, "the committee minutes amounted to a skeletal outline of the issues discussed, evidently thoroughly sanitized." ⁸² Committee documents were supposed to be included with the minutes, but this requirement was occasionally not adhered to, ⁸³ and, unless the documents were maintained by the agency, committees [*464] argued they were not subject to the FOIA. ⁸⁴

The **FACA** addressed these perceived problems in several ways. Responding to the concern that advisory committees reflected only the views of particular interests, the Act requires that the membership of advisory committees be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." ⁸⁵ No longer could advisory committees be industry-advisory committees. ⁸⁶ The Act similarly attempts to address the concern that advisory committees might become the tail that wags the agency dog; it requires that no advisory-committee meeting occur "except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and [except for Presidential advisory committees] with an agenda approved by such officer or employee." ⁸⁷ Moreover, no meeting can occur without the presence of a designated federal officer or employee, and the officer or employee is authorized to adjourn the meeting whenever "he determines it to be in the public interest." ⁸⁸

The **FACA's** response to the secrecy concerns reflects the legal culture of the time, midway between the passage of the FOIA ⁸⁹ and the Government in the Sunshine Act. ⁹⁰ Section 10 of the Act begins by requiring that "each advisory committee meeting shall be open to the

public." ⁹¹ In order to make this requirement meaningful, the Act further requires that "timely notice" of meetings be published in the Federal Register, and that the Administrator prescribe rules for other types of public notice. ⁹² Moreover, the public is entitled to participate in meetings by appearing before and filing statements with the committee. ⁹³ The **FACA** also requires that committees keep [*465] "detailed minutes of each meeting," the accuracy of which the chair of the committee must certify, and which must contain "a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee." ⁹⁴ These are to be made available for public inspection and copying at the offices of the advisory committee or agency, unless they are subject to one of the exemptions from public release contained in the FOIA. ⁹⁵ In several important ways, then, the **FACA** reflects the good-government values that motivated its passage.

II. Issues Currently Arising Under the **FACA**

But while the Act embodies many good-government concerns, it has in recent years raised new difficulties. The many salient issues that have recently arisen in connection with it can be categorized into five groups: constitutional issues; questions concerning the identification of groups subject to the Act; issues surrounding the creation of an advisory committee once a group that would be subject to the Act is identified; issues concerning the administration of advisory committees once created; and finally, issues concerning **judicial review** of claims brought under the Act. As will be seen, these categories overlap to some degree, but they nevertheless provide useful starting points for considering the many specific questions that the interpretation, implementation, and administration of the **FACA** have recently generated. Each is explored in turn.

A. Constitutional Issues

The **FACA's** restrictions on federal executive power implicate several constitutional values, including federalism, separation of powers, and executive prerogative. ⁹⁶ Thus, for example, the Western Governors [*466] Association (WGA) in June of 1994 resolved that the **FACA** "hinders the free flow of communication between [state and federal] jurisdictions" and thereby interferes with informed, cooperative decisionmaking by state and federal policy makers--in short, that it hinders federalist government. ⁹⁷ Clearly, the WGA is (or at least was, until passage of the Unfunded Mandates Act ⁹⁸) partly correct. Literally speaking, the Act does inhibit the free flow of information between federal and state employees. This is a function of the definition of an "advisory committee" subject to the **FACA**, as given in section 3(2)(B) and 3(2)(C)(iii) of the Act. The definition includes "any committee, board, commission, council, conference, panel, task force, or other similar group," ⁹⁹ which group is established or utilized by the President or by one or more agencies, ¹⁰⁰ but it excludes any such committee composed "wholly of fulltime officers or employees of the Federal Government." ¹⁰¹ Because state officers and employees do not enjoy the benefit of section 3(2)(C)(iii)'s federal-employees exemption, ¹⁰² the establishment of a group of state (or local) decisionmakers for the purpose of providing advice or recommendations to a federal decisionmaker would--unless it fell within the recent Unfunded Mandates' exemption ¹⁰³ --trigger the Act's requirements.

The governors, whose views, after all, may be shaped in part by incentives to bend the ears of federal decisionmakers without publicity, are not the only ones to have voiced such a concern. For example, the court in *Natural Resources Defense Council v. Environmental Protection Agency* (NRDC v. EPA) suggested that interpretations of the **FACA** inhibiting communication and cooperation between state governors and federal officials would raise questions about the Act's compatibility with federalism. ¹⁰⁴ The case involved a claim by the NRDC that the Governors' Forum on Environmental Management (Governors' Forum), a bipartisan group including nine state governors together with EPA personnel formed at the request of the EPA Administrator to address the issue of states' abilities to implement certain

environmental programs such as those contemplated by the [*467] Safe Drinking Water Act,¹⁰⁵ constituted an advisory committee under the **FACA** and that the Governors' Forum was therefore obliged to open its meetings to the public. The court disagreed, concluding that because the governors who serve on the Governors' Forum act "as independent chief executives in partnership with the federal agency,"¹⁰⁶ it could not "ignore the federalism . . . concerns, which would arise if the Court were to determine that a body of nine Governors organized to address an environmental problem constitutes an advisory committee under **FACA**."¹⁰⁷ The court also stated that to conclude that the Governors' Forum was an advisory committee under the **FACA** "would ignore the responsibilities the states maintain in complying with the Safe Drinking Water Act."¹⁰⁸

Whether the governors' or the court's concerns truly necessitate or even justify further changes to the **FACA** to facilitate federal-state communication, however, is another matter. While freeing state and local officials from the strictures of the Act would facilitate federal-state dialogue, those gains might be offset by compromises to the values underlying the Act, such as openness and balance. Put bluntly, whereas state officials sometimes seek to communicate with their federal counterparts simply to coordinate federal-state programs, other times state officials act in the capacity of regional interest groups, whose communications may be better carried out pursuant to the Act. At the very least, the court in *NRDC v. EPA* overstated its case. Concluding that the Governors' Forum was subject to the **FACA** would not, in fact, have "ignored the responsibilities the states maintain in complying with the Safe Drinking Water Act." Rather, such a holding would have simply required state officials to observe the **FACA's** openness requirements in the process of carrying out those responsibilities.

To be sure, not satisfying the Act's requirements is easier than satisfying them. To that extent, the **FACA** "burdens" federal-state communications. But, all things considered, the gains in openness and balance might well be worth their burdens. While the Act's requirements may be unnecessary inconveniences on federal and state regulators who seek simply to coordinate a federal-state program, those requirements may be welcome inhibitions on regional influence peddling. Although the court in *NRDC v. EPA* stated that "closed meetings of the Governors' Forum would foster an environment of cooperation and collegiality among the independent executives,"¹⁰⁹ one wonders why open meetings would necessarily thwart cooperation and collegiality among governors trying merely to achieve effective state [*468] implementation of federal programs.¹¹⁰ Unless courts are to determine the motives of federal-state advisory groups on a costly case-by-case basis, an overinclusive categorical rule may well be better than an underinclusive one.¹¹¹ At any rate, the choice requires a weighing of values such as speed and efficiency of government decisionmaking, on the one hand, and openness and balance, on the other. The new exemption provided in the Unfunded Mandates legislation seems to facilitate federal-state coordination by freeing elected state officers and their delegates from the Act's requirements. At the same time, the exclusion guards against such illicit forces as regional lobbying by limiting its application to communications carried out in state and local officials' capacities. This accommodation of values seems reasonable, and the Act's residual applicability to state officials--for example, to state elected officials who are part of advisory committees with other members who are neither federal nor state employees--can hardly be said to constitute a serious threat to federalism.

Federalism is not the only constitutional value implicated by the **FACA**, and perhaps not the most important. Many courts, including the Supreme Court, have also expressed concerns about separation of powers and the permissibility of the Act's interference with executive power in particular. In fact, insofar as the **FACA** prohibits the President from receiving advice in whatever form or manner he might choose, the constitutionality of the Act has been subject to serious question. Thus in *Public Citizen v. Department of Justice*,¹¹² the only Supreme Court **FACA** case, three justices argued in a concurring opinion that the Act constituted an unconstitutional interference with the President's ability to solicit advice.

Public Citizen involved a challenge under the Act to presidential reliance upon the American Bar Association's Standing Committee on the Federal Judiciary (ABA Committee) as a source of information about potential judicial nominees. The plaintiffs pointed out that section 3 of the Act defines "advisory committee" as "any committee, board, commission, council, conference, . . . established or utilized by the President, or established or utilized by one or more agencies, in the interest of obtaining advice or recommendations" ¹¹³ Because the ABA Committee was utilized, though not established, by the President for the purpose of obtaining advice and [*469] recommendations on potential judicial nominees, the plaintiffs argued that the ABA Committee must provide notice of its meetings, open those meeting to the public, and supply minutes and copies of committee records and reports upon request.

The Court disagreed. According to the Public Citizen majority, the word "utilize" in section 3 was not to be taken literally, but rather was properly understood as an extension and qualification of the term "establish." According to the majority:

"Utilize" is a woolly verb, its contours left undefined by the statute itself. Read unqualifiedly, it would extend **FACA's** requirements to any group of two or more persons, or at least any formal organization, from which the President or an executive agency seeks advice. We are convinced that Congress did not intend that result. A nodding acquaintance with **FACA's** purpose . . . reveals that it cannot have been Congress' intention, for example, to require the filing of a charter, the presence of a controlling federal official, and detailed minutes any time the President seeks the views of the National Association for the Advancement of Colored People (NAACP) before nominating Commissioners to the Equal Employment Opportunity Commission, or asks the leaders of an American Legion Post he is visiting for the organization's opinion on some aspect of military policy. ¹¹⁴

To avoid such an unlikely result, the majority looked past plain meaning and to the Act's legislative history, observing, for example, that the term "utilize" in the Act very likely originated in EO 11,007, ¹¹⁵ which was not understood by that or subsequent administrations to encompass the ABA Committee notwithstanding its highly visible role in advising the President regarding judicial nominees before and after the passage of the Act. ¹¹⁶ The Court also explained that "construing **FACA** to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties." ¹¹⁷ Noting that the district court below had held the Act unconstitutional insofar as it applied to consultations with the ABA Committee on the grounds that it infringed on the President's power to nominate federal judges and violated the separation of powers doctrine, the Court, without ruling on those questions, furthermore observed that "there is no gainsaying the seriousness of these constitutional challenges." ¹¹⁸ Because the legislative history contained substantial evidence that Congress did not [*470] intend "utilize" to include consultations with the ABA Committee, the Court avoided "formidable constitutional difficulties" by interpreting the term "utilize" more narrowly.

However, three justices resisted the majority's interpretation, arguing instead that "utilize" in section 3 was best interpreted as consistent with common usage. In an opinion written by Justice Kennedy (joined by Rehnquist and O'Connor), they argued that the legislative history was more complicated than the majority acknowledged and did not provide a justifiable basis for the majority's gloss on "utilize." ¹¹⁹ Turning, then, to the constitutional question that the Act's application to the ABA Committee presented, the concurrers concluded that the Act violated constitutional separation of powers by infringing upon the President's appointment power. ¹²⁰

Like the concurrers in Public Citizen, Judge Buckley, concurring in *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, ¹²¹ explained that in his view too the **FACA's** application to the supply of presidential advice was unconstitutional. The majority of the D.C. Circuit panel in that case avoided considering that constitutional question when it concluded

that the First Lady was an "employee" for the purposes of the Act, and thus that her leadership of the presidential Task Force on Health Care Reform did not render that group an advisory committee subject to the Act. Judge Buckley, in contrast, argued that the Act's language "full-time officers or employees of the Federal Government" ¹²² clearly excluded the First Lady. ¹²³ Under his interpretation, then, the Task Force was clearly covered by the Act, for the First Lady's presence on the Task Force meant that the Task Force was not "composed wholly of full-time officers or employees" ¹²⁴ and thus was not excluded from the Act's definition of an "advisory committee." ¹²⁵ But this conclusion raised the question whether the Act could withstand constitutional scrutiny, given its restrictions on presidential power. Citing the Nixon cases, ¹²⁶ Judge Buckley concluded that it could not. ¹²⁷

Still other courts have raised questions about the effect of the Act on separation of powers and executive prerogative with reference to judicial, rather than with legislative, limitations on executive power. That is, courts have sometimes questioned their own ability to enjoin the president from [*471] relying on advice or recommendations from groups seemingly covered by the Act but whose procedures did not conform with the Act's requirements. The Espy case exemplifies this concern. ¹²⁸ There, a district court concluded that considerations of separation of powers and of executive privilege allowed only declaratory relief to plaintiffs who had brought a successful **FACA** claim. Other lower courts have expressed similar concerns about the Act's compatibility with separation of powers. ¹²⁹

In addition to broad constitutional principles such as federalism and separation of powers, the **FACA** also implicates a seldom-remembered provision in Article I, section 9, which states: "No Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office or Title, of any kind whatever, from any King, Prince, or foreign State." ¹³⁰ The Emoluments Clause might be read to pose constitutional restrictions on advisory-committee membership. For example, members of international organizations who receive financial support from foreign governments might be barred by the Emoluments Clause from serving on advisory committees. More importantly, perhaps, lawyers employed by law firms whose clients include foreign governments--including, for example, most large D.C. law firms--might be barred from serving on an advisory committee. Although this issue has not been litigated, the Department of Justice once expressed the view that the Clause may well prohibit such membership. ¹³¹ Whether that view is sound of course depends on whether advisory-committee membership constitutes an "Office of Profit or Trust," ¹³² and whether foreign business relationships, for example, constitute a type of "Emolument." Given the Act's many openness requirements, there are no strong policy reasons for interpreting the Clause this way, and only the rare agency (and no court) has done so. ¹³³ [*472]

B. What Constitutes an Advisory Committee Governed by the Act?

Although potentially the most important, constitutional questions do not account for most of the **FACA** litigation. Rather the most litigated issue under the **FACA** concerns whether, when, and how a given group becomes an advisory committee subject to the Act. ¹³⁴ Such litigation arises when someone sues because persons are providing advice to the President or to an agency without complying with the **FACA's** chartering and meeting requirements. Challengers may sue in order to monitor the advice being given, to affect the advice being given, to oppose advice that has been given, or to oppose government action that might be taken on the basis of advice given. Agencies can avoid such lawsuits by ensuring that all groups that are arguably advisory committees undergo the requisite chartering and follow the required procedures. Given the burdens involved in fulfilling these tasks, however, it is not surprising that agencies or the President may attempt to operate outside of the Act's scope while nonetheless trying to obtain advice from persons outside government. The Act's exact scope thus has become a perennial issue.

The **FACA** itself defines an "advisory committee" as:

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 Government¹³⁵

The definition goes on to exclude the Advisory Commission on Intergovernmental Relations, the Commission on Government Procurement, and any committee composed wholly of full-time Federal employees¹³⁶ as well as any advisory committees of the Central Intelligence Agency or the Federal Reserve System,¹³⁷ any advisory committee that is a local civic group "whose primary function is that of rendering a public service with respect to a Federal program,"¹³⁸ and any state or local committee "established to advise or make recommendations to State or local officials or agencies."¹³⁹ Subsequent [*473] statutes have from time to time exempted specific advisory committees that would otherwise meet the Act's definition.¹⁴⁰

Exemptions aside, there are three core components to the Act's definition of "advisory committee." First, the Act applies only to a "group" (containing at least one person not employed by the government). Second, groups subject to the Act must be either "established" by a statute (or reorganization plan) or "utilized" by the President or an agency. Third, groups so established or utilized must be established or utilized for the purpose of supplying "advice or recommendations" to the President or an agency. Each of these requirements raises several questions.

1. The Group Requirement

A single person cannot be an advisory committee.¹⁴¹ An unresolved question is whether a single, non-natural "person" can be an advisory committee. For example, a corporate entity like General Motors certainly would not seem to fit the concept of a "committee, board, commission, council, conference, panel, task force, or other similar group." At the same time, the Board of Directors of General Motors is literally a "board," and to the extent that communications from GM were authorized by the Board, one might conclude that advice from GM to an agency constituted advice from a board. Though this would seem to stretch the conception of the Act and there are no cases to suggest that a for-profit corporation, acting alone, might qualify as an advisory committee, there are a number of cases involving non-profit corporations. For example, an early **FACA** case involved a challenge to meetings between the Federal Highway Administration (FHWA) and the American Association of State Highway and Transportation Officials (AASHTO).¹⁴² In concluding that AASHTO was an advisory committee utilized by the FHWA, the court never questioned whether AASHTO was a "committee" within the meaning of the Act. Moreover, in *Public Citizen*, the Supreme Court never questioned whether the American Bar Association's Standing Committee on the Federal Judiciary was a "committee" under the Act; the issue was whether it was "utilized" by the President within the meaning of the Act. Given the lack of discussion on the subject, it is not clear whether the Court relied on the fact that the recommendations came from the "Standing Committee on the Federal Judiciary," as opposed to the ABA itself. There is a suggestion in the opinion, however, that the involvement of the "Standing Committee" was not critical: In explaining why the term "utilize" should not be read broadly, the Court said

that otherwise the National [*474] Association for the Advancement of Colored People, leaders of an American Legion Post, or the President's own political party would be an advisory committee if the President sought their advice. ¹⁴³

One can question, however, why for the purposes of the Act these disparate entities should be considered committees or groups at all. Perhaps there is a sense of membership in these entities that is missing from a for-profit organization, and perhaps it is this element of membership in an organization that suggests the organization is a similar group to a committee, board, commission, and so on. On this view, the important distinction is not for-profit versus non-profit. Neither Stanford University nor General Motors would be a committee, but under the membership rationale both the Association of American Law Schools and the Motor Vehicles Manufacturers Association would be. Such an analysis might explain the cases, but it is difficult to see why improper influence is more likely to arise from a general-membership group than from other corporate entities. ¹⁴⁴ Nor is it clear how the underlying purposes of the **FACA**--specifically, avoiding improper influence of government by private interests--would be served by such a distinction.

Building on the idea that a single individual cannot be a committee, the GSA has provided by regulation that convening a number of people to obtain the advice of each individually (rather than collectively) does not establish an advisory committee. ¹⁴⁵ A number of agencies make use of this provision, and this approach makes considerable sense. If an agency separately asks a number of individuals for their individual advice, doing so would not implicate the **FACA**. If that agency asks the same people for the identical (individual) advice, but for the purposes of efficiency does so in a group setting, the **FACA** likewise should not apply. Moreover, when one thinks of a committee, board, [*475] commission, council, etc., one imagines that the group will vote or otherwise seek to obtain at least a majority position for whatever position it takes. Advice from such an entity, therefore, suggests advice from a collective identity. However sensible this may be, there is nothing inherent in the concept of a committee, board, commission, or council that positively precludes the notion of individual members having responsibilities separate from, or in addition to, any collective responsibility of the group. Consequently, there is nothing in the language "committee, board, commission, council . . ." that precludes members of a committee transmitting their individual, as opposed to collective, views. Moreover, the **FACA's** definition does not explicitly refer to the committee's advice or recommendations; it merely says that the committee is established in the interest of obtaining advice for an agency. One could read that language to include the creation of a group for the purpose of obtaining the advice of each of its members individually.

Such a reading implies that the GSA's regulation might be questionable. However, because the GSA is the agency entrusted with administering the **FACA** ¹⁴⁶ one might also expect courts to apply the standards of *Chevron, U.S.A., Inc. v. National Resources Defense Council*, ¹⁴⁷ to its regulatory interpretations of an ambiguous statutory definition. Yet this has not been the case. The Supreme Court in *Public Citizen*, without citing *Chevron*, gave several reasons not to defer to the GSA's regulatory definition of advisory committee, two of which are relevant here. First, the Court said that GSA's regulations were not contemporaneous interpretations of the statute because they were not finally promulgated until more than ten years after the **FACA** was passed. ¹⁴⁸ Second, the Court interpreted the **FACA's** authorization to the GSA to "prescribe administrative guidelines and management controls applicable to advisory committees, and . . . provide advice, assistance, and guidance to advisory committees . . ." ¹⁴⁹ not to "empower the agency to issue, in addition to these guidelines, a regulatory definition of 'advisory committee' carrying the force of law." ¹⁵⁰ Subsequently, the D.C. Circuit rejected deference to the GSA's regulations on the related issue of whether advisory committees had to provide consensus advice, stating that it does not defer to an agency's construction of a statute interpreted by more than one agency, "let alone one applicable to all agencies." ¹⁵¹ Nevertheless, despite a refusal to accord deference to GSA's interpretation, the D.C. Circuit expressly agreed with the GSA's conclusion, stating that "a

group is a **FACA** advisory committee when it is asked to render advice or recommendations, as a group, and not as a collection of individuals." ¹⁵² As the only circuit court decision directly on [*476] point, it may decide the issue definitively. ¹⁵³

Even if a group of individuals convened to provide individual advice does not constitute an advisory committee in principle, there are practical problems associated with such undertakings. First, a group brought together for the purpose of providing individual advice may, in the course of the meeting, end up providing collective advice. If this occurs, the GSA regulation states--and the Physicians & Surgeons court confirms--group dynamics might well transform the substance of the advice, with the result being that the meeting would be covered by the **FACA**. ¹⁵⁴ The problem is, by that point in time, it would be too late to comply with the **FACA's** requirements, since the meeting would already have occurred. Just such a scenario occurred with respect to a panel of experts assembled by the Fish and Wildlife Service to provide individual advice with respect to listing the Alabama Sturgeon as an endangered species. ¹⁵⁵ Rather than filing individual reports as originally requested, the scientists decided to file a joint report recommending that the Alabama Sturgeon be listed. As a result, they were considered an advisory committee which had not complied with the **FACA**, resulting in an injunction against their advice being used by the agency for any purpose. ¹⁵⁶

Second, even if the members do not provide collective advice, but hew to individual opinions, if the group is challenged as an advisory committee, a failure to adequately memorialize the purpose and activities of the group may lead to extended discovery and litigation over what actually took place. In Physicians & Surgeons, for example, the court agreed that persons gathered together to provide individual advice did not constitute advisory committees, but explained that the record before it did not enable the court to determine whether the working group for the President's Task Force on National Health Care Reform provided only the individual advice of its members. As a result, the court was forced to remand the case to the district court for further proceedings, including discovery, to determine the character of the working [*477] group and the relationship among its members. On remand, the government was unable to easily recreate the membership and activities of the working group, resulting in further litigation and discovery. ¹⁵⁷

2. "Establishing" or "Utilizing" a Committee

a. "Utilized"

Prior to Public Citizen v. Department of Justice, there were a number of cases in lower courts trying to determine when a private group was "utilized" within the meaning of the **FACA** for providing advice to government agencies or the President. ¹⁵⁸ Previous courts, like the GSA regulation defining "utilized," ¹⁵⁹ used a functional test--asking whether an outside group was used as a preferred source of advice on some sort of official or institutional basis. This would exclude outside groups whose advice was provided on an incidental basis or as just another member of the public. In Public Citizen, the ABA's Standing Committee on the Federal Judiciary seemed to satisfy this preferred-source test with respect to its recommendations regarding potential judicial nominees. But, because such an interpretation would raise grave constitutional questions, ¹⁶⁰ the Court looked to the legislative history of the term to determine its purpose and limitations. In EO 11,007, "utilized" had been used as part of the phrase, "utilized by a department or agency in the same manner as a Government-formed advisory committee," ¹⁶¹ and yet as noted, the ABA Committee had never been considered to fall within the definition of the executive order. ¹⁶² The Court furthermore noted that the House Committee Report that accompanied the bill that became the **FACA** reflected this definition by stating that the bill would include "committees . . . which are used by the President or any agency in the same way as an advisory committee formed by the President himself or the agency itself." ¹⁶³ And while the Senate Report provided some examples of "private" advisory committees, ¹⁶⁴ the Court characterized them as "limited to groups

organized by or closely tied to the Federal Government, and thus enjoying quasi-public [*478] status." ¹⁶⁵ Finally, the Conference Report, which actually added the words "or utilized" to the bill--without explaining the reason for the addition--stated generally that the bill did not apply to "advisory committees not directly established by or for federal agencies." ¹⁶⁶ From these indicia of congressional intent and prior executive practice, and in light of the need to avoid constitutional questions, the Court concluded:

["Utilized"] appears to have been added simply to clarify that **FACA** applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences "for" public agencies as well as "by" such agencies themselves. ¹⁶⁷

The ABA's Standing Committee on the Federal Judiciary did constitute such a group because it was formed privately, not at the federal government's prompting, ¹⁶⁸ because neither the President nor the Department of Justice had any control over the Committee, ¹⁶⁹ and because the Committee received no federal funds to provide the advice or recommendations. ¹⁷⁰ Moreover, the Committee had not been created by "some organization created or permeated by the Federal Government" or by "some semiprivate entity the Federal Government helped bring into being." ¹⁷¹

The Public Citizen court was quite explicit in stating that the factor that tipped the balance against including the ABA's Standing Committee within the **FACA's** definition was the serious constitutional question such an interpretation would raise. ¹⁷² This then raises the question whether "utilized" should receive the same restrictive interpretation when agencies created by Congress seek advice from private groups as to the implementation of statutes passed by Congress, as opposed to the President seeking advice with respect to his constitutional duty to nominate federal judges. Here, there would seem to be little constitutional question that Congress could, if it wished, so restrict the agencies without running afoul of the doctrine of separation of powers. Nevertheless, there would remain a (different) constitutional question as to interference with the associational and expressive rights of members of private groups wishing to advise agencies. Both the ABA and amici raised this issue in Public Citizen, ¹⁷³ but the Court did not address it. Earlier, [*479] however, in Center for Auto Safety v. Cox, ¹⁷⁴ the D.C. Circuit had dismissed a claim that imposing the **FACA** requirements for advisory-committee meetings on a private group "utilized" for advice by an agency would interfere with the group's First Amendment rights. The court concluded:

[The group] and its members remain free to communicate their views to the Administrator. They remain free to lobby the agency. Congress has determined simply that when a federal executive official utilizes an advisory committee to assist him in discharging his responsibilities, in most instances he must do so openly and publicly. [The group] has no First Amendment right to have the Administrator keep its communications secret. ¹⁷⁵

According to this analysis, the **FACA's** openness requirements only apply "when a federal executive official utilizes an advisory committee." If by this language the court means the Act's openness requirements will apply when the advisory committee actually meets with or communicates to the official, the court's conclusion seems well taken. If, however, the court means whenever a private group is "utilized" for obtaining advice by an agency, the private group's internal deliberations regarding recommendations to the agency must be subject to the **FACA's** openness requirements, that would raise serious First Amendment questions, unless "utilized" is read narrowly, and consistently with Public Citizen, as applied to agencies as well. In the latter situation, private groups that provide advice to agencies--even on a regular and preferred basis--would very rarely be deemed "utilized" by the agencies.

Cases subsequent to Public Citizen suggest that the Supreme Court's narrow reading of "utilized" will indeed be applied to independent groups providing advice to agencies. In Food Chemical News v. Young, ¹⁷⁶ for example, the Food and Drug Administration (FDA) had

contracted with the Federation of America Societies for Experimental Biology (FASEB) to provide advice to the agency. Pursuant to the contract, the FASEB assembled panels of experts to provide it with "expert counsel." Because the **FACA's** legislative history specifically stated that the Act does not apply to "persons or organizations which have contractual relationships with Federal agencies," ¹⁷⁷ all were agreed that the FASEB itself was not an advisory committee. Food Chemical News, an industry publication, argued among [*480] other things that the expert panels were advisory committees utilized by the FDA, and that Public Citizen's interpretation of "utilized" was only a narrow exception to the otherwise broadly inclusive definition of advisory committees. ¹⁷⁸ The D.C. Circuit rejected this argument and applied Public Citizen's analysis to the expert panels. ¹⁷⁹ Because the expert panels were established by the FASEB rather than by the FDA--the FASEB selected the members, scheduled the meetings, and was to review the panels' work before making its own report to the FDA--it was the FASEB that utilized the panels, not the FDA. ¹⁸⁰ Moreover, the court observed, the FASEB was a private entity that did not have "quasi-public status." ¹⁸¹

If indeed a necessary prerequisite for a group to be a "utilized" advisory committee is that it must have "quasi-public status" or must be created by an entity that has "quasi-public status," a "semiprivate entity the Federal Government helped to bring into being," or an "organization created or permeated by the Federal Government," there will be few "utilized" advisory committees. ¹⁸² If, however, this aspect of the Supreme Court's analysis is viewed as just one factor in deciding whether a private group is "utilized" within the meaning of the **FACA**, then the term may serve the purpose of preventing agencies from evading the **FACA** merely by having a private entity create a group which otherwise would be controlled by the agency. For example, the Environmental Protection Agency, prior to proposing a policy [*481] on how to treat environmental audits conducted voluntarily by regulated entities, assembled a group of interested stakeholders to make recommendations on EPA's initial concept. ¹⁸³ While this group was officially assembled under the auspices of the American Bar Association's Section on Natural Resources, Energy, and Environmental Law, that section was responding to the EPA's request for such a group. The EPA had specified some persons who should be members and otherwise gave indications of who should be members, and the EPA furthermore determined what the group would consider, when it would meet, and under what circumstances. Subsequent to the comment period on the proposed policy, the EPA again summoned this group for its reactions to the EPA's policy and the comments thereon. Under these circumstances, but for the fact that the ABA is not a "quasi-public" entity, the EPA would otherwise seem to be "utilizing" this group as an advisory committee. ¹⁸⁴

Even if "quasi-public" status is not a prerequisite to a group being considered a "utilized" advisory committee, Public Citizen as applied to agencies goes far to eliminate the **FACA's** applicability to existing private groups that may advise federal agencies, again even on a regular and preferred basis. ¹⁸⁵ Thus, the Court has in this area come down on the side of facilitating interchange of views between private entities and the federal government at the cost of the openness and public participation goals of the **FACA**. It should be recognized, however, that the FOIA ¹⁸⁶ will in most instances ensure that the public can have access to whatever written communications are made to agencies by these private groups. ¹⁸⁷ With this information, the ability of the public to communicate its views directly to the agency may largely compensate for the limited participation rights the public has under the Act itself. [*482]

b. "Established"

The vast majority of federal advisory committees are established by statute, the President, or an agency. At the end of fiscal year 1993 there were 1,088 established advisory committees. ¹⁸⁸ Of these, about one-third were specifically mandated by statute, another third were specifically authorized by statute, and almost another third were created under general agency authority. ¹⁸⁹ As with the term "utilized," "established" has also raised questions as to

its exact meaning. The Senate Report on the bill that became the **FACA** expressed the view that the term should be broadly interpreted.¹⁹⁰ The Conference Report, however, suggested a somewhat more limited understanding.¹⁹¹ Since, the executive branch's interpretation predictably has favored a narrower view of the term. Immediately following passage of the **FACA**, the OMB¹⁹² and the Department of Justice issued a joint memorandum to provide guidance to agencies, which included guidelines for determining what constituted established committees.¹⁹³ These guidelines suggested that only groups convened by a federal agency in a relatively formal manner would constitute established committees.¹⁹⁴

In a series of early cases, the parameters of "established" were further explored. For example, in *Nader v. Baroody*,¹⁹⁵ Ralph Nader challenged the White House's failure to follow the **FACA** in convening biweekly, three-hour meetings between high executive officials and major business organizations and other private sector groups. The meetings were convened to exchange information and views,¹⁹⁶ and each involved different individuals.¹⁹⁷ Noting that "the Act was not intended to apply to all amorphous, ad hoc group [*483] meetings"¹⁹⁸ and citing cases agreeing with that proposition,¹⁹⁹ the court concurred with the OMB/Justice guidelines by agreeing that "established" committees should have "some sort of established structure and defined purpose."²⁰⁰ The court emphasized that the ad hoc groups in question were not brought together for "specific recommendations on a particular matter of governmental policy."²⁰¹ Accordingly, and especially in light of the constitutional questions a contrary interpretation would raise, the court found the biweekly groups not to be "established" advisory committees.

At almost the same time, a different judge in *Food Chemical News, Inc. v. Davis* found that two "informal" meetings--between officials of the Bureau of Alcohol, Tobacco, and Firearms (ATF) and representatives of consumer groups, and between the ATF and the distilled spirits industry--were subject to the **FACA**.²⁰² Here, however, the agency had called specific persons together to advise it regarding the agency's proposed rulemaking on ingredient labeling of alcoholic beverages. Similarly, in *National Nutritional Foods Ass'n v. Califano*,²⁰³ the Second Circuit found the **FACA** applicable to one meeting between six Food and Drug Administration officials and five experts on obesity "to assist the FDA in selecting the best course of action for regulating the production and promotion of [weight reduction protein products] and/or informing the public of their hazard potential."²⁰⁴ The court said that it agreed with the courts in both *Nader v. Baroody* and *Food Chemical News*, but found *Food Chemical News* more on point, explaining that in the latter, as in the case before it, specific individuals were called upon by an agency to give group advice on a particular government proposed regulation, and furthermore that although only one meeting was held, the group stood ready to be used again in the future. The court was also moved by the public reliance the agency placed on the advice received from the group.²⁰⁵

These two lines of cases begin to mark the boundary between when a group can be called upon for advice without being an "established" advisory committee. If the group is brought together on an ad hoc basis to discuss general matters of concern, the courts seem willing to accept such meetings as part of the give-and-take between agencies and elements of the public, something Congress did not intend to impede by subjecting all such activities to the formalities of the Act. If, however, an agency wishes to obtain advice on a particular policy matter, especially a matter of policy that may have effect on other persons, then the courts are more likely to perceive the convening of an ad hoc group for that purpose as the "establishment" of an [*484] advisory committee, requiring the formalities of the **FACA**.²⁰⁶ Even so, the court in *Physicians & Surgeons* suggested that one "important factor in determining the presence of an advisory committee becomes the formality and structure of the group."²⁰⁷ The court went on to observe that when a group is created that "has, in large measure, an organized structure, a fixed membership, and a specific purpose," courts will tend to consider such a group an established advisory committee.²⁰⁸

As indicated earlier, although the Senate Report on the original bill manifested an intention to

include advisory committees brought together by contract, ²⁰⁹ the House Report reflected a different view, ²¹⁰ and the Conference Report adopted the House view. ²¹¹ Although the GSA regulations do not include this exception in their list of exceptions, the D.C. Circuit in *Food Chemical News v. Young* referred to the Conference Committee's report as the "main rule" to dispose of a claim that a group acting pursuant to an agency contract could be an advisory committee. ²¹² The court suggested that the selection of government contractors is subject to its own set of procedures aimed at providing checks against waste or improper influence, thereby making the **FACA's** protections unnecessary. ²¹³ On the other hand, in *Physicians & Surgeons*, the same court, when faced with the question of whether certain "consultants" working "on an intermittent basis with or without compensation" ²¹⁴ could trigger the **FACA's** requirements when they met with a group of federal employees, did not specifically mention the contractual exception. Rather, the court asked whether the consultants' "involvement and role are functionally indistinguishable from other committee members." ²¹⁵ The court said:

We must construe **FACA** in light of its purpose to regulate the growth and operation of advisory committees. **FACA** would be rather easy to avoid if an agency could simply appoint 10 private citizens as special government employees for two days, and then have the committee [***485**] [exempt from **FACA**]. ²¹⁶

While this statement was made in the context of a claim of the "full-time employee" exception, ²¹⁷ the same could be said for evading the Act's requirements under the contractual relationship exception. The likely synthesis of *Food Chemical News* and *Physicians & Surgeons* is to retain the contractual exception with respect to traditional government contracts with private organizations that provide analysis and recommendations to the contracting agency, but not to recognize it when individuals are hired (by contract) as consultants and thereafter regularly participate in "committee" meetings as participants in formulating collective advice to the agency.

A final issue with regard to the term "established" is whether the committee must be directly established by statute, the President, or an agency, as opposed to by contractors or other third parties. The Conference Report stated that the Act did not reach committees not "directly established by or for" federal agencies. ²¹⁸ The Supreme Court in *Public Citizen* interpreted this language to mean that "established" committees were established by agencies, while "utilized" committees were established for agencies. ²¹⁹ The D.C. Circuit has relied on this distinction to exclude from "established" committees any committee not directly created by the agency. ²²⁰ Thus in *Food Chemical News* the court found that, although the FDA's contract required the contractor to create an advisory committee, the agency did not establish the committee. ²²¹ The court reached a similar result in *Aluminum Co. of America v. National Marine Fisheries Service*. ²²² There, the Aluminum Company of America challenged the activities of two working groups assisting the National Marine Fisheries Service (NMFS) to produce a biological opinion relating to salmon in the Columbia River system. The court held that the working groups were not advisory committees under the Act because they were not established by NMFS. Rather, the court concluded, the "principals" in litigation challenging an earlier biological opinion, which included not only several federal agencies but also several states and Indian tribes, had established the groups. ²²³ [***486**]

3. The "Advice or Recommendations" Requirement

Only committees established or utilized "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government" are subject to the **FACA**. Thus, if a committee only receives information from an agency, rather than providing advice or recommendations to the agency, the committee is not an advisory committee. ²²⁴ Similarly, a committee which provides advice and recommendations to private entities but not to the President or a federal agency is not an "advisory committee" subject to the Act. ²²⁵ In addition, if the advice does not involve governmental policy, the entity will not qualify as an advisory committee. For example, in

Judicial Watch, Inc. v. Clinton, ²²⁶ the court found that a trust set up to help defray President and Mrs. Clinton's personal legal expenses was not an advisory committee subject to the Act because whatever advice it gave did not relate to government policy. The court reasoned that the membership requirements for advisory committees reflected a purpose to ensure that committees would provide varying points of view, which necessarily implicated debatable policy choices. ²²⁷

The GSA has by regulation further interpreted the "advice and recommendations" language in the Act to exclude committees whose functions are primarily "operational," rather than advisory. ²²⁸ That is, if a committee primarily is involved in "making or implementing Government decisions or policy," ²²⁹ it simply is not an "advisory committee." Moreover, even if such a committee incidentally or occasionally provides advice or recommendations, it does not automatically become an advisory committee subject to the **FACA**. ²³⁰ Only if the committee becomes "primarily advisory in nature" does it become an advisory committee subject to the Act. ²³¹ This interpretation finds support in both the legislative history ²³² and the case [***487**] law. ²³³

If the validity of this exception seems clear, however, its application is much less clear. That is, what is "operational" as opposed to "advisory" is not always apparent. One area of continuing question relates to peer review of proposals for government grants. When the federal government decides which of the many proposed private research or artistic endeavors to support with federal funds, the agency involved usually uses a system of peer group review. ²³⁴ The National Institutes of Health, the National Science Foundation, the EPA, and the National Endowments for the Arts and Humanities all use peerreview systems to assess proposed grants. ²³⁵ Normally this involves the use of peer-review panels, ²³⁶ and indeed this is the preferred method of peer review. ²³⁷ Of course, the peer-review panels do not actually decide to fund the grant; that is done by the agency. Thus, the question is whether the panel's activity is "advisory," requiring application of the **FACA's** requirements. At the present time, the above agencies treat these groups as advisory committees, but there are strong arguments that they properly should be viewed merely as operational. These arguments sometimes derive from the characterization of these peer-review groups as acting in the nature of staff to the agency. ²³⁸ Were these activities of reviewing and making recommendations on particular proposals actually performed by agency staff, one would consider the activity operational, even though the staff might not have power to make the actual grant. The fact that this staff work is performed by a group of outsiders, the argument goes, makes the work operational rather than advisory. This argument alone, however, proves too much, because whatever work advisory committees do could, in theory, be performed by agency staff. After all, agency staff is not precluded from giving advice and making recommendations to higher authorities in the agency. But here, the argument continues, the peer groups' function is very narrow and focused, commonly concerning the technical merit of proposals, not the kind of policy advice one normally associates with advisory committees such as, for example, advice to an agency concerning the categories of activities the [***488**] agency should support through grants. Ultimately, this argument depends upon a particular reading of the ambiguous statutory language "advice or recommendations."

In any event, the GSA has taken the spirit of the "operational" exception and gone one step further to exclude committees or meetings where "the purpose [is the] exchanging of facts or information," as opposed to giving advice or making recommendations to the agency. ²³⁹ Unlike the GSA's "operational" interpretation, there does not appear to be strong support for this interpretation in the case law ²⁴⁰ or the legislative history, and clearly a committee might well provide facts and information to an agency in support of its advice and recommendations. On the other hand, if all the committee does is transmit or receive facts and information, the committee could arguably be operational, rather than advisory. Here the difficulty concerns the blurry line not between "operational" functions and "advice," but rather between "information" and "advice." ²⁴¹ Here, too, further clarification--whether

legislative, administrative, or judicial--is in order. While the Act's openness and participation goals probably do not require agencies to charter an advisory committee whenever they request or accept raw data, agencies need guidance on where the line between information and advice is to be drawn.

4. Subgroups and the Act's Requirements

A question often arises with respect to subcommittees or subgroups of recognized advisory committees--are they themselves also advisory committees? The definition of advisory committee in the Act expressly states that it includes "any subcommittee or other subgroup thereof."²⁴² However, this language, like that describing the other entities listed in the definition, is also modified (and apparently limited) by the clause: "which is established . . . in the interest of obtaining advice and recommendations for the President or one or more agencies or officers of the Federal Government."²⁴³ Thus, it has been argued that if an advisory committee creates a subcommittee for the purpose of aiding the full committee, rather than for providing advice directly to the President or an agency, the subcommittee is not an advisory committee.²⁴⁴ The subcommittee would then not be required to be balanced, [*489] chartered by the GSA, or subject to the open-meeting requirements. The GSA itself has refused to recognize such a general exception to its regulations,²⁴⁵ but it has made two accommodations to this argument. First, it has provided that "subcommittees that do not function independently of the full or parent advisory committee need not follow [the chartering requirements for advisory committees]." ²⁴⁶ However, such subcommittees are subject to all other requirements of the Act. In addition, the GSA has exempted from all requirements of the Act:

meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft position papers for deliberation by the advisory committee or a subcommittee of the advisory committee. ²⁴⁷

This latter exemption, however, seems to create a loophole in the GSA's purported requirement that "dependent" subcommittees follow "all other requirements of the Act." That is, if the members of the subcommittee meet for one of the three specified purposes, they are simply excused from compliance with the requirements applicable to advisory-committee meetings. Moreover, even the members of an advisory committee with no subcommittees could meet in groups (but apparently not call them subcommittees) and likewise escape all the requirements of the Act, so long as they only engage in one of the three specified functions. Inasmuch as these three specified functions seem to exhaust the functions of a "dependent" subcommittee--that is, essentially acting as staff for the full committee--it is not clear that GSA's regulations in fact require subgroups "that do not function independently of the full or parent advisory committee" to follow any of the requirements of the Act.

Nothing in the legislative history of the Act suggests such an exception from the public access and participation requirements for subgroups of advisory committees. Nevertheless, this exception, like a similar exception from the Government in the Sunshine Act applicable to meetings of subgroups of a multimember agency not formally delegated authority to take action for the agency, ²⁴⁸ seems to derive directly from the statutory language, [*490] even if perhaps by inadvertence. And although there have not been many judicial decisions addressing this issue, courts that have considered it have agreed with the conclusion that the dependent subgroups are not themselves advisory committees and are therefore not subject to the Act. ²⁴⁹

5. Statutory Exceptions to the Act

In addition to the several exceptions inferred from the Act, the **FACA** expressly excludes certain specific committees and certain types of committees from the definition of advisory

committee.²⁵⁰ Least problematic from an interpretive standpoint, the Act exempts any advisory committee established or utilized by the Central Intelligence Agency or the Federal Reserve System.²⁵¹ It also exempts the Advisory Commission on Intergovernmental Relations and the Commission on Government Procurement.²⁵² Subsequent statutes have exempted various newly created advisory committees from all or part of the Act.²⁵³ Rarely has Congress articulated a reason for exempting a specific advisory committee from the **FACA**. Thus, it is difficult to perceive an overarching principle governing why some committees should be subject to the Act and others not. More likely, exemptions are based on ad hoc, political considerations of the relative benefits and costs of subjecting new committees to the Act.

Another exemption provided by the **FACA** itself is for "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."²⁵⁴ The explanation for this exemption was that "it would be unwise both administratively, and even constitutionally, for Congress to impose Federal standards as to advisory bodies created at the State and local level."²⁵⁵ An early case interpreting this provision held it inapplicable to a national organization of state highway officials.²⁵⁶ The court questioned whether any national organization, even if made up of state officials, would qualify under the statutory language, but it was certain that **[*491]** the organization in that case was established for purposes beyond making advice and recommendations to state or local officials or agencies.²⁵⁷

Congress' most recent generic exemption from the **FACA** came in the Unfunded Mandates Reform Act of 1995,²⁵⁸ which as mentioned earlier exempts "meetings held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities,"²⁵⁹ if the meetings "are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration."²⁶⁰ Guidance provided to agencies by the OMB pursuant to the Unfunded Mandates Reform Act²⁶¹ broadly interprets this exemption to ensure that "the process required by the Federal Advisory Committee Act is not . . . a hindrance to full and effective intergovernmental consultation."²⁶² For example, despite the seeming limitation of the exemption to executive agencies,²⁶³ the OMB indicated that the exemption applies to "all Federal agencies subject to **FACA**."²⁶⁴ Moreover, although the statutory language limits the exemption to meetings between federal officials and elected state, local, and tribal officers (or their designated employees with authority to act on their behalf), the OMB's guidance seems to broaden this category by referring generally to state, local, and tribal "elected officers, officials, employees, and Washington representatives."²⁶⁵ Finally, whereas the statutory language seems to restrict the exemption to meetings "solely" for the purposes of exchanging views, information, or advice about "Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration," the OMB guidance eliminates any reference to the "sole" **[*492]** purpose of the meetings and does not limit exempt meetings concerning intergovernmental responsibilities to those regarding statutorily created federal programs. The OMB guidelines provide instead that the intergovernmental responsibilities "include those that arise . . . under statute, regulation, or executive order."²⁶⁶ In short, the guidance suggests that the exemption covers any meeting of the requisite people generally "concerning the implementation of intergovernmental responsibilities or administration."²⁶⁷ Given this broad interpretation of the Unfunded Mandates Reform Act's **FACA** exemption in a guidance document specifically authorized and required by Congress,²⁶⁸ courts might well rely upon it rather than search for other bases for exempting intergovernmental advisory bodies. For example, in *NRDC v. EPA*,²⁶⁹ where the EPA had established a Governors' Forum to assist it in addressing the problems encountered by states in carrying out their delegated responsibilities under the Safe Drinking Water Act,²⁷⁰ the court determined a meeting

between the Governors' Forum and the Administrator of EPA to be exempt from the **FACA** in part on the grounds that the group was an operational committee ²⁷¹ (a conclusion questionable on the facts). Under the OMB's interpretation of the new exemption in the Unfunded Mandates Reform Act, however, the meeting would clearly be exempt.

Finally, the **FACA** itself exempts any committee "composed wholly of full-time officers or employees of the Federal Government." ²⁷² The major question that has arisen under this exemption is when a person becomes a "full-time employee." The most notable case here is *Physicians & Surgeons*, ²⁷³ in which the Court held that the President's spouse--the only possible non-full-time officer or employee of the federal government on the Health Care Task Force--is a "full-time employee" of the federal government for purposes of the Act. That holding is unlikely to have much application beyond the case, but *Physicians & Surgeons* also involved a **FACA** challenge to a "working group" under the Task Force. In addition to the some 300 federal officers and employees involved in the working group, there were also 40 "special government employees." The term "special government employee" appears in Title 18 of the U.S. Code and means a person "employed to perform, with or without compensation, for not to exceed [130] days during any period of [*493] [365] consecutive days, temporary duties either on a full-time or intermittent basis." ²⁷⁴ The government's argument was that because the definition of special government employee refers to full-time employees with temporary duties, full-time employees under the **FACA** can include special government employees with a temporary assignment. ²⁷⁵ The *Physicians & Surgeons* majority rejected this argument, however, finding that the definition of "special government employee" for purposes of conflict-of-interest statutes was simply not relevant to the term "full-time employee" in the **FACA**. ²⁷⁶ Nevertheless, the court remanded the case to determine whether the special government employees were in fact "full-time." ²⁷⁷ Although the court did not give any particular guidance as to what "full-time" meant, it indicated that the Act must be interpreted consistently with its purpose, and that it would be inconsistent with the purpose of the Act if an agency could avoid its requirements simply by designating a person as a full-time, but temporary, employee for the days of a committee meeting. ²⁷⁸

C. Issues Concerning the Creation of an Advisory Committee

Distinguishing groups subject to the Act from those outside of its scope does not exhaust the salient issues currently surrounding the **FACA**. The actual creation of an advisory committee squarely within the Act's scope also implicates a range of issues, from those as mundane as satisfying information and other paperwork requirements, on the one hand, to issues concerning the Administration's substantive policy goals of controlling the costs of federal regulation and encouraging consensus-based regulatory decisionmaking on the other. Issues surrounding the mechanics of advisory-committee creation, the limitations on advisory-committee membership, and the constraints upon the establishment of advisory committees imposed by recent White House directives have in recent years proven to be especially thorny. [*494]

1. The Mechanics of Advisory Committee Creation

As explained above, an advisory committee cannot meet or otherwise become active until a charter has been filed with the head of the agency establishing the committee (or with the head of the GSA in the case of presidential advisory committees) and also with the standing committees of the Senate and House having jurisdiction over the relevant agency. ²⁷⁹ In addition, the GSA's regulations establish procedures for the filing of charters, according to which agency heads are instructed to submit charter proposals to the GSA's **FACA** Secretariat for review. ²⁸⁰ According to these regulations, agencies are to justify a proposed advisory committee by explaining why the committee is necessary, how its balance will be ensured, and so on. ²⁸¹ Upon review, the GSA notifies the agency head of its views of the proposed committee, ²⁸² although authority to establish an advisory committee ultimately resides with the agency. ²⁸³

President Clinton's EO 12,838 furthermore requires the OMB's permission to establish any new advisory committee. The Order, designed explicitly to reduce the number of agencies' advisory committees, instructs agencies not to create a new advisory committee "unless . . . the agency head (a) finds that compelling considerations necessitate the creation of such a committee, and (b) receives the approval of the Director of OMB." ²⁸⁴ Like the GSA chartering requirements, EO 12,838 and OMB Circular A-135 (EO 12,838's implementing directive) create layers of administrative requirements for agencies using advisory committees. Thus, an agency now must report annually to the OMB and the GSA on how the agency is meeting the goals of EO 12,838, including the agency's performance measures used to evaluate its existing committees, its plans for establishing any new committees, a summary of the agency's actions taken to ensure that EO 12,838's goal of committee reduction is achieved, and the results of the agency's review of its non-discretionary committees ²⁸⁵ --all of this in addition to the information agencies are required to maintain under section 8 of the **FACA** itself and the information which agencies must provide the GSA under section 101-6.1035 of the GSA's regulations to aid in the preparation of both the GSA's and the President's annual reports.

Currently, the GSA Secretariat, with help from a subgroup of the GSAnitiated Interagency Committee on the Federal Advisory Committee Act [***495**] (ICFACA)--specifically, the ICFACA Focus Group on GSA Regulations, Annual Report & Circular A-135 (Focus Group)--is undertaking efforts to eliminate duplicative reporting requirements imposed by the above. ²⁸⁶ The Focus Group is contemplating amendments to the GSA's Annual Report forms so that those forms can satisfy agencies' obligations under both the GSA regulations and OMB Circular A-135 at once. These efforts reflect agencies' perception that advisory-committee chartering requirements are more cumbersome than necessary to achieve effective agency oversight of advisory committees. ²⁸⁷ In fact, approximately half of the agencies responding to the survey questionnaire expressed the view that changes in the chartering requirements could make chartering easier. ²⁸⁸ The GSA's efforts to streamline the chartering and reporting requirements have been met with no resistance, nor is it easy to see why consolidation of those requirements is in any way undesirable.

2. Limitations on Advisory Committee Membership

Once an agency has determined that it will establish an advisory committee and has received OMB approval to do so, the agency is obliged to assemble committee members mindful of two sets of limitations. The first relates to regulatory, statutory, and possibly even constitutional limitations on the selection of particular committee members. The second relates to the membership of a committee taken as a whole.

a. The Selection of Individual Committee Members

First, Section 101-6.1009(j) of the GSA regulations instructs agency heads to ensure that the "interests and affiliations of advisory-committee members are reviewed consistent with regulations published by the Office of Government Ethics . . . , and [consistent with] additional requirements, if any, established by the sponsoring agency pursuant to EO 12764, the conflict-of-interest statutes, and the Ethics in Government Act of 1978, as amended." ²⁸⁹ Section 101-6.1009(j) does not create independent obligations as much as it serves as a reminder to agencies that existing ethics requirements listed there may be applicable to the selection of advisory committee members. These several ethics requirements are all closely related.

To take them one at a time, the Ethics in Government Act of 1978 (EGA) requires financial disclosure by officers and employees of the federal [***496**] government. ²⁹⁰ The EGA also created the Office of Government Ethics, charged by EGA to facilitate other agencies' compliance with federal conflict-of-interest laws. ²⁹¹ The Office in turn was given expanded

powers and greater independence by the Ethics Reform Act of 1989 ²⁹² and by EO 12731, ²⁹³ one of a series of executive orders concerning ethical conduct by executive-branch employees. ²⁹⁴ Pursuant to the Ethics Reform Act and EO 12731, the Office has issued regulations seeking to establish "a single, comprehensive, and clear set of executive-branch standards of conduct." ²⁹⁵ And EO 12731 itself sets forth general principles of ethical conduct for federal officers and employees by directing the head of each agency to supplement the Office of Government Ethics regulations, as appropriate, given "the particular functions and activities of that agency." ²⁹⁶

These various ethics statutes and regulations can implicate the selection of potential advisory-committee members in several ways. For example, section 208 of Title 18 (part of the EGA) makes it a crime for any "officer or employee" to participate in any way in a "decision, approval, disapproval, recommendation, or the rendering of advice, . . ." with respect to any "particular matter" in which that officer or employee has a financial interest. ²⁹⁷ Section 208 contains a waiver for "special Government employees serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position)" whose service is determined by the official responsible for the employee's appointment, "after review of the financial disclosure report filed . . . pursuant to the Ethics in Government Act of 1978," to be valuable enough to outweigh the potential for a conflict of interest. ²⁹⁸ This means that before an individual is appointed to an advisory committee, an establishing agency must first ensure that such an appointment will not create a conflict of interest. If a conflict of interest would or might be created, the agency must then determine whether that individual's service on a committee is important enough to trump potential conflicts of interest.

Similarly, section 219 of Title 18 of the United States Code makes it a **[*497]** crime for any "officer or employee of the United States" to act as "an agent of a foreign principal." ²⁹⁹ However, like section 208, section 219 has a caveat: An agent of a foreign government can be a government employee, if that employee is a "special Government employee" whose service is determined by the head of the employing agency to be "required in the national interest." ³⁰⁰ Again, an agency must determine whether a potential committee member acts as an agent of a foreign principal, as many lawyers with foreign-government clients may be deemed to do. If so, the agency must then determine whether national interests nevertheless counsel in favor of that individual's appointment.

These sections of the Ethics in Government Act apply to advisory committees insofar as an advisory-committee member constitutes a "special Government employee" under the EGA. The EGA defines "special Government employee" as "an officer or employee . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis . . ." ³⁰¹ On the surface, this definition might be thought to encompass all advisory committee members, though neither the EGA itself nor the executive orders governing ethical conduct address this issue explicitly. In any event, the Office of Government Ethics has issued a Memorandum to agencies instructing that advisory-committee members who are selected because of their individual qualifications, but not those selected as representatives of larger groups (such as an industry or a public interest group), are to be considered "special government employees" subject to the EGA. ³⁰² The Office has also provided guidelines to distinguish members selected to represent a group from those selected to act in their individual capacities. ³⁰³ Notwithstanding the Office of Government Ethics' Memorandum concerning special government employees, many agencies categorize all of their advisory-committee members as such, or none of them as such, rather than making case-by-case determinations. ³⁰⁴

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To satisfy these various requirements, agencies now have routine procedures for ascertaining possible conflicts of interests of potential advisory-committee members, as indicated in

agencies' responses to the survey questionnaire. ³⁰⁵ Typically, these procedures include providing potential committee members with ethics counseling or training either by agencies' designated agency ethics officials--senior ethics employees whose appointment is required by the EGA and who help oversee agencies' conformity with ethics requirements--or by agencies' general counsel offices or ethics committees. Most agencies also require potential committee members to file conflict-of-interest disclosure forms created by the Office of Government Ethics. ³⁰⁶ If the form reveals a conflict of interest, potential members are dismissed unless circumstances call for available waivers (or the conflict is removed through, for example, divestiture of an offending asset).

Whether agencies' current methods for detecting and dealing with potential conflicts of interest could be improved is open to question. Because this subject has been addressed elsewhere, ³⁰⁷ it will not be examined at great length here. A couple of observations, however, are in order. First, Public Citizen, among other groups, has called for reforming agencies' systems for protecting against unwanted conflicts of interest on the part of advisory-committee members. ³⁰⁸ Specifically, Public Citizen has advocated simplified, uniform, and publicly available conflict-of-interest disclosure for all advisory-committee members, a view which enjoyed the support of the Administrative Conference of the United States. Senate sponsors of S. 444, on the other hand, the last serious attempt to amend the **FACA** (prior to the Unfunded Mandates legislation), would have instead required only advisory-committee members who were federal employees to file conflict-of-interest reports, ³⁰⁹ and would have codified many agencies' existing practice of providing ethics counseling to advisory-committee members representing non-federal interests. ³¹⁰

Whether advisory-committee members should be required to file conflict [*499] of-interest reports which disclose their financial interest, and, a fortiori, whether members' reports should be available to the public, requires balancing administrative efficiency against openness and even-handedness. Mandatory conflict-of-interest reporting would add to the requirements that agencies already must satisfy in order to establish an advisory committee, thereby increasing agencies' paperwork and other administrative costs. In addition, potential advisory-committee members may not, for legitimate reasons, be eager to divulge personal financial information, particularly if it will become publicly available. Such reluctance would further add to agencies' burdens to the extent that it caused potential committee members to decline agencies' offers of appointment, thereby ultimately reducing the quantity or quality of advisory-committee advice. Furthermore, although uniform disclosure requirements certainly have some appeal, advisory committees in fact serve agencies in a wide range of ways over a wide range of issues. In light of this fact, it is not clear that uniform reporting and disclosure requirements would be desirable. It is at least plausible that the need for such requirements is not uniform across agencies. To the extent that such a lack of uniformity exists, some amount of agency discretion in this area may be justified. For some advisory committees, an ethics briefing may be perfectly adequate.

This is not to say, however, that uniform or publicly available disclosure would be undesirable, all things considered. Mandatory financial disclosure reports might alert agencies to some conflict-of-interest problems they might not otherwise discover during the course of an ethics training session or the like. Publicly available financial disclosure reports would likely further reduce the danger of illicit influence on advisory-committee activities by subjecting the relationships between committee members' financial interests and the subject-matter of their advice to public scrutiny. These benefits could be considerable. Even so, whether these advantages outweigh the disadvantages just described depends on how the balance is struck between goals of even-handedness and openness and goals of administrative efficiency.

b. The Committee as a Whole

Having determined the eligibility of particular committee members, the agency must also

ensure the "fair balance" of any committee, viewing its membership as a whole, at least according to the GSA's regulations. According to the Act itself, Congress is to ensure that committees have a "fairly balanced" membership whenever Congress considers legislation establishing or authorizing the establishment of advisory committees.³¹¹ In addition, section 5(c), "Responsibilities of Congress," states: "To the extent **[*500]** 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."³¹² Section 5(c) thus seems to impose some obligation on the part of agencies as well as to seek balanced advisory committee memberships. Yet, because section 5 specifies not agencies', but rather Congress's, responsibilities under the Act, and furthermore because 5(c) conditions its applicability with the language "to the extent possible"--without specifying who shall determine the extent to which observance of 5(b) is possible--it is not clear how much 5(b) itself actually constrains agencies.³¹³

However that may be, the GSA's regulations do instruct agencies to seek a balanced membership. Section 101-6.1007(b)(2)(iii) instructs agencies to include within their charter plans for ensuring that proposed committees are "fairly balanced."³¹⁴ And section 101-6.1015 similarly instructs agencies to include in their Federal Register notice announcing the establishment of an advisory-committee agency plans for attaining a "fairly balanced membership."³¹⁵ In addition, many agencies seem to take independent measures to ensure that their committees are fairly balanced, as suggested in several agencies' responses to the survey questionnaire. For example, the U.S. Commission on Civil Rights indicated that it seeks to balance its committees, among other ways, according to political party, race, age, and religion, while the Small Business Administration similarly selects its advisory committee members in partial consideration of ethnic, gender, and geographic balance.³¹⁶ In general, eleven of thirty-two responding agencies indicated that between 81 and 100% of their advisory committees have "at least one member who is also a member of a citizens interest group, consumer interest group, or environmental interest group."³¹⁷ One agency indicated that 61 to 80% of its advisory committees have such members, while twenty indicated that 60% or fewer of their committees have such members (5 agencies at 41-60%; 4 agencies at 21-40%; and 11 agencies at 0-20%).³¹⁸ **[*501]**

Agency efforts to achieve balanced committees are consistent with one of the purposes of the Act and, as such, are clearly unobjectionable. Whether those efforts are sufficient, on the other hand, is not perfectly clear. Unfortunately, however, the magnitude of such efforts is difficult to gauge, though agencies' conformity with sections 101-6.1007 and 101-6.1015 presumably goes far to ensure balanced committee membership. The only plausible external check on agencies' selection of committee members, besides the GSA (whose view is not decisive³¹⁹) and the OMB, is the courts. Whether courts can perform this oversight function depends ultimately on whether courts have meaningful criteria against which to assess the balance of a given committee, an issue to be examined below.

3. Constraints Imposed by White House Policy Directives

Much more problematic than both the paperwork requirements associated with notice and chartering and the constraints imposed by conflict-of-interest and balancing requirements, however, are the more recent constraints on the creation of advisory committees imposed by EO 12,838 and other White-House directives issued to further EO 12,838's goal of reducing the total number of advisory committees. As mentioned above, besides requiring the OMB's approval, the Order also conditions the establishment of an advisory committee upon a finding by the relevant agency head that "compelling considerations necessitate the creation of such a committee."³²⁰ In addition, the Order instructs all agencies to terminate "not less than one-third of the advisory committees . . . that are sponsored by the department or agency"³²¹ and to submit justifications to the GSA and the OMB for the continued existence of committees not terminated.³²²

But the new advisory-committee ceilings imposed under OMB Circular A-135, EO 12,838's implementing directive, constitute the greatest concern with the current administration of the Act for many agencies' Committee Management Officers. Under it, agencies are no longer able to establish advisory committees at their discretion, even if an agency determines that a committee could produce helpful advice and recommendations at a price worth its cost, or, indeed, even if "compelling considerations" necessitate the creation of a committee as anticipated in EO 12,838. Instead, agencies must establish committees subject to the number of available slots under their given ceilings. This means that agencies already at their ceilings cannot establish a new committee without abolishing one in existence.³²³ By the same **[*502]** token, agencies must allocate any remaining slots mindful of the fact that filling their slots will render them effectively unable to establish new advisory committees. In short, agencies no longer enjoy discretion to establish advisory committees determined to be necessary and effective at assisting them to carry out their statutory responsibilities. This limitation on agency discretion is currently a sore spot for agency advisory-committee management personnel. Thus, one agency response to the survey questionnaire suggested that "OMB Circular No. A-135 should be withdrawn,"³²⁴ while another wrote: "It has gotten to the point where the OMB is deciding for Department/agency heads whether or not they can seek advice from experts outside the Federal government regardless of the mandate/mission. I do not believe this was the intent of Congress when **FACA** became law."³²⁵ And the Federal Advisory Committee Management Association's first two recommendations in response to the survey questionnaire were that EO 12,838 and OMB Circular A-135 be withdrawn.³²⁶

Agency personnel are by no means alone in their disenchantment with the new advisory-committee ceilings. State and local government officials, grass-roots interest groups, and citizens groups have also expressed frustration at agencies' refusal to enter into communications with them on the grounds that to do so would trigger the **FACA's** requirements for agencies already at their advisory-committee ceiling. For example, the Department of Transportation recently held "town meetings" and "transportation summits" to discuss with interested parties certain highway-safety issues. Non-federal participants at these meetings, deeming them successful in addressing important highway-safety concerns, sought to complement those meetings by establishing certain "implementation groups" to follow-up on recommendations voiced at the meetings and to develop related recommendations. For a time, however, the Department resisted maintaining close contact with interested parties, out of concern that communications would trigger the **FACA** when the agency's ceiling gave it no room to establish a new advisory committee. As a result of the Department's resistance, those interested parties came to perceive the Department as a one-time listener, not serious about solving real regulatory problems, a perception harmful to the reputation of the Department and, by extension, the Administration.³²⁷ **[*503]**

D. Issues Concerning the Administration of an Advisory Committee

Once created, advisory committees must be administered under section 10 of the Act. Here too matters are more complex than might first meet the eye. As explained in Part I, section 10's requirements are intended to protect against the undue influence of outside persons on agency activity in two separate ways. One is to ensure the primary authority of the agency with respect to the committee, the other to open up the process to public access and accountability.

The **FACA** ensures that the agency retains its authority over the committee meetings by requiring that a designated employee of the agency attend each meeting and have the authority to terminate the meeting when he or she determines it is in the public interest.³²⁸ Moreover, as explained above, committee meetings can only be held on the call, or with the prior approval, of the designated employee, who must approve the agenda (except for Presidential advisory committees).³²⁹ These provisions have not been the subject of litigation or complaint by agencies or advisory committees.

The same cannot be said for the provisions ensuring public access and accountability. While the time and bureaucratic difficulties involved in chartering new advisory committees are the greatest source of complaint by agencies,³³⁰ the public access and accountability provisions also have been the object of agency criticism. First, committee meetings must be open to the public.³³¹ In order to make this requirement meaningful, the Act also requires that agencies give "timely notice" of the meetings in the Federal Register (except when the President determines otherwise for reasons of national security) and requires the GSA to provide by regulation for other types of notice to assure that potentially interested parties are notified.³³² The GSA's regulations specify a minimum of 15 days of notice in the Federal Register except "in exceptional circumstances," which must be explained in the notice,³³³ but they do not address other types of notice to assure interested persons are notified, notwithstanding the fact that many agencies routinely do use additional methods of notification. In fact, twenty-three of thirty-eight responding agencies indicated that they provide notice of committee meeting in fora other than the Federal Register, and sixteen of those agencies indicated that they do so "very frequently."³³⁴ For one example, the Environmental Protection Agency indicates that it notifies appropriate trade [*504] journals and maintains a mailing list of persons who have indicated they are "interested persons."³³⁵ However communicated, the notice must include a summary of the agenda.³³⁶

A second burden (from some agencies' point of view) of the public access and accountability provisions is the requirement that interested persons are entitled to "attend, appear before, or file statements with any advisory committee," subject to any reasonable rules GSA may prescribe.³³⁷ Those regulations specify that members of the public may file written statements with a committee, and, if the agency's guidelines so permit, may speak at the meeting.³³⁸ In addition, "detailed minutes" of each meeting must be kept, which must include a record of those present, "a complete and accurate description of matter discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee."³³⁹ As noted, the GSA's regulations require the chairperson of each committee to certify to the accuracy of the minutes.³⁴⁰ And any "records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee" must be made available to the public.³⁴¹

The burdens occasioned by these public access and accountability requirements are at least twofold. First, providing advance notice of what a committee will consider substantially limits the flexibility and spontaneity of committee meetings and may preclude a committee from considering a matter in a timely fashion. This burden is exacerbated by a decision of the D.C. Circuit to the effect that an agency must release committee materials so that "whenever practicable, parties have access to the relevant materials before or at the meeting at which the materials are used and discussed."³⁴² At the same time, the requirement that all discussions and information be made public may inhibit candid advice to the agency or candid discussion within the committee, or even reduce the available input to the committee if the person who would submit that information would be concerned about it being made public.

Fortunately, Congress recognized the need to keep certain information confidential and included exceptions to the open-meeting requirement and to [*505] the requirement that information be made public. Advisory committees may close meetings (or portions of meetings) to the public if the President or the head of the agency to which the advisory-committee reports determines that one of the exceptions to the Government in the Sunshine Act would apply.³⁴³ Such a determination must be made in writing and explain why the meeting (or portion thereof) qualifies for closing.³⁴⁴ While most agencies' advisory committees rarely close their meetings under one of the Sunshine Act's exemptions, a few agencies' committees do so regularly.³⁴⁵ Such committees must still issue a report (at least annually) summarizing "activities and such related matters as would be informative to the

public consistent with the policy of [the Government in the Sunshine Act]." ³⁴⁶ And even closed meetings must be announced in the Federal Register, with indication of why they are closed. ³⁴⁷ Furthermore, the GSA's regulations require consultation with the agency's general counsel, or the GSA's general counsel in the case of Presidential advisory committees, before the agency head (or President) makes a determination to close a meeting. ³⁴⁸

There would appear to be a certain rationality in applying the exceptions of the Government in the Sunshine Act to advisory-committee meetings. The same purposes of public access to (and some public participation in) the internal deliberations that lead to government action underlie both statutes, and there is much functional equivalence between meetings of an advisory committee and the meetings of a multimember agency. There may be reasonable questions whether the exceptions in the Sunshine Act go far enough (or too far), but the same issues would generally arise with respect to advisory committees.

On the other hand, despite the similarities between advisory committees and Sunshine Act agencies, there is one major difference: the committees only recommend, while agencies decide. Even if the purpose of public access is the same in both cases, its importance necessarily is less with respect to advisory committees, because there will be public access to (and often some participation in) the agency decision itself. Loss of access to or participation [*506] in the advisory-committee process may somewhat disadvantage those members of the public who would seek it, but it does not foreclose them altogether from ultimately affecting agency decisions. ³⁴⁹ Because the value in public access and participation is probably less with respect to recommendations than to the decision itself, the balance between the value of those interests and the value of the interests of confidentiality might turn out differently with respect to advisory committees, as compared to agencies subject to the Sunshine Act. This is particularly true in light of the underlying values behind the deliberative-process privilege. If the purpose of an advisory committee is to provide advice and recommendations to an agency or the President, and if it is true that candid and frank advice is inhibited by knowledge that it will be publicly disclosed, ³⁵⁰ the value of protecting the confidentiality of that advice, if not for the whole committee, at least for the internal deliberations of its members, would seem to be particularly high.

These arguments did not prevail, however, at the time of the **FACA's** passage--the Act expressly applies the exemptions of the Sunshine Act equally to advisory committees. The legislative determination that Sunshine Act agency deliberations and advisory-committee meetings should be treated as equivalents suggests that Sunshine Act case law would apply to advisory-committee meetings. This would include not only the case law on the exemptions to public meetings, but also the case law as to what constitutes a meeting subject to the Sunshine Act in the first place. Thus, for example, in *Federal Communications Comm'n v. ITT World Communications*, ³⁵¹ the Supreme Court held that a meeting of a subgroup of a Sunshine Act agency was not a meeting subject to the Act where the subgroup did not possess the "formally delegated authority to take official action for the agency." ³⁵² While obviously not directly applicable to the question of whether subgroups of advisory committees are subject to the **FACA**, the logic and policies reflected in the Sunshine Act and the Court's opinion would support a similar conclusion with respect to **FACA** subgroups. That is, if the subgroup merely reports to the full committee and cannot take action (make a recommendation) on behalf of the full committee or directly to an agency, the subgroup's meetings would not be subject to the **FACA**.

One area in which **FACA** advisory committees and Sunshine Act [*507] agencies may not be equivalent involves peer review panels. ³⁵³ While the **FACA's** main burden for these panels may lie in the chartering requirements, the public meeting requirements could also create major problems. ³⁵⁴ Yet, such problems have been largely avoided. The National Science Foundation, for example, held 474 advisory-committee meetings in FY 1994. ³⁵⁵ Of these, 399 were totally closed (the largest number of any federal agency), and 35 were partially closed. ³⁵⁶ For another example, the National Endowment for the Humanities held no

open advisory-committee meetings and totally closed 169 of its 173 meetings.³⁵⁷ Indeed, four agencies utilizing peer-review panels accounted for approximately 44% of all advisory-committee meetings,³⁵⁸ but they accounted for over 70% of all totally or partially closed advisory-committee meetings.³⁵⁹

According to the National Science Foundation, its peer-review panels are closed to protect personal privacy and proprietary and patentable information of researchers.³⁶⁰ At least in theory, the Sunshine Act would probably protect such information. Exemption (c)(4) protects "trade secrets and commercial or financial information obtained from a person and privileged and confidential,"³⁶¹ while exemption (c)(6) protects "information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy."³⁶² The first of these is identical to a FOIA exemption,³⁶³ while the second is slightly broader on its face than its comparable FOIA **[*508]** exemption.³⁶⁴ The case law, however, is not totally supportive of a broad ability to use these exemptions to close peer-review panels. The only case directly relating to peer groups is *Washington Research Project, Inc. v. Department of Health, Education, and Welfare*,³⁶⁵ a FOIA case, in which an organization sought the grant applications, the peer review's site-visit report, and the staff's summary of the peer review's reactions and recommendations for certain NIH-funded projects. The agency claimed that the information was exempt under exemptions 4, 5, and 6 of the FOIA.³⁶⁶ The court construed exemption 4 narrowly,³⁶⁷ however, holding that "a noncommercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce."³⁶⁸ This conclusion stemmed from a general view that non-profit organizations not engaged in profit-making ventures (e.g., colleges, universities, research institutes, hospitals, and state agencies) are not engaged in commercial activity.³⁶⁹

This is not to say that arguments do not exist for considering even this information to be potentially "commercial information." For example, in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*,³⁷⁰ the court held that information obtained by a non-profit industry group regarding nuclear reactor safety incidents was commercial information because "the revelation of the details of the operations of [its members'] nuclear power plants, whether in critical or laudatory contexts, could materially affect their profitability in multiple ways."³⁷¹ This language could be read to support the idea that any information that, if made public, would affect the financial interests of a person could be "commercial information." Both grant-application materials as well as peer-review reports, whether in hard science, soft science, or the arts, could well have this effect, as public knowledge of a **[*509]** proposed study or artistic endeavor could lead to another person using this information to beat the applicant to the study (if not to the grant). Certainly, public disclosure of negative information in the peer review could affect the financial well-being of the applicant beyond the effect on the application itself.³⁷²

The court of appeals in *Washington Research Project* did not address the exemption 6 question. An initial question is whose personal privacy this exemption protects--the applicants' or the peer reviewers'? The reviewers are expressing their personal opinions on the proposal, and it is possible that, if made public, those opinions might embarrass the reviewers. Nevertheless, this does not seem to be the type of invasion of personal privacy at which this exemption is aimed. Rather it seems more responsive to the concerns underlying the deliberative-process privilege encompassed by Exemption 5 of the FOIA, which does not exist in the Sunshine Act.³⁷³ More likely, the personal privacy of the applicants could be involved in the reviewers' comments on their reputations, professional qualifications, or competence in the field, which may be relevant in considering the grant proposals. Even here, however, there is some question about the applicability of the exemption. While negative assessments of the person's reputation might be embarrassing, it is not clear that a person's reputation among his peers is private information.³⁷⁴

On the other hand, reviewers' opinions of a person's qualifications and competence seem

much like what one would find in an employee's personnel file, which is clearly covered by exemption 6. Perhaps for this reason, the district court in Washington Research Project held that portions of the site visit reports and the panel's recommendations that would identify the applicants could qualify for deletion from released materials.³⁷⁵ To the extent, however, that the reviewers assess the merits of the proposal itself, as opposed to the person making it, there would seem to be little personal information involved at all. Nevertheless, the mere fact that a negative assessment would [*510] be embarrassing to the applicant might suggest that disclosure would invade his privacy. Even assuming the peer-review panel's meeting would implicate the applicant's personal privacy, its invasion would have to be "clearly unwarranted" in order to qualify for exemption 6. If the information was relevant to whether the grant should be awarded, a good case could be made that there is a sufficient public interest in its disclosure to make the invasion of privacy "warranted."

In light of this analysis, Thomas McGarity's conclusion that "while the case for closing peerreview panel meetings to the public under the **FACA** is plausible, it is not especially compelling,"³⁷⁶ seems well taken. Nonetheless, the agencies utilizing peer-review panels appear to close those meetings, in whole or in part, in the vast majority of cases, and the lack of judicial actions challenging that practice may suggest general acceptance of this way of doing business. What is clear, however, is that the law is not clear. Given the importance of peer review to the grant review process of a number of agencies and the large number of peer-review panels, this ambiguity of the law should be resolved. Preferably, this would be accomplished by Congress, but repeated calls to exempt or largely exempt peer review from the **FACA** have so far been unavailing.³⁷⁷ Moreover, if peer-review panels were to be categorically exempt from the **FACA**, there may be a need for some regulation of their procedures to avoid the potential problem of bias by the panels,³⁷⁸ and at least NSF is not enthusiastic about trading an exemption from the **FACA** for an unseen specific peer-review statute.³⁷⁹ After all, NSF and the other peer-review agencies are already avoiding much of the effect of the **FACA** by routinely closing committee meetings. The GSA, as the oversight agency under the Act, might establish clear rules and exclusions with respect to peer-review panels.³⁸⁰ Instead, the peer-review agencies have relied on an opinion from the Office of Legal Counsel (the OLC) in the Department of Justice in 1980,³⁸¹ the interpretive decisions of which are authoritative within the executive branch³⁸² and can carry weight with reviewing courts.³⁸³ The OLC's opinion, relying in part on two congressional committee reports indicating [*511] concern as to the applicability of the **FACA** to peer review and clinical trial preliminary review,³⁸⁴ and citing the district court opinion in Washington Research Project, concluded that "discussing a scholar's competence, a researcher's reputation, or an applicant's ability to carry through a project that he starts . . . could reveal highly personal matters as to which an individual has a strong privacy interest."³⁸⁵ The opinion acknowledged that this privacy interest had to be weighed against the "countervailing interests in openness,"³⁸⁶ and that the fact that certain private information might be discussed did not necessarily justify closing the entire meeting.³⁸⁷ It went on to say, however, that "it might be impossible to segregate in advance all of the policy-oriented, nonprivate topics from the particularized, highly private subjects,"³⁸⁸ suggesting that in such circumstances the whole meeting might have to be closed. While agencies should be able to rely upon the OLC for the proposition that discussions of applicants' personal information or qualifications is private in nature, the opinion does not provide blanket authority for closing all peer-review panel meetings.

Even if peer-review panel meetings could be closed, there remains the separate requirement in section 10(b) of the **FACA** that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be made available for public inspection" subject to the exceptions of the FOIA. As discussed above, exemptions 4 and 6 of the FOIA may be applicable to some materials. The FOIA, however, also contains a deliberative-process privilege in exemption 5,³⁸⁹ which could justify nondisclosure for certain types of materials. Exemption 5 by its terms only applies to "inter-agency or intraagency

memorandums or letters."

This exemption can arise in two different circumstances. The first would involve internal documents within an advisory committee. The second would be an internal document of the agency which is provided to an advisory committee. In either case, the question arises whether an advisory committee is itself to be considered an "agency" or part of an "agency" for purposes of [*512] the FOIA so that internal documents would be intra-agency documents and documents from an agency could be inter-agency documents. The case law is consistent that advisory committees are not themselves to be considered agencies.³⁹⁰ Prior to the **FACA's** amendment substituting the Sunshine Act exceptions for the FOIA exceptions as a ground for closing an advisory committee meeting, the courts were split on the issue of whether the internal deliberations of an advisory committee would qualify for the deliberative-process privilege contained in the FOIA's exemption 5.³⁹¹ While the 1976 amendments to the **FACA** clearly eliminated the deliberative-process privilege as a basis for closing meetings of an advisory committee, they left intact the exemptions of the FOIA, including the deliberative-process privilege of exemption 5, applicable to the various documents of an advisory committee. Of course, if the meetings of a committee must be open, it is less likely that the agency will attempt to maintain the confidentiality of documents used by the committee. Where, however, the agency can close the meetings under another exemption, such as exemptions 4 or 6, or where members of a committee meet privately under the theory that they do not constitute an advisory committee,³⁹² the desire to maintain confidentiality of these internal deliberations and documents might well remain. Here, the pre-**FACA** amendments decision of the court in Washington Research Project³⁹³ would seem to have continuing validity. In that case, the court held that the peerreview panels were not themselves agencies, but that they acted in the nature of staff to the Department of Health, Education and Welfare, and thus their internal deliberations were intra-agency documents subject to exemption 5.³⁹⁴ Nevertheless, the possibly unique aspects of peer-review panels and the context in which the case arose (when arguably the **FACA** was more protective of internal deliberations) may undermine its guidance to other circumstances today. And there do not appear to be any post-1976 judicial opinions on the subject.³⁹⁵ [*513]

Moreover, there seems to be a culture of disclosure of the internal documents of advisory committees without consideration of whether they are exempt from disclosure. Of course, an agency can always waive the deliberative-process privilege under exemption 5, and indeed it is Administration policy to waive the privilege unless there is a particular determination that disclosure would be harmful to the interest protected by the privilege.³⁹⁶ Accordingly, the release of internal advisory committee deliberative materials may well be the consequence of a general or particular determination that release does not have significant adverse consequences on the advice received by the agency.

To sum up, the public access and participation requirements of section 10 of the **FACA** impose significant burdens on agency use of advisory committees, providing another incentive for agencies to structure groups in a way to avoid "advisory committee" designation. Yet, the agencies that traditionally have complained the most about these requirements (the agencies sponsoring peer-review groups--for whom the Act's openness and accountability values are much less relevant relative to other agencies) have made at least some accommodations to the **FACA** and its requirements. Meanwhile, they have largely avoided its public-access and participation requirements under one or more Sunshine Act or FOIA exemptions.³⁹⁷ Access and participation values counsel in favor of preserving section 10's requirements for other agencies. At the least, relaxation of those requirements would involve significant trade-off between administrative-efficiency, on the one hand, and openness and participation, on the other.

E. Judicial Review of **FACA** Claims

Unless the **FACA's** requirements are merely hortatory, they must be **enforceable** by the courts upon the successful prosecution of a claim brought by the appropriate parties. Courts must be able to offer meaningful relief to parties with standing who bring justiciable claims under the Act. Yet, while standing requirements have not created insurmountable barriers to successful **FACA** challenges, several courts have raised serious questions about the [*514] justiciability of at least one of the Act's core requirements. At the same time, several other courts have raised important questions about the limited types of remedies that courts can grant, even for clearly justiciable claims brought by parties with solid standing to sue.

1. Proper Plaintiffs and Proper Defendants

In *Public Citizen*,³⁹⁸ the Supreme Court settled the issue of standing in the context of claims brought under section 10 of the Act. The ABA Judicial Selection Committee (as amicus) argued that the plaintiffs lacked standing to sue to enjoin the Justice Department and force compliance with the **FACA**. It rested its argument on two separate grounds: (1) that the plaintiff's grievance was a general, nonconcrete one; and (2) that a decision in their favor would not redress their alleged harm because the meetings they sought to attend and the records they sought to review would probably be closed to them under the provisions of the **FACA**.³⁹⁹

The Court disagreed on both counts. It explained that, as in the case of the FOIA, refusing to permit the plaintiffs to review the ABA Committee's records and minutes (much less to participate in its deliberations) constitutes a "sufficiently distinct injury to provide standing to sue."⁴⁰⁰ With respect to the argument that a remedy would not redress the plaintiff's harm, the Court simply noted that, were the plaintiffs to prevail, the Justice Department would have to file a charter for the ABA Committee and give notice of its meetings.⁴⁰¹ In addition, the Court further noted, while some of the ABA Committee's meetings might be closed under the Act, there was no reason to believe that all of them would be, and moreover the ABA Committee would be obliged to provide some records even where the **FACA's** exceptions applied.⁴⁰² Thus *Public Citizen* makes clear that parties seeking the application of the **FACA's** section 10 requirements have standing to sue under the Act.

The matter is somewhat more complicated, however, with respect to section 5. As explained above, whereas section 10 specifies agencies' duties to provide notice of the formation of advisory committees, keep minutes of committee meetings, and allow for public participation, section 5 speaks instead to Congress's duty to ensure that committees are fairly balanced and not unduly influenced by special interests (although the "fairly balanced" requirement is echoed in the GSA's regulations in reference to agencies). Thus, it is less immediately clear that parties seeking to sue for alleged [*515] violations of section 5 can satisfy standing requirements. Nevertheless, the rare cases that have addressed the question suggest that plaintiffs can, at least in principle, satisfy standing requirements to bring a claim under section 5.

The court in *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*,⁴⁰³ a leading case on the question, addressed the standing issue in the context of a challenge under section 5. The plaintiffs brought a section 5 claim on the grounds that the advisory committee upon which the President relied for advice about how to minimize the federal government's management costs consisted mainly of executives of major corporations, and included no public-interest advocates or beneficiaries of federal food-assistance programs notwithstanding that the committee's policy recommendations would likely have significant consequences for poor persons, and might affect the availability of federal food-assistance programs specifically. On the appeal of their claim, the appellate court strongly suggested that the plaintiffs had standing under 5(b)(2). Below, Judge Gesell had concluded that he saw no difference between section 10 and section 5 relevant to standing purposes,⁴⁰⁴ noting an earlier appellate court case in which the court stated in dicta that a plaintiff denied actual representation on an advisory committee would have standing

under the **FACA**.⁴⁰⁵ The appellate court vindicated Judge Gesell's conclusion by suggesting that, in the appropriate circumstances, plaintiffs could have standing under section 5 as well as section 10.⁴⁰⁶ That suggestion comports with an earlier decision in which the same court held that the particular plaintiffs before it did not satisfy standing requirements to bring claims under section 5 without anywhere suggesting that standing could never be satisfied for a section 5 claim.⁴⁰⁷

Of course, identifying those parties with standing to sue under the **FACA** still leaves open the question of who may be sued under the Act. Fortunately, [*516] this issue is fairly straightforward. The language of the Act quite clearly creates obligations on the part of agencies, not on private parties. Thus, the plain meaning of the Act strongly suggests that violations of the **FACA** gives rise to claims against agencies and not against private parties allegedly in violation of the **FACA**.

Any doubt regarding who may be a defendant in **FACA** was settled in *Center for Auto Safety v. Cox*⁴⁰⁸ and *Washington Legal Foundation v. American Bar Association Standing Committee on the Federal Judiciary*.⁴⁰⁹ In *Center for Auto Safety*, the plaintiffs brought suit against the Administrator of the Federal Highway Administration to prohibit the Administrator from relying on the American Association of State Highway and Transportation Officials (AASHTO) for advice or recommendations on certain regulations concerning highway safety. While the appeals court agreed with the plaintiffs that the district court had correctly concluded that the AASHTO was an advisory committee governed by the Act and thus subject to its requirements, the court observed in passing that the Act regulated the agency in reliance on advisory committees, and not third parties such as the AASHTO which themselves constitute advisory committees.⁴¹⁰

Washington Legal Foundation, a predecessor to *Public Citizen v. Department of Justice*, tested this proposition. There, the plaintiffs brought a **FACA** case against the ABA Committee, seeking to enjoin the Committee from holding meetings in violation of section 10 of the Act. The ABA Committee moved to dismiss, arguing among other things that the plaintiffs lacked standing and that the **FACA** could not serve as a basis for a cause of action against a private entity.⁴¹¹ After determining that the plaintiffs had standing to sue, the court nevertheless granted the Committee's motion to dismiss on the grounds that the **FACA** does not sanction suits against private parties. Citing *Center for Auto Safety* and noting that the language of the Act creates obligations only on the part of government officials,⁴¹² the court explained:

If the Act regulates the government's use of the advisory committee and not the committee itself, it follows that the proper defendant in a suit brought to enforce the Act is the government, not the advisory committee "utilized" by the government. . . . Phrased differently, it is the government's involvement with the committee that triggers the Act, not actions of the committee taken independently of the [*517] government. . . . The proper remedy for a violation of **FACA**, therefore, is an order requiring the government either to cease its undertakings with the advisory committee or to ensure that the advisory committee is brought into compliance with the Act.⁴¹³

The court's conclusion here is uncontroverted in the **FACA** case law. Thus, it seems clear that whatever uncertainties surround the standing issue under section 5,⁴¹⁴ suits under section 5 or section 10 are properly brought against the agency allegedly relying on an advisory committee governed by, but allegedly in violation of, the Act.

2. Justiciability and Section 5(b)

As explained in Part I, the **FACA** seeks to ensure that the advice and recommendations federal decisionmakers receive from non-governmental parties are even-handed. In particular, section 5(b)(2) provides that Congress, in considering legislation establishing or

authorizing the establishment of an advisory committee, must "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented . . . by the advisory committee." ⁴¹⁵ Section 5(b)(3) additionally requires that any such legislation "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[.]" ⁴¹⁶ Similar requirements find expression in the GSA regulations. ⁴¹⁷ **[*518]**

Although the avoidance of bias is among the core aims of the **FACA**, it is not clear whether that aim can be vindicated through **judicial review**. Indeed, the justiciability of section 5(b) constitutes one of the thorniest issues of the **FACA** case law. More than one court has suggested that section 5(b)(2)'s "fairly balanced" requirement presents a non-justiciable issue. At the same time, at least one court has indicated the same with regard to section 5(b)(3)'s language proscribing undue "special interest" influence.

The position that section 5(b)(2) does not provide grounds for a justiciable claim is represented by Judge Silberman's concurring opinion in *Public Citizen v. National Advisory Comm. on Microbiological Criteria*. ⁴¹⁸ In that case, a D.C. Circuit panel affirmed the district court's dismissal of a section 5(b)(2) claim. *Public Citizen* brought the case alleging that the National Advisory Committee on Microbiological Criteria did not contain members who would adequately represent consumers' interests, and thus was not "fairly balanced" as contemplated in section 5(b)(2). The district court found that the plaintiffs had offered no specific evidence that their viewpoints were not adequately represented, and therefore dismissed the case. ⁴¹⁹ The appeals court affirmed, but the panel, deeply split on both the justiciability and the merits of the case, issued three separate opinions. One judge concluded that the plaintiffs' claim was nonjusticiable, the second concluded that the claim was justiciable but lacked merit, and the third concluded that the plaintiffs' claim was justiciable and meritorious.

According to Judge Silberman, the plaintiffs' claim was nonjusticiable because the court lacked any way of determining what constitutes a "fairly balanced" committee. He wrote, "For any claim under section 5(b)(2) of the **FACA** to be justiciable . . . we must first conclude that Congress provided 'a meaningful standard against which to judge the agency's exercise of discretion.'" ⁴²⁰ Because he perceived "no principled basis for a federal court to determine which among the myriad points of view deserve representation on particular advisory committees," ⁴²¹ Judge Silberman concluded that whether such a committee is fairly balanced is a question committed entirely to the Secretaries' discretion and is thus not subject to **judicial review**. ⁴²²

The other two judges in *Microbiological Criteria* concluded that claims under 5(b)(2) are justiciable. ⁴²³ They disagreed with Judge Silberman **[*519]** specifically regarding the significance of an earlier footnote in *National AntiHunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*. ⁴²⁴ There, in affirming the district court's decision in *National Anti-Hunger Coalition*, the appellate court wrote:

As the legislative history makes clear, the "fairly balanced" requirement was designed to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee. When the requirement is ignored, therefore, persons having a direct interest in the committee's purpose suffer injury-in-fact sufficient to confer standing to sue. ⁴²⁵

This footnote was cited in all three of the *Microbiological Criteria* opinions. Judge Silberman argued that this passage constituted dicta, since the *National Anti-Hunger Coalition* court had held that it did not need to settle the standing question in order to affirm the district court's decision in that case. ⁴²⁶ The other two judges gave this footnote more weight, and therefore determined that the plaintiffs did have standing. ⁴²⁷

Despite the lack of guidance from above, the lower courts have been consistent in denying claims based on alleged lack of balance. ⁴²⁸ In *Doe v. [*520] Shalala*, the court stated without discussion that "the balance of judicial opinion holds that, by reason of the lack of judicial standards to address alleged 'imbalances' of membership on such committees, courts will not decide the issue; it is nonjusticiable." ⁴²⁹ And, in *Public Citizen v. Department of Health and Human Servs.*, the court addressed the justiciability of a claim under section 5(b)(2), setting the stage with the following apt observation: "Unfortunately, the decisions that have been rendered thus far (concerning the 'fairly balanced' requirement of 5(b)(2)) have resulted in a legal quagmire with no coherent guidelines for district courts to follow." ⁴³⁰ As if out of frustration, the court in *Public Citizen v. Department of Health and Human Servs.* cast its vote against the justiciability of section 5(b)(2) claims. The court did discuss the "functionbased" approach to section 5(b)(2) which the opinion in *National Anti-Hunger Coalition* seemed to suggest. According to this function-based approach, a court considering a section 5(b)(2) claim would take into account the function of the advisory committee in question when determining whether that advisory committee included members of all interests directly affected by its deliberations. However, the court rejected the function-based approach on the grounds that it provided district courts with insufficient guidance. ⁴³¹ In so doing, the court asked:

Is the Court to engage in continuous oversight so that for each separate "function" that a particular committee engages in, the Court can reassess whether the committee was "fairly balanced" to engage in that function? Is the Court to examine the background of every person on the committee to determine whether anyone already represents the interests of the person or group challenging the committee's composition? ⁴³²

Arguing that the judicial precedent with respect to the justiciability of section 5(b)(2) did not compel the conclusion that the plaintiffs' claims were justiciable, ⁴³³ the court quoted from Judge Silberman's opinion in *Public [*521] Citizen v. National Advisory Comm. on Microbiological Criteria for Foods* ⁴³⁴ and concluded that those claims were not justiciable, with a parting invitation to the appellate court to resolve the matter. ⁴³⁵ More recently, the district court of the District of Columbia bemoaned the lack of clear circuit guidance but had little difficulty in holding that section 5(b)(2) was not justiciable. ⁴³⁶ In the words of Judge Sporkin:

For the Court to become entangled in determining what represents a "fair balance" would require the Court to arbitrarily substitute its judgment for that of the agency. No meaningful standards are available to assist the Court in making such determinations. In short, courts should not involve themselves in what is really an executive branch function. ⁴³⁷

If few courts have squarely considered the justiciability of section 5(b)(2), even fewer courts have addressed the justiciability of section 5(b)(3). *Microbiological Criteria* is one of the few. As with respect to section 5(b)(2), Judge Silberman argued that 5(b)(3) also presents a nonjusticiable question. First, section 5(b)(3), "on its face, is directed to the establishment of procedures to prevent 'inappropriate' external influences on an already constituted advisory committee by outside special interests or the appointing body." ⁴³⁸ Second, like section 5(b)(2), section 5(b)(3) supplies no meaningful standard for judicial enforcement because it is dependent on the meaning of a value-laden, undefinable term. ⁴³⁹ Here too, however, his colleagues agreed that the issue was justiciable, but split on the merits of that question in the case before them.

Whatever uncertainty attaches to section 5(b)(3) as a basis for a judicially cognizable claim, it should be noted that this uncertainty probably overlaps substantially with that surrounding section 5(b)(2). This is true because sections 5(b)(2) and 5(b)(3) are probably best

understood largely as flip sides of the same coin: If an advisory committee is truly "fairly balanced," then it is difficult to see how it could be unduly influenced by a "special interest." The [*522] inverse (though probably not the converse) ⁴⁴⁰ also seems true: If a committee is unduly influenced by a special interest, then it is not fairly balanced. In this light, it is not clear that plaintiffs would benefit from standing to bring a justiciable claim under section 5(b)(3) if they can satisfy standing requirements to do so under section 5(b)(2). Additionally, if plaintiffs cannot satisfy standing under section 5(b)(2), it is not clear how they could do so under section 5(b)(3). Perhaps for this reason Judge Edwards in *Microbiological Criteria* seemed to consider standing under 5(b) without specifically distinguishing 5(b)(2) from 5(b)(3).

Of course, whether a claim under section 5(b) is justiciable depends upon whether there is law for courts to apply. ⁴⁴¹ Judges who have answered that question in the affirmative have stated that, in view of both the language of section 5 and its legislative history, courts are to consider the functions of the advisory committee in question and the interests directly affected by that committee given its function. ⁴⁴² Judges who have answered the question in the negative have, not without some justification, found these inquiries to be uselessly open-ended. ⁴⁴³

3. Forms of Relief for Violations of Section 10

As explained above, several courts have raised questions about the **FACA's** compatibility with separation-of-powers principles, questions which have at times influenced courts' interpretations of the Act. Other times, however, such concerns have instead affected the remedies courts have been willing to grant litigants bringing a successful **FACA** claim. Because the **FACA** itself does not specify what remedies are to be granted for its violation, the issue here is perceived as one of possible judicial, rather than legislative, infringement on executive power.

Northwest Forest Resource Council v. Espy ⁴⁴⁴ provides the best example. There, the plaintiffs (the Northwest Forest Resource Council) argued that the FEMAT, an interagency organization composed of numerous subteams and [*523] subgroups whose non-government participants included private contractors, ⁴⁴⁵ constituted an advisory committee subject to the Act. The FEMAT was organized during the events immediately surrounding President Clinton and Vice President Gore's visit to Portland, Oregon for a oneday "Forest Conference," mentioned above, designed to negotiate a solution to the long-standing controversy between environmentalists and foresters concerning the use of federal forest lands.

Because the FEMAT's membership included individuals other than full-time employees of the federal government, the **FACA** applied to the group. Accordingly, the court agreed with the plaintiffs that the "FEMAT was subject to **FACA**, and that FEMAT was convened and did its work in violation of the Act's requirements for the proper conduct of 'advisory-committee' business." ⁴⁴⁶ The past tense here is what created the problem for the court. For the plaintiff's success on the merits naturally raised the question of what remedy the court would grant for the Act's previous violation. Given that the violation was no longer ongoing--the FEMAT had concluded its work and submitted its report--the only nondeclaratory remedy the court could grant was to enjoin the Administration from relying upon the FEMAT report in promulgating regulations implementing the Administration's "Forest Plan for a Sustainable Economy and a Sustainable Environment." The President chose this plan from among a list of options which were developed by the FEMAT and contained in its Report. The problem, according to the *Espy* court, was that such a remedy would raise a serious separation of powers question, for the court doubted its constitutional ability to restrict the President or the Cabinet from relying on any advice, from any source, "however irregular." ⁴⁴⁷

To avoid that difficult separation-of-powers issue, the *Espy* court provided only declaratory

relief. This relief did not interfere with the President's ability to solicit or act upon outside advice. Pragmatic concerns clearly influenced the court's decision:

Both the Supreme Court majority in *Public Citizen* and the D.C. Circuit majority in *[Physicians & Surgeons]* were able, by adroit semantics and near-clairvoyant discernment of legislative intent, to avoid that drastic result in the circumstances of those cases, but not, however, without difficulty, and in doing so incurred stern disapprobation from concurring brethren who were less squeamish. . . . However, this Court has rejected the opportunities offered by defendants to engage in similar creative statutory construction and interpretation, and no others have manifested themselves [*524] spontaneously. Nevertheless, the importance of avoiding the constitutional issues to the last, acknowledged by both the *Public Citizen* and *[Physicians & Surgeons]* courts, must still be respected if at all possible, and the avenue by which escape lies for this Court is found in the measure of the remedy to be given on the plaintiff's complaint. ⁴⁴⁸

Because the **FACA** prescribes no specific remedies for its violation, the court went on to explain, the court is left to exercise its own general equitable powers in fashioning a remedy. Those equitable powers, in turn, must be invoked subject to constitutional considerations. Thus, the court reasoned, constitutional considerations counsel the award of only declaratory relief to the successful plaintiffs. ⁴⁴⁹ According to the *Espy* court: "An injunction would exceed the injury presently to be redressed. There is nothing in the record to suggest that the FEMAT Report, or its advice and recommendations to the President, would have in any way been altered had **FACA** been complied with to the letter." ⁴⁵⁰

However, the case law provides somewhat mixed signals with respect to the judicial remedies available to plaintiffs bringing successful claims under section 10 of the Act. While not all courts have followed the *Espy* court's escape route, two appellate courts have affirmed the denial of injunctive relief in other cases. ⁴⁵¹ On the other hand, the Court of Appeals for the Eleventh Circuit has not shied away from granting successful plaintiffs injunctive relief for violation of the **FACA**. In *Alabama-Tombigbee Rivers v. Department of the Interior*, ⁴⁵² the Interior Department's Fish and Wildlife Service (FWS) had proposed a rule listing Alabama Sturgeon on the endangered species list, following a report supplied to the FWS by a scientific advisory panel organized by the FWS, under directions from the Secretary, to assess the status of the Sturgeon. The plaintiffs were a coalition of thirty-four businesses and other organizations that operate on the Alabama and Mississippi Rivers. Concerned about the objectivity of the panel's membership, they brought a **FACA** claim in district court. The district court ruled in their favor and enjoined the FWS from "publishing, employing and relying upon the Advisory Committee report . . . for any purpose whatsoever, directly or indirectly, in the process of determining whether or not to list the Alabama Sturgeon as an endangered species." ⁴⁵³

The Eleventh Circuit affirmed. Sharing with the *Espy* court the premise [*525] that, because the **FACA** prescribes no specific remedy for its violation, courts must rely on their equitable powers when fashioning relief, the appellate court concluded that "to allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act." ⁴⁵⁴ Furthermore, the court added, only injunctive relief "carries the sufficient remedial effect to ensure future compliance with the **FACA's** clear requirements." ⁴⁵⁵ In reaching this conclusion, the court did not indicate whether in its view the importance of injunctive relief trumped any separation-of-powers concerns, or whether instead separation-of-powers concerns were simply misplaced. ⁴⁵⁶

Yet, *Alabama-Tombigbee Rivers* represents the minority approach. In a post-*Espy*, consolidated case, *Seattle Audubon Society v. Lyons* ⁴⁵⁷ (again challenging the legality of the FEMAT's forestmanagement plan, but this time by environmental groups rather than by the loggers' association), the court specifically considered and then rejected the plaintiffs' request for an injunction prohibiting the government from relying upon the FEMAT's report.

The Seattle Audubon Society court determined that injunctive relief would be inappropriate in large part because the FEMAT report "was circulated during a ninetyday public comment period and was subjected to public comments and criticisms, including those by [some of the plaintiffs]." ⁴⁵⁸ Similarly, in *National Nutritional Foods v. Califano*, after having held that the FDA violated the **FACA** by convening a group of nutrition experts who developed proposals to respond to perceived dangers of liquid protein diets, ⁴⁵⁹ the court refused to enjoin the FDA from using the fruits of the experts' deliberations. The court explained, in a passage later quoted by the Seattle Audubon Society court ⁴⁶⁰ :

No court has held that a violation of **FACA** would invalidate a regulation adopted under otherwise appropriate procedures, simply because it stemmed from the advisory committee's recommendations, or even that pending rulemaking must be aborted and a fresh start made . . . Applicable rulemaking procedures afford [***526**] ample opportunity to correct infirmities resulting from improper advisory-committee action prior to the proposal. ⁴⁶¹

Indeed, even in *Alabama-Tombigbee Rivers*, the court did not compel the agency to "undo" anything it had done; the court certainly did not invalidate a promulgated rule. Rather, the court enjoined the agency from using the panel report before the agency had distributed and formally relied upon that report's conclusions. In this light, *Alabama-Tombigbee Rivers* represents one end of a continuum more than it represents an isolated alternative approach to the remedies question, for courts have consistently suggested that injunctive relief is appropriate in the context of a challenge brought contemporaneously with the offending advisory committee's activities. So in *Seattle Audubon Society*, for example, the court remarked that the "**FACA** can and should be enforced by injunctive relief during the process; that is, by an order requiring that a proposed or existing committee comply with the statute." ⁴⁶² This approach makes considerable sense, for injunctive relief in the context of an ongoing **FACA** violation is a remedy commensurate with the injury in question. It is most unlikely, for example, that courts would hesitate to enjoin an agency from holding advisory-committee meetings in violation of section 10's various openness requirements until the agency ensured compliance with those requirements.

III. Conclusions and Recommendations

The foregoing analysis of the Federal Advisory Committee Act yields mixed results, but the results are more positive than negative: By and large, the **FACA** and its regulations appear to serve the Act's original purposes in an effective and efficient manner. Nothing in the Act's case law, and nothing that agency personnel with the greatest understanding of how the **FACA** is administered have identified, suggests any basis for a fundamental restructuring of its basic framework. Furthermore, while the Act has over the years raised several significant constitutional questions, the Supreme Court's interpretations of "utilize" and the Unfunded Mandates Act's exemption of state and local officials (certainly as interpreted by the OMB) go far to avoid the most serious constitutional problems the **FACA** may have once presented.

What is more, according to a recent Annual Report of the President, ⁴⁶³ the **FACA's** administrative expenses cost the federal government approximately \$ 133 million annually, a trifle for the quantity and range of advice and [***527**] recommendations that price seems to buy. ⁴⁶⁴ Whether or not fully appreciated by those who passed the Act, the main virtue of the **FACA** is that it enables the federal government to solicit what is tantamount to free advice.

The Act, however, is not only an economic bargain. It also seems to promote openness, participation, and accountability in regulatory decisionmaking, thus enhancing the political legitimacy of the administrative state. Additionally, the Act helps to ensure that such participation is unbiased and evenhanded, thereby minimizing the danger of illicit influence on agency decisionmaking. These virtues are interdependent. Because self-serving advice, however cheap, is no bargain, it is crucial that balance, even-handedness, and openness

continue to be promoted in advisory-committee activities.

While the interpretation, implementation, and administration of the Act have for the most part contributed to the success of the **FACA**, it is also true that a review of the case law and the results of the agency survey suggest several innovations that could improve the Act's effectiveness while advancing its underlying goals. Although some imaginable innovations would require difficult trade-offs between administrative-efficiency values, on one hand, and participation and openness values, on the other, certain improvements would largely further both sets of values simultaneously. Such innovations warrant serious consideration--by Congress, the GSA, the White House, the courts, and by agencies themselves.

First of all, the scope of the Act has generated considerable uncertainty. This uncertainty is partly due to elements of the definition of "advisory committee" that are unclear, and in part to the improbable implications of giving that language its full literal effect (not only with respect to constitutional issues that might then arise but also from inferred imperatives of normal, and desirable, government practice). Because advisory committees, without differentiation among them, are subject to the full range of the Act's requirements, some courts have often strained to interpret the Act's language to exempt certain groups or types of groups providing advice to the government from strictures that would effectively prohibit the government from obtaining benign outside counsel. Other courts, however, have at times evidenced a somewhat different balance between the value of facilitating interchange between outside groups and the government and the value of "government in the sunshine." These courts seem more willing to give broad effect to the definition in order to bring more groups under the umbrella of the **FACA**. Unfortunately, these seemingly competing approaches leave agencies somewhat confused, a confusion aggravated by courts' unwillingness to defer to the GSA's regulations interpreting the Act. [***528**]

The relative values of openness and the facilitation of communication between agencies and outside parties are appropriately determined by Congress. The **FACA's** current definition of "advisory committee," however, is not a convincing statement of such a determination. Moreover, it is probably true that attitudes with regard to those values have changed since the Act's passage. Congress should clarify and update the definition of "advisory committee," making perfectly clear, among other things, that parties like technical peer reviewers and ordinary government consultants are not subject to the Act.

In the meantime, the GSA, as the agency charged with overseeing the Act, should provide leadership with respect to the definition of advisory committee. Specifically, the GSA should amend section 101-6.1003 of its regulations both to bring the definition of "utilize" in that section into harmony with the case law on the meaning of "utilize" and to emphasize that under Public Citizen agencies are quite free to receive advice from previously established, independent groups. The GSA should also amend subsection 101-6.1004(I) to clarify the distinction between advice, on the one hand, and facts or information, on the other. Similarly, the GSA should reexamine subsection 101-6.1004(i) to ensure its consistency with recent case law indicating that "consensus" is not a sine qua non for triggering the Act. And finally, the GSA should promulgate regulations making clear that peer reviewers and contractors are outside of the Act's scope unless they behave as ordinary advice-giving members of an advisory committee. GSA codification of judicial signals concerning the Act's applicability would help to make clear both that ordinary consultants are not subject to the Act, and that simply hiring a consultant to behave as an advisory-committee member will not suffice to avoid the Act. Such an approach would advance administrative-efficiency goals by avoiding duplicative administrative requirements while preserving the Act's openness and accountability goals by ensuring that agencies cannot short-circuit the Act with a contract. Indeed, in each of these areas, more guidance from the GSA with respect to activities outside of the Act's scope would avoid unnecessary confusion without jeopardizing other important values such as balance and openness.

The GSA should also promulgate new regulations permitting agencies to exploit new technologies such as electronic bulletin boards in order to provide cheaper and more effective notification to interested parties of the pending establishment of an advisory committee, as well as notice of advisory-committee meetings and agenda. Existing notice requirements are both too narrow and too broad. They are too narrow in being limited to the Federal Register. And despite the **FACA's** requirement for GSA regulations to provide for broader notice, GSA has not provided guidance. Regular targeted notice in additional fora would likely mean more effective notice. Parties interested in advisory committees that potentially affect them would not have **[*529]** to rely exclusively on their own monitoring of the Federal Register to discover whether meetings are planned. Instead, they could, for example, monitor the appropriate electronic bulletin board ⁴⁶⁵ --a cheaper and much less cumbersome task. To that extent, encouraging more targeted notice techniques requires no painful trade-off between efficiency and participation values.

At the same time, the **FACA's** notice requirements are too broad in that they do not provide for alternative forms of notice in lieu of Federal Register publication. This problem is particularly acute in the case of meetings which are regularly closed, as is true with many peer-review panels. ⁴⁶⁶ Moreover, some proposed advisory committees' activities will affect only a narrow set of interests, with respect to a rather narrow policy issue or in a discrete geographical area. In both such cases, the Federal Register's net is wastefully wide. ⁴⁶⁷ Arguably, a need remains for formal notice of meetings, whether open or closed. ⁴⁶⁸ However, the cost and inefficiency of Federal Register notice suggests that in this electronic age a different form of formal notice (possibly posting on the agency's Internet home page, for example) should suffice. Of course, this issue is hardly limited to notice of the **FACA** meetings or the **FACA** at all. Nevertheless, Congress (or the GSA) need not wait to make global solutions before improving this aspect of the Act.

Accordingly, subsections 101-6.1015(a)(1) and 101-6.1015(b) of the GSA's regulations should be revisited. If necessary, Congress should amend section 9(a)(2) of the Act for the same reason. Employed appropriately, targeted notice techniques could minimize the costs of the Act's requirements while at the same time facilitating participation in advisory-committee activities by reducing interested parties' burdens of keeping abreast of those activities. Agencies should employ alternative notice techniques whenever, but only whenever, the activities of a particular advisory committee would interest only a narrow constituency and notice in the Federal Register would therefore be wasteful. Furthermore, agencies employing alternative notice techniques should have the burden of establishing that their notice was adequate to reach potentially interested parties. Notice requirements for meetings that will be closed should also be relaxed, again by the GSA and, if necessary, by Congress. Their costs bring no openness benefits. **[*530]**

In addition, the GSA should strive to consolidate agencies' chartering and reporting obligations under section 9 of the Act, sections 101-6.1007, 101-6.1009(c), 101-6.1013, 101-6.1017(b), and 101-6.1035 of the regulations, as well as those under EO 12,838 and OMB Circular A-135. Agencies' reporting obligations could be profitably streamlined given that in several cases, these requirements ask for redundant information. As agency committee management officers and the GSA have recognized, the information required under OMB Circular A-135 and that required for the GSA's annual report overlap substantially. Streamlining would save on administrative costs without jeopardizing openness and accountability; redundant paperwork requirements compromise the administrative efficiency of advisory committees while achieving no offsetting benefits in the form of greater openness or participation. The efforts of the Interagency Committee on Federal Advisory Committee Management in this regard should be encouraged and promoted.

Finally, and not least of all, the GSA should add to or amend its regulations to provide courts with law to apply to determine whether agencies have satisfied the "fairly balanced" requirements of section 5(b)(2) of the Act and sections 101-6.1007(2)(iii) and 101-6.1015(a)

(1) of the regulations. The current judicial treatment of the "fairly balanced" requirement is not only unnecessarily confusing but it also seriously jeopardizes the Act's openness and participation goals. Specifically, the GSA should consider adding a subsection to 101-6.1009, "Responsibilities of an agency head," providing specific criteria according to which agencies establishing an advisory committee can ensure that proposed committees are fairly balanced in furtherance of one of the Act's central purposes. Such a subsection could instruct agencies to consider first the interests likely to be directly affected by an agency's ultimate approach to the issue with respect to which the agency seeks advice or recommendation, taking into account factors such as: (i) the interests that are most directly affected by that agencies' decisions, (ii) the interests that are most directly implicated by the specific statute(s) or regulation(s) under which the agency is contemplating action about which it seeks advice/recommendations, (iii) the interests that typically seek to influence agency decisions of a similar nature through participation in the kinds of agency decisionmaking processes employed once the agency decided to act in one way or another on the matter, and (iv) the identity of parties who have in the past indicated an interest in advisory-committee activities concerning related subject matter. Such a subsection might further instruct agencies to compile a list of parties who commonly represent the interests so identified, and to communicate with representatives of those parties concerning the proposed establishment of an advisory committee, much as is already contemplated in section 101-6.1015. **[*531]**

Admittedly, whether an agency satisfied such guiding criteria would present a fact-specific question, not resolvable in the abstract. But in the context of a particular case, regulations providing agencies with instructions on the establishment of a "fairly balanced" committee would provide a judicial metric according to which section 5(b)(2) claims could be assessed. Moreover, such a metric need not be finely calibrated. Precision is not necessary for a 5(b)(2) claim to be justiciable; close questions could be resolved in favor of the agency, leaving the appointment of committee members largely, but not entirely, to the discretion of the appointing agency official. So long as the agency could show that it followed regulatory guidance by appointing committee members mindful of the specific interests likely to be affected by a decision on the particular issue with respect to which the agency seeks advice, courts could conclude that section 5(b)(2) and its related regulations were satisfied. At the same time, regulatory instruction concerning how an agency is to seek to establish a fairly balanced committee would provide courts with law to apply. Thus, egregious omissions from a committee's membership could be corrected, and one of the central goals of the Act could be judicially safeguarded. What is more, such guidance would, by codifying in the interest of justiciability some of the very efforts agencies already undertake informally, promote participation and balance values without imposing onerous new administrative burdens on agencies.

As for 5(b)(3), claims under 5(b)(3) should be subsumed by 5(b)(2), for reasons explained above. Plaintiffs who bring a successful 5(b)(2) claim do not need 5(b)(3), and plaintiffs who could not show an absence of fair balance probably could not show special interest capture.⁴⁶⁹ Thus, section 5(b)(3) need do no independent work. More guidance on section 5(b)(2) alone would adequately vindicate the Act's goal of providing even-handed advice to the executive branch. Moreover, the subsuming of 5(b)(3) by 5(b)(2) would avoid administrative and judicial uncertainties surrounding the satisfaction of two separate, but closely overlapping, requirements.

Agencies, for their part, should better recognize the lesson of Public Citizen and its progeny, which gives them fairly wide latitude to communicate with preexisting, independent groups without triggering the Act. In addition, agencies employing committees whose activities do not promote participation and openness by supplying advice to agencies on specific policy matters should not automatically assume that those committees are subject to the Act. For example, given that no court has held that scientific peer-review groups are covered by the Act, and given also that such committees would seem to fall within the category of "operational" committees not subject to the Act (which category has received judicial

sanction), agencies should not necessarily assume that technical peer-review committees, such as those convened by the National Institute of Health and [*532] the National Science Foundation, are subject to the **FACA**. On policy grounds, the case for administering peer review outside of the **FACA** is especially strong for those peer-review committees whose deliberations are categorically closed and whose deliberations and reports routinely fall within Sunshine and FOIA exceptions, as contemplated by subsections 10(b) and 10(d) of the Act. Chartering such committees, whose missions usually do not implicate substantive policy issues, creates administrative burdens without offsetting openness or participation benefits. Again, the GSA and/or the Office of Legal Counsel (as necessary to interpret the Sunshine Act and the FOIA) should provide explicit guidance on the type of peer-review committees that fall outside of the **FACA's** scope. In addition, agencies should understand that consultants are not subject to the **FACA**, insofar as (and only insofar as) agencies do not hire consultants to participate in the production of policy advice as an end-around the Act. Finally, agencies that wish to rely on the "individual advice" exception from the **FACA** should make and retain records detailing both the agency's desire for individual advice from the members and its actions to assure that only such advice is received.

With regard to the White House, the Administration should view the **FACA** as a useful tool for promoting its goals of reducing regulatory costs while promoting consensus-oriented decisionmaking. Unfortunately, the White House so far has sent mixed signals about how advisory committees fit within its vision of reinvented government.⁴⁷⁰ As the agency survey reveals, these mixed signals have generated understandable frustration among agency personnel. Insofar as its regulatory policy goals include reducing federal management costs while promoting participation and open government, advisory committees are fully compatible with the Administration's goals. This is not to say that the White House should not ensure through executive oversight that advisory committees are dissolved when they are no longer useful. But oversight can be achieved through more productive means than advisory-committee ceilings, for often creation of an advisory committee provides citizens with cost-effective access to their government. In other words, the Administration's goal of promoting consensus-based regulatory decisionmaking could be advanced by greater, not lesser, use of the **FACA**. While the policies underlying EO 12,838, OMB Circular A-135, and other similar White-House directives are laudable, they are not effectively advanced by the establishment of advisory-committee ceilings. Simply put, the number of ceilings that any given agency "should" have cannot be determined in the abstract. Rather, whether an agency should establish a committee depends [*533] upon whether the advice or recommendations the committee would generate would be worth the agency's trouble. This determination depends crucially upon the particular circumstances at hand.

Worse yet, some of the Administration's most important regulatory policy goals are actually thwarted by strictly enforced ceilings. The March 4, 1995 White-House memorandum instructing agencies to "negotiate, don't dictate,"⁴⁷¹ for example, stands in considerable tension with restrictions on advisory committees that, but for the OMB's ceilings, would be chartered precisely to engage in consensus-building regulatory decisionmaking. Nor does the March 4 memorandum constitute an isolated signal about the Administration's regulatory priorities. Its call for greater use of regulatory negotiation and other consensusbased decisionmaking techniques is found not only in the National Performance Review,⁴⁷² but also in EO 12,866,⁴⁷³ and EO 12,875⁴⁷⁴ --both of which also direct agencies to make greater use of consultation. How agencies are to heed both sets of commands simultaneously is thus not altogether clear. To the extent agencies seek to expand their efforts towards consensus-based decisionmaking techniques, they face the constraint of advisory-committee ceilings. To the extent they seek to meet the Administration's goals of reducing the number of advisory committees, on the other hand, their ability to initiate regulatory consultation and negotiation is significantly limited. In response, some agencies seem to have adopted a "don't ask, don't tell" stance towards advisory-committee formation, formally combining committees to reduce their tally, stretching the regulation's "operational" committees exception,⁴⁷⁵ hiring consultants where they might otherwise prefer a chartered committee, and so on.

Fortunately, this tension has not escaped the Administration's notice. Indeed, even in his March 4 memorandum, the President stated explicitly: "I will amend EO 12,838 to allow for advisory committees established for negotiated rulemakings." ⁴⁷⁶ Shortly thereafter, a memorandum from the Director of the GSA's Committee Management Secretariat also indicated that the Administration was "considering an amendment to EO 12,838 to expand the use of negotiated rulemaking committees." Such an exclusion, however, has not been provided as of yet. Moreover, as indicated in agencies' survey responses, slightly fewer than one-third of all agencies have "ever conducted a negotiated rulemaking." ⁴⁷⁷ Excluding committees chartered under the Negotiated Rulemaking Act from agency ceilings thus would not go very far to resolve the more general tension between the White House's efforts to **[*534]** promote public participation in regulatory decisionmaking, on the one hand, and its efforts to reduce agency reliance on advisory committees, on the other hand. The White House should do more to encourage consensus-based decisionmaking under the **FACA**.

None of this is to suggest, however, that only advisory committees involved in consensus-based regulatory decisionmaking are worth the federal dollar. To the contrary, the use of advisory committees not convened for the purpose of a negotiated rulemaking, including some established primarily to advise agencies on narrow technical questions, should also be encouraged in several areas. The National Institute of Health's advisory committees provide one of many available examples of how agencies can benefit from the use of advisory committees. According to agency personnel, members of NIH's "initial review groups" (IRGs)--advisory committees that conduct the agency's first-tier peer review--spend approximately fortyfive days per year (excluding any necessary site visits and any mail or telephone exchanges related to reviews) reviewing the technical details of grant applications and proposals and preparing comments, in anticipation of periodic IRG meetings. Once the individual advisory-committee members have completed their own reviews, they assemble for a meeting to make their determinations with respect to NIH grants and contracts. In return for their work, these members are paid by the agency for the time they actually serve at the IRG meetings, which amounts to nine days per year on average. ⁴⁷⁸ Clearly, the federal government should make use of as many such groups as possible. ⁴⁷⁹ If such peer-review groups are not explicitly exempted from the **FACA**, at least they should be exempt from agencies' advisory-committee ceilings.

The Department of Transportation's Commercial Space Transportation Advisory Committee (COMSTAC) provides another compelling example of how the **FACA** allows agencies to solicit unremunerated expertise. Its impressive twenty-four person membership includes CEOs of major space firms, as well as such luminaries as a vice-president of Rockwell International, the president of the International Association of Machinists, the Director of Satellite Communications of AT&T, and the Lieutenant Governor of Colorado. The Committee and its subgroups meet regularly and write comprehensive reports on issues of great policy importance to the Department. They do so at the trivial cost to the Department of approximately twenty-four hundred dollars per year (the costs of travel for some of COMSTAC's members, plus printing/copying and other miscellaneous costs). Given the high costs of their time, individuals such as those on the COMSTAC are not generally available to be hired as government consultants. **[*535]** Even were they so available, the cost of hiring one such person for just one year would be prohibitive. And even if the Department could afford to hire one or even a few high-caliber consultants, that alternative would sacrifice the balance achieved by a group of twenty-five individuals with varying interests. Here again, the federal government, and in turn the public, benefit from advisorycommittee advice at the price of a song.

Indeed, one of the greatest benefits of the **FACA** is that it allows agencies to exploit incentives present in other institutions to encourage members to render advisory service to agencies for submarket pay. Because advisory-committee membership is in many circles honorific or prestigious, ⁴⁸⁰ some individuals are willing to render service with little or no

remuneration. To be very sure, potential members' eagerness to serve on an advisory committee may at times be motivated by ignoble goals. As already explained, worries about the proximity of some members' interests to the regulatory jurisdiction of the agencies they advised led to the **FACA's** passage in the first place.⁴⁸¹ But bolstering the Act's requirements of openness and balance, rather than eliminating committees altogether, seems likely to be the best antidote to agency infiltration.

This is not to say that more advisory committees are necessarily better than fewer, but rather that, EO 12,838 and OMB Circular A-135 notwithstanding, fewer committees are not necessarily better than more. Agencies' creation of an advisory committee should not depend on strictly enforced ceilings arrived at in the abstract. Thus, the Vice President's datum that EO 12,838's ceilings have led to a savings for the federal government of \$ 17 million might, if understood incorrectly, create misperceptions.⁴⁸² While the elimination of some 300 committees since EO 12,838 was issued has meant that total expenditures for advisory committees have been reduced by \$ 17 million, policy makers sympathetic to the Administration's goal of reducing the costs of regulatory programs will be interested most keenly in the net savings achieved by the elimination of advisory committees. And those net savings are probably less, and may be negative--depending on whether the foregone benefits of eliminated advisory committees are greater or less than their costs. Wasteful committees should be eliminated, but committees producing advice or recommendations worth their costs should be encouraged, even though those benefits are not included in **FACA** budget reports. [*536]

Instead of advisory-committee ceilings, the White House should place greater reliance on performance measures, the chartering (and rechartering)⁴⁸³ process, and advisory-committee justification reports already required under section 7(b) of the Act and section 101-6.1009(e) of the regulations to ensure that committees do not outlive their usefulness. White-House exemption of advisory committees convened for the purposes of a regulatory negotiation from EO 12,838 and its implementing directive, OMB Circular-135, would be a welcome development in this regard, but the White House should go still further to reconcile its good-government goals.

Finally, courts should safeguard the Act's underlying principles by requiring non-complying agencies, including agencies that have chartered committees that are not fairly balanced, to suspend their advice-gathering activities until they observe the Act's requirements. But while courts should not be cavalier about the ease with which **FACA** violations can be ameliorated during ordinary notice-and-comment processes, neither should courts strive to wipe non-complying advice or recommendations from agencies' memories. Invalidating an otherwise unobjectionable final rule on the grounds that an agency had somewhere violated the Act would in most cases exceed the injury to be redressed. Quite apart from any constitutional concerns courts might have about sweeping injunctive relief, neither the Act's participation and accountability goals, nor its administrative-efficiency goals would be best advanced by a "Start Over" remedial approach to **FACA** violations. Instead, courts should require agencies to consider whatever points of view were not represented as a result of a violation--not instead of, but in addition to--the advice or recommendations generated by an agency's non-complying activities. On the other hand, judicial refusal to enjoin ongoing advisory-committee meetings held in violation of the Act's requirements would needlessly thwart the **FACA's** openness and participation goals. Lastly, and more generally, courts should also show some deference to GSA's resolution as to the relative weight to be given to the competing values inherent in the **FACA**, just as the Supreme Court deferred to EPA's resolution of the competing values of economic efficiency and clean air in adopting a "bubble" policy (at the very least until Congress itself addresses some of the issues identified here).

⁴⁸⁴

The interpretation, implementation, and administration of the **FACA** could be improved in these several ways. Such steps, if taken--and surely none of them asks too much--would

further advance the Act's underlying openness and administrative-efficiency goals without requiring painful tradeoffs between them. As it stands, the Act promotes both openness and efficiency fairly successfully. No act can do so perfectly, but the changes [*537] described would narrow the unbridgeable gap between the ideal and the possible. [*538]

Appendix A: Federal Advisory Committee Act Agency Survey ⁴⁸⁵

NAME OF AGENCY:

NAME OF AGENCY'S

ADVISORY COMMITTEE

MANAGEMENT OFFICER:

NAME AND POSITION OF

PERSON ANSWERING THIS

SURVEY QUESTIONNAIRE:

Chartering an Advisory Committee:

1. How many of your agency's current chartered advisory committees/subcommittees were established by your agency?

2. How many of your agency's current chartered advisory committees/subcommittees were not established by your agency, but are nevertheless utilized by your agency? Put differently, how many of your agency's chartered advisory committees had a previous, independent existence?

3. What percentage of your agency's Advisory Committees have independently chartered subcommittees or independently chartered "work groups," "task forces," or other committee subdivisions?

37 a. 0-20%

0 b. 21-40%

0 c. 41-60%

0 d. 61-80%

0 e. 81-100% [*539]

4. What percentage of your agency's advisory committees, including chartered subcommittees, are re-chartered for at least one additional two-year period?

4 a. 0-20%

1 b. 21-40%

3 c. 41-60%

2 d. 61-80%

27 e. 81-100%

5. What percentage of those re-chartered advisory committees/subcommittees are re-chartered at least once again?

4 a. 0-20%

1 b. 21-40%

4 c. 41-60%

1 d. 61-80%

16 e. 81-100%

6. Does your agency currently use advisory committees statutorily or otherwise exempted from **FACA**?

10 a. Yes 25 b. No

7. If yes, approximately how many?

8. In your view, which best describes the **FACA's** chartering requirements:

0 a. insufficiently stringent to aid your agency's management/oversight of its advisory committees

26 b. appropriately stringent to aid your agency's oversight of its advisory committees

8 c. more cumbersome than what is necessary to aid your agency's oversight of its advisory committees

9. Do you think changes in the chartering requirements would make the chartering process easier?

15 a. Yes 10 b. No 8 c. Don't Know

10. If yes, what amendments to the **FACA** or changes in its implementing regulations do you think would make the chartering process easier? (For this and all similar questions, feel free to attach additional pages as necessary.)

Composition of Advisory Committees:

11. Please provide a brief explanation of how, if at all, the Emoluments Clause of the U.S.

[*540] Constitution affects the composition of your agency's advisory committees.

12. Please provide a brief description of the steps, if any, your particular agency takes with respect to the General Services Administration's requirement, under 41 C.F.R. §101-6.1009 (j), of conformity with ethics and conflict-of-interest statutes and regulations.

13. Please provide a brief description of the steps, if any, your agency takes to ensure that the advisory committees it establishes are balanced with respect to the point of view represented on them.

14. Please provide a brief description of the steps, if any, your agency takes to ensure that none of its advisory committees is unduly influenced by one special interest.

15. What percentage of your agency's advisory committees have at least one member who is also a member of a citizens interest group, consumer interest group, or environmental interest group?

11 a. 0-20%

4 b. 21-40%

5 c. 41-60%

1 d. 61-80%

11 e. 81-100%

16. What percentage of your agency's advisory committees have only one member who is a federal officer?

27 a. 0-20%

3 b. 21-40%

4 c. 41-60%

0 d. 61-80%

3 e. 81-100% [***541**]

17. What percentage of your agency's advisory committees have chartered or unchartered subcommittees that have at least one member who is not also a member of the relevant subcommittee's full, parent committee?

30 a. 0-20%

2 b. 21-40%

2 c. 41-60%

1 d. 61-80%

0 e. 81-100%

The **FACA** and Negotiated Rulemaking:

18. Has your agency ever conducted a negotiated rulemaking?

11 a. Yes 23 b. No

19. In your estimation, does the **FACA** discourage your agency's use of and/or experimentation with negotiated rulemaking?

3 a. Yes 13 b. No 16 c. Don't Know

20. If yes, which statement best describes the extent to which the **FACA** discourage your agency's use of and/or experimentation with negotiated rulemaking?

1 a. **FACA** discourages use of negotiated rulemaking only slightly

1 b. **FACA** is a substantial impediment to use of negotiated rulemaking

1 c. **FACA** is my agency's greatest obstacle to use of negotiated rulemaking

21. If, in your estimation, the **FACA** discourages your agency's use of negotiated rulemaking procedures, which particular **FACA** requirements impede the use of those procedures?

22. What amendments to the **FACA** or changes in its implementing regulations, if any, do you think would facilitate your agency's use of negotiated rulemaking?

[*542]

The **FACA** and Federal-State Relations:

23. What percentage of your agency's advisory committees are composed wholly of full-time state employees (aside from their designated federal officers)? Put differently, advisory committees with only full-time state employees as members constitute what percentage of your agency's advisory committees?

35 a. 0-20%

0 b. 21-40%

0 c. 41-60%

0 d. 61-80%

0 e. 81-100%

24. Does your agency frequently communicate with members of, or representatives from, state or local governments?

19 a. Yes 17 b. No

25. In your estimation, does the **FACA** discourage communication by your agency with state and/or local government officials (elected or unelected)?

5 a. Yes 24 b. No 8 c. Don't Know

26. If yes, which statement best describes the extent to which the **FACA** discourages communication by your agency with state and/or local government officials?

4 a. **FACA** discourages such communication only slightly

1 b. **FACA** is a substantial impediment to such communication

0 c. **FACA** is my agency's greatest obstacle to such communication

27. If, in your estimation, the **FACA** discourages communication by your agency with state and/or local government officials, which particular **FACA** requirements most impede the use of those procedures?

28. What amendments to the **FACA** or changes in its implementing regulations, if any, would improve your agency's ability to communicate with state and/or local government officials?

[*543]

The **FACA** and Peer Review:

29. Has your agency ever used peer-review processes?

15 a. Yes 20 b. No

30. In your estimation, does the **FACA** discourage your agency's reliance on peer-review processes?

6 a. Yes 16 b. No 11 c. Don't Know

31. If yes, which statement best describes the extent to which the **FACA** discourages your agency's reliance on peer review?

4 a. **FACA** discourages our agency's use of peer review only slightly

2 b. **FACA** is a substantial impediment to our agency's use of peer review

0 c. **FACA** is my agency's greatest obstacle to our agency's use of peer review

32. If, in your estimation, the **FACA** discourages the use of peer review by your agency, which particular **FACA** requirements do so most?

33. What amendments to the **FACA** or changes in its implementing regulations, if any, would facilitate use of peer review?

Agency-GSA/OMB Relations:

34. Please provide a brief description of the main ways in which your agency's AC guidelines, promulgated pursuant to §8(a) of the **FACA**, supplement or otherwise differ from the General Services Administrations regulations, 41 C.F.R. §101-6.1001 et seq.

35. What percentage of your agency's proposals for the creation of a chartered advisory committee submitted to the General Services Administration, as contemplated by 41 C.F.R. §101-6.1007(c), are reviewed unfavorably by the General Services Administration?

35 a. 0-20%

0 b. 21-40%

0 c. 41-60%

0 d. 61-80%

0 e. 81-100% [***544**]

36. What percentage of those proposals nevertheless lead to the creation of an advisory committee as contemplated by 41 C.F.R. §101-6.1007(d)?

17 a. 0-20%

0 b. 21-40%

0 c. 41-60%

0 d. 61-80%

2 e. 81-100%

37. Which statement best describes the frequency with which your agency communicates with the Office of Management and Budget (OMB) specifically on **FACA**-related matters?

17 a. very rarely or never

14 b. occasionally, but not regularly

5 c. regularly

1 d. on an on-going basis

38. Please describe the nature of those communications, if any.

Agency Management/Oversight of Advisory Committees:

39. Which statement best describes the allocation of advisory committee oversight duties in your agency between your agency's advisory committee management officer and the head of your agency?

8 a. head of agency performs most of substantive oversight duties,
with advisory committee management officer providing administrative
support

3 b. substantive oversight duties shared roughly evenly by head of agency

and advisory committee management officer

25 c. advisory committee management officer performs most of substantive duties, with head of agency serving a largely ministerial role **[*545]**

40. Which statement best describes your agency's general counsel's role in overseeing your agency's advisory committees?

11 a. general counsel plays minor or no substantive role in oversight of agency's advisory committees

21 b. general counsel plays significant but not dominant role in oversight of agency's advisory committees

1 c. general counsel plays dominant role in oversight of agency's advisory committees

Executive Order 12,838:

41. Has your agency established any advisory committees since the issuance of Executive Order 12,838?

15 a. Yes 20 b. No

42. If yes, please provide a brief description of the steps your agency has taken to conform to Executive Order 12,838's higher, "compelling considerations" standard (EO 12,838 §3(a)) for establishing an advisory committee?

Public Participation in Advisory Committee and Subcommittee Proceedings:

43. Does your agency ever provide notice of its advisory committees' meetings in any publication besides the Federal Register?

23 a. Yes 14 b. No

44. If yes, how often?

0 a. rarely

7 b. sometimes

16 c. very frequently

45. If yes, please also list one or two example publications in which such notice is published.

[*546]

46. Please provide a brief description of how, if at all, your agency seeks to ensure an opportunity for public participation in your agency's advisory committees' proceedings?

47. Please provide a brief description of how, if at all, your agency seeks to ensure an opportunity for public participation in your agency's advisory committees' subcommittees' proceedings?

48. What percentage of your agency's advisory committees close one or more of their meetings pursuant to §10(d)'s incorporation of the Sunshine Act's exemptions (5 U.S.C. §552b(c))?

26 a. 0-20%

1 b. 21-40%

3 c. 41-60%

2 d. 61-80%

3 e. 81-100%

49. Where, if anywhere besides the Library of Congress, are records of your advisory committees' records, minutes, reports, background papers, studies, data, etc., maintained for public inspection?

50. What percentage of your agency's advisory committees have unchartered subcommittees that meet at least as often as their full, parent committee?

29 a. 0-20%

2 b. 21-40%

4 c. 41-60%

0 d. 61-80%

1 e. 81-100%

51. What percentage of your agency's advisory committees have chartered subcommittees that meet at least as often as their full, parent committee?

36 a. 0-20%

0 b. 21-40%

0 c. 41-60%

0 d. 61-80%

0 e. 81-100%

52. What percentage of your agency's advisory committees have unchartered [*547] subcommittees that meet privately?

34 a. 0-20%

2 b. 21-40%

0 c. 41-60%

0 d. 61-80%

0 e. 81-100%

53. What percentage of your agency's advisory committees have chartered subcommittees that meet privately?

35 a. 0-20%

0 b. 21-40%

0 c. 41-60%

0 d. 61-80%

0 e. 81-100%

54. What amendments to the **FACA** or changes in its implementing regulations, if any, do you think would increase public participation in advisory committee/subcommittee proceedings in a cost-effective way?

General Comments:

55. Please comment on any aspects of the **FACA** or any **FACA**-related issues--especially aspects of the Act and issues not implicated by the above questions--that you think warrant amendment of the Act or changes in its implementation.

[*548]

Appendix B: Representative Responses to Survey Question 55

"OMB Circular No. A-135 should be withdrawn. This Circular places ceilings on discretionary committees and requires agencies to predict what committees they might need in the coming year. Again, ceilings create a loss of time. Should a committee be needed and the agency can't eliminate any of their other committees, OMB would have to find a slot. An important task may not get completed in time waiting for this process to take place. Second, although it might be possible to know of an upcoming need for a committee, there is no way for any agency to accurately predict what committees might be necessary in the upcoming year."

"Requirements for annual reports should be combined into one report. As most information required by OMB Circular No.-135 is already contained in the Annual Report to the President, it would not be difficult to consolidate these two requirements. Closed meeting reports aren't submitted to GSA so it may be more difficult to combine this report into the annual report submitted to GSA. However, this report should be reviewed to see if the information is actually being used and, if not, determine the need for its continuation."

* * *

"I have been associated with federal advisory committee management long before **FACA** was enacted, and have first hand knowledge of what it was like before **FACA** and what it has been like since **FACA**. It is my belief that **FACA** was needed before as well as now. However, what is not needed are the controls we're having to contend with from OMB and GSA over the number of advisory committee in our inventory. It has gotten to the point where OMB is deciding for department/agency heads whether or not they can seek advice from experts outside the federal government regardless of the mandate/mission. I do not believe this was the intent of Congress when **FACA** became law."

"Also, I would like to raise the question of who is better qualified to determine what is needed to accomplish the mission of a particular program than the head of that department or agency? Example, when a department head (who is a member of the President's cabinet, and is confirmed by the Senate, I might add) is asked by top program officials to make a decision as to how a particular congressional mandate is to be carried out, and is provided briefing papers which contains a discussion, options, pros and cons on the situation, recommendations, etc., and that department head makes a determination that advice from a group composed of experts from the private sector is what is needed--why must that cabinet level official be required to send a letter of justification for that decision to another cabinet level official requesting approval to establish that advisory committee? This is one example of the kind of micromanagement we're having to contend with."

* * *

"I helped draft the comments of the Federal Advisory Committee Management Association, and I fully concur with those recommendations. I would also like to reiterate that: [*549]

1) Advisory committees are a very low cost option for getting professional and technical advice. If we were to contract for such services, we would only be able to hire limited

expertise and, as a regulatory agency, would not have the benefit of face to face discussions with all of the affected parties. Contracting for advice is also a much more expensive option for scarce budget dollars.

2) Advisory committees are an excellent tool for increasing public involvement in federal decisionmaking which is a primary goal of this Administration.

3) The primary responsibility for determining the number and range of advisory committees should be within the purview of each individual agency. Future budget limitations will serve as sufficient inhibitors to reduce numbers and costs."

* * *

"In spite of the criticism that the language of the Federal Advisory Committee Act (**FACA**) is broad and ambiguous in part, the Act has served government agencies and the public well for 23 years. Also, it should be noted that, prior to the Clinton Administration, the subject was given little attention in the press and the Act's existence was unknown to many government officials. The Administration's efforts to cut government costs, streamline and involve the public to make government leaner and more responsive to State and local governments and the public in general, have made **FACA** front page news commencing with the President's Health Reform initiative."

* * *

"The time consuming chartering process has become the biggest barrier to public participation. Quite often committees are needed immediately and the Agency's approval procedure may take 2 months, in addition to the 2-3 months needed to obtain OMB approval. If the Agency is over-ceiling or at-ceiling, OMB will likely say "No." Therefore, agency staff do not contact the CMO regarding chartering; instead they hold meetings that do not trigger **FACA** (individual opinions rather than collective advice). Such meetings do not always meet the Agency's needs, nor do they ensure maximum public participation. But they do happen much quicker by avoiding the 'Mother May I' red-tape."

* * *

"Applying **FACA** requirements equally to peer-review panels and general advisory committees has always been awkward. **FACA** is intended to open to public participation and scrutiny the agencies' receipt of policy or program advice from sources outside the federal government and to prevent undue influence on government policy-making."

"**FACA** does not fit peer-review panels. Panels provide advice from outside persons, but they are narrowly focused on individual research proposals, not policy. Moreover, the openness so crucial to general advisory committees is inappropriate to panel [***550**] reviews."

* * *

"Emphasize National Performance Review principle of evidence, direction, leadership rather than control, micro-management (this should apply to the Administration (especially OMB/somewhat GSA) and Congress, both.)"

* * *

"The most difficult part of **FACA** is its attempt to be all things to all committees. A classic case was the attempt several years ago to amend **FACA** to impose severe financial

reporting/conflict of interest rules. That amendment, had it passed, would have required an enormous amount of paperwork that we could not have managed without great difficulty (agency with fewer than 100 staff and more than 600 advisory committee members) and that would have caused us difficulty in recruiting members, who reasonably could have asked, 'Why such rules for an agency that makes no grants, enforces no regulations or laws?'" [*551]

Appendix C: Letter from FACMA

Professor Steven P. Croley

The University of Michigan Law School

428 Hutchins Hall

Ann Arbor, Michigan 48109-1215

Dear Professor Croley:

On behalf of the Federal Advisory Committee Management Association (FACMA), I am pleased to forward the enclosed response to the Federal Advisory Committee Act Agency Survey.

As you may know, the FACMA is an association of committee management officers and other journeyman professionals who administer committee management programs in federal departments and agencies. The organization was formed in 1980 and has been consulted and has offered advice in the past on a number of significant issues which have affected the advisory committee community. For example, the members commented on the then proposed GSA Rule, (41 CFR, Part 101-6) in 1986, made recommendations to GSA concerning the annual reporting requirement, and assisted GSA in achieving uniform cost reporting. In 1989 our members testified before the Senate Committee on Governmental Affairs concerning proposed **FACA** amendments (S-444).

At our July, 1995 meeting we discussed at length the survey you distributed to our respective agencies. Since the FACMA members have common views and concerns which go beyond the survey's impact on any particular agency, we considered it appropriate to formulate a collective response which focuses on the substantive issues in the narrative questions. The enclosed commentary represents the combined views of our members, whose organizations make up most of the Executive Branch departments and agencies.

We trust that this response will be helpful to you in evaluating the views of the advisory committee community with regard to the **FACA**, and the manner in which it is implemented.

Sincerely,

Henry J. Gioia

President

Enclosure [*552]

8/3/95 Federal Advisory Committee Management Association Response to **FACA** Agency Survey by ACUS.

55. General Comments:

The Federal Advisory Committee Act (**FACA**) has served government agencies and the public well for 23 years, bringing government decisionmaking out in the open and allowing for substantial citizen participation. The federal government and the nation have benefited greatly from the knowledge and expertise of public citizens who give freely of their time by serving on **FACA** advisory committees. Using **FACA** committee members to provide expertise not resident in the federal government is generally more cost-effective than hiring individual consultants because many committee members do not receive compensation for their services and some even pay for their own travel expenses.

The Act works well for a very broad range of advisory committees. **FACA's** very success in assisting government managers to resolve contentious issues by including the affected parties in the decisionmaking process has spawned such new concepts as the Negotiated Rulemaking Act of 1990 and EO 12,871, 'Labor-Management Partnerships. Although, this has created some administrative duplication, **FACA** should not be abandoned or unnecessarily revised because of its success.

The language of **FACA** is broad, and it is difficult to narrowly define which groups are intended to be included and which are operational or otherwise intended to be excluded. We applaud the common sense **FACA** exemption in 5204 of P.L. 104-4 (the Unfunded Mandates Reform Act of 1995). It allows federal officials to meet with elected state, local, and tribal officials (or their designated employees with authority to act on their behalf) acting in their official capacities regarding management or implementation of federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration. Communication with state and/or local officials would be further improved by exempting from **FACA** those meetings held with local citizens, not just elected officials, for the purpose of discussing local issues, not national public policy. Rather than amending **FACA**, it would be far simpler to focus on other such remedies which are more within our immediate reach as outlined herewith.

For example: the GSA Rule on Committee Management could be revised (1) to clarify certain exemptions from the Act and (2) to streamline the procedures for biennial renewal of committee charters.

EO 12,838 (issued 2/10/93) which requires OMB approval of **FACA** committees should be rescinded because it has made the chartering process so burdensome that some agencies cannot get the citizen participation needed for good government without circumventing **FACA**. EO 12,838 has made public participation more difficult by the requirement for OMB approval of proposed **FACA** committees. This dual (OMB/GSA) review of committee establishments has delayed the chartering process by months, making it difficult to use **FACA** committees when advice is needed on a timely basis for critical requirements.

Circular A-135 (issued 10/5/94) which sets arbitrary ceilings limiting the number of **FACA** advisory committees should be withdrawn because it has made it impossible for some agencies to establish sorely needed new committees without that have not terminating currently established committees completed their objectives. It has also caused the federal government to spend more resources on advisory committee management by attempting to project what committees will be needed in the coming fiscal year, only to find that the Annual Plan changes on a monthly basis due to the current crises situations in [*553] the nation. Agency committee management officers and agency **FACA** attorneys have spent significant amounts of time on such activities as interpreting requirements, issuing guidance to the agencies, consulting with the program offices, advising agency management officials, preparing reports, and interacting with OMB and GSA, all in direct response to EO 12,838 and OMB A-135.

Following are several proposed changes that the Administration could make to reinvent government and streamline the process to bring relief without amending **FACA**.

PROPOSED CHANGES

1. Withdraw EO 12,838 which requires OMB approval of discretionary **FACA** committees needed by other Agency heads. Return to the "consultation" requirement with GSA as contained in **FACA**. In cases where there is a disagreement regarding proposed establishment, the Agency head retains final authority for establishing a particular advisory committee (as stated in the GSA Rule).

Discussion:

Section 9 of **FACA** requires the head of an agency to publish a notice announcing establishment of an advisory committee in the Federal Register after consultation with the Director of the CMB (which was subsequently changed to GSA in 1976 when the Committee Management Secretariat staff was moved from OMB to GSA). However, the consultation was never meant to be a red-tape obstacle in the chartering process as it has now become. One of the authors of **FACA** (Former Representative John S. Monagan) spoke at a Federal Bar Association seminar on 9/25/86 saying:

"I abhor the idea that this legislation . . . **FACA** may be used to delay government action, that a branch of the Executive may use it to hold up action which another branch thinks is desirable. That certainly is far from the objective of stimulating economy and efficiency in government."

The Federal Bar Association has testified to Congress numerous times that the consultation process has unduly delayed the establishment of advisory committees. However, just prior to issuance of EO 12,838, the establishment process was functioning rather efficiently because GSA was conducting the consultation without OMB review. Some consultations were completed by GSA within a 15-day turn-around period. Now, however, the consultation process has become more burdensome than ever under the new OMB approval requirements for the chartering of all discretionary committees. Making it so difficult to obtain OMB approval to establish new advisory committees has hindered valuable consensus communications between the federal government and the citizen stakeholders in government policy. We need to revert to **FACA's** consultation requirements and 5101-6.1007(c) of the GSA Rule which states "The agency head retains final authority for establishing a particular advisory committee."

2. Withdraw OMB Circular A-15 which sets arbitrary ceilings on **FACA** committees and requires an annual plan justifying committees proposed to be established during the next fiscal year.

Discussion:

Ceiling limitations lead to circumvention of **FACA** because agency officials won't admit to having a **FACA** Committee if they know it will be difficult to get OMB approval. It puts agency and department staffers in a 'Don't Ask-Don't Tell' frame of mind rather [***554**] than open government.

In addition to requiring OMB approval of proposed discretionary committees, EO 12,838 also required agencies to terminate one-third of their discretionary committees by the end of fiscal year 1993. Although more than a one-third reduction was achieved, the President directed the executive branch to exercise continued restraint in the creation and management of advisory committees. This resulted in OMB Circular A-135 setting arbitrary agency ceilings on the number of discretionary advisory committees. Getting OMB approval to exceed the ceiling is extremely time-consuming and sometimes impossible. Ceiling limitations lead to circumvention of **FACA**. The current budget reductions will serve to make

agencies prioritize how best to spend their limited resources and minimize the number of advisory committees far better than an arbitrary ceiling.

The ceilings were derived artificially by the Director of the OMB who, upon completion of the one-third reduction of discretionary committees by federal agencies in compliance with EO 12,838, set the resultant overall number remaining as the government-wide ceiling. There was little, if any, evaluation of individual agency requirements based on rational analysis. It is interesting to note, in this respect, that the agencies overall are currently well below (494) the government-wide ceiling of 534. Therefore, further ceiling control limits will further inhibit federal officials from obtaining collective advice and recommendations at minimum cost to the taxpayers.

Annual Plans Are Costly and Inaccurate

OMB A-135 also requires agencies to submit an annual plan regarding the committees proposed for establishment during the coming fiscal year. It is impossible for some agencies to accurately predict the number or kinds of **FACA** committees that may be needed during the next fiscal year because the need constantly changes. The high level agency officials who are involved in the crystal ball playing sessions required to develop the annual plan make it a very resource intensive project which may be totally different in a few months as agency priorities change.

By the time agencies receive OMB approval to establish the committees projected in their annual plans, the fiscal year is half over. Once OMB approval is granted for committees proposed in the annual plan, agencies do not have to request OMB approval again during the chartering process unless creation of these committees causes an agency to go over their ceiling. However, agencies are required to also send the OMB approved committee's charter to GSA for review and consultation which takes an additional two weeks or more. OMB approval of newly proposed committees that were not included in the approved annual plan has taken more than two months in some agencies, delaying the establishment considerably. This needless delay in the chartering process may jeopardize the success of the project were advice and recommendations are needed quickly to resolve an emergency situation that threatens the health and safety of the nation. Thus, the OMB approval process results in a disservice to the American taxpayer by spending extra resources and causing more delays in the chartering process, or driving some groups to meet secretly because they don't have the time or resources to spend in obtaining OMB approval to charter.

3. Streamline the GSA Rule procedures for biennial renewal of discretionary charters.

Discussion:

The **FACA** requires committee charters to be renewed biennially and filed with [*555] Congress and the GSA Committee Management Secretariat. An annual report on every **FACA** committee is submitted to GSA at the end of each fiscal year (as required by 56(c) of **FACA**). The annual report to GSA provides justifications for continuing all committees that are not scheduled for termination. Therefore, it should not be necessary to submit this information to GSA CMS again when the committee charter is about to expire within months after the annual report has been submitted (as is currently required by Sec. 101-6.1029 of the GSA Rule). If the charter has been revised, the renewal charter should be filed with GSA and Congress without any additional consultation since it was justified satisfactorily in the annual report to GSA. However, if the charter was not revised, a copy of the Federal Register notice indicating the committee's renewal should be sent to CSA and the appropriate Congressional committees in lieu of submitting a renewal charter.

4. Specify in the GSA Rule exemptions in Section 101-6.1004 that peer-review committees (such as those that provide expertise and evaluation for use by an agency in selecting among

competing applications or proposals for grants, fellowships, or other assistance awards) are considered operational and therefore exempt from the Act.

Discussion:

FACA was created to allow for openness and public participation and to prevent special interests from having undue influence in government policy decisions. Peer-review panels do not provide policy advice, but provide peer reviews and evaluations of grant applications and contract proposals that are required prior to federal funding. They focus on individual grant applications and contract proposals as well as research conducted at an agency where the effectiveness and efficiency of individual investigators are assessed. The panels cannot comply with the openness intent of **FACA** because they must protect (1) the disclosure of personal information concerning individuals which would constitute an invasion of personal privacy; (2) any confidential or proprietary information which a proposal or application contains; (3) the reviewers' right to candid review; and (4) the reviewers' right to be free from harassment or undue influence on behalf of a particular applicant or researcher. Meetings are closed and grant and contract proposal applicants' and panelists' names are not released to the public in connection with a specific review.

Including peer-review committees under **FACA** artificially adds large numbers of committees to the advisory committee inventory. Agencies are encouraged by the Administration and GAO to increase their use of peer-review panels, but at the same time they fall under the strict OMB ceiling. Furthermore, counting the large number of peer-review panels as advisory committees distorts the total numbers and makes it appear that advisory committees are proliferating. This results in such measures as EO 12,838 and OMB, Circular A-135.

Requiring the panels to comply with **FACA** adds administrative burden and cost without benefit. Therefore, agencies are disinclined to create additional panels but rather evade **FACA** by creating ad hoc, non-consensus groups or simply mailing out proposals for individual review.

Since the review panels are an integral and necessary part of the mission of the agencies which use them, it could be argued that they are operational and thus exempt from **FACA**. At some agencies, the panels do not merely advise and make recommendations--they actually determine which grant applications or contract proposals merit funding. This exemption could be accomplished by adding peerreview panels to the list in §101-6.1004 of the GSA Rule on Committee Management.

If peer review is not considered to be operational and therefore is subject to **FACA**, [*556] GSA guidance should allow agencies the flexibility to decide how best to reach their customers, while complying with the spirit of **FACA**, by exempting such committees from certain provisions of **FACA**, e.g.: (1) eliminate requirement for publication of Federal Register notices for peer-review meetings where such meetings are closed consistent with the provisions of section 552(b) of title 5; (2) allow agencies to utilize alternative methods of public notice, of meetings in lieu of publication in the Federal Register; (3) eliminate the requirement for annual closed meeting reports summarizing activities of closed meetings because this same information is contained in the accomplishments section of the GSA annual report; (4) eliminate requirement for consultation with OMB and GSA prior to establishment of peer-review committees; and (5) eliminate the requirement for renewal of peer-review committees.

5. Amend Sec. 2(9) of the Negotiated Rulemaking Act (NRA) of 1990 to state that Negotiated Rulemaking Committees are not subject to the **FACA** charter procedures.

Discussion:

This is an excellent example of the government undermining the objectives it seeks to achieve. The President directed agencies on March 4, 1995, to substantially expand efforts to promote consensual rulemaking. Currently, negotiated rulemaking committees only amount to one percent of the total government **FACA** committees. The President stated: "I will amend EO 12,838 to allow for advisory committees established for negotiated rulemakings." However, as of this date, the OMB continues to work against the President's directive by counting negotiated rulemaking committees against the agencies' ceilings. Because of ceiling limitations, it is impossible for some agencies to establish temporary regulatory negotiation (Reg-Neg) committees without terminating currently needed on-going committees.

Reg-Neg committees provide many long-term benefits by achieving a more cooperative relationship between the agency and other affected parties in the rulemaking process. They potentially save the government money and may reduce compliance costs. It is very cost-effective for some agencies to enlist the free help of the affected parties and thereby prevent potential law suits that are very expensive for the taxpayers.

In some ways the NRA requirements are more stringent than the **FACA** requirements. For example, **FACA** requires agencies to publish a Federal Register notice announcing the establishment of a new committee. Whereas NRA requires agencies to publish a Federal Register notice of an intent to establish a Negotiated Rulemaking committee as well as a list of the interests which will be significantly affected by the rule. Therefore, it serves no purpose for the Reg-Neg committee to go through the **FACA** consultation/approval process after holding the convening meetings which were held to determine whether the stakeholders are willing to negotiate in good faith. Thus, NRA should be amended to exempt Reg-Neg committees from the **FACA** chartering procedures so that agencies could establish these committees as needed without GSA/OMB hindrance and red-tape during the chartering process. [*557]

6. Delete provisions such as the General Government Appropriation (Sec. 611 of P.L. 103-123) prohibiting federal agencies/departments from providing joint funding to committees that benefit more than one agency.

Discussion:

Special limitations on joint funding of advisory committees are unduly inhibiting when applied to committees performing services of value to more than one agency. If such services are done through contract or under the Economy Act, more than one agency may contribute to its cost; why limit use of advisory committees where private sector advice is available, usually at less cost? Given the ceiling on creation of new advisory committees, one possibility for obtaining private sector advice, that is not precluded by the **FACA** itself but is not recognized in GSA regulations, is the use by one agency of another agency or agencies, advisory committees. There may be an existing advisory committee with expertise in general areas analogous to those of interest to another agency. While that committee would not normally undertake a study of a specific subject of interest to another agency, it might be willing to do so if requested by its sponsoring agency. It might even create a working group with members selected for this specific expertise.

There might even be more than one agency with an advisory committee with competence in the area of interest, so that a joint working group, reporting to each parent committee, would be a possible arrangement.

So long as the subject is generally within the scope of the sponsoring agency's mission and that agency may make use of the advice generated in at least a peripheral way, as well as pass the advice to the requesting agency, such an arrangement seems to be consistent both with **FACA** and with other legislation, such as the Economy Act. If the general areas of study of advisory committees were made available, other agencies, that do not have current

advisory committees in those areas but have a need for advice, would be able to research the available resources and to seek advice through existing committees of other agencies. This would be analogous to the use of umbrella committees within a single agency.

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** Professor of Law, Lewis & Clark Law School; B.A., 1967, Harvard; J.D., 1973, Columbia. This Article is based on a Report prepared for the Administrative Conference of the United States shortly before the Conference's recent elimination. Thanks to the numerous agency personnel who provided comments on earlier versions of this Article and thoughts about its subject matter, especially Jim Dean (GSA), Brian Dettelbach (Senate Minority Counsel), Roberta Fede (DOT), Sue Feldman (NIH), Eric Goulian (DOJ), Susan Fonner (NRC), Jeff Lubbers (ACUS), and Nancy Miller (ACUS). Thanks also to the GSA Committee Management Secretariat, the Interagency Committee on Federal Advisory Committee Management, and the Federal Advisory Committee Management Association for information and feedback. Finally, thanks to the Cook Research Fund of the University of Michigan Law School for funding portions of this article.

FOOTNOTES:

†n1 Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. II §§ 1-15).

†n2 See id. §§ 2(a), 2(b)(5), 3(2).

†n3 See generally *infra* Part II.

†n4 5 U.S.C. App. II § 5(b)(2) (1994) (Federal Advisory Committee Act).

†n5 Pub. L. No. 94-409 § 3(a), 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1994)).

†n6 Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (1994)).

†n7 Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. § 3501-3520 (1994)).

†n8 See *infra* Part II.

†n9 H.R. Rep. No. 85-576 (1957), reprinted in Congressional Research Service, Federal Advisory Committee Act Sourcebook 44, 46 (1978) [hereinafter Sourcebook].

†n10 See Administrative Conference of the United States, Federal Administrative Procedure Sourcebook 574 (2d ed. 1992).

†n11 See Sourcebook, *supra* note 9, at 3. In 1842, Congress passed a law prohibiting disbursement of funds to pay the expenses of advisory committee members without congressional approval of a special appropriation. Act of Aug. 26, 1842, ch. 202, § 23, 5 Stat. 533.

†n12 Vice President Al Gore, From Red Tape to Results, Creating a Government that Works Better & Costs Less: Report of the National Performance Review 118-19 (1993).

†n13 President William J. Clinton, White House Memorandum for Heads of Departments and Agencies, Subject: Regulatory Reinvention Initiative 3 (March 4, 1995).

†n14 Id.

†n15 See Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4,969, 5 U.S.C. §§ 581-90 (1990).

†n16 Videotape: An Introduction to Negotiated Rulemaking (Department of Labor) (on file with authors). See also Exec. Order No. 12,871, 3 C.F.R. 655 (1993), reprinted in 5 U.S.C. § 7101 at 1033-34 (instructing agencies to form "labor-management councils" under **FACA**).

†n17 Similar efforts have been undertaken by the Department of Agriculture and the Department of the Interior to include interested parties in decisions concerning the management of public lands. Furthermore, the Department of Transportation has initiated "safety summits" for the purposes of promoting dialogue with its constituencies about highway safety issues, while the Federal Aviation Administration has developed its own community outreach program designed to facilitate communication between agency personnel and citizens concerned about airport noise and radar safety.

†n18 846 F. Supp. 1009 (D.D.C. 1994).

†n19 Id. at 1013-15.

†n20 997 F.2d 898 (D.C. Cir. 1993).

†n21 Id. at 904-11.

†n22 5 U.S.C. App. II § 3(2)(C)(iii).

†n23 997 F.2d at 911-15.

†n24 Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. § 1501-71 (Supp. 1996)).

†n25 The Unfunded Mandates Reform Act of 1995 tit. 2, § 204, 2 U.S.C.A. § 1534 (West Supp. 1997).

†n26 Most notably, the narrowly failed Dole-Johnston compromise regulatory reform bill would have exempted the new "peer review" groups created by the bill to review agencies' risk assessments required for "major rules or major environmental management activity" from the Act. At one point during consideration of that bill, Senator Domenici introduced an amendment that would have exempted from the **FACA** all review panels for EPA and OSHA rules.

†n27 3 C.F.R. 590 (1993), reprinted in 5 U.S.C. § 14 App. at 1379.

†n28 Of course, independent agencies need not comply with the executive order. But they are requested to do so, and OMB budgetary clout goes far to make the request an obligation. See Exec. Order No. 12,838 § 5, 3 C.F.R. 590 (1993), reprinted in 5 U.S.C. § 14 App. at 1379.

†n29 59 Fed. Reg. 33,856 (1984).

†n30 Several interesting and important examinations of the **FACA** have already been done, including one also commissioned by the Administrative Conference, see Michael H. Cardozo, The Federal Advisory Committee Act in Operation, 33 Admin. L. Rev. 1 (1981), and one undertaken under the auspices of the OMB, see Brian C. Murphy, Implementation of the Federal Advisory Committee Act, 9 Gov. Pub. Rev. 4 (1982). Unfortunately, however, most of these are by now somewhat dated, and thus do not reflect either the recent developments mentioned above or current judicial developments. See, e.g., Richard A. Wegman, The

Utilization and Management of Federal Advisory Committees (1983); David B. Marblestone, *The Coverage of the Federal Advisory Committee Act*, 35 Fed. Bar J. 119 (1976); Henry H. Perritt, Jr. & James A. Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 Geo. L.J. 725 (1975); Barbara W. Tuerkeimer, *Veto by Neglect: The Federal Advisory Committee Act*, 25 Am. U.L. Rev. 53 (1975). For a more recent general analysis that offers proposals different from the recommendations of this Article, see Michelle Nuszkiwicz, *Twenty Years of the Federal Advisory Committee Act: It's Time for Some Changes*, 65 S. Cal. L. Rev. 957 (1992). For a recent examination of the **FACA** as it relates specifically to the President's power to seek advice, see Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994). Finally, for an analysis of the Act's scope specifically, see Steven Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 Admin. L.J. Am. U. 111 (1996).

†n31 The appendices contain the survey questionnaire with reported results (Appendices A and B) and a copy of a letter sent in response to the questionnaire by the Federal Advisory Committee Management Association (Appendix C).

†n32 The Interagency Committee on Federal Advisory Committee Management is an interagency group organized and run by the Advisory Committee Management Secretariat of the GSA. It consists of each agency's Advisory Committee Management Officer, who oversees the administration of advisory committees for his or her respective agency, together with personnel from the GSA. The group serves to provide an ongoing line of communication between agencies and the GSA. The GSA Advisory Committee Management Secretariat uses the group to help it develop short-term and long-term improvements to the Act and especially its regulations.

†n33 The membership of the Federal Advisory Committee Management Association (FACMA) overlaps substantially with that of the Interagency Committee on Federal Advisory Committee Management. The crucial difference is that the former is not organized under the GSA's auspices and does not include GSA personnel. The FACMA, in other words, provides some agencies' Advisory Committee Management Officers an opportunity to share their views about and experiences under the Act, while asserting some independence from the GSA.

†n34 See Cardozo, *supra* note 30; Errol Meidinger, *Legislative History and Background on FACA*, Conference on Understanding the Federal Advisory Committee Act: Implications for Public Involvement on the National Forests, Forest Trust and Pinchot Institute, Washington, D.C., Mar. 31, 1995 (unpublished manuscript, on file with authors). Cardozo refers generally to Washington having convened committees, and Meidinger specifically mentions the Whiskey Rebellion Commission. In addition, Meidinger quotes Henry Clay as saying in 1842 that advisory committees had "grown into use long since." *Id.*

†n35 See generally H.R. Rep. No. 85-576, reprinted in Sourcebook, *supra* note 9. See also Richard O. Levine, Note, *The Federal Advisory Committee Act*, 10 Harv. J. on Legis. 217, 219-20 (1973).

†n36 See *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989). The Guidelines themselves were published in Hearings on WOC's [Without Compensation Government Employees] and Government Advisory Groups before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., pt. 1, at 586-587 (1955).

†n37 *Id.* The last of these requirements was added in 1951. See Levine, *supra* note 35, at 220.

†n38 See *Public Citizen*, 491 U.S. at 454.

†n39 See H.R. 7390, 85th Cong. (1957). See also H.R. Rep. No. 85-576 (1957).

†n40 See Levine, *supra* note 35, at 221.

†n41 See *id.*

†n42 3 C.F.R. 573 (1959-1963), reprinted in 5 U.S.C. § 901 at 574 (superseded, current law at Exec. Order No. 11,686, 37 Fed. Reg. 21,421 (1972)).

†n43 See Levine, *supra* note 35, at 221.

†n44 *Supra* note 42.

†n45 *Id.* §§ 2(b), 6(d).

†n46 See *id.* §§ 5, 6(d), 6(f).

†n47 See *id.* §§ 6(e), 8.

†n48 See *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989).

†n49 See Levine, *supra* note 35, at 222.

†n50 *Id.*

†n51 *Id.*

†n52 The house bill, H.R. 4383, 92d Cong. (1971), became law. There were three bills in the Senate: S. 1637, 92d Cong. (1971), introduced by Senator Metcalf; S. 1964, 92d Cong. (1971), introduced by Senator Roth; and S. 2064, 92d Cong. (1971), introduced by Senator Percy. Both of the latter bills closely resembled H.R. 4383. Later these three senators and nine others would sponsor a compromise bill, S. 3529, 92d Cong. (1972).

†n53 See Levine, *supra* note 35, at 223-24; Perritt & Wilkinson, *supra* note 30, at 733-34.

†n54 See H.R. Rep. No. 91-1731, at 14 (1970). During the 1971 hearings, about 1,800 committees were specifically identified. See *Advisory Committees: Hearings on S. 1637, S. 1964, and S. 2064 Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Gov't Operations*, 92d Cong., 1st Sess. 12 (1971).

†n55 The hearings followed not long after a brouhaha over the Commission on Obscenity and Pornography, which spent about \$ 1,800,000 to produce a report that was repudiated by the White House and ignored by Congress. See H.R. Rep. No. 91-1731, at 12 (1970).

†n56 491 U.S. at 445-46 (quoting the **FACA** § 2(a)).

†n57 5 U.S.C. App. II § 5(a).

†n58 See *id.* § 6(c). For an example of an annual report, see 23 Pres. Ann. Rep. on Fed. Advisory Comms. (1995).

†n59 See 5 U.S.C. App. II § 6(c).

†n60 See *id.* § 7(a), (c)-(e). The original Act placed oversight responsibility in the OMB but the responsibility was shifted to GSA in Reorganization Plan No. 1 of 1977. 3 C.F.R. 197, 199 (1977), reprinted in 5 U.S.C. App. at 1567-70.

†n61 See 5 U.S.C. App. II § 7(b).

†n62 See id. § 12(a).

†n63 See id. § 5(b).

†n64 Id. § 9(a).

†n65 See id. § 9(c). The charter must set out: the advisory committee's title; its purpose; the time necessary to carry out that purpose; the agency or official to whom it reports and who is responsible for providing necessary support; the duties for which the committee is responsible; the estimated annual cost and number and frequency of meetings; the termination date; and the date the charter is filed. See id.

†n66 See id. § 14(a).

†n67 See id. § 14(b).

†n68 See Cardozo, *supra* note 30, at 8.

†n69 See William F. Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harv. J. on Legis. 1, 10-13 (1987).

†n70 See id.

†n71 See id.

†n72 See id.

†n73 Cardozo, *supra* note 30, at 8 (quoting 115 Cong. Rec. 31,237 (1969)).

†n74 William H. Rodgers, Jr., *The National Industrial Pollution Control Council: Advise or Collude?*, 13 B.C. Indus. & Com. L. Rev. 719, 719 (1972) (quoting Statement by the President on Establishing the National Industrial Pollution Control Council, 6 Wkly. Comp. Pres. Doc. 502 (Apr. 9, 1970)).

†n75 Id. at 743.

†n76 3 C.F.R. 573, 573 (1963). EO 11,007 did require that industry advisory groups be "reasonably representative of the group of industries, the single industry, or the geographical, service, or product segment thereof to which it relates, taking into account the size and function of business enterprises in the industry or industries, and their location, affiliation and competitive status, among other factors." Id. at 574.

†n77 See id. at 574-75.

†n78 See id. at 574.

†n79 See id.

†n80 Id.

†n81 See Rodgers, *supra* note 74, at 724-25.

†n82 Id. at 727.

†n83 See id.

†n84 See Perritt & Wilkinson, *supra* note 30, at 733.

†n85 5 U.S.C. App. II § 5(b)(2). While subsection (b) by its terms applies only to legislation creating or authorizing advisory committees, section 5(c) requires that the guidelines set out in subsection (b) . . . shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee." Id. § 5(c).

†n86 Senator Metcalf's bill, S. 1637, 92d Cong. (1971), would have required one-third of the members of committees to come from public interest groups.

†n87 5 U.S.C. App. II § 10(f).

†n88 Id. § 10(e).

†n89 5 U.S.C. § 552 (initially enacted in 1966).

†n90 5 U.S.C. § 552b (initially enacted in 1976).

†n91 5 U.S.C. App. II § 10(a)(1).

†n92 Id. § 10(a)(2). GSA's regulations require at least 15 days' notice in the Federal Register. 41 C.F.R. § 101-6.1015(b)(1). Those regulations further require that the notice contain the name of the committee; the time, date, place, and purpose of the meeting; a summary of the agenda; and a statement whether any of the meeting is to be closed to the public, and, if so, why. See id. There are exceptions to these requirements however. For example, notice of meetings is not required when the President determines that reasons of national security preclude giving such notice. See 5 U.S.C. App. II § 10(a)(2).

†n93 See 5 U.S.C. App. II § 10(a)(3). However, meetings (or portions of meetings) need not be opened to the public if the President or the head of the advisory committee's agency determines in writing, with reasons given, that the meetings would qualify for closure under the Government in the Sunshine Act. See id. § 10(d). In the original Act, which preceded the Government in the Sunshine Act, meetings could be closed if they would deal with matters that could be withheld under the FOIA. See Federal Advisory Committee Act, Pub. L. No. 92-463, § 10(a)(3)(d), 86 Stat. 774, 775.

†n94 5 U.S.C. App. II § 10(c). Although the **FACA** does not require a verbatim transcript of committee meetings--only the detailed minutes--transcripts are listed among the documents to be subject to inspection and copying, see id. § 10(b), and referred to in a provision requiring agencies and advisory committees to "make available to any person, at actual cost of duplication, copies of transcripts of . . . advisory committee meetings." Id. § 11(a).

†n95 See id. § 10(b). Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), which exempts certain inter-agency and intra-agency documents, does not apply to draft reports, working papers, and other documents made available to or prepared by or for an advisory committee, because the committee is not an "agency." See, e.g., *Wolfe v. Weinberger*, 403 F. Supp. 238, 241-43 (D.D.C. 1975).

†n96 The **FACA** might also raise delegation/nondelegation issues: For example, is the Act consistent with classic nondelegation doctrine--as embodied in cases like *A.L.A. Schechter Poultry*, *Panama Refining Co.*, and *Carter Coal*--which prohibited the delegation of legislative authority to private or semi-private bodies? The short answer, and probably the correct one, is that under the **FACA**, agencies, not advisory committees, are the final decisionmakers.

Arguably, however, parts of the Act do seem to contemplate the possibility that an advisory committee's recommendations might be used for more than just advice. See 5 U.S.C. App. II § 9(b) ("Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions."); id. § 9(c)(F) ("[Advisory committee charters shall include] 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.").

†n97 Western Governors' Association, Resolution No. 94-001 (1994).

†n98 See infra text accompanying notes 24-25.

†n99 5 U.S.C. App. II § 3(2).

†n100 See id. § 3(2)(B)-(C).

†n101 Id. § 3(2)(C).

†n102 See, e.g., *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1012-13 (D.D.C. 1994) (noting that state employees do not save a group from advisory-committee status).

†n103 See infra text accompanying notes 24-25.

†n104 806 F. Supp. 275, 278 (D.D.C. 1992).

†n105 42 U.S.C. § 300(f) -(j). Under the Safe Drinking Water Act, the EPA sets minimum national standards for specific water contaminants, and states are free to establish their own particular standards and to take the lead in enforcement, with the EPA providing financial and technical assistance. 42 U.S.C. § 300(g) -(j)(1).

†n106 806 F. Supp. at 277.

†n107 Id. at 278.

†n108 Id. at 277.

†n109 Id. at 279.

†n110 At the very least, the court's suggestion here is in tension with Brandeis's observation that "sunshine is the best disinfectant." Louis Brandeis, *Other People's Money, And How the Bankers Use It* 92 (1914).

†n111 Nevertheless, it was in response to such concerns that Congress passed the Unfunded Mandates exemption mentioned above. See supra text accompanying note 24. Interestingly, according to Congressional staff sources, that provision met resistance both from public interest groups, who believed that any exemption would compromise the purposes underlying the Act, and from the National Governors' Association and the National Association of Counties, who sought an exception more broad than that which Congress in the end adopted.

†n112 491 U.S. 440 (1989).

†n113 5 U.S.C. App. II § 3(2)(B)-(C) (emphasis added).

†n114 491 U.S. at 452-53.

†n115 See Exec. Order No. 11,007, *supra* note 42.

†n116 491 U.S. at 456-57.

†n117 *Id.* at 466.

†n118 *Id.* at 467.

†n119 *Id.* at 474-77 (Kennedy, J., concurring).

†n120 *Id.* at 482-88.

†n121 997 F.2d 898 (D.C. Cir. 1993) (Buckley, J., concurring).

†n122 5 U.S.C. App. II § 3(2)(C)(iii).

†n123 997 F.2d at 917-922. In making his argument, Judge Buckley observed that even the Public Citizen Court stated that courts cannot "press statutory construction to the point of disingenuous evasion [of Congress's intent], even to avoid a constitutional question." *Id.* at 917 (quoting *Public Citizen*, 491 U.S. at 467).

†n124 5 U.S.C. App. II § 3(2)(C)(iii).

†n125 5 U.S.C. App. II § 3(2).

†n126 *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977).

†n127 997 F.2d at 924-25.

†n128 See *supra* text accompanying note 18.

†n129 See, e.g., *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C. 1983) ("The Act leaves a myriad of questions unanswered, especially concerning the extent to which Congress intended to interfere with the President's formulation of policy. A President constantly seeks, as he should, informed advice. His choice of advisors should be largely his personal concern under our tripartite form of government."); *Nader v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975) ("To hold that Congress intended to subject [biweekly White-House meetings between the President and non-public parties] . . . to press scrutiny and public participation with advance notice on formulated agendas, etc., as required by the Act, would raise the most serious questions under our tripartite form of government as to the congressional power to restrict the effective discharge of the President's business.")

†n130 U.S. Const. art. I, § 9, cl. 8.

†n131 See Sourcebook, *supra* note 9, at 573.

†n132 The Act and the GSA regulations certainly contemplate that advisory-committee members will be paid. See 5 U.S.C. App. II § 7(d); 41 C.F.R. § 101-6.1033.

†n133 See Responses to Question 11, Federal Advisory Committee Act Agency Survey (on file with authors).

†n134 See generally Croley, *supra* note 30.

†n135 5 U.S.C. App. II § 3(2).

†n136 Id. § 3(2)(C).

†n137 Id. § 4(b).

†n138 Id. § 4(c).

†n139 Id. The Act's definition is given further specification by GSA regulations. 41 C.F.R. § 1016.1003-04.

†n140 See, e.g., 29 U.S.C. § 1302(h)(8) (advisory committee to Pension Benefits Guaranty Corporation not subject to **FACA**).

†n141 See also 41 C.F.R. § 101-6.1004(h) (meetings initiated by President or agency to seek advice from single individual not subject to Act).

†n142 Center for Auto Safety v. Cox, 580 F.2d 689 (D.C. Cir. 1978).

†n143 Public Citizen, 491 U.S. at 453.

†n144 Indeed, to the extent that the concern is with improper government influence by private interests, the evil may also arise from powerful individuals, whose advice is clearly outside the bounds of the **FACA**. At any rate, this issue, insofar as it related to privately organized groups, has largely been mooted by the Supreme Court's decision in Public Citizen, which restrictively interpreted the term "utilized." See *infra* Subsection I.B.2.a. Consequently, whether or not these private organizations are committees or groups, even if they do provide advice to agencies, they are not likely to be considered "utilized" by the agency within the meaning of the **FACA** and, therefore, will escape characterization as "advisory committees." Nevertheless, the failure of courts to address clearly what constitutes a committee continues to raise questions when an agency or the President brings individuals together.

†n145 41 C.F.R. § 101-6.1004(i).

†n146 See 5 U.S.C. App. II § 7.

†n147 467 U.S. 837 (1984).

†n148 Public Citizen, 491 U.S. at 463 n.12. Chevron, of course, did not require (or even deem relevant) whether an agency's regulations were contemporaneous with the statute, finding the justification for deference to lie in a presumed delegation of authority from Congress to clarify ambiguities in the statute, rather than in exogenous reasons for the agency's interpretation to be correct.

†n149 5 U.S.C. App. II § 7(c).

†n150 Public Citizen, 491 U.S. at 463 n.12.

†n151 Physicians & Surgeons, 997 F.2d at 913. The court failed to recognize that while the **FACA** may apply to all agencies, GSA has been given a special role under the **FACA**. Thus, the court's citation to Reporters Comm. for Freedom of the Press v. Department of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989), in which the court refused to defer to the Justice Department's interpretation of the FOIA, was inapt.

†n152 997 F.2d at 913 (emphasis in the original). Its explanation for its agreement is

somewhat problematic. The court indicated that it believed the group's activities were expected to benefit from the interaction among the members. This may be true, but it is certainly conceivable that a group could discuss a matter among themselves and still render individual opinions on the subject. Thus, interaction does not necessarily mean advice "as a group." The court also indicated that advisory committees not only provide advice, but they also provide political legitimacy to that advice stemming from the "distinguished and knowledgeable individuals appointed." *Id.* But again, if distinguished and knowledgeable individuals render individual advice, they still provide political legitimacy to that advice, albeit perhaps not as much as would be the case if it were joint advice. Thus, the court's statement that "committees bestow these various benefits only insofar as their members act as a group," *id.* at 914, seems to overstate the case.

†n153 See also *American Society of Dermatology v. Shalala*, No. 95-1263, 1996 WL 693830 (D.D.C. 1996) (multispecialty physician panels established by Health Care Financing Administration are not advisory committees because they are created in order to obtain individual ratings of members rather than consensus view).

†n154 41 C.F.R. § 101-6.1004(i).

†n155 See *Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103 (11th Cir. 1994).

†n156 *Id.*

†n157 See *Association of American Physicians & Surgeons v. Clinton*, 837 F. Supp. 454 (D.D.C. 1993). See also *Natural Resources Defense Council v. Herrington*, 637 F. Supp. 116 (D.D.C. 1986) (quoting from agency letters inviting persons to advise agency on individual basis).

†n158 See, e.g., *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2d Cir. 1979); *Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978); *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975), *aff'd* without opinion, 546 F.2d 1043 (D.C. Cir. 1976).

†n159 41 C.F.R. § 101-6.1003.

†n160 See *Public Citizen*, 491 U.S. at 455-56, 464.

†n161 See Exec. Order No. 11,007, *supra* note 42.

†n162 See *Public Citizen*, 491 U.S. at 456-58.

†n163 H.R. Rep. No. 92-1017, at 4 (1972). The bill at the time, however, did not include the word "utilized" in the definition of advisory committee. That was added later in Conference Committee. See H.R. Rep. No. 92-1403 (1972).

†n164 S. Rep. No. 92-1098, at 8 (1972).

†n165 *Public Citizen*, 491 U.S. at 461-62.

†n166 H.R. Rep. No. 92-1403, at 10 (1972).

†n167 *Public Citizen*, 491 U.S. at 462.

†n168 *Id.* at 457, 460.

†n169 *Id.* at 465.

†n170 Id. at 457, 460.

†n171 Id. at 463.

†n172 Id. at 465-66.

†n173 Id. at 466-67.

†n174 580 F.2d 689 (D.C. Cir. 1978).

†n175 Id. at 694.

†n176 900 F.2d 328 (D.C. Cir. 1990).

†n177 H.R. Conf. Rep. No. 1403, at 10 (1972) ("The Act does not apply to persons or organizations which have contractual relationships with Federal agencies."). See also H.R. Rep. No. 1017, at 4 (1972) ("advisory committee" does not include contractor or consultant hired by officer or agency of Federal Government).

†n178 Food Chemical News, 900 F.2d at 332.

†n179 Id.

†n180 Id. at 333.

†n181 Id. See also Aluminum Co. of America v. National Marine Fisheries Service, 92 F.3d 902 (9th Cir. 1996) (committees were created by parties to litigation at instance of court); Sofamor Danek Group, Inc. v. Gaus, 61 F.3d 929 (D.C. Cir. 1995) (restrictively applying **FACA** and citing Public Citizen in support); Huron Env. Activist League v. EPA, 917 F. Supp. 34 (D.D.C. 1996) (EPA's extended discussions and negotiations with industry group did not render it "utilized" advisory committee). Cf. Natural Resources Defense Council v. EPA, 806 F. Supp. 275, 277 (D.D.C. 1992) ("Recognizing the Pandora's Box that could erupt sic if **FACA** were construed broadly, the Supreme Court has adopted restrictive interpretation.").

†n182 In Public Citizen, 491 U.S. at 460, the Court gave one example of a "quasi-public" organization, the National Academy of Sciences (NAS), and stated in dicta that groups formed by the NAS indirectly for federal agencies would be "utilized" advisory committees. The NAS maintains, however, that the **FACA's** legislative history "evidences a general intent to exclude from coverage the committees of the Academy." Food Chemical News, 900 F.2d at 333 n.4. In an early **FACA** case, a court held that a committee created by the NAS pursuant to an NAS-EPA contract was not subject to the **FACA**. See Lombardo v. Handler, 397 F. Supp. 792, 798-800 (D.D.C. 1975), aff'd without opinion, 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977). A more recent case, however, suggests that NAS's committees henceforth will be deemed advisory committees used by agencies. In Animal Legal Defense Fund v. Shalala, 104 F.3d 424 (D.C. Cir. 1997), a committee formed by a subcomponent of the NAS's principal operating arm was involved in producing the 7th edition of the Guide for the Care and Use of Laboratory Animals, guidelines used by federal agencies for handling and treatment of laboratory animals. The Animal Legal Defense Fund sought access to the committee meetings under the **FACA**. The committee and the NAS denied that it was an advisory committee utilized by federal agencies. The court, however, stated that Public Citizen "focused not so much on how [the committee] is used but whether or not the character of its creating institution can be thought to have a quasi-public status," 104 F.3d at 428, and the NAS was in fact just such a quasi-public organization, which the Court had specifically identified in Public Citizen.

†n183 "In developing this interim policy, the Agency . . . held a focus group meeting in San Francisco on January 19, 1995 with key stakeholders from industry, trade groups, State environmental commissions, State attorneys general offices, district attorneys' offices, environmental and public interest groups, and professional environmental auditing groups." Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875, 16,876 (1995).

†n184 It could also be argued that on these facts the EPA "established" this committee, as the next subsection explains.

†n185 See, e.g., *American Society of Dermatology v. Shalala*, No. 95-1263, 1996 WL 693830 (D.D.C. 1996) (committees of the American Medical Association regularly used by the Health Care Financing Administration were not "utilized" committees under **FACA**).

†n186 5 U.S.C. § 552.

†n187 Cf. *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994) (finding that President's Forest Ecosystem Management Assessment Team (FEMAT) violated **FACA** but denying injunction as relief, noting that documents made available by FEMAT or to be made available under FOIA provide substantial public disclosure). But cf. *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994) (injunction to require future compliance with openness requirements is proper relief if meetings are on-going).

†n188 General Services Administration, Twenty-Third Annual Report of the President on Federal Advisory Committees 1 (1994). This marked a net decrease of 148 over the course of the year. Id.

†n189 Id. at 7. Two percent were created under Presidential authority. Id.

†n190 See S. Rep. No. 92-1098, at 8 (1972) ("The intention is to interpret the word 'established' . . . in its most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill.").

†n191 See H.R. Conf. Rep. No. 92-1403, at 10 (1972) ("The Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies.").

†n192 Under the **FACA** as originally enacted, the OMB rather than the GSA was the agency responsible for general guidance and oversight of executive implementation of the **FACA**. See Federal Advisory Committee Act, Pub. L. No. 92-463, § 7, 86 Stat. 770, 772 (1972).

†n193 See 38 Fed. Reg. 2306, 2307 (1973), reprinted in *Nader v. Baroody*, 396 F. Supp. 1231, 1233 n.4 (D.D.C. 1975).

†n194 The guidelines said that "such bodies would have all or most of the following characteristics: (a) Fixed membership. . . ; (c) A defined purpose . . . ; (d) An organizational structure (e.g., officers) and a staff; and (e) Regular or periodic meetings." Id.

†n195 396 F. Supp. 1231 (D.D.C. 1975).

†n196 Id. at 1232.

†n197 Id.

†n198 Id. at 1233.

†n199 Id.

†n200 Id.

†n201 Id. at 1234.

†n202 378 F. Supp. 1048 (D.D.C. 1974).

†n203 603 F.2d 327 (2d. Cir. 1979).

†n204 Id. at 329-330.

†n205 See id. at 336.

†n206 See, e.g., Alabama-Tombigbee Rivers Coalition v. Department of Interior, 26 F.3d 1103 (11th Cir. 1994) (panel of four scientists asked to make recommendations as to the listing of the Alabama Sturgeon as an endangered species held advisory committee). But cf. Natural Resources Defense Council v. Herrington, 637 F. Supp. 116 (D.D.C. 1986) (panel of scientist-executives convened by the Secretary of Energy to study safety of a government-owned nuclear reactor in light of nuclear disaster at Chernobyl was not an advisory committee).

†n207 997 F.2d at 914.

†n208 Id.

†n209 S. Rep. No. 92-1098, at 8 (1972).

†n210 See H.R. Rep. No. 92-1017, at 4 (1972) ("advisory committee" does not include contractor or consultant hired by an officer or agency of the Federal government).

†n211 See H.R. Conf. Rep. No. 92-1403, at 10 (1972) ("The Act does not apply to persons or organizations which have contractual relationships with Federal agencies.").

†n212 See Food Chemical News v. Young, 900 F.2d 328, 331 (D.C. Cir. 1990).

†n213 Id.

†n214 997 F.2d at 915.

†n215 Id.

†n216 Id.

†N217 See 5 U.S.C. App. II § 3(2)(iii).

†n218 H.R. Conf. Rep. No. 92-1403, at 10 (1972).

†n219 See Public Citizen, 491 U.S. at 460.

†n220 See Food Chemical News v. Young, 900 F.2d 328, 332-33 (D.C. Cir. 1990).

†n221 Id. The court also relied on the conclusion that the contractual provision was proposed by the contractor, and the contractor selected the committee's members, set the agenda,

and scheduled its meetings. *Id.* at 333.

†n222 92 F.3d 902 (9th Cir. 1996).

†n223 See also *People for Ethical Treatment of Animals, Inc. v. Barshefsky*, 925 F. Supp. 844 (D.D.C. 1996) (working group on the Development of International Humane Standards established at the behest of an international constituency, not the President or a federal agency.).

†n224 See, e.g., *Consumers Union v. Department of Health, Educ., and Welfare*, 409 F.2d 473 (D.C. Cir. 1976).

†n225 *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 935-37 (D.C. Cir. 1995); But see *California Forestry Ass'n v. Forest Service*, 102 F.3d 609 (D.C. Cir. 1996) (*SofamorDanek Group* distinguished because here there was no statutory directive indicating use of the report by non-government agencies and the Forest Service had in fact used the report).

†n226 76 F.3d 1232 (D.C. Cir. 1996).

†n227 *Id.* at 1233. See also *Sofamor Danek Group*, 61 F.3d at 935-37; *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993).

†n228 41 C.F.R. § 101-6.1004(g).

†n229 *Id.*

†n230 See *HLI Lordship Indus. v. Committee for Purchase from the Blind & Other Severely Handicapped*, 615 F. Supp. 970, 978 (E.D. Va. 1985) (ruling **FACA** inapplicable to committee whose "advisory capacity is secondary to its operational activities"), *rev'd* on other grounds, 791 F.2d 1136 (4th Cir. 1986). See also *Natural Resources Defense Council v. EPA*, 806 F. Supp. 275 (D.D.C. 1992) (state governors on Governors' Forum established by EPA act primarily in operational manner as independent chief executives in partnership with federal agency).

†n231 *Id.*

†n232 See H.R. Rep. No. 92-1017, at 4, reprinted in 1972 U.S.C.C.A.N. 3491, 3494 ("The term advisory committee as used in this bill does not include committees or commissions which have operational responsibilities. Only those committees established for the purpose of obtaining advice are within the bill's definition."); S. Rep. No. 92-1098, at 8 (1972) (if a committee is "primarily operational, rather than advisory," it is not covered by **FACA**).

†n233 See, e.g., *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232 (D.C. Cir. 1996) (dictum); *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929 (D.C. Cir. 1995); *Natural Resources Defense Council v. EPA*, 806 F. Supp. 275, 278 (D.D.C. 1992); *Public Citizen v. Commission on the Bicentennial*, 622 F. Supp. 753, 758 (D.D.C. 1985).

†n234 See generally Thomas O. McGarity, *Peer Review in Awarding Federal Grants in the Arts and Sciences*, 9 High Tech. L.J. 1 (1994).

†n235 *Id.* at 2.

†n236 *Id.* at 64.

†n237 See *id.* at 64-65.

†n238 See Washington Research Project, Inc. v. Department of Health, Educ., & Welfare, 504 F.2d 238, 246 (D.C. Cir. 1974) (groups "performing staff functions through the medium of outside consultancy").

†n239 41 C.F.R. § 101-6.1004(l).

†n240 To the contrary, in Northwest Forest Resource Council v. Espy, 846 F. Supp. 1009 (D.D.C. 1994), the court indicated a distinct hostility to the claim that a committee's presentation of technical options did not constitute advice or recommendations.

†n241 After all, in one sense advice necessarily communicates information, at the very least information about the advice-giver's views. Still, it is certainly possible to supply information without rendering advice.

†n242 5 U.S.C. App. II § 3(2).

†n243 Id.

†n244 Interestingly, virtually every agency responding to the survey questionnaire indicated that 0-20% of their advisory committees have independently chartered subgroups that meet at least as often as their parent committees, while 29 of 36 agencies answering the question indicated that 0-20% of their advisory committees have unchartered subcommittees that meet at least as often as their parent committees. See Appendix A, Questions 50-51.

†n245 See 52 Fed. Reg. 45,926, 45,927 (1987).

†n246 41 C.F.R. § 101-6.1007(b)(3). See also 41 C.F.R. § 101-6.1007(b)(4) (requiring charters for subcommittees that function independently, "such as by making recommendations directly to the agency rather than for consideration by the chartered advisory committee").

†n247 41 C.F.R. § 101-6.1004(k).

†n248 See generally Federal Communications Comm'n v. ITT World Communications, 466 U.S. 463, 465-66 (1984).

†n249 See National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1075 (D.C. Cir. 1983) (task forces to committee acting as "staff" and not providing advice directly to President or any agency); Association of Am. Physicians & Surgeons, Inc. v. Clinton, 813 F. Supp. 82, 88-89 (D.D.C. 1993), rev'd on other grounds, 997 F.2d 898 (D.C. Cir. 1993).

†n250 See 5 U.S.C. App. II §§ 3(2)(C), 4(b)-(c).

†n251 Id. § 4(b)(1)-(2).

†n252 Id. § 3(2)(i)-(ii).

†n253 See, e.g., 29 U.S.C. § 1302(h)(8) (advisory committee to Pension Benefits Guaranty Corporation not subject to **FACA**).

†n254 5 U.S.C. App. II § 4(c).

†n255 S. Rep. No. 90-1098, at 9 (1972).

†n256 See Center for Auto Safety v. Cox, 580 F.2d 689, 692-93 (D.C. Cir. 1978).

†n257 See id.

†n258 Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. § 1501-71 (Supp. 1996)).

†n259 Id. § 1534(b)(1).

†n260 Id. § 1534(b)(2).

†n261 Id. § 1534(c).

†n262 Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of Title II of Public Law 104-4, 60 Fed. Reg. 50,651 (1995) [hereinafter Guidelines]. Only 4 of 36 responding agencies indicated that they believed the **FACA** discourages communication between their agency and state or local governments; 24 agencies indicated that they did not believe this to be the case; while 8 were uncertain about the matter. See Appendix A, Questions 25-26.

†n263 Section 3(1) of the Unfunded Mandates Reform Act, 2 U.S.C. § 1502(1), provides that the definitions found in section 421 of the Congressional Budget and Impoundment Control Act of 1974, as added by section 101 of the Unfunded Mandates Reform Act, apply to the entire Act. The definition of "agency" in section 421(1), 2 U.S.C. § 658(1), incorporates the definition of agency in the APA, 5 U.S.C. § 551(1), except that it excludes independent regulatory agencies. Accordingly, the **FACA** exemption in the Unfunded Mandates Reform Act would seem to apply only to executive agencies. There is no apparent reason for this limitation, and it is probably the result of careless legislative drafting, but this does not gainsay the express language of the Act.

†n264 Guidelines, *supra* note 262, at 50,653.

†n265 Id.

†n266 Id.

†n267 Id.

†n268 Actually, the Unfunded Mandates Reform Act refers to guidelines issued by the President, but the President delegated his authority to make those guidelines to OMB. See 60 Fed. Reg. 45,039 (1995).

†n269 806 F. Supp. 275 (D.D.C. 1992).

†n270 Id. at 276.

†n271 Id. at 277-78.

†n272 5 U.S.C. App. II § 3(2)(c)(iii).

†n273 *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 898 (D.C. Cir. 1993).

†n274 18 U.S.C. § 202(a).

†n275 See 997 F.2d at 914-15.

¶n276 Id. at 915. Judge Buckley, who concurred in the judgement on the grounds that, while the President's wife could not be construed to be an employee of the government, it would be unconstitutional to apply the **FACA** to the Task Force, found a great deal of relevance between the conflict-of-interest provisions of federal law and the applicability of the **FACA**. See 997 F.2d at 921-22. He noted that the significant burdens imposed by the Ethics in Government Act, which Act includes the various conflict-of-interest provisions, provide safeguards that substitute for at least one of the purposes of the **FACA**--the protection against undue influence of outside interests. "Because committees not composed exclusively of federal officers and employees have members who are not required to foreswear their private associations and insulate themselves against potential conflicts of interest, the **FACA** requires, as an alternative check, that their deliberations be conducted in the open." Id. at 922.

¶n277 Id.

¶n278 Id. See also Northwest Forest Resource Council v. Espy, 846 F. Supp. 1009 (D.D.C. 1994). There, the court held that the fact that persons worked over 40 hours per week on a Forest Ecology Management Task Force would not render them "full-time" employees and that "the exception for 'fulltime officers and employees' only supports the purposes of the **FACA** if the term as used in the **FACA** is interpreted as drawing a distinction between regular civil servants and outsiders or hybrids; it clearly has no place in **FACA** as a wage-and-hour rule." 846 F. Supp. at 1013.

¶n279 5 U.S.C. App. II § 9(c).

¶n280 41 C.F.R. § 101-6.1007(b)(2).

¶n281 Id.

¶n282 41 C.F.R. § 101-6.1007(b)(2).

¶n283 Id.

¶n284 Exec. Order No. 12,838 § 3, 3 C.F.R. 590 (1993), reprinted in 5 U.S.C. § 14 App. at 1379.

¶n285 OMB Circular A-135 § (5). OMB Circular A-135 also instructs agencies to notify the GSA of any plans to establish a non-discretionary committee--one required by statute--prior to filing such a committee's charter.

¶n286 See Interagency Focus Group on GSA Regulations, Annual Report & Circular A-135, Memorandum to Interagency Committee on the Federal Advisory Committee Act (1995) (on file with the authors).

¶n287 See Appendix A, Question 8.

¶n288 See Appendix A, Question 9.

¶n289 41 C.F.R. § 101-6.1009(j).

¶n290 Ethics in Government Act of 1978, Pub. L. No. 100-598, 102 Stat. 3031 (1998) (codified as amended in scattered sections of titles 2, 5, 18, 28, and 39 of U.S.C.).

¶n291 See id.

¶n292 Pub. L. No. 101-194, 103 Stat. 1716 (1989) (codified as amended in scattered

sections of titles 3 & 14 of U.S.C.).

†n293 Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (1990), reprinted in 5 U.S.C. § 7301.

†n294 These include Exec. Order No. 11,222, 30 Fed. Reg. 6,469 (1965), reprinted in 18 U.S.C. § 201; Exec. Order No. 12,565, 51 Fed. Reg. 34,437 (1986), reprinted in 5 U.S.C. § 201; and Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (1989), reprinted in 5 U.S.C. § 7301.

†n295 Exec. Order No. 12,731, 5 C.F.R. §§ 734-35, 737, reprinted in 5 U.S.C. § 7301.

†n296 Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (1989). Agencies' supplemental regulations are prepared as addenda to the Office of Government Ethics regulations. See id.

†n297 18 U.S.C. § 208. See also Sourcebook, supra note 9, at 433 (discussing scope of section 208's "particular matter").

†n298 18 U.S.C. § 208(b)(3).

†n299 18 U.S.C. § 219.

†n300 18 U.S.C. § 219(b).

†n301 18 U.S.C. § 202(a).

†n302 See J. Jackson Walter, Director, Office of Government Ethics, Memorandum to Heads of Executive Departments and Agencies (1982).

†n303 In addition to the requirements of the EGA itself, EOs 12674 and 12731 instruct the Office of Government Ethics to establish a system of conflict-of-interest reports to complement the public reports required by the EGA. See Exec. Order No. 12,674, supra note 294; Exec. Order No. 12,731, supra note 295. These confidential reports, less extensive than the public financial disclosure reports required by the EGA for ordinary government employees, see 5 U.S.C. App., §§ 201-207, are applicable to some special government employees.

†n304 Finally, in addition to these statutory, regulatory, and executive constraints on advisorycommittee membership, the ability of an individual to serve on an advisory committee may be subject to the Emoluments Clause. As noted above, there is no judicial guidance on this question, though the Justice Department at one time took the position that the Emoluments Clause does limit advisory-committee membership. Whatever the Justice Department's current views on the Emoluments Clause's applicability, at least a couple of agencies today choose committee members so as to avoid possible Emoluments Clause problems. See Responses to Question 11, Federal Advisory Committee Act Agency Survey (on file with authors).

†n305 See id.; Responses to Question 12, Federal Advisory Committee Act Agency Survey (on file with authors).

†n306 For a very helpful review of agencies' different practices in this regard, which recommends simplified, standardized, and public conflict-of-interest reporting for advisory-committee members, see generally Richard K. Berg, Conflict-of-Interest Requirements for Members of Federal Advisory Committees, Report to the Administrative Conference of the U.S., 37 Fed. Bar News & J. 396 (1990).

†n307 See, e.g., Walter, supra note 302.

✚n308 See generally Public Citizen Litigation Group, *The Federal Advisory Committee Act at the Crossroads: Needed Improvements in the Regulation of Federal Advisory Committees* (1989). As Public Citizen rightly points out, the issue is not one of conflicts of interest per se, but rather one of unwanted conflicts of interest. At times, agencies want the points of view of parties whose direct, economic interests are at stake. See *id.* at 9.

✚n309 See S. 444, S. Hrg. 101-38, at §§ (9)(c)(2)(a), (10)(c)(5)(B).

✚n310 *Id.* §§ (7)(3)(7)(a)(7), (9)(c)(2)(a), (10)(c)(5)(B).

✚n311 *Id.* § 5(b).

✚n312 5 U.S.C. App. II § 5(c).

✚n313 Nor is it clear how a claim alleging that an agency violated § 5(b) creates a justiciable question for courts. See *infra* Part III.E.

✚n314 Section 101-6.1007(b)(2)(iii) states, in relevant part: "[The agency's proposed charter shall include a] description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in the selection of members for the committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee." 41 C.F.R. § 101-6.1007(b)(2)(iii).

✚n315 Section 101-6.1015(a) states, in relevant part: "Upon receiving notification of the completed review from the Secretariat . . . the agency shall publish a notice in the Federal Register that the committee is being established. . . . For a new committee, such notice shall also describe the nature and purpose of the committee and the agency's plan to attain fairly balanced membership" 41 C.F.R. § 101-6.1015(a).

✚n316 See Responses to Question 14, Federal Advisory Committee Act Agency Survey (on file with authors).

✚n317 Appendix A Question 15.

✚n318 *Id.*

✚n319 See 41 C.F.R. § 101-6.1007(c)-(d).

✚n320 Exec. Order No. 12,838, 58 C.F.R. 8,207, reprinted in 5 U.S.C. App. § 14.

✚n321 *Id.* § (1).

✚n322 *Id.* § (2).

✚n323 According to some, agencies sometimes create and abolish an advisory committee within the same year, with OMB acceptance, without counting such a committee against the OMB ceilings. The extent of this practice is difficult to gauge, however, in part because agencies may be reluctant to acknowledge such a practice.

✚n324 See *infra* Appendix B.

✚n325 *Id.*

✚n326 See *infra* Appendix C.

✚n327 The story continues: Responding to the criticism, the Department has subsequently

decided to communicate with any parties interested in certain highway-safety issues. Specifically, interested parties will be able to participate in periodic dialogue the Department has described as a "give and take" and an "exchange of information." The Department intends to instruct those participating in the dialogue that it is seeking neither "advice" nor "consensus" viewpoints from participants.

†n328 See 5 U.S.C. App. II § 10(e).

†n329 See *id.* § 10(f).

†n330 See *supra* note 31 and accompanying text (summarizing agency survey response). See also *infra* Appendix B (quoting agency response: "The time consuming chartering process has become the biggest barrier to public participation.").

†n331 See 5 U.S.C. App. II § 10(a)(1).

†n332 See *id.* § 10(a)(2).

†n333 41 C.F.R. § 101-6.1015(a)(2).

†n334 See Appendix A Questions 43-44.

†n335 See Federal Advisory Committee Act Agency Survey, Response by Mary Anne Betty, EPA Committee Management Officer (on file with authors).

†n336 41 C.F.R. § 101-6.1015(b)(1)(iii).

†n337 5 U.S.C. App. II § 10(a)(3).

†n338 41 C.F.R. § 101-6.1021(c), (d). Given this statutory and regulatory language, it is difficult to conclude that interested persons have no right of public participation in advisory committees as the court held in *Gates v. Schlesinger*, 366 F. Supp. 797 (D.D.C. 1973).

†n339 5 U.S.C. App. II § 10(c).

†n340 41 C.F.R. § 101-6.1025(b).

†n341 5 U.S.C. App. II § 10(b).

†n342 *Food Chemical News v. Department of Health and Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992).

†n343 5 U.S.C. App. II § 10(d). The exceptions to the Government in the Sunshine Act are found at 5 U.S.C. § 552b(c). Prior to the enactment of the Government in the Sunshine Act in 1976, meetings of advisory committees could be closed if they "concerned matters listed in [the exceptions to the FOIA]." Pub. L. No. 92-463, § 10(d), 86 Stat. 770, 775 (1972) (codified as amended at 5 U.S.C. App. II §§ 1-15. Determining how the exceptions applicable to documents applied to meetings occasioned a fair amount of litigation, in particular with respect to the inter-and intra-agency memoranda exception in 5 U.S.C. § 552(b)(5). See, e.g., *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101 (D.C. Cir. 1976) (holding exemption (b)(5) applicable to advisory committee meetings discussing inter-or intraagency memoranda). Substitution of the Sunshine Act's exemptions applicable to agency meetings for the FOIA exemptions clarified many of the questions and resolved definitively that there was no deliberative privilege exemption for closing meetings.

†n344 *Id.*

†n345 See Appendix A Question 48.

†n346 5 U.S.C. App. II § 10(d).

†n347 41 C.F.R. § 101-6.1015(b)(1)(iv).

†n348 41 C.F.R. § 101-6.1023(b).

†n349 It is certainly true that some types of agency decisions may not be subject to any public access or participation, and it might be argued that here the need for public access to and participation in advisory committee meetings is critical. However, if public access and participation are not required, and presumably therefore not advisable, with respect to the agency decision itself, the question may be asked why it is advisable with regard to an advisory committee's recommendation. The answer might be that requiring public oversight of the advisory committee was a political compromise by those who would have preferred public oversight of the agency decision itself, but who could not achieve that outcome.

†n350 See, e.g., United States v. Nixon, 418 U.S. 683, 703 (1974).

†n351 466 U.S. 463 (1984).

†n352 Id. at 472.

†n353 See generally supra Part II.B.3. There is a strong argument that at least some peer review panels are "operational" rather than advisory however. See supra text accompanying note 238. At present, the large number of peer review panels necessitated by different subject-matter expertise plagues the chartering agencies. The National Science Foundation, for example, has the third largest number of advisory committees of all agencies of the federal government. See General Services Administration, Twenty-Third Annual Report of the President on Federal Advisory Committees 7 (1994). Advisory committees of the National Institutes of Health are not separately broken out from the rest of the Department of Health and Human Servs. (HHS), but they undoubtedly are primarily responsible for HHS's position as the agency with the most advisory committees. Id.

†n354 See Cardozo, supra note 30, at 44-45 (quoting from statement made in hearings on possible **FACA** amendments).

†n355 General Services Administration, supra note 353.

†n356 Id.

†n357 Id.

†n358 Id. This counts all of the Department of Health and Human Services' advisory committees, at least some of which are not peer review panels, but it does not count any of EPA's advisory committees, some of which are peer review panels.

†n359 Id.

†n360 See Federal Advisory Committee Agency Survey, NSF Response (on file with authors). Thomas McGarity's study suggests similar grounds form the basis for closing the other agencies' peer review panels, see McGarity, supra note 234, at 68-71. See also, e.g., National Science Foundation, Special Emphasis Panel in Design, Manufacture, and Industrial Innovation; Notice of Meeting, 60 Fed. Reg. 46,872 (1995) ("Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including

technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals.").

†n361 5 U.S.C. § 552b(c)(4).

†n362 5 U.S.C. § 552b(c)(6).

†n363 See 5 U.S.C. § 552(b)(4).

†n364 See 5 U.S.C. § 552(b)(6) ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). The case law under this FOIA exemption, however, reads "similar files" so broadly that it is doubtful whether the Sunshine Act exemption as a practical matter is any broader. See *Washington Post Co. v. Department of State*, 456 U.S. 595, 600 (1982). See also *Washington Post Co. v. Department of Health and Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1982) (similar files requirement "is fairly minimal and is easily satisfied").

†n365 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975).

†n366 *Id.* at 241-242.

†n367 As a general matter, exemptions to the FOIA are construed narrowly. See, e.g., *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

†n368 504 F.2d at 244.

†n369 504 F.2d at 244 n.6. McGarity doubts that the factual assumptions of that opinion still are valid (if they ever were), noting that "in the booming area of biotechnology, lucrative partnerships and consultantships are no longer the exception to the general rule that academic scientists are devoted, but poorly compensated, seekers of scientific truth." McGarity, *supra* note 234, at 70. Nevertheless, as he further recognizes, "the Washington Research Project rationale would still seem to preclude using the trade secrecy exemption to shield from public disclosure peer review information about applications in other hard sciences, the social sciences, and the arts." *Id.*

†n370 644 F. Supp. 344 (D.D.C. 1986), *aff'd*, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

†n371 644 F. Supp. at 346.

†n372 McGarity relates the horror story of a NSF applicant who was identified (falsely) in the peer review as involved with CIA covert operations. McGarity, *supra* note 234, at 22-23.

†n373 See *Schell v. Department of Health and Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988) (stating in dictum that author's opinions, even if embarrassing to him if released, did not fall within personal privacy exemption, but finding exemption 5 applicable).

†n374 Arguably, a person's reputation is by definition public. But see *Rural Housing Alliance v. Department of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (finding file containing "information regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights and reputation" subject to exemption 6).

†n375 See *Washington Research Project, Inc. v. Department of Health, Educ., and Welfare*, 366 F. Supp. 929, at 937 (D.D.C. 1973), *aff'd* on other grounds, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975). The court held that exemption 6 was not available

because the information was not in "personnel and medical files and similar files" as required for that exemption, but it found authority for deletion of identifying data in 5 U.S.C. § 552(b)(6)'s provision allowing for deletion of "identifying details" "to the extent required to prevent a clearly unwarranted invasion of personal privacy." Subsequent case law suggests that the court's restrictive interpretation of the files subject to exemption 6 would not be followed today.

†n376 McGarity, *supra* note 234, at 71.

†n377 See Cardozo, *supra* note 30, at 44-46.

†n378 See generally McGarity, *supra* note 234.

†n379 See M. Rebecca Winkler, Committee Management Officer, National Science Foundation, Memorandum of July 31 (1995) (on file with authors).

†n380 See Cardozo, *supra* note 30, at 46-47 (suggesting GSA regulations to govern peer review panels). A difficulty, however, is that unlike GSA regulations interpreting terms of the **FACA**, regulations here would be interpreting the Sunshine Act (and derivatively the FOIA), and GSA does not have any particular oversight or administrative responsibilities for those acts. Consequently, Chevron deference would not and probably should not apply.

†n381 4 Op. Office of Legal Counsel 743 (1980).

†n382 See Michael Herz, Imposing Unified Executive Branch Statutory Interpretation, 15 Cardozo L. Rev. 219, 227 (1993).

†n383 See, e.g., *Burlington N. R.R. Co. v. Office of Inspector General, R.R. Retirement Bd.*, 983 F.2d 631, 642-43 (5th Cir. 1993).

†n384 The first report stated that the FOIA's privacy exemption "may" apply to "a review of a grant application which requires assessing an individual's professional competence." S. Rep. No. 94-354, at 21 (1975). However, this is an after-the-fact statement about the meaning of the original **FACA**, not legislative history for any provision that became law. The second report was part of the legislative history of the amendments that applied the Sunshine Act's exceptions to the **FACA**, but here the only statement reads: "The conferees . . . are concerned about the possible effect of this amendment upon the peer review and clinical trial preliminary review systems 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." H. R. Conf. Rep. No. 94-1441, at 26 (1976).

†n385 4 Op. Office of Legal Counsel at 747.

†n386 *Id.*

†n387 *Id.* at 748.

†n388 *Id.*

†n389 5 U.S.C. § 552(b)(5).

†n390 See *Washington Research Project v. Department of Health, Educ., and Welfare*, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975).

✚n391 Compare Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C. Cir. 1976) (using exemption 5 to justify closing an advisory committee meeting) and Washington Research Project, 504 F.2d at 238 (upholding nondisclosure of certain advisory committee documents based on exemption 5) with Wolfe v. Weinberger, 403 F. Supp. 238, 241-43 (D.D.C. 1975) (holding exemption 5 inapplicable to internal deliberations of advisory committee) and Nader v. Dunlop, 370 F. Supp. 177, 177 (D.D.C. 1973) (holding that exemption 5 does not apply so as to permit exclusion of public).

✚n392 See, e.g., 41 C.F.R. § 101-6.1004(k).

✚n393 504 F.2d 238 (D.C. Cir. 1974).

✚n394 Id. at 246-49.

✚n395 Reflecting a greater commitment to openness, a highly respected analysis of the FOIA and the **FACA** states flatly that "exemption 5 does not apply to draft reports, working papers and other documents made available to or prepared by or for an advisory committee." Litigation Under the Federal Open Government Laws 343 (A.R. Adler ed., 18th ed. 1993). The book cites three cases to support the sentence. But the first, Food Chemical News v. Advisory Comm. on the Food and Drug Admin., 760 F. Supp. 220 (D.D.C. 1991), aff'd as clarified sub nom., Food Chemical News v. Department of Health and Human Servs., 980 F.2d 1468 (D.C. Cir. 1992), does not support the statement; it acknowledged an argument of the plaintiffs seeking release that exemption 5 did not apply to internal deliberations of advisory committees, but it did not express an opinion on the issue and ruled against plaintiffs on other grounds. The second and third cases cited are unreported decisions, ACLU v. Attorney General's Comm'n on Pornography, C.A. No. 86-0893 (D.D.C. 1986), and BNA v. President's Council of Advisors of Science & Technology, C.A. 92-1088 (D.D.C. 1993). The latter is acknowledged as a case in which the government entered into a stipulation requiring disclosure.

✚n396 See U.S. Attorney General, Memorandum of October 4 for Heads of Departments and Agencies, Subject: The Freedom of Information Act 1 (1993); U.S. Attorney General, Memorandum of December 13 for Heads of Department Components, Subject: The Freedom of Information Act 1 (1993).

✚n397 One can reasonably question the scope of the public access and participation requirements of the **FACA** in light of the distinctions between advisory committees and agencies, but Congress has clearly decided that advisory committees and Sunshine Act agencies should be treated as equivalent entities.

✚n398 Public Citizen, 491 U.S. at 440.

✚n399 5 U.S.C. App. II § 10(b), (d). See also supra Part II.D. (explaining Act's openness provisions).

✚n400 491 U.S. at 449.

✚n401 491 U.S. at 450.

✚n402 Id.

✚n403 557 F. Supp. 524 (D.D.C. 1983), aff'd, 711 F.2d 1071 (D.C. Cir. 1983).

✚n404 Id. at 527.

✚n405 Id. (citing Physician's Educ. Network, Inc. v. Department of Health, Educ., and

Welfare, 653 F.2d 621, 622-23 (D.C. Cir. 1981) (per curiam)).

✚n406 National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983). There, the court wrote:

Like the District Court, . . . we can find 'no distinction between requirements under § 5 and requirements under § 10 of the Act' for purposes of standing. Section 5, to be sure, confers no cognizable personal right to an advisory committee appointment. But . . . when the requirements [of a fairly balanced committee] is sic ignored, . . . persons having a direct interest in the committee's purpose suffer injury-in-fact sufficient to confer standing to sue.

Id. As explained below, however, the proper interpretation of this footnote became a bone of contention in a subsequent D.C. Circuit case. See *infra* text accompanying notes 419-27.

✚n407 See Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977). In practice, standing may be difficult to satisfy in the context of a section 5 claim, notwithstanding that the proper plaintiffs making the proper allegations could conceivably satisfy standing requirements. See, e.g., Public Citizen v. Department of Health and Human Servs., 795 F. Supp. 1212, 1222 (D.D.C. 1992) (suggesting that standing to bring section 5 claim is difficult to satisfy but not ruling that standing to bring section 5 claim can never be satisfied).

✚n408 580 F.2d 689 (D.C. Cir. 1978).

✚n409 648 F. Supp. 1353 (D.D.C. 1986).

✚n410 580 F.2d at 693.

✚n411 While the defendant's motion was pending, the plaintiffs filed a separate action against the Justice Department, which was consolidated with a case against the Justice Department brought by Public Citizen, which the Supreme Court heard in Public Citizen v. Department of Justice, 491 U.S. 440 (1989).

✚n412 648 F. Supp. at 1359-60 (making reference to §§ 7 & 8, and to 5 U.S.C. App. II §§ 7-13).

✚n413 Id. (emphasis in original).

✚n414 Notwithstanding that section 5 on its face seems to create obligations on the part of Congress and not agencies, most courts that have considered the question of standing in the context of a section 5 case have concluded or implied that, under the right set of factual circumstances, plaintiffs may be able to meet standing requirements. Only one judge has suggested that plaintiffs cannot possibly satisfy standing in a case based on section 5. In Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419 (D.C. Cir. 1989), Judge Silberman argued that plaintiffs cannot have standing in a section 5 case because a court could not possibly fashion a remedy that affords plaintiffs relief. See *id.* at 431. According to that argument, to conclude that a plaintiff's absence from an advisory committee undermined the fair balance of that committee a court would first have to answer or assume away daunting philosophical questions about which kinds of groups most accurately represent various kinds of interests. See *id.* at 428-30. But this argument overstates the judicial task in question. A court need not, to use Judge Silberman's own example, resolve whether groups like Public Citizen or instead groups sharing the economic perspective of Milton Friedman most legitimately represent consumers' interests in some ultimate sense. Surely both types of groups represent different consumer interests in different ways over different contexts. Rather, a court need only make the more modest conclusion that a particular plaintiff's perspective (regardless of merit) is missing from a particular committee, and that this lack of representation is inappropriate, given that

committee's task. Such an approach to the remedy prong of the standing doctrine not only comports with common sense, but is more faithful to the language of section 5(b)(2) itself, which mentions balance of "points of view represented," not interests represented, thus allowing for different points of view about who best represents different interests.

†n415 5 U.S.C. App. II § 5(b)(2).

†n416 *Id.* § 5(b)(3).

†n417 See *supra* Part II.C.2.b.

†n418 886 F.2d 419, 426 (D.C. Cir. 1989).

†n419 *Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods*, 708 F. Supp. 359, 364 (D.D.C. 1988).

†n420 886 F.2d at 426 (Silberman, J., concurring) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), and § 5(b)(2) of the **FACA**).

†n421 *Id.*

†n422 *Id.* Judge Silberman also argued that the court's inability to ascertain whether the advisory committee was fairly balanced rendered it incapable of remedying the plaintiffs' claim, and that standing was therefore lacking. See *id.* at 431. See also *supra* note 414.

†n423 Judge Friedman concluded that the committee in question was fairly balanced. See *id.* at 423-25, while Judge Edwards concluded that the committee was not. See *id.* at 432-34.

†n424 711 F.2d 1071, 1071 n.2 (D.C. Cir. 1983).

†n425 *Id.* (citations to legislative history of the **FACA** omitted). It is noteworthy that subsequent to the appellate court's decision in *Anti-Hunger Coalition*, the plaintiffs challenged the factual basis of the decision below. They brought pleadings contending that the advisory committee was not genuinely a deliberative body but rather a pro forma "rubber stamp" of recommendations brought to it by its component task forces, and offered evidence that the advisory committee did make recommendations relating to the repeal of three pieces of legislation specifically concerned with hunger relief. The plaintiffs also argued that the committee had acted beyond the scope of its mission statement, which authorized it to control government's management costs. The court rejected the plaintiffs' first claim, but granted declaratory relief on their second, declaring the committee's approval of recommendations to repeal the hunger-relief legislation to be "ultra vires and illegal because of the lack of fair balance." See *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983).

†n426 See 711 F.2d at 1074-75.

†n427 *Id.* at 1073-74. None of the opinions in *Microbiological Criteria* is entirely convincing. Judge Friedman's opinion essentially skirts the justiciability issue. Judge Edward's opinion does not squarely confront the fact that section 5 addresses congressional rather than agency obligations. And Judge Silberman's opinion seems to blur justiciability and standing by arguing, in effect, that the plaintiff's claim was not justiciable because the plaintiffs lacked standing because their claim was not redressable. Although courts often consider justiciability determinations to be pragmatically prior to standing issues, strictly speaking the two are independent. A plaintiff could in principle have standing to sue to bring a nonjusticiable claim. If, on the other hand, Judge Silberman is right that, for the purposes of section 5(b)(2), the "law to apply" question (justiciability) and the redressability question (standing) are

inextricably intertwined, then his characterization of National Anti-Hunger Coalition as nongoverning on the standing issue misses the mark; by considering the plaintiffs' claim to be justiciable, the National AntiHunger Coalition court necessarily implied (according to the logic that insists the two are connected) that the plaintiffs had standing.

†n428 See, e.g., *Fertilizer Institute v. Environmental Protection Agency*, 938 F. Supp. 52 (D.D.C. 1996); *Doe v. Shalala*, 862 F. Supp. 1421 (D. Md. 1994); *Public Citizen v. Department of Health and Human Servs.*, 795 F. Supp. 1212 (D.D.C. 1992); *National Treasury Employees Union v. Reagan*, 1988 WL 21700 (D.D.C. 1988); *National Ass'n of People with AIDS v. Reagan*, 1988 WL 36143 (D.D.C. 1988).

†n429 In support of this proposition, the *Doe v. Shalala* court cited two cases in addition to Judge Silberman's opinion in *Microbiological Criteria: Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977), and *Public Citizen v. Department of Health and Human Servs.*, 795 F. Supp. 1212 (D.D.C. 1992). The court cited as negative authority *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524 (D.D.C. 1983), *aff'd* 711 F.2d 1071 (D.C. Cir. 1983), but did not cite the subsequent case of *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983) (declaring advisory committee's recommendations to be ultra vires and illegal for lack of fair balance).

†n430 795 F. Supp. at 1213.

†n431 795 F. Supp. at 1221, 1221 n.7.

†n432 *Id.*

†n433 *Id.* at 1220.

†n434 886 F.2d 419 (D.C. Cir. 1989).

†n435 795 F. Supp. at 1221, 1223. This invitation has, to date, not been accepted.

†n436 *Fertilizer Institute v. EPA*, 938 F. Supp. 52 (D.D.C. 1996). See also *National Treasury Employees Union v. Reagan*, 1988 WL 21700 (D.D.C. 1988); *National Ass'n of People with AIDS v. Reagan*, 1988 WL 36143 (D.D.C. 1988). Both these latter, unreported cases expressed skepticism regarding the justiciability of section 5(b)(2) claims in the course of dismissing motions for preliminary injunctions.

†n437 938 F. Supp. at 54-55.

†n438 *Microbiological Criteria*, 886 F.2d at 430 (emphasis in original). This claim is somewhat puzzling in light of the provision's language. Section 5(b)(3) states: "Any such legislation [establishing or authorizing the establishment of any advisory committee] shall . . . 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." 5 U.S.C. App. II § 5(b)(3).

†n439 See 886 F.2d at 430.

†n440 An advisory committee could be unfairly imbalanced without being unduly influenced by a special interest.

†n441 See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410-13 (1971) (discussing exception to justiciability where statute is drawn so broadly that there is in effect

no law to apply, but holding that there was law to apply in case at issue); Heckler v. Chaney, 470 U.S. 821 (1985) (holding administrative agency's behavior immune from **judicial review** under Administrative Procedures Act because statute in question was drawn such that judge would have no meaningful standard of review, no law to apply).

✚N442 Judges Edwards and Gesell represent this view. See National Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d at 432-34 (Edwards, J.); National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector on Cost Control, 566 F. Supp. 1515, 1517 (D.D.C. 1983) (Gesell, J.).

✚n443 Judges Silberman and Hogan represent this view. See 886 F.2d at 426-30 (Silberman, J.); Public Citizen v. Department of Health and Human Servs., 795 F. Supp. 1212, 1220-22 (D.D.C. 1992) (Hogan, J.).

✚n444 846 F. Supp. 1009 (D.D.C. 1994).

✚n445 The private contractors included full-time university professors. In all, the FEMAT, counting its subdivisions, consisted of between 600 and 700 people. 846 F. Supp. at 1011.

✚n446 Id. at 1013.

✚n447 Id. at 1015.

✚n448 Id. at 1014 (citations omitted).

✚n449 Id. at 1014-15.

✚n450 846 F. Supp. at 1015.

✚n451 See Microbiological Criteria, 886 F.2d at 419; National Nutritional Foods Ass'n v. Califano, 603 F.2d 327 (2d Cir. 1979).

✚n452 26 F.3d 1103 (11th Cir. 1994).

✚n453 Id. at 1105.

✚n454 Id. at 1107.

✚n455 Id.

✚n456 In National Nutritional Foods Ass'n, 603 F.2d at 336, the Second Circuit considered the appropriateness of injunctive relief for violation of the Act, but concluded that relief enjoining the FDA from relying on tainted advice was inappropriate given (1) that the agency had acted on a good faith belief that the advisory group in question was not an advisory committee under the **FACA**, (2) that the agency agreed not to reconvene the group, (3) that the agency had only proposed regulations, and (4) that, according to the court, normal rulemaking processes would "afford ample opportunity to correct infirmities resulting from improper advisory committee action." Id.

✚n457 871 F. Supp. 1291 (W.D. Wash. 1994).

✚n458 871 F. Supp. at 1310.

✚n459 See supra text accompanying note 203.

✚n460 871 F. Supp. at 1309-10. See also id. at 1310 ("Here, as in National Nutritional, . . .

the 'procedures afforded ample opportunity to correct infirmities.'")

✚n461 603 F.2d at 336. Accord *Center for Auto Safety, Inc., v. Teimann*, 414 F. Supp. 215, 226 (D.D.C. 1976), remanded on other grounds, 580 F.2d 689 (D.C. Cir. 1978).

✚n462 871 F. Supp. at 1309.

✚n463 General Services Administration, *supra* note 188, at 3.

✚n464 To this figure, the government's cost of defending the **FACA** suits must also be added in order to get a true picture of the total costs of the Act. This additional cost is not great. According to Department of Justice lawyers who handle the government's **FACA** litigation, only a few **FACA** cases, if any, are on the government's docket at any given time.

✚n465 See generally Bruce Maxwell, *Washington Online: How to Access the Federal Government on the Internet* (1995); Bruce Maxwell, *Washington Online: How to Access the Government's Electronic Bulletin Boards* (1995).

✚n466 According to the NSF, it spends approximately \$ 60,000 per year in direct costs and \$ 75,000 per year in staff time to satisfy notice requirements of meetings that are closed. And according to the NIH, it has published meetings notices in the Federal Register for over 2,000 closed meetings. Several agencies close their committees' meetings more often than not. See Appendix A Question 48.

✚n467 The Federal Register had 13,750 subscribers as of January of this 1995. Telephone Interview with General Accounting Office Marketing Department (Mar. 14, 1995).

✚n468 Absent notice of a closed meeting, an interested party might never discover that a meeting had ever been held, even if that meeting was closed improperly.

✚n469 Cf. *Microbiological Criteria*, 886 F.2d at 430-31 (Silberman, J., concurring).

✚n470 As one congressional staff person astutely observed during the course of our research, "the **FACA** means pain for the Administration." This is probably true, given the bad press for the Administration generated by the Physicians & Surgeons case. If true, this association of the **FACA** with pain is unfortunate, for in fact the Act in many ways embodies the Administration's regulatory-policy goals.

✚n471 See *supra* note 13.

✚n472 See *supra* note 12.

✚n473 58 Fed. Reg. 51,735 (1993), reprinted in 5 U.S.C. § 601.

✚n474 58 Fed. Reg. 58,093 (1993), reprinted in 5 U.S.C. § 601.

✚n475 See 41 C.F.R. § 101-6.1004(g).

✚n476 See *supra* note 13.

✚n477 See Appendix A Question 18.

✚n478 National Institute of Health, *Ad Hoc Panel, Sustaining the Quality of Peer Review: A Report of the Ad Hoc Panel* 30 (1989).

✚n479 Whether peer-review committees should be subject to the **FACA** is another question,

however. The important point is that, through the Act, the government can enlist the resources of nonagency personnel for submarket prices.

†n480 See, e.g., *Physicians & Surgeons*, 997 F.2d at 914 (noting that advisory committee membership is prestigious).

†n481 See, e.g., 118 Cong. Rec. 30,276 (1972) ("Viewed in its worst light, the federal advisory committee can be a convenient nesting place for special interests seeking to change and preserve a federal policy for their own ends. Such committees stacked with giants in their respective fields can overwhelm a federal decision maker, or at least make him wary of upsetting the status quo.") (excerpt of Senate staff report entered into record by Sen. Percy). See also S. Rep. No. 92-1098, at 5 (1972).

†n482 See Vice President Al Gore, Memorandum for the Heads of Executive Departments and Agencies, Subject: Management of Federal Advisory Committees (1994).

†n483 See Appendix A Questions 4-5 (large majority of agencies recharter committees at least once, and a large majority of them are rechartered at least once again).

†n484 See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

†n485 We distributed this survey questionnaire to 49 departments, agencies, councils, and boards (collectively, "agencies") from a list provided in the Twenty-Second Annual Report of the President. Department of Agriculture personnel reproduced the questionnaire and distributed it to nine agencies within the Department, increasing the list of recipient agencies to 58. Thirty-seven agencies responded. Those responding included the largest agencies, and those who rely most on federal advisory committees, such as EPA, DOT, HHS, and NSF, for examples. This Appendix reports agencies' responses to the non-qualitative survey questions. Where the answers to a question do not add up to 37, one or more of the respondents left that question unanswered (unless that question applies only to agencies that answered a previous question in a particular way). Since our aim in presenting the survey results is simply to report how agencies view the Act, not to test some hypothesis, we recorded all answers agencies submitted, and did not exclude an agency from the tabulation if that agency did not answer every survey question. Appendix B provides examples of representative responses to the survey's most important qualitative question, question number 55. Appendix C contains the Federal Advisory Committee Management Association's organized, official response to the survey questionnaire.

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**COMMENTS: THE FEDERAL ADVISORY COMMITTEE ACT AND THE EXECUTIVE PRIVILEGE:
RESOLVING THE SEPARATION OF POWERS ISSUE**

Andrea L. Wolff

SUMMARY:

... An advisory committee is any group of individuals that considers governmental issues and furnishes its views and conclusions to government agencies and officers. ... This Comment will then evaluate the development of the executive privilege and the application of the balancing test pronounced in *United States v. Nixon*. Part IV will illustrate the conflict between the Act and the executive privilege and will examine how courts have avoided the separation of powers issue, at times using strained construction of the Act and the definitions included therein to exclude certain executive advisory committees from the Act's requirements. Finally, part V will conclude that the openness requirements of the Act, when applied to Presidential advisory committees that formulate and report advice and recommendations to the President, violate the executive privilege. ... Defendants claimed that FEMAT did not function as an advisory committee, and if the court found otherwise then "**FACA** itself must be deemed an unconstitutional invasion of the executive privilege for communications necessary to his exercise of the powers entrusted by the Constitution to the President." ... The Act should be amended to specifically exempt advisory committees that advise the President from the openness requirement and the document disclosure requirement when such committees are formulating policy or presenting advice and recommendations to the President. ...

TEXT:

[*1023]

I. INTRODUCTION

An advisory committee is any group of individuals that considers governmental issues and furnishes its views and conclusions to government agencies and officers. ¹ A public advisory committee is one whose members are not all government officials. ² The Federal Advisory Committee Act ("**FACA**" or "Act") was enacted in 1972 to control the establishment and use of public advisory committees. ³ The Act imposes public "oversight" upon the use of advisory committees by requiring open meetings and public access to documents used in such meetings. ⁴ Advisory committees that advise the President are also subject to the Act's requirements, including openness. ⁵

In exercising constitutional powers, the President is privileged to receive communications in confidence. ⁶ This privilege is implied in the [*1024] Constitution and has been recognized by the Supreme Court. ⁷ This power, however, is not absolute, and the Court has developed a balancing approach which requires the President to disclose confidential, privileged information when the President's right is outweighed by other constitutional needs. ⁸ *United States v. Nixon* ⁹ and *Nixon v. Administrator of General Services* ¹⁰ [*1025] are two important instances where the Court found that the privilege was overcome by competing constitutional issues, thereby requiring the disclosure of information received by the President in confidence. ¹¹ **FACA's** openness requirements, as applied to Executive advisory committees, conflict with the President's privilege to receive confidential communications. ¹²

This Comment will examine the constitutional conflict resulting from the application of **FACA** to committees that consult the President. Part II of this Comment will review the history leading to the enactment of **FACA** and will discuss the purpose and application of various sections of the Act. This Comment will then evaluate the development of the executive privilege and the application of the balancing test pronounced in *United States v. Nixon*. ¹³ Part IV will illustrate the conflict between the Act and the executive privilege and will examine how courts have avoided the separation of powers issue, at times using strained construction of the Act and the definitions included therein to exclude certain executive advisory committees from the Act's requirements. Finally, part V will conclude that the openness requirements of the Act, when applied to Presidential advisory committees that formulate and report advice and recommendations to the President, violate the executive privilege. This section will then argue that the constitutional conflict should be resolved by amending the Act to specifically exempt such advisory committees.

II. THE FEDERAL ADVISORY COMMITTEE ACT

The United States Government has a long history of using advisory committees. ¹⁴ The use of advisory committees dates back to the 1790's when George Washington formed a cabinet and convened committees. ¹⁵ [*1026] These committees have been established by both the executive and the legislative branches for the purpose of obtaining advice, recommendations, and expert insights. ¹⁶ The value of these committees is illustrated by the numerous important events surrounding their work. For example, due in part to the recommendations of the General and Plastic Surgery Devices Committee, the Food and Drug Administration instituted the voluntary ban on the sale and use of silicone gel breast implants. ¹⁷ Additionally, on January 25, 1993, President Clinton established the Task Force on Health Care Reform to prepare health care reform legislation. ¹⁸ More recently, in January 1994, President Clinton released an Executive Order establishing an Advisory Committee on Human Radiation Experiments. ¹⁹ This Advisory Committee was responsible for uncovering "the nature and extent of government-sponsored experiments on individuals involving intentional exposure to ionizing radiation." ²⁰

Although Congress did not question the importance of these committees, ²¹ it did recognize the need to regulate their establishment, [*1027] operation, and use. ²² During the 1950's, it was revealed in the Hearings before the House Subcommittee on Executive and Legislative Reorganization of the Committee on Government Operations ("House Subcommittee") that many existing advisory committees were not subject to any formal control during their creation, organization, or operation, and some had been formed without specific statutory authorization. ²³ Moreover, many of these committees met without agendas and failed to keep records of their deliberations. ²⁴ Some also kept their existence concealed from public scrutiny, allowing internal conflicts of interest as well as domination by special interests to go unrecognized. ²⁵

Prior to 1957, there were few attempts to regulate advisory committees. ²⁶ In 1957, following numerous studies and hearings on congressional committees by the House Subcommittee, Congress began consideration of a bill which attempted to regulate advisory committees and

required public disclosure and input concerning the committees.²⁷ This House Bill was "the consanguineous forbearer of the Federal Advisory [*1028] Committee Act" which was enacted in 1972.²⁸ The hearings conducted in 1957 and those on the bills introduced in 1970 and 1971 revealed the condition of the Federal Government's advisory committee system.²⁹ The system was characterized as lacking adequate guidelines, supervision or direction and advisory committees were found so numerous as to defy accurate accounting.³⁰ Additionally, the Presidential Advisory Committee Hearings indicated that there were approximately 1,800 advisory committees in the Federal Government.³¹ Included in this number were 198 presidential advisory committees.³² These Presidential advisory committees constituted only thirteen percent of all advisory committees, but operated at an estimated cost of \$ 75 million per year or approximately seventy-five percent of the total estimated cost associated with all advisory committees.³³ As such, controls were needed to eliminate unnecessary committees, to govern the administration of the remaining committees, and to provide information to the public regarding the membership and activities of these committees.³⁴ Accordingly, **FACA** was enacted for these purposes.³⁵ [*1029]

Section 3 of the Federal Advisory Committee Act defines an advisory committee as: 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....³⁶

Section 3 lists committees which are specifically exempt from the requirements of the Act, including the Advisory Committee on Intergovernmental Relations, the Commission on Government Procurement, and any committee exclusively composed of full-time officers or employees of the Federal Government.³⁷ This last exemption indicates that the Act is only concerned with "public advisory committees," or those containing members who are not government employees or officers.³⁸ [*1030]

Advisory committees that are subject to the requirements of the Act are closely monitored to prevent the recurrence of problems that plagued the advisory committee system prior to the Act's adoption.³⁹ The Act imposes various administrative guidelines and record keeping requirements on the operations of the advisory committees.⁴⁰ For instance, section 5 establishes guidelines and responsibilities of Congressional committees monitored by the standing committees of the Senate and the House of Representatives.⁴¹ Among the requirements imposed upon the standing committees is a requirement that they promote the efficiency and economy of advisory committees already in existence.⁴² The standing committee, in exercising its legislative review function, is required to evaluate each advisory committee under its jurisdiction to determine whether any of the committees should be cancelled or merged with another existing advisory committee, whether revision of the advisory committee's responsibilities is needed, and whether the advisory committee is performing a necessary function, which is not also being performed by another committee.⁴³

Section 5(b) sets forth the criteria that standing committees must follow when considering legislation establishing or authorizing the establishment of [*1031] an advisory committee.⁴⁴ These criteria include ensuring that other existing committees are not serving the same

function as the proposed committee, as well as determining whether the function of the proposed committee could be accomplished by an existing committee or agency. ⁴⁵

Legislation establishing an advisory committee must state the purpose of the advisory committee, ⁴⁶ and must require "balanced" membership "in terms of the points of view represented and the functions to be performed by the advisory committee." ⁴⁷ In order to assure that the advisory committee's advice and recommendations are the result of its independent judgment, the legislation must employ means to prevent influence by special interests. ⁴⁸ Additionally, the legislation should set the duration of the advisory committee, dates for the submission of reports, and authorization for **[*1032]** appropriations. ⁴⁹ Finally, the legislation is responsible for assuring that the advisory committee has sufficient staff, funding, and quarters. ⁵⁰

Subsection (c) further requires that the guidelines found in section (b) are followed by the President, agency heads, or other Federal officials to the extent applicable, when creating a federal advisory committee. ⁵¹

Next, section 6 of the Act sets forth the President's responsibilities and requirements regarding advisory committees. ⁵² Initially, the President is permitted to delegate authority for evaluating and acting upon the recommendations received from an advisory committee. ⁵³ After receiving a public report from an advisory committee, the President or his delegate, within one year, must report to Congress on his proposal for action or report reasons for not acting. ⁵⁴ **[*1033]**

The President is also required to submit annual reports to Congress regarding the activities, status, and changes in membership of the advisory committees in existence during the fiscal year. ⁵⁵ The report should include, inter alia, the names of the members, the estimated annual cost, and a reference to reports which the advisory committee has submitted. ⁵⁶ Only information which the President believes should be withheld for national security reasons can be excluded from the report. ⁵⁷

In addition to the guidelines that Congress and the President must follow, section 7 establishes a review and reporting system which the Administrator of General Services must follow. ⁵⁸ The Administrator must establish and maintain a Committee Management Secretariat within the General Services Administration to be responsible for all matters concerning **[*1034]** advisory committees. ⁵⁹ In addition, the Administrator is responsible for reviewing the advisory committees to determine if each is fulfilling its purpose, ⁶⁰ whether any should be abolished ⁶¹ or merged with another, ⁶² and whether its responsibilities should be revised. ⁶³ This review is to be carried out annually, and after each review the Administrator must make recommendations to the President, agency head, or the Congress regarding the action which he believes should be taken. ⁶⁴

To assist the advisory committees in improving their performance, the Administrator shall "prescribe administrative guidelines and management controls... and, to the maximum extent feasible, provide advice, assistance, and guidance...." ⁶⁵ To ensure financial economy of the advisory committees, the Administrator is required to consult with the Director of Personnel Management, and establish "guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors." ⁶⁶

Prior to the authorization and creation of an advisory committee, certain standards must be met. ⁶⁷ This procedure was intended to arrest the "bureaucratic proliferation of advisory committees," and to ensure that the committees serve a significant advisory purpose. ⁶⁸ Section 9 mandates that the establishment of an advisory committee be specifically authorized by **[*1035]** statute, ⁶⁹ or determined as a matter of formal record to be in the

public interest. ⁷⁰ Timely notice of the advisory committee's creation must also be published in the Federal Register to give the public and Congress ample opportunity to challenge the committee's establishment. ⁷¹ After establishment, no advisory committee can meet or take action until a charter has been filed with the appropriate body. ⁷² The charter should contain specified information which will aid in the monitoring and supervision of the committee's effectiveness, responsibilities, and expenses. ⁷³ [*1036]

Section 10 establishes additional procedures which must be followed prior to any advisory committee meeting. ⁷⁴ Specifically, subsection (e) mandates that an officer or employee of the Federal Government be designated to chair or attend every meeting of the advisory committee and that no meeting may be conducted in the absence of the designated officer or employee. ⁷⁵ This subsection is intended to prevent advisory committee meetings from becoming forums for antitrust law violations, and to prevent discussions which could inappropriately influence government decision-making. ⁷⁶ Subsection (f) requires that meetings only be held at the call of, or after advanced approval by, the designated officer or employee. ⁷⁷ Additionally, advisory committee meetings, other than Presidential advisory committees, must have an agenda approved by the officer or employee. ⁷⁸

Moreover, to prevent abuses of the advisory process, the Act limits the functions of established advisory committees. ⁷⁹ These functions are limited solely to "advisory functions," unless otherwise provided by Presidential directive or statute. ⁸⁰ Therefore, the Act does not apply to operational [*1037] committees which provide substantive functional duties under statute, rather than merely providing advice. ⁸¹

To control the growth of the number of advisory committees, the Act limits the duration of each advisory committee's existence to two years from the date of its establishment with allowance for renewal. ⁸² Advisory committees renewed by the President or an officer of the Federal Government may continue for successive two-year periods. ⁸³ Upon renewal, a charter is required to be filed in accordance with section 9(c), ⁸⁴ and no action other than preparing and filing the charter can be taken prior to filing the charter. ⁸⁵

In addition to the housekeeping functions discussed above, the Act attempts to correct internal abuses in the advisory system by imposing "openness" on the advisory process. ⁸⁶ The openness requirement is the touchstone of the Act and prevents subjective influences from being too easily exerted upon federal decision makers. ⁸⁷

Section 10 of the Act outlines the procedures that each advisory committee must follow, the first being that the each meeting be open to the public. ⁸⁸ In order that the public becomes aware of the meetings, the Act [*1038] requires that timely notice of the meeting is published in the Federal Register. ⁸⁹ In addition, the Administrator is to prescribe regulations providing for other types of public notice to insure that all interested members of the public are notified prior to a meeting. ⁹⁰

The Act also imposes the openness requirement on the documents included in the advisory committee meetings. ⁹¹ Subject to the Freedom of Information Act, ⁹² all "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which are made available to or prepared for or by each advisory committee" are to be made available for public inspection and copying. ⁹³ The minutes of each meeting, required to be kept by every advisory committee, must include: a list of all [*1039] persons in attendance; an accurate description of all matters discussed and all conclusions reached; and copies of all reports the committee received, issued, or approved. ⁹⁴ The accuracy of the minutes must then be certified by the chairperson of the advisory committee. ⁹⁵ Copies of transcripts of advisory committee meetings are available to any person upon payment of duplication costs. ⁹⁶

Finally, the Librarian of Congress is required to establish a depository for each report made

by every advisory committee including, in some cases, background reports furnished by consultants. ⁹⁷ The Administrator is responsible, subject to the Freedom of Information Act exemptions, for filing at least eight copies of such reports and papers. ⁹⁸

Although advisory committees are valuable governmental tools, they must be regulated to increase the efficiency of their utilization and to reduce the danger of abuse by special interest groups. ⁹⁹ **FACA** provides this necessary regulation by instituting administrative control and by opening to the public the operations of groups that supply advice to the government. ¹⁰⁰ This regulation applies to all groups which fall under the definition of "advisory committee" provided in the Act ¹⁰¹ and the definitions established through case law. ¹⁰² **[*1040]**

III. THE EXECUTIVE PRIVILEGE

Pursuant to Article II, Section 1, Clause 1, of the United States Constitution, ¹⁰³ the President of the United States has a right to receive confidential communications from his aides and advisors. ¹⁰⁴ In discharging his enumerated powers effectively, the President has a great interest in confidentiality of communications. ¹⁰⁵ Therefore, although the Constitution does not explicitly reference a privilege of confidentiality, to the extent the President's interest in confidentiality relates to the effective discharge of Executive powers, it is constitutionally based. ¹⁰⁶ The need to protect **[*1041]** confidential information is derived from the constitutional doctrine of the separation of powers ¹⁰⁷ and is recognized, not as an absolute privilege, but **[*1042]** as a qualified privilege. ¹⁰⁸ This Presidential or executive privilege applies to military and diplomatic secrets, as well as to "documents integral to an appropriate exercise of the executive's domestic decisional and policy making functions." ¹⁰⁹

Although the executive privilege is not expressly set forth in the Constitution, the United States Supreme Court has recognized and honored its existence, but has not defined its scope. ¹¹⁰ In *United States v. Nixon*, ¹¹¹ a grand jury indicted several White House staff members and political supporters of the President for alleged violations of federal statutes. ¹¹² Following the indictment, the Special Prosecutor filed a motion **[*1043]** for a subpoena duces tecum ¹¹³ for the production at trial of certain documents and tapes concerning specified conversations and meetings between the President and others. ¹¹⁴ The President filed a motion to quash the subpoena, claiming that the information sought by the Special Prosecutor was protected under the executive privilege. ¹¹⁵ After concluding that the Special Prosecutor had standing to bring the case and that a justiciable controversy existed, the Supreme Court turned to the issue of the executive privilege. ¹¹⁶ **[*1044]**

The President's claim of privilege was twofold. ¹¹⁷ The President first claimed that the doctrine of the separation of powers precluded **judicial review** of a President's claim of privilege. ¹¹⁸ Second, the President claimed that if he did not prevail on the claim of absolute privilege, then "the Court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum." ¹¹⁹

Regarding the first claim, the Court turned to *Marbury v. Madison* ¹²⁰ **[*1045]** for the proposition that "it is emphatically the province and duty of the judicial department to say what the law is." ¹²¹ Thus, the Court found that it had the authority in this case to state what the law was regarding the President's claim of privilege. ¹²²

Turning to the second claim, the Court opined that an unqualified, absolute privilege of the President protecting the confidentiality of communications would impede the Court's Article III function and its constitutional duty to do justice in criminal actions. ¹²³ The Supreme Court, **[*1046]** therefore, ruled that the President had a "presumptive privilege" which could be overcome in certain circumstances and justified the privilege on the ground that it

"is fundamental to the operation of Government and inextricably rooted" in the constitutional doctrine of separation of powers. ¹²⁴ The Court further noted that the public interest necessitates affording Presidential confidentiality the utmost protection consonant with the fair administration of justice. ¹²⁵ Nevertheless, the Court found that in the limited circumstances presented in the case, the fundamental demands of due process of law in the fair administration of criminal justice would prevail over the President's generalized interest in confidentiality. ¹²⁶ [*1047]

United States v. Nixon has become one of the most often cited cases for the acknowledgment of a Presidential privilege to receive confidential communications in the exercise of Article II powers. ¹²⁷ It has been applied in cases involving the disclosure of documents containing confidential communications, ¹²⁸ and to cases involving the application of **FACA**, most notably, Public Citizen v. United States Department of Justice ¹²⁹ and American Association of Physicians and Surgeons v. Clinton. ¹³⁰ Despite its treatment by the courts and various discussions and studies by scholars and commentators, the scope and the effectiveness of the privilege remain largely undefined. ¹³¹ [*1048]

IV. AVOIDING THE CONSTITUTIONAL ISSUE

Although the Act does not expressly provide for a judicial process whereby the public can enforce its provisions, today's broad concepts of standing ¹³² permit interested groups or individuals to ensure that agency [*1049] action is taken in accordance with the statute. ¹³³ Much litigation has ensued over certain advisory committees not adhering to the Act's requirements. ¹³⁴ Generally, the focus has been on the status of the committee, and whether it falls under the classification of an advisory committee, which is subject to the Act, or whether it meets any of the exceptions. ¹³⁵ The statutory definition is very broad and includes any committee, task force, or similar group or subgroup which is "established or utilized" by the President or agencies for the purpose of obtaining advice or recommendations. ¹³⁶ Many of the cases involve the following issues: the definition of "established by"; ¹³⁷ the definition of "utilized by"; ¹³⁸ and [*1050] what constitutes an advisory committee. ¹³⁹ To avoid constitutional [*1051] conflicts, courts have cleverly applied various interpretations of these definitions, holding that groups do not constitute advisory committees subject to the Act. ¹⁴⁰

The executive privilege of confidentiality appears to be at odds, in some instances, with the Act. ¹⁴¹ In contrast to the Act, which requires "openness," the executive privilege permits the President to obtain information in confidence. ¹⁴² The courts, however, have avoided the constitutional questions regarding the conflict of the Act's openness requirement with the executive privilege of receiving confidential communications. [*1052]

For instance, in Nader v. Baroody, ¹⁴³ the district court acknowledged that it was interpreting the Act so as to avoid constitutional issues. ¹⁴⁴ In Nader, the plaintiff sought an injunction directing the Assistant to the President of the United States for Public Liaison to comply with the requirements of **FACA** regarding various meetings between certain executive branch officials and business organizations, or private sector groups. ¹⁴⁵ These meetings were regularly convened every two weeks and were designed to increase the flow of information between the private sector and the Executive, including the President, through the exchange of views on a variety of subjects. ¹⁴⁶

Regarding the purpose of **FACA**, the court opined that the Act was not intended to interfere with the day-to-day operations of the presidency or to inhibit casual, informal contacts between the President, or his staff, and the interested public. ¹⁴⁷ In addition, the court determined that it was not Congress's intent to restrict the President's ability to receive unsolicited opinions concerning topics that are useful to the exercise of his executive and

political obligations. ¹⁴⁸ The court then held that the meetings did not involve advisory committees and, therefore, were not subject to the Act's requirements. ¹⁴⁹ [*1053]

The Supreme Court has similarly avoided the constitutional issue. For example, in *Public Citizen v. United States Department of Justice*, ¹⁵⁰ the Washington Legal Foundation ("WLF") and Public Citizen sued the Justice Department under the Act after the American Bar Association ("ABA") Committee refused the WLF's request for the names of potential nominees for judgeships that the ABA was considering. ¹⁵¹ In addition, the WLF sought the ABA Committee's reports and minutes of its meeting. ¹⁵²

The Justice Department, in aiding the President in performing his Article II function of appointing federal judges, often seeks advice from the Standing Committee on Federal Judiciary of the ABA. ¹⁵³ The ABA Committee's ratings of particular candidates who are nominated are made public. ¹⁵⁴ The Committee's investigations, reports, and votes on the potential nominees, however, are kept confidential. ¹⁵⁵ It was this undisclosed information that the WLF sought, arguing that the ABA Committee was utilized by the President or the Justice Department, thus requiring compliance with **FACA**. ¹⁵⁶

The Court, however, was not convinced that Congress intended to use the term "utilize" in the Act in the literal sense, and noted that "utilize is a woolly verb, its contours left undefined by the statute itself." ¹⁵⁷ Concluding that the application of **FACA** to the Justice Department would present "formidable constitutional difficulties" as "the relative powers of coordinate branches of government" were concerned, the Court held that the President and the Justice Department did not "utilize" the ABA when seeking advice for potential nominees for judgeships. ¹⁵⁸ [*1054]

Similarly, in *National Resources Defense Council v. E.P.A.*, ¹⁵⁹ the district court interpreted the definition of advisory committee to exclude from the Act, meetings of the Environmental Protection Agency ("EPA") and the Governors' Forum on Environmental Management ("Forum"). ¹⁶⁰ The court did not view the governors sitting on the forum as mere advisors to the EPA, but opined that they acted "operationally as independent chief executives in partnership with the federal agency." ¹⁶¹ Such committees, which perform primarily operational functions specifically provided by law "such as making or implementing Government decisions or policy," are specifically exempted from the Act. ¹⁶² In its holding, the court further noted that federalism, separation of powers, and Executive powers issues would arise if it found that the Forum was subject to the Act. ¹⁶³

An interesting interpretation to avoid application of the Act is found in *Association of American Physicians and Surgeons v. Clinton*, which involved the determination of the status of the First Lady, Hillary Rodham Clinton. ¹⁶⁴ On January 25, 1993, President Clinton established a Task Force on National Health Care Reform to be chaired by Mrs. Clinton. ¹⁶⁵ The President also formed an "interdependent working group" which was responsible for collecting data and developing options for health care [*1055] reform. ¹⁶⁶ It was contemplated that only the Task Force would directly advise and provide recommendations to the President. ¹⁶⁷

Although the Task Force did conduct open meetings at which members of the public could present their views on health care reform, at least twenty of the meetings were closed to the public. ¹⁶⁸ In the closed meetings, the Task Force reviewed the information of the working group, developed proposals and options for health care reform, and presented its proposals to the President. ¹⁶⁹ The Task Force terminated on May 30, 1993. ¹⁷⁰

The Association of American Physicians and Surgeons ("AAPS"), the American Council for Health Care Reform, and the National Legal & Policy Center sought access to the meetings under **FACA**. ¹⁷¹ Access, however, was denied by Counsel to the President on the grounds that the Task Force did not constitute an advisory committee subject to the Act. ¹⁷²

Thereafter, the plaintiffs brought suit seeking a temporary restraining order and a preliminary injunction to prevent the Task Force from operating until it complied with the Act and opened its meetings to the public. ¹⁷³

The plaintiffs claimed that the Task Force was an advisory committee subject to the Act because it was chaired by the First Lady, who was not a full-time government officer or employee. ¹⁷⁴ In response, the government asserted that the Task Force came under the exemption of section 3(2)(iii) of the Act because all of the members, including Mrs. Clinton, were full-time [*1056] officers or employees of the Federal Government. ¹⁷⁵ In the alternative, the government asserted that an unconstitutional infringement on the President's executive power would result if the Act was applied to the Task Force. ¹⁷⁶ Agreeing with the government's alternative argument concerning executive power, the district court held that meetings in which the Task Force formulated advice and recommendations were not subject to the Act. ¹⁷⁷ In addition, the court regarded the working group as "staff" of the advisory committee and, hence, not itself an advisory committee subject to the Act. ¹⁷⁸ [*1057]

The circuit court reversed the district court's injunction on the operations of the Task Force, and criticized the district court for determining that the Act applied to the Task Force and for truncating the Act due to the constitutional concerns. ¹⁷⁹ The circuit court, finding that the "question whether the President's spouse is 'a full-time officer or employee' of the government is close enough for us properly to construe **FACA** not to apply to the Task Force merely because Mrs. Clinton is a member," concluded that, for purposes of **FACA**, the President's spouse was a full-time officer or employee of the Federal Government. ¹⁸⁰ Hence, the circuit court held that section 3(2)(iii) applied to exempt the Task Force from the Act's requirements. ¹⁸¹ [*1058]

Further, the court ruled that it had insufficient information to determine the character of the working group, and remanded the district court's dismissal of the plaintiffs' claim for further proceedings and expedited discovery. ¹⁸² Determining that an advisory committee subject to the Act is one that is required to render advice or recommendations as a group, rather than as a collection of individuals, the court required the formality and structure of the group to be considered on remand. ¹⁸³ Regarding the government's contention that the working group was also made up of full-time government officials and, therefore, was exempt from the Act, the court opined that more discovery was necessary to determine the status of the "special government employees" and the consultants. ¹⁸⁴ [*1059]

In cases involving the implications of the constraints placed on the President's ability to receive information and advice by **FACA**, courts have taken great pains to "elide the literal reading of **FACA** to avert what those courts believed were surely legislatively unintended consequences on the one hand, or a major constitutional issue on the other." ¹⁸⁵ A recent case, however, used another means to avoid the constitutional issue. ¹⁸⁶

In *Northwest Forest Resource Council v. ESPY*, to avoid separation of powers conflicts, the court refused to enjoin the President from using a report issued by an advisory committee that did not comply with the Act. ¹⁸⁷ The plaintiff, NFRC, a nonprofit corporation protecting the concerns of forest product industries in Washington and Oregon, alleged that the Forest Ecosystem Management Assessment Team ("FEMAT"), as convened and employed by the President to assist in the formulation of a policy regarding over twenty-four million acres of federally owned forest lands, constituted an advisory committee under **FACA**. ¹⁸⁸ Defendants claimed that FEMAT did not function as an advisory committee, and if the court found otherwise then "**FACA** itself must be deemed an unconstitutional invasion of the executive privilege for communications necessary to his exercise of the powers entrusted by the Constitution to the President." ¹⁸⁹ [*1060]

The court found that FEMAT was an advisory committee within the contemplation of **FACA**.

¹⁹⁰ The court determined that FEMAT was established and utilized by the President in devising

a forest management policy and that the committee rendered advice and recommendations which the President accepted and followed. ¹⁹¹ The court further found that FEMAT was convened and operated in violation of the Act. ¹⁹²

Nevertheless, because **FACA** does not prescribe remedies for violations of its provisions, the court fashioned a remedy using its general equitable powers. ¹⁹³ Observing its constitutional limitations, the court granted a declaratory judgment that **FACA** was violated. ¹⁹⁴ The court, however, considering separation of powers principles, declined to issue an order enjoining the Administrator from relying on the FEMAT report in promulgating its Forest Plan. ¹⁹⁵ The court reasoned that there was no **[*1061]** indication that the report, advice, or recommendations would have been altered had the government complied with the Act. ¹⁹⁶

V. CONCLUSION

Courts and scholars have recognized that the President has a legitimate interest in maintaining the confidentiality of certain information obtained from aides, advisors, and advisory committees. ¹⁹⁷ This interest in confidentiality has become the basis for the executive privilege to receive confidential communications. ¹⁹⁸ As a result of the Supreme Court's decision in *United States v. Nixon* and subsequent cases, the executive privilege to receive confidential communications has achieved a constitutional basis. ¹⁹⁹ Nevertheless, this privilege is not expressly granted in the United **[*1062]** States Constitution, and therefore, when it is raised by the President, the courts will balance the need for the information against the need for maintaining confidentiality. ²⁰⁰

In *United States v. Nixon*, ²⁰¹ the Supreme Court established that when evidence is needed in a criminal case, the privilege must give way to disclosure. The privilege was then narrowed in *Nixon v. Administrator of General Services*, ²⁰² wherein the Court determined that the American public's need for knowledge may overcome the privilege. ²⁰³ The courts, however, have avoided the issue of whether the privilege is valid against a demand for information under the Act. ²⁰⁴

Information is given to the President through many sources, one important source being advisory committees. ²⁰⁵ Congress established **FACA** to regulate the use, establishment, and termination of these and other **[*1063]** advisory committees. ²⁰⁶ The Act, however, in regulating the advisory committees, may encroach upon the President's privilege of confidentiality. ²⁰⁷ For instance, information provided by advisory committees is subject to disclosure by way of open meetings and document production. ²⁰⁸ Hence, the confidentiality is not preserved.

Although Congress has the power to make laws, ²⁰⁹ this power is limited by the doctrine of separation of powers. Congress may not use its legislative authority to usurp or limit the power of another branch if such limitation prohibits the other branch from accomplishing its constitutional function. ²¹⁰ The Act has the effect of inhibiting the President's ability to perform his constitutional duties by tempering his ability to organize and obtain advice from his advisors. ²¹¹ Therefore, according to the existing **[*1064]** state of the law, the application of **FACA** to advisory committees that formulate and present advice and recommendations to the President when he is exercising a constitutional function, is a violation of the separation of powers. ²¹²

Many courts, however, have not reached such a conclusion. Rather, they have relied on legal precedent, which allows them to avoid constitutional issues through statutory construction. ²¹³ Such a resolution, however, **[*1065]** presents two problems. First, the resulting interpretations have restricted the application of the Act, in contradiction to the Act's intended scope. The legislative history indicates that Congress intended the scope of the Act to be very broad. ²¹⁴ By manipulating the definitions contained in the Act, such as "established" and "utilized," the courts have narrowed the statute's application. ²¹⁵ Moreover,

by stretching the definition of "full time officers or employees of the federal government," the courts have opened the doors to allow more advisory committees to come within the exceptions to **FACA**.²¹⁶

A second and related problem is that citizens may be deterred from bringing actions to compel compliance with the Act. Although the goals of the Act are salutary, the efficient utilization of advisory committees can only be achieved through effective enforcement.²¹⁷ Effective enforcement depends in a large part on actions by private citizens to compel compliance with the Act.²¹⁸ Moreover, the success of the openness provision depends upon the existence of persons willing to act as advisory committee **[*1066]** "watchdogs."²¹⁹ Citizens have made attempts to enforce the provisions of the Act but have been thwarted by the courts' unwillingness to apply the Act to advisory committees, which provide advice and recommendations to the President. Due to the narrowing coverage of the Act, a greater number of committees will not be subject to the Act; hence, more cases will be lost by citizens or groups still interested in attempting to bring actions to force compliance.

An appropriate solution is not judicial resolution through statutory construction, but rather statutory amendment. The Act should be amended to specifically exempt advisory committees that advise the President from the openness requirement and the document disclosure requirement²²⁰ when such committees are formulating policy or presenting advice and recommendations to the President.²²¹ As the privilege exists when the President is exercising a constitutionally assigned function, the exemption from **FACA** should be limited to those situations where the President consults **[*1067]** a committee in furtherance of his constitutionally assigned functions.²²² When an advisory committee is not subject to the Act, none of the Act provisions will apply. By exempting specific committees from only the openness and document disclosure provisions of section 10, the express purposes of the Act contained in section 2 is still satisfied. Section 2 does not include any express intent with regard to opening or closing advisory committee meetings, but refers to housekeeping functions.²²³ The administrative controls and housekeeping provisions would remain **enforceable**. Moreover, such advisory committees can still be monitored for expense, efficiency, and balanced membership without raising constitutional issues.²²⁴

Nevertheless, until legislative action is taken, the courts can "say what the law is" regarding the issue, rather than avoid the constitutional implications.²²⁵ The Supreme Court should entertain the issue of whether **[*1068]** **FACA** conflicts with the executive privilege to receive confidential communications by applying the balancing test announced in *United States v. Nixon*.²²⁶ As much controversy exists concerning the executive privilege, the Court should not bypass the opportunity to define the strength and scope of this privilege. Delineating the extent of the executive privilege may answer the question of whether **FACA** violates separation of powers principles.

FOOTNOTES:

†n1. Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 Admin. L. Rev. 1, 3 (1988).

†n2. *Id.* at 3.

†n3. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. app. (1988)).

†n4. Openness is imposed by 10 of the Act. 5 U.S.C. app. 10 (1988). See also James T. O'Reilly, *Advisers and Secrets: The Role of Agency Confidentiality in the Federal Advisory Committee Act*, 13 N. Ky. L. Rev. 27, 27 (1986).

†n5. 5 U.S.C. app. 10 (1988).

¶n6. The executive powers are set forth in Article II of the Constitution of the United States. These powers include:

Section 1. The executive Power shall be vested in a President of the United States of America....

Section 2. The President shall be commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take care that the Laws be faithfully executed, and shall Commission all the Offices of the United States.

U.S. Const. art. II. See *infra* part III (discussing the executive privilege to receive confidential communications).

¶n7. *United States v. Nixon*, 418 U.S. 683 (1974) [hereinafter *Nixon I*], is the case most often cited for the recognition of such privilege. Laurence H. Tribe, *American Constitutional Law* 4-15, at 278 (2d ed. 1988) (noting that *Nixon I* is the leading case concerning the executive privilege).

¶n8. See, e.g., *infra* notes 111-26 and accompanying text (discussing *Nixon I*); *S.C.M. Corp. v. United States*, 473 F. Supp. 791, 798 (Cust. Ct. 1979) (granting the Secretary of the Treasury's motion for a protective order as to certain "documents and things in the files of the International Trade Commission and each Commissioner" on the ground that plaintiff failed to demonstrate "a clear and persuasive need for the documents in question").

¶n9. 418 U.S. 683 (1974).

¶n10. 433 U.S. 425 (1977) [hereinafter *Nixon II*].

¶n11. Although disclosure was required in both cases, the disclosure was regulated and safeguarded so that the intrusion on confidentiality was minimal. See *infra* notes 126, 128.

†n12. See *infra* part IV (discussing cases wherein the court acknowledged the separation of powers problem, but used judicial construction to avoid the constitutional issue).

†n13. 418 U.S. 683 (1974).

†n14. Cardozo, *supra* note 1, at 1.

†n15. *Id.* President Washington used an advisory committee to aid in resolving the whiskey rebellion. Jerry W. Markham, *The Federal Advisory Committee Act*, 35 U. Pitt. L. Rev. 557, 557 (1974) (citing Hearings Before the House Subcommittee on Legal and Monetary Affairs of the Committee on Government Operations on H.R. 4383, 92d Cong., 1st Sess. 1 (1971)).

†n16. Michelle Nuskiewicz, *Twenty Years of the Federal Advisory Committee Act: It's Time for Some Changes*, 65 S. Cal. L. Rev. 957, 963 (1992).

†n17. *Id.* at 958.

†n18. Remarks on Health Care Reform and an Exchange With Reporters, 29 Wkly Comp. Pres. Doc. 96 (Feb 1, 1993) (indicating that the task force's mission was to "build on the work of the campaign and the transition, listen to all parties, and prepare health care reform legislation to be submitted to Congress within 100 days of our taking office").

†n19. Exec. Order No. 12,891, 59 Fed. Reg. 2935 (1994).

†n20. *Id.*

†n21. *Federal Advisory Committee Act*, 5 U.S.C. app. 2 (1988). The statute specifically states:

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.

Id. See also Cardozo, *supra* note 1, at 2 (noting that advisory committees are valuable aides to the efficient administration of the government).

†n22. Richard K. Berg, *Conflict of Interest Requirements for Members of Federal Advisory Committees: The Interaction Between FACA, 18 U.S.C. 201-219, and the Federal Personnel Statutes and Regulations*, 37 Fed. Bar & News J. 396, 396 (1990). See also *Nader v. Baroody*, 396 F. Supp. 1231, 1232-33 (D.D.C. 1975) (noting that the legislative history of the Act indicates that "Congress was aware that advisory committees had proliferated the federal bureaucracy to such numbers and at such expense that there was need for some regulation and greater disclosure").

†n23. Markham, *supra* note 15, at 558.

†n24. *Id.*

†n25. *Id.* In a 1957 report, the House Committee on Government Operations noted that some of the advisory committees consisted of members whose special interests did not

coincide with the interests of the country as a whole. *Id.* at 559.

†n26. Cardozo, *supra* note 1, at 10. During the 1950's, the Justice Department promulgated guidelines to help government agencies avoid antitrust problems arising through the use of advisory committees heavily influenced by industry groups. Nuskiewicz, *supra* note 16, at 963. The advisory committees and the employing agencies, however, ignored the regulations because they did not have the force of statute, regulation, or executive order. *Id.* See also Richard O. Levine, Comment, The Federal Advisory Committee Act, 10 Harv. J. on Legis. 217, 221-25 (1973) (discussing the background and history leading to the enactment of the Act).

†n27. Cardozo, *supra* note 1, at 10.

†n28. Markham, *supra* note 15, at 558.

†n29. The hearings are discussed at length in Markham, *supra* note 15, at 558-70.

†n30. Hearings Before the Senate Subcommittee on Intergovernmental Relations of the Committee on Government Operations on S. 1637, S. 1964 and S. 2064, 92d Cong., 1st Sess., pt.1, at 7 (1971).

†n31. Presidential Advisory Committee, Hearings Before the House Special Studies Committee on Government Operations, 91st Cong., 2d Sess., pt.1, at 31 (1970).

†n32. *Id.*

†n33. *Id.* at 32.

†n34. Markham, *supra* note 15, at 564.

†n35. 5 U.S.C. app. 2(b) (1988). The Act provides in pertinent part:

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 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 purpose 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.

Id. See also Cardozo, *supra* note 1, at 10.

†n36. 5 U.S.C. app. 3(2) (1988).

†n37. Id. 3(2). Section 4 exempts advisory committees established or utilized by the Central Intelligence Agency or the Federal Reserve System and "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." Id. 4(b)-(c). Also exempt from the Act are advisory committees established by an act of Congress which provides for their exemption. Id. 4(a).

†n38. Cardozo, *supra* note 1, at 3. Presumably, the third exception is permitted to apply to certain advisory committees because the Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 378 (codified as amended at 5 U.S.C. 551 et seq., 701 et seq., 3105, 3344 (1988)), and the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (codified as amended at 5 U.S.C. 552b (1988)), establish guidelines for insiders who would sit on these committees. Cardozo, *supra* note 1, at 3. Additionally, the Freedom of Information Act, 1966 Pub. L. No. 89-554, 80 Stat. 378, 1 (codified as amended at 5 U.S.C. 552 (1988)), opens the documents of these committees to the public. Cardozo, *supra* note 1, at 3.

†n39. *Infra* notes 48, 99 and accompanying text (illustrating problems and abuses of the system).

†n40. Markham, *supra* note 23, at 270.

†n41. 5 U.S.C. app. 5(a) (1988).

†n42. Id.

†n43. Id. Section 5(a) provides:

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 activities of each advisory committee under its jurisdiction to determine whether such advisory committee should 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.

Id.

†n44. Id. 5(b).

†n45. Id. Regarding this legislation, the Act states:

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.

Id.

↗n46. Id. 5(b)(1).

↗n47. Id. 5(b)(2). Broadening the membership would bring more diverse viewpoints and would make it difficult for members "to collude among themselves or to misuse their close access to government decisionmakers." Levine, *supra* note 26, at 228.

↗n48. 5 U.S.C. app. 5(b)(3) (1988). This section functions as a safeguard, ensuring that the advice and recommendations of an advisory committee are not inappropriately influenced by any special interest groups seeking to promote private concerns through committee membership. Markham, *supra* note 15, at 588. Rather than functioning as advisory aides, the committees were acting as an internal lobby. Id. For instance, an advisory committee on animal health, which had closed its operations to the public and other interested groups, recommended that the Department of Agriculture certify that cancerous chickens were safe for human consumption. Id. at 569. See also Federal Advisory Committee Act, 5 U.S.C. app. 10 (1988) (imposing "openness" upon advisory committee meetings and documents).

↗n49. 5 U.S.C. app. 5(b)(4) (1988).

↗n50. Id. 5(b)(5).

↗n51. Id. 5(c). Section 8 lists the responsibilities of agency heads for establishing administrative guidelines and management controls as follows:

(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 Administrator 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;

(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.

Id. 8.

↗n52. Id. 6.

¶n53. Id. 6(a). "The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees." Id.

¶n54. Id. 6(b).

¶n55. Id. 6(c).

¶n56. Id. Concerning the report, the Act states:

The report shall include 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.

Id.

¶n57. Id. "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 a report a statement that such information is excluded." Id.

¶n58. Id. 7. The term "Administrator" means the Administrator of General Services. Id. 3(1). Pursuant to Reorg. Plan No. 1 of 1977, 42 Fed. Reg. 56,101 (1977) reprinted in 91 Stat. 1634 (1977), all of the functions of the Office of Management and Budget and its Director relating to the Committee Management Secretariat were transferred to the Administrator.

The General Services Administration is established in the Executive branch and is headed by the Administrator of General Services who is appointed by the President with the Senate's advice and consent. 40 U.S.C. 751 (1988). The Administration was established to achieve an economic and efficient program for property management within the Federal Government. 1949 U.S.C.C.A.N. 1475.

¶n59. Federal Advisory Committee Act, 5 U.S.C. app. 7(a) (1988).

¶n60. Id. 7(b)(1).

¶n61. Id. 7(b)(4).

¶n62. Id. 7(b)(3).

¶n63. Id. 7(b)(2).

¶n64. Id.

¶n65. Id. 7(c).

¶n66. Id. 7(d)(1).

†n67. See id. 9. See also Markham, *supra* note 15, at 585 (discussing the standards imposed by the Act upon the authorization and creation of an advisory committee).

†n68. S. Rep. No. 1098, 92d Cong., 2d Sess. 13 (1972).

†n69. 5 U.S.C. app. 9(a)(1) (1988).

†n70. Id. 9(a)(2). This section states:

No advisory committee shall be established unless such establishment is... determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, 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.

Id.

†n71. See S. Rep. No. 1098, 92d Cong., 2d Sess. 13 (1972).

†n72. 5 U.S.C. app. 9(c) (1988). Charters are to be filed with "(1) the Administrator, in the case of Presidential Advisory 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." Id. Additionally, a copy of the charter should be furnished for the Library of Congress. Id.

†n73. Id. 9(c)(A)-(J). 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 the charter is filed.

Id. See also Markham, *supra* note 15, at 586 (noting that the information is used for the Office of Management and Budget review, and to assist Congress and the public in identifying the effectiveness and responsibilities of the advisory committees).

†n74. 5 U.S.C. app. 10 (1988).

†n75. Id. 10(e). This officer or employee has the authority to adjourn any meeting of the advisory committee if he or she determines that adjournment is in the public interest. Id.

†n76. Id. 10(f). Hearings Before the House Subcommittee on Executive and Legislative Reorganization of the Committee on Government Operations, H.R. 3378, 85th Cong., 1st Sess. (1957). The primary purpose of subsections (e) and (f) is to "prevent illegal interactions between committee members themselves, rather than to prevent abuses in the relationship between committee members and agency officials." Levine, *supra* note 26, at 233.

†n77. 5 U.S.C. app. 10(f) (1988).

†n78. Id.

†n79. Id. 9.

†n80. Id. 9(b).

†n81. Markham, *supra* note 15, at 576 (noting that exempting operational groups conforms with the intent of the Act, as the Act is directed only at committees that supply advice to the government).

†n82. 5 U.S.C. app. 14(a)(2) (1988). Advisory committees established by the President or an officer of the Federal Government can be renewed by the President or that officer prior to the expiration of the two-year period and upon appropriate action. Id. 14(a)(2)(A). An advisory committee established by Act of Congress is not limited to a duration of two years if its duration is provided for by law. Id. 14 (a)(2)(B). See also Markham, *supra* note 15, at 589.

†n83. 5 U.S.C. app. 14(c) (1988).

†n84. See *supra* notes 72-73 (discussing 9(c)).

†n85. 5 U.S.C. app. 14(b)(3) (1988).

†n86. Id. 10. The most notable abuse corrected by the openness requirement is undue influence of special interest groups. 118 Cong. Rec. S14,647 (1972).

†n87. Markham, *supra* note 15, at 590 (citing S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972)).

†n88. 5 U.S.C. app. 10(a)(1) (1988). This section permits any interested persons, subject to reasonable regulations prescribed by the Administrator, to "attend, appear before, or file statements with any advisory committee...." Id. 10(a)(3). The application of subsections (a) (1) and (a)(3) is limited by subsection (d). Id. 10(d). Subsection (d) applies if the President, or the head of an agency to which the advisory committee reports, determines that any portion of an advisory committee meeting may be closed to the public under the Government in the Sunshine Act, 5 U.S.C. 552b(c) (1988). 5 U.S.C. app. 10(d). The determination made by the President or agency head, that disclosure limitations apply, must be made in writing

and shall include the reasons for the determination. Id.

¶n89. 5 U.S.C. app. 10(a)(2) (1988). This notice requirement is also subject to the President's determination that national security will not be infringed upon. Id.

¶n90. Id.

¶n91. Id. 10(b). See also O'Reilly, *supra* note 4, at 35. This public access provision does not apply to the financial records of an advisory committee, but only to the records "made available to or prepared for or by each advisory committee." *American Ass'n of Physicians & Surgeons v. Clinton*, No. 93-0399 1994 WL 692814 (D.D.C. Dec. 1, 1994).

¶n92. The Freedom of Information Act, 5 U.S.C. 552 (1988), was designed "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). The categories of information which are protected from disclosure under the Freedom of Information Act include, *inter alia*, matters of national defense or foreign policy; matters concerning internal personnel rules and practices of the agency; information specifically exempt from disclosure by statute; certain inter-agency or intra-agency documents available only to "an agency in litigation with the agency"; information containing privileged or confidential trade secrets and commercial or financial information; personnel and medical files; and investigatory files compiled for law enforcement purposes. 5 U.S.C. 552 (b)(1)-(9) (1988).

¶n93. 5 U.S.C. app. 10(b) (1988). The documents should be available at "a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist." Id.

¶n94. Id. 10(c).

¶n95. Id.

¶n96. Id. 11(a). Section 11 also applies to transcripts of "agency proceedings" as defined in the Administrative Procedure Act, 12, 5 U.S.C. 551 (1988). 5 U.S.C. app. 11(a) (1988).

¶n97. 5 U.S.C. app. 13 (1988).

¶n98. Id. See *supra* note 92 (discussing the Freedom of Information Act).

¶n99. Markham, *supra* note 15, at 607. Such abuses include diverting attention from or delaying decisions on sensitive issues, or bestowing political favors. Id.

¶n100. Id. at 606 (summarizing the purpose of the Act).

¶n101. See *supra* notes 36-38 and accompanying text (setting forth the statutory definition of advisory committees and certain exemptions from that definition).

¶n102. See *infra* note 136-39 and accompanying text (raising questions about what groups constitute advisory committees).

¶n103. "The executive power shall be vested in a President of the United States of America...." U.S. Const. art. II, 1, cl. 1. See *Meyers v. United States*, 272 U.S. 54, 151 (1926) (noting that the provisions of art. II, 1, cl.1, of the Constitution, vesting the executive power in the President, are a grant of power and not merely a designation of an office of the government).

¶n104. 39 Op. Att'y Gen. 343 (1962) (noting that the President has powers not enumerated in the statutes; constitutional powers which have not been and cannot be specifically defined, as their extent and limitations are largely dependent upon conditions and circumstances). See *Nixon I*, 418 U.S. 683, 704 (1974) (noting that the executive privilege to receive confidential communications is not derived from a power expressly granted by the Constitution but is a power derived from an enumerated power). See also Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1384 (1974) (noting that although the Constitution is silent with regard to a privilege to withhold information, the controversy concerning executive privilege arises from the tripartite system of government).

¶n105. *Nixon I*, 418 U.S. at 711. In 1955 President Eisenhower stated:

But when it comes to the conversations that take place between any responsible official and his advisers... expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody; and if they are, will wreck the Government.

There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.

Cox, *supra* note 104, at 1386 (citation omitted).

¶n106. *Nixon I*, 418 U.S. at 711, 705-06 & n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917), for the rule established in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), "that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant...."). See contra Raoul Berger, *Executive Privilege: A Constitutional Myth* (1974). See generally K.A. McNeely-Johnson, Comment, *United States v. Nixon*, Twenty Years After: The Good Bad and the Ugly -- an Explanation of the Executive Privilege, 14 N. Ill. L. Rev. 251 (1993) (discussing the evolution of the executive privilege).

¶n107. *Nixon I*, 418 U.S. 603, 708 (1974) (noting that the privilege is premised upon the concern that the release of confidential government information to the public or coordinate branches of government would offend principles of separation of powers). See also *Black v. Sheraton*, 371 F. Supp. 97, 100 (D.D.C. 1974) (noting that the executive privilege is based on the constitutional doctrine of the separation of powers and it "exempts the executive from disclosure requirements applicable to the ordinary citizen or organization, where such exemption is necessary to the discharge of highly important executive responsibilities involved in maintaining governmental operations").

In the United States, the federal and state governments are divided into three branches: the legislative, the executive, and the judicial. Tribe, *supra* note 7, 2-2. Each branch has a different function and power. *Id.* Simply stated, the legislative branch makes the laws, the executive branch is required to carry out the laws, and the judicial branch interprets the laws and adjudicates disputes arising under the laws. *Id.* For the specific powers and duties of each branch, see U.S. Const. arts. I-III.

Under the constitutional doctrine of separation of powers, each branch is prohibited from encroaching on the domain, or exercising the powers of another branch. Black's Law

Dictionary 1365 (6th ed. 1990). This concept was illustrated in *Nixon I*, wherein the Court stated:

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

418 U.S. at 704 (quoting *The Federalist* No. 47 (James Madison) (S. Mittell ed., 1938)). The Court in *Humphrey's Executor v. United States*, 295 U.S. 602 (1953), described the principle of separation of powers as follows:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and [in] the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

Id. at 629-30. See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1801) (asserting that a federal court has the power to refuse to give effect to congressional legislation that is inconsistent with the Court's interpretation of the Constitution); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500 (1867) ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.").

✦n108. When a privilege is qualified, a court will balance the moving party's need for whatever is protected by the privilege against the reasons for maintaining the privilege. *Tribe*, *supra* note 7, at 207. See, e.g., *Nixon I*, 418 U.S. at 707 (ruling that the executive privilege of confidentiality is not an absolute unqualified privilege, but rather is a presumptive privilege that can be outweighed in certain circumstances); *Armstrong Brothers Tool Co. v. United States*, 463 F. Supp. 1316, 1320 (Cust. Ct. 1979) (noting that the executive privilege to withhold certain governmental documents is not absolute, but qualified, and in the absence of a proper showing of need for the production of the privileged information, which outweighs the harm that might result to intra-governmental candor, the claim of privilege should be sustained).

✦n109. *Black*, 371 F. Supp. at 100. Documents which are integral to the President's domestic decisional and policy making functions are "those documents reflecting the frank expression necessary in intra-governmental advisory and deliberative communications." *Id.* "The doctrine of executive privilege permits the executive branch to withhold disclosure of intragovernmental documents which contain advisory opinions, recommendations and deliberations in the formulation of governmental policies and decisions." *S.C.M. Corp. v.*

United States, 473 F. Supp. 791, 797 (Cust. Ct. 1979) (citations omitted).

†n110. See supra notes 104-06 and accompanying text (discussing the privilege as an unenumerated power of the President).

†n111. 418 U.S. 683 (1974). Chief Justice Burger delivered the opinion of the Court, in which all Members joined except, Justice Rehnquist, who took no part. *Id.* at 685.

†n112. *Id.* at 687.

†n113. "A subpoena decus tecum is a court process initiated by a party in litigation to compel production of certain specific documents and other items, [and] material... relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of a person or body served with process." *Black's, supra* note 107, at 1426.

†n114. *Nixon I*, 418 U.S. at 687-88. On March 1, 1974, a grand jury for the United States District Court for the District of Columbia indicted seven individuals who had occupied either a position of responsibility on the White House Staff, or a position with the Committee for the Re-election of the President, for various offenses, "including conspiracy to defraud the United States and to obstruct justice." *Id.* at 687 & nn.3-4. The grand jury named the President and others as unindicted coconspirators. *Id.* at 687.

The subpoena duces tecum was issued to President Nixon on April 18, 1974 requiring the production prior to trial of "certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others." *Id.* at 688.

†n115. *Id.* at 687-88, 697.

†n116. *Id.* at 697. The President's counsel argued that the district court lacked the authority to issue the subpoena because the matter was not subject to judicial resolution as it involved an intra-branch dispute between superior and subordinate officers of the Executive Branch. *Id.* at 692. The Court found that the President's resistance to the subpoena which was sought by the Special Prosecutor, also a member of the Executive Branch, fell within the scope of the Special Prosecutor's express authority delegated by the Attorney General, and thus presented issues "of a type which are traditionally justiciable." *Id.* at 697 (citing *United States v. ICC*, 337 U.S. 426, 430 (1949)). In so finding, the Court noted that "in light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability." *Id.* at 697.

Before discussing the executive privilege, the Court determined that the Special Prosecutor satisfied the requirements of Fed. R. Crim. P. 17(c) governing the issuance of a subpoena duces tecum in federal criminal proceedings. *Id.* at 697-703. In a criminal case, there are certain fundamental characteristics of a subpoena decus tecum. *Id.* at 698. In order to sustain a subpoena, the moving party must show the following:

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. (quoting *United States v. Ioia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)). Essentially, the Special Prosecutor had to show that the information sought from President Nixon was relevant to the proceeding, that it was admissible, and that the subpoena was specific. Id. at 700. The Court, affirming the district court's denial of the President's motion to quash the subpoena, concluded that each of the tapes sought contained evidence admissible regarding the offenses charged and found that they were not available from any other source. Id. at 702.

✚n117. Id. at 703.

✚n118. Id.

✚n119. Id.

✚n120. 5 U.S. (1 Cranch) 137 (1803). The circumstances surrounding *Marbury* are as follows. After Jefferson's election in 1800, but prior to his inauguration on March 4, 1801, President John Adams, nominated his Secretary of State, John Marshall, as Chief Justice of the Supreme Court. David Crump, et al., *Cases and Materials on Constitutional Law* 36 (1989). The nomination was confirmed on January 27, 1801, and for the month of February, Marshall occupied both positions. Id. During February, Congress passed the Circuit Court Act which doubled the number of federal judges, enabling President Adams to appoint sixteen judges to the newly created Federal Circuit Court. Id. Another piece of legislation enabled President Adams to appoint forty-two Justices of the Peace for the District of Columbia and Alexandria, Virginia. Id. The Senate confirmed the appointments, but Secretary of State, Marshall, was unable to deliver all of the commissions before Jefferson took office. Id. Jefferson and his Secretary of State, James Madison, refused to deliver the remaining commissions. Id.

William Marbury was one of the judges confirmed for the District of Columbia and Alexandria who did not receive his commission. Id. Marbury brought an action in the Supreme Court for mandamus to compel Madison to issue the commission. Id. Section 13 of the Judiciary Act granted the Supreme Court mandamus jurisdiction. Id. Chief Justice Marshall, however, writing for the Supreme Court, held that Congress could not give the original mandamus jurisdiction to the Supreme Court and that section 13 was repugnant to the Constitution. Id. Noting that in order to issue a mandamus the Supreme Court would be exercising appellate jurisdiction, yet the Constitution only granted the Court original jurisdiction in cases "affecting ambassadors, other public ministers and consuls," Justice Marshall stated:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.... If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury, 5 U.S. at 174, 177-78. Marbury did not get his commission, but the essence of this decision is that the Supreme Court claimed the authority to declare unconstitutional acts of the legislative or executive branches. Crump, *supra* at 37.

✚n121. *Nixon I*, 418 U.S. at 703 (quoting *Marbury*, 5 U.S. (1 Cranch) at 137)).

¶n122. *Id.* at 704-05 (noting that "since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers").

¶n123. *Id.* at 707. Article III specifically provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects....

U.S. Const. art. III, 1; *id.* 2, cl.1.

¶n124. *Nixon I*, 418 U.S. at 708. In support of this justification, the Court noted:

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

Id. The Court further concluded:

The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversation will be called for in the context of a criminal prosecution.

Id. at 712. See contra Raoul Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. Rev. 4, 19 (1974) ("In addition to the lack of precedent for the assumption that presidential privilege is 'inextricably rooted in the separation of powers,' there are historical materials that contradict that assumption." (citations omitted)).

¶n125. *Nixon I*, 418 U.S. at 715.

†n126. *Id.* at 712 & n.19, 713. The Court, however, ordered an in camera inspection of the papers and further instructed that the district court be scrupulous in protecting against release or publication of material which the Court found inadmissible as evidence or irrelevant to the issues of the trial. *Id.* at 715-16.

†n127. As Judge Silberman opined: "Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes." *Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993).

†n128. See, for example, *Nixon II*, wherein the Supreme Court held that the Presidential privilege must yield to the important congressional objective of preserving Presidential materials and maintaining access to those materials for lawful governmental and historical purposes where the Act had built in safeguards to prevent the disclosure of confidential materials and any intrusion into the President's confidentiality was minimal. *Nixon II*, 433 U.S. 425, 454 (1977) (discussing Nixon's challenge to the Presidential Recordings and Materials Preservation Act which directs the Administrator of General Services to take custody of Presidential materials to preserve those with historical value and to make them available for use in judicial proceedings); *McNeely-Johnson*, supra note 106, at 283-92 (discussing the difficulty in documenting the scope of the use of the doctrine of the Executive Privilege in the Iran-Contra cases). See supra notes 111-26 and accompanying text (discussing *Nixon I* wherein the President attempted to avoid disclosing certain documents by claiming the executive privilege).

†n129. 491 U.S. 440 (1989).

†n130. 997 F.2d 898 (D.C. Cir. 1992).

†n131. *Tribe*, supra note 7 at 275 (noting that a President's claim of privilege may be asserted with varying degrees of success in both judicial and legislative investigations); *Berger*, supra note 124, at 19 (discussing the lack of precedent for an executive privilege); Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 *Geo. L. J.* 281, 291-94 (1990) (commenting on the willingness of 3 Justices in *Public Citizen v. United States Department of Justice* to accept the government's argument that compliance with **FACA** interfered with the President's exclusive power to appoint federal judges, and noting that the balancing test makes the outcome of an executive privilege case difficult to predict); Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 *J. L. & Pol.* 719 (Summer 1993) (discussing the various contexts in which the claim of executive privilege arises and noting that the precise application of the privilege to "Congressional demands for information remains unsettled").

†n132. "Standing is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit...." *Black's*, supra note 107, at 1405 (citing *Carolina Environmental Study Group, Inc. v. Atomic Energy Comm'n*, 431 F. Supp. 203, 218 (D.N.C. 1977)). The concept of standing was discussed in *Sierra Club v. Morton*, 405 U.S. 727 (1971). In *Sierra Club*, *Sierra Club* filed suit seeking a declaratory judgment that aspects of Disney's proposed development of Mineral King Valley, a designated national game refuge, violated federal laws and regulations concerning preservation of national parks, forests, and game refuges. *Id.* at 730. *Sierra Club* also sought preliminary and permanent injunctions to prevent the approval of the development project. *Id.* Respondents challenged *Sierra Club's* standing to sue. *Id.* at 731.

The Court examined the traditional test of standing, "whether a party has a sufficient stake in an otherwise justiciable controversy" and noted that this case involved a claim of injury of a

noneconomic nature to an interest that is shared by many. *Id.* at 731-32, 734. In considering Sierra Club's standing, the Court noted that the suit was brought under the Administrative Procedure Act ("APA"), 10, 5 U.S.C. 702, (APA) which states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to **judicial review** thereof." *Sierra Club*, 405 U.S. at 732-33.

The Court held that Sierra Club lacked standing to sue because it failed to prove that its members would be injured by the development. *Id.* at 735. See also *NAACP v. Button*, 371 U.S. 415, 428 (1963) (noting that where members of an organization are directly injured, the organization may represent those members in seeking **judicial review**); *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (noting that where a party is not bringing suit under the authority of a statute, the issue of standing depends upon whether "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution"); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (opining that standing depends upon whether the party alleges "a personal stake in the outcome of the controversy").

Recently, in *Lujan v. Defenders of Wildlife*, Justice Scalia set out the modern test for standing consisting of 3 elements:

First, the plaintiff must have suffered an "injury in fact" an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of.... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 112 S. Ct. 2130, 2136 (1992) (citations omitted).

✦n133. *Markham*, supra note 15, at 607. In *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), the American Bar Association ("ABA") argued that Washington Legal Foundation ("WLF") lacked standing to bring suit under **FACA** to compel the disclosure of certain information. The ABA contended that the WLF did not have a sufficiently concrete and specific injury and that the WLF failed to demonstrate that a verdict in their favor would redress any alleged harm. *Id.* at 448-49. The Court rejected the ABA's contention and opined that refusing to allow appellants to scrutinize the ABA Committee's activities constituted sufficiently distinct injury to confer standing. *Id.* at 449-51. Additionally, the Court found the potential gains to appellant if they prevailed were sufficient to give them standing. *Id.*

✦n134. See infra notes 137-39 and accompanying text (reviewing case law).

✦n135. See supra notes 36-38 and accompanying text (examining the definition of advisory committee and the exceptions).

✦n136. Federal Advisory Committee Act, 5 U.S.C. app. 3 (1988). *Markham*, supra note 15, at 572 (discussing 3 exceptions). The definition of "advisory committee" provided in 3 of the Act has been described as "'another example of unimpressive legislative drafting. It is obscure, imprecise and open to unduly broad interpretation.'" *Nuszkiewicz*, supra note 16, at 973 (quoting *National Anti-Hunger Coalition v. Executive Comm.*, 557 F. Supp. 524, 530 (D.D.C. 1983), *aff'd* 711 F.2d 1071 (D.C. Cir. 1983)). The definition, therefore, has been established through case law and courts using statutory construction. *Cardozo*, supra note 1, at 11-12. See, e.g., *Consumers Union of U.S. Inc. v. Department of Health, Educ. & Welfare*, 409 F. Supp. 473, 477 (D.D.C. 1976) (holding that meetings between Food and Drug Association

("FDA") officials and representatives of the Cosmetic, Toiletry and Fragrance Association, Inc. ("CTFA") were not "advisory" in nature because the CTFA was merely seeking the FDA's comments and advice regarding an industry sponsored proposal concerning cosmetic testing).

✚n137. *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975) (holding that the National Academy of Sciences Advisory Committee on Motor Vehicle Emissions was not an advisory committee established by statute or one established or utilized by the Environmental Protection Agency). The court in *Lombardo* reasoned that the term "established" denotes measures of direct congressional creation, not merely legislation concerning the making of a contract to perform a scientific study which results in the formation of a committee. *Id.* at 796. See also *Food Chemical News v. Young*, 900 F.2d 328 (D.C. Cir. 1990) cert. denied 111 S. Ct. 132 (1990) (holding that **FACA's** established by definition indicates a government formed advisory committee, not an expert panel assembled pursuant to a contract with the Food and Drug Association).

✚n138. The term "'utilized' encompasses a group organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Young*, 900 F.2d at 333 (quoting *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989)). See also *Washington Legal Foundation v. United States Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994) (noting that "utilized" is "a stringent standard, denoting something along the lines of actual management or control of the advisory committee"); Cardozo, *supra* note 1, at 59 ("The conference believes that the definition of 'advisory committee' is limited to committees 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." (citations omitted)).

✚n139. The question arises whether committees which give advice to the government, but which are created by private organizations are subject to **FACA**. Cardozo, *supra* note 1, at 20. See *Lombardo*, 397 F. Supp. at 800 (noting that the Act's legislative history evidences Congress's intent to exclude private groups providing advice to government agencies under a contractual relationship, such as the National Academy of Sciences, from coverage of the Act); *Consumers Union*, 409 F. Supp. at 476 (reviewing the legislative history of the Act, and concluding that the purpose being served by the committee meetings would be a crucial factor in determining whether the Act will apply to privately organized groups); *Center for Auto Safety v. Cox*, 580 F.2d 689, 693 (D.C. Cir. 1978) ("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.").

Another question presented to the courts is whether meetings of unstructured ad hoc groups or "one-shot meetings" are subject to the Act. Cardozo, *supra* note 1, at 26. "The Act was not intended to apply to all amorphous, ad hoc group meetings." *Nader v. Baroody*, 396 F. Supp. 1231, 1233 (D.D.C. 1975) (holding that the unstructured, informal group meetings, which were "not conducted for the purpose of obtaining advice on specific subjects indicated in advance," did not involve advisory committee meetings as defined by the Act). See also *NRDC v. EPA*, 806 F. Supp. 275, 278 (D.D.C. 1992) (holding that the Governors' Forum's organization did not resemble an advisory committee because it was not seeking to influence the EPA, it did not receive federal funds, the membership was not fixed, and it was uncertain whether the Forum would conduct future proceedings).

It is also undetermined whether an advisory committee can be composed of a single person. Markham, *supra* note 15, at 576. If so, the President and other federal officials may have to comply with the provisions of the Act before seeking advice from any person who is not a government employee. *Id.* The President, then, may be required to comply with the Act before consulting his or her spouse for advice on certain issues. See *infra* notes 165-82 and

accompanying text (discussing whether an advisory committee chaired by the First Lady is exempt from the Act).

Regarding the issues that arise concerning which groups are subject to the Act, Markham, *supra* note 15, at 576-77 notes:

The Office of Management and Budget has taken the view that "while broad coverage was intended, the statute is aimed at advisory committees or similar groups in the ordinary sense," and this would intend that such bodies have all or most of the following characteristics of fixed memberships: establishment by a federal official, definite purpose of providing advice regarding a particular subject or particular subjects, organizational structure, and regular or periodic meetings.

Id. (citation omitted).

¶n140. In evading the constitutional implications, the courts have relied on the rule that when the constitutionality of an act of Congress is called into question, the Court will first determine whether a plausible alternative construction can be used in order to avoid formidable constitutional difficulties. *Public Citizen*, 491 U.S. at 465-66 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). When such an acceptable alternative exists, the Court will use it unless it is "plainly contrary to the intent of Congress." *Id.* at 466 (citations omitted). This rule "'reflects the prudential concern that constitutional issues not be needlessly confronted'" and is especially applicable where the Court is reluctant to decide a constitutional issue that concerns the "relative powers of coordinate branches of government." *Id.* (citations omitted).

¶n141. See *infra* notes 144-97 and accompanying text (reviewing cases which address the conflict between the Act and the executive privilege).

¶n142. See *supra* notes 86-94 and accompanying text (examining 10 of the Act).

¶n143. 396 F. Supp. 1231 (D.D.C. 1975).

¶n144. The Court ruled "to avoid serious constitutional questions... and to reach an interpretation of the statute consistent with its overall provisions and legislative history, the Court declares that the White House meetings here under review do not involve 'advisory committees,' since the group meetings are unstructured, informal and not conducted for the purpose of obtaining advice on specific subjects indicated in advance." *Id.* at 1234-35.

¶n145. *Id.* at 1231-32. Of the fifteen meetings that were held, the President attended a portion of four. *Id.* at 1232.

¶n146. *Id.* Representatives of the following groups were present: housing construction and residential financing industries; senior citizens; life insurance industry; agriculture and livestock industries; electric utilities; printing industry; professional service firms; food processing firms; women business leaders; National Council of Churches; home economists in business; grocery manufacturers; youth and technology; and insurance. *Id.*

¶n147. *Id.* at 1234.

¶n148. *Id.*

¶n149. The court further opined that "to hold that Congress intended to subject meetings of this kind to press scrutiny and public participation... as required by the Act, would raise the most serious questions under our tripartite form of government as to the congressional power to restrict the effective discharge of the President's business." Id.

¶n150. 491 U.S. 440 (1989).

¶n151. Id. at 447.

¶n152. Id.

¶n153. Id. at 443.

¶n154. Id. at 444-45.

¶n155. Id.

¶n156. Id. at 447.

¶n157. Id. at 452.

¶n158. Id. at 450-51, 463, 466.

¶n159. 806 F. Supp. 275 (D.C. Cir. 1992).

¶n160. Id. at 275. The Administrator of the EPA invited nine governors to participate in the Forum to address the problem of the states' abilities to carry out program activities under the Safe Drinking Water Act which makes the EPA and the states responsible for implementing the drinking water program. Id. at 276.

¶n161. Id. at 277. The court noted that the "workings of the Forum underscore its independent, nonadvisory, operational capacity.... The Forum's program appears to propose the coordination of federal and state efforts in three general areas.... Thus, many of the Forum's proposals cannot be implemented through unilateral action on the part of either the EPA or the states. Instead, they may require legislative action on both the state and federal levels." Id. at 278.

¶n162. Id. at 276.

¶n163. Id. at 278.

¶n164. 997 F.2d 898 (D.C. Cir. 1993) [hereinafter AAPS].

¶n165. Id. at 902. Other members of the Task Force included the Secretaries of the Treasury, Defense, Veterans Affairs, Health and Human Services, Labor, and Commerce Departments, the Director of the Office of Management and Budget, the chairman of the Council of Economic Advisors, and three White House advisors. Id.

¶n166. Id. at 901. The working group was composed of 300 employees from the Executive Office, federal agencies and Congress; 40 "special government employees"; and various consultants. Id. The special government employees were hired for a limited duration by agencies of the Executive Office of the President. Id. The head of the working group, Ira Magaziner, was the senior advisor to the President for Policy and Development. Id.

¶n167. Id.

†n168. Id. (citations omitted).

†n169. Id.

†n170. Id.

†n171. Id.

†n172. Id.

†n173. Id. The plaintiffs alleged that the Task Force violated the Act by failing to file a charter and closing its meetings to the public. Id.

†n174. Id.

†n175. See supra note 37 and accompanying text (discussing 3 exemptions to the Act).

†n176. AAPS, 997 F.2d at 901.

†n177. The district court held that Mrs. Clinton was not an officer or employee of the federal government, and therefore, the Task Force did not qualify for the 3(2)(iii) exemption. See AAPS, 813 F. Supp. 82, 89-90 (D.D.C. 1993). The court agreed, however, that application of the Act to the Task Force encroached on the President's constitutional authority to receive confidential advice for the purpose of recommending legislation, but only when the Task Force was actually advising the President. Id. at 91-92. Therefore, the court balanced the interests and granted the preliminary injunction requiring the Task Force to satisfy the Act when it was meeting to gather and report information, but not when it was meeting to formulate advice or recommendations for the President. Id.

†n178. AAPS, 997 F.2d at 911. Regarding the working group, the court found that it was not an advisory committee because it was engaged in fact-gathering and did not provide advice to the President. Id. The government appealed and the plaintiffs cross-appealed. Id.

On appeal, the government argued that Mrs. Clinton is the functional equivalent of a full-time officer or employee and hence all meetings, whether they involved information-gathering or advisory functions, were exempt from the Act. Id. at 902. Plaintiffs responded that despite Mrs. Clinton's status as First Lady, she could not be an officer or employee of the federal government due to the Anti-Nepotism Act which statutorily bars her from such a position. Id. at 903. Further, plaintiffs challenged the district court's determination that the working group was not subject to the Act. Id.

The Anti-Nepotism Act provides:

A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.

5 U.S.C. 3110(b) (1988).

¶179. AAPS, 997 F.2d at 910, 916. Although the court opined that the operational proximity of the Task Force to the President, implicated the executive powers and that regardless of the function that the Task Force was exercising, the President had a strong interest in confidentiality, it declined to consider the constitutional dilemma. Id. at 910 (noting that "if public disclosure of the real information gathering process is required, the confidentiality of the advice-giving function inevitably would be compromised," therefore confidentiality is required at each stage of advice formulation).

¶180. Id. at 910-11.

¶181. Id. The court found some weight to the government's argument that in enacting 3 U.S.C. 105(e), Congress recognized that the President's spouse acts as the functional equivalent of a President's assistant. Id. at 904. That section provides in part:

Assistance and services authorized pursuant to this section to the President are authorized to be provided to the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities. If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President's family whom the President designates.

3 U.S.C. 105(e) (1988). Noting that the statute neither limited the type of assistance rendered nor defined the Presidential responsibilities which could be aided, the court thought it reasonable to construe 105(e) as treating the President's spouse as a de facto officer or employee. AAPS, 997 F.2d at 904-05. "Otherwise, if the President's spouse routinely attended, and participated in, cabinet meetings, he or she would convert an all-government group, established or used by the President, into a **FACA** advisory committee." Id. at 905. Moreover, a presidential spouse has a supporting staff which is composed of members who would be considered full-time government officers or employees. Id. The court thought it anomalous to conclude that one of the spouse's staff could serve as a member of an advisory committee without implicating **FACA**, but the spouse could not. Id.

Further, in the court's opinion, although the anti-nepotism provision defines "agency" as an "executive agency," it was not intended to apply to the Executive Office of the President or to the White House. Id. In addition, the court noted that the anti-nepotism statute bars appointment only to paid government positions, and therefore, although it might "prevent the President from putting his spouse on the federal payroll, it does not preclude his spouse from aiding in the performance of his duties." Id.

Judge Buckley concurred in the judgment but criticized the majority for "straining the plain meaning" of the Act rather than considering the constitutional challenge. Id. at 922 (Buckley, J., concurring). The judge commented that Public Citizen v. United States Dep't of Justice, does not sanction such a strained statutory interpretation. Id. at 923 (Buckley, J., concurring) (holding that the ABA Committee was not "utilized" by the President and hence, not subject to **FACA** (citing Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989))). Further, the Judge would have held that the Task Force was subject to **FACA** and would have addressed the constitutional issues implicated by such a holding. Id. at 924 (Buckley, J. concurring). Applying the balancing approach used in Nixon I, the Judge concluded that "because none of Congress's purposes in enacting **FACA** are of a gravity that would justify overriding the Presidential privilege in this case," the Act is unconstitutional as applied to the Task Force. Id. at 925 (Buckley, J., concurring) (noting that in contrast to Nixon I, where the Court permitted very limited intrusion on the Presidential privilege, this

case would require the Task Force to "operate in the full glare of provisions requiring public meetings and disclosure of records").

†n182. Id. at 916.

†n183. Id. at 914.

†n184. Id. at 915. After the trial, the plaintiffs refused a settlement offer by the defendants. *AAPS v. Clinton*, No. 93-0399, 1994 WL 692814 (D.D.C. Dec. 1, 1994). The defendants then unilaterally released some of the documents created by the working group to the public. Id. Subsequently the defendants brought a motion to dismiss the case as moot. Id. Because some documents were not disclosed, the court ruled that the case was "almost" moot. Id. The court required the defendants to create an adequate index of each document that had not been released, along with an explanation of the reason for withholding. Id. The court would then evaluate the index to determine whether any more documents needed to be released and whether the case was in fact moot. Id. at 2. Defendants then released the remaining records and the court dismissed the case with prejudice. *AAPS v. Clinton*, No. 93-0399, 1994 WL 774769 (D.D.C. Dec 21, 1994).

†n185. *Northwest Forest Resource Council v. ESPY*, 846 F. Supp. 1009, 1010 (D.D.C. 1994) The court noted that "both the Supreme Court majority in *Public Citizen* and the D.C. Circuit majority in *AAPS* were able, by adroit semantics and near-clairvoyant discernment of legislative intent, to avoid that drastic result in the circumstances of those cases, but not, however, without difficulty, and in doing so incurred stern disapprobation from concurring brethren who were less squeamish." Id. at 1014.

†n186. Id. at 1010 (acknowledging the constitutional issue which arose by finding FEMAT to be an advisory committee, but limiting plaintiff's remedy to avoid constitutional and separation of powers conflicts).

†n187. Id. at 1013-14.

†n188. Id. at 1010. In addition, NFRC requested that the court declare FEMAT's proceedings null and void for failure to comply with the Act and enjoin the Executive Branch from relying on FEMAT's recommendations in managing federal forest land until FEMAT complies with the Act. Id.

†n189. Id.

†n190. Id. at 1012.

†n191. Id.

†n192. Id. 1013-14 (finding that FEMAT violated the open meeting requirement; failed to publish notice of its meetings; failed to allow volunteers to attend meetings and participate in its activities; failed to make records available for public inspection and copying; failed to keep detailed minutes; failed to obtain authorization for its establishment; failed to file a charter; failed to fairly balance its membership; failed to insure against inappropriate influence by special interests; and failed to comply with the termination provisions).

†n193. Id. at 1014-15.

†n194. Id. at 1015.

†n195. Id. The court noted:

The Court is aware of no authority upon which it could confidently rely in concluding that it may forbid the President and his Cabinet to act upon advice that comes to them from any source, however irregular. There is no "exclusionary rule" applicable to the decisionmaking processes of the President. And it is certainly no less presumptuous than would be a similar instruction from Congress to the President -- as plaintiff deems **FACA** to be -- as to what he can and cannot consider in executing the duties of his office.

Id.

†n196. Id. In contrast, in *Alabama-Tombigbee Rivers Coalition v. Department of the Interior*, the circuit court held that injunctive relief is an appropriate remedy under the Act where the advisory committee did not comply with the provisions of **FACA**. *Alabama-Tombigbee Rivers Coalition*, 26 F.3d 1103, 1107 (11th Cir. 1994). The court reasoned that such relief was the best method to assure future compliance with the Act. Id. at 1107.

†n197. Confidentiality is needed to encourage candid communications between government advisors and decisionmakers and to honor their expectations of privacy. *Tribe*, supra note 131, at 276. Succinctly stated:

if executive officials fear being held answerable in a different forum for their tentative judgements, off-the-cuff remarks, or dissenting views, then the officials will tend toward self-censorship, thereby reducing the vigor of internal executive branch debate and degrading the quality of executive decisions.

Geoffrey Miller, *Separation of Powers May Become Focus of Dispute Over NSC*, 9 *Legal Times* 16, 17 (Dec. 15, 1986).

†n198. Although the courts acknowledge its existence, the scope of this privilege is not well-defined, and some scholars question its necessity as well as its validity. See supra note 131.

†n199. See *McNeely-Johnson*, supra note 106, at 292, noting that the "pragmatic reality is the doctrine [of Executive Privilege] is here, it is recognized by the Supreme Court, and it must be effectively contained." But see *Cox*, supra note 104, at 1435, noting that the Supreme Court in *Nixon I*, carefully "chose the words 'constitutionally based,' not 'constitutionally secured' or 'guaranteed by the Constitution.'" See contra *Berger*, supra note 124, at 21 (noting that there are bizarre side-effects from rooting the executive privilege in the separation of powers; i.e. does it impair Congress's attempts to provide executive information to the public? "Is the Freedom of Information Act then unconstitutional?").

†n200. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 467 (1988) (Kennedy, J., concurring). When the Constitution explicitly grants the power to the President, then congressional regulation of that power will not be tolerated and no balancing approach is necessary. Id. at 483-87 (Kennedy, J., concurring). See also *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (holding that Congress cannot limit the full legal effect of the President's powers); *Schick v. Reed*, 419 U.S. 256, 266 (1974) (noting that the pardon power "flows from the Constitution alone... and... cannot be modified, abridged or diminished by the Congress"); *INS v. Chadha*, 462 U.S. 919 (1983) (noting that one reason for striking down a legislative veto provision of the Immigration and Naturalization Act was that it

violated the constitutional requirement that all legislation be presented to the President for signing before becoming law).

If, however, Congress does not directly limit an express power of the President, but rather indirectly affects an executive power that is not specifically enumerated in the Constitution, the statute is not unconstitutional per se, but a balancing test is applied. *Public Citizen*, 491 U.S. at 467 (Kennedy, J., concurring). Justice Kennedy explained that the Court balances the extent to which the Congressional regulation restricts another branch's accomplishment of a constitutionally assigned function against the need "to promote objectives within the constitutional authority of Congress." *Id.* at 484-85 (Kennedy, J., concurring). Applying the test to the case, Justice Kennedy opined that the application of **FACA** constituted "a direct and real interference with the President's exclusive responsibility to nominate federal judges." *Id.* at 488 (Kennedy, J., concurring).

¶n201. 418 U.S. 683 (1974).

¶n202. 433 U.S. 425 (1977).

¶n203. *Id.* at 452-53.

¶n204. See *supra* part IV.

¶n205. See *supra* notes 14-20 and accompanying text (discussing the importance of advisory committees and giving examples of their work).

¶n206. See *supra* part II (setting forth sections of the Act in detail).

¶n207. See, e.g., *AAPS*, 997 F.2d 898 (D.C. Cir. 1993).

¶n208. Federal Advisory Committee Act, 5 U.S.C. app. 10 (1988).

¶n209. U.S. Const. art. I, 1, cl.1 states "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." In addition, Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, 8, cl.18.

¶n210. *Morrison*, *supra* note 131, at 291.

Even when there has been no textual violation and one branch has not exercised power given by the Constitution to another, separation of powers problems may still exist if a statute "disrupts the proper balance between the coordinate branches."

Id. (citation omitted) (noting that the context in which this separation of powers issue arises is through legislative restrictions on the President or the Executive Branch). *Morrison* noted that Congress's failure to consider separation of powers problems when creating legislation, has led to its involvement in law suits based on separation of powers issues. *Id.* at 309.

¶n211. See, e.g., *AAPS*, 813 F. Supp. 82, 90-91 (D.D.C. 1993). In *AAPS*, the district court opined:

Article II, section 3 of the Constitution states that the President "shall from time to time... recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." In order to formulate these measures, defendants claim, the President must be able to meet confidentially with his advisors. He must be able to trust that his advisors shall speak with complete candor and that they will not be cowed by the fear of premature public reaction. That candor is risked should **FACA** apply to the Task Force. A realistic and practical appraisal of the application of **FACA** to these presidential advisors reveals that **FACA** prevents the President from receiving the full measure of the Task Force's advice. When confidentiality is compromised and advisors are afraid to speak, the President is necessarily hampered in his ability to obtain the information he needs to offer proposed legislation to Congress. Thus, the court holds that the application of **FACA** presents "the potential for disruption" of the President's accomplishing his constitutionally assigned functions....

Id. (citations omitted). In a concurring opinion in *Soucie v. David*, Judge Wilkey stated:

When President Washington first declined to furnish the House of Representatives with a document requested by it, he gave as his reason for refusal, it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.

Soucie, 448 F.2d 1067, 1082 (D.C. Cir. 1971) (Wilkey, J., concurring) (citation omitted).

¶n212. See, e.g., *AAPS*, 813 F. Supp. at 85 & n. 5, wherein the court acknowledged that the constitutional issue of the power of Congress to regulate the power of the President was at issue, and such an issue was undoubtedly a "serious constitutional question." *Cox*, *supra* note 104, at 1418, noted that amending the Freedom of Information Act to grant the public greater access to information concerning intergovernmental affairs may conflict with the executive privilege of confidentiality.

¶n213. *AAPS*, 813 F. Supp. at 85 ("It is the cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))). Nevertheless, as Justice Kennedy pointed out in a concurring opinion in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), there is an exception to the rule that "where the plain language of a statute is clear in its application, the normal rule is that [the court] is bound by it." *Id.* at 470 (Kennedy, J., concurring). The exception exists "where the plain language of the statute would lead to 'patently absurd consequences' that 'Congress could not possibly have intended.'" *Id.* (Kennedy, J., concurring) (quoting *United States v. Brown*, 333 U.S. 18, 27 (1948); *F.B.I. v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J. dissenting)). Justice Kennedy opined that the majority was loosely invoking the "absurd result" exception which created the risk that the court would exercise "its own 'WILL instead of JUDGMENT,' with the consequence of 'substituting [its own] pleasure to that of the legislative body.'" *Id.* at 471 (Kennedy, J., concurring) (citation omitted). The Justice further stated, "I cannot go along with the unhealthy process of amending the statute by judicial interpretation." *Id.* at 470 (Kennedy, J., concurring).

†n214. Nuskiewicz, *supra* note 16, at 972.

†n215. See *id.* The Supreme Court's definition of "utilize" "pushed statutory construction to the extreme and therefore was not fairly plausible." AAPS, 813 F. Supp. at 86 & n.7 (discussing Judge Joyce Green's decision in *WLF v. United States Dep't of Justice*, 691 F. Supp. 483, 491 (D.D.C. 1988)).

†n216. See, e.g., *AAPS v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (interpreting this exemption to include the First Lady).

†n217. Markham, *supra* note 15, at 607.

†n218. *Id.* Enforcement also depends upon the "vigilance of the standing committees of Congress and the forcefulness of the Office of Management and Budget in fulfilling its role as administrator of the provision of the Act...." *Id.*

†n219. Levine, *supra* note 26, at 233. Levine noted that "the supply of such persons should not be taken for granted." *Id.*

†n220. The Freedom of Information Act, 5 U.S.C. 552 (1988) ("FOIA"), specifically exempts privileged documents. Section (b)(5) excludes "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." Under this exemption, the agency could protect its "policy papers" containing the "deliberative discussions, selections of key policy points, or legally-privileged documents." O'Reilly, *supra* note 4, at 37. In enacting this exemption, Congress intended to codify some of the components of the executive privilege doctrine. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Stokes v. Hodgson*, 347 F. Supp. 1371 (D. Ga. 1972). Under **FACA**, documents are exempted from disclosure under the exemptions contained in the FOIA, and meetings are exempted from openness under the narrower exceptions contained in the Government in the Sunshine Act, 5 U.S.C. 552b (1988), which does not have an interagency memorandum exemption. Nevertheless, litigation has indicated that the FOIA (b)(5) exemption is inherently inapplicable to advisory committees. See, e.g., *Wolfe v. Weinberger*, 403 F. Supp. 238 (D.C. Cir. 1975) (ruling that an advisory committee cannot also be an agency, hence the documents cannot be interagency memoranda subject to the exemption). But see *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 109 (D.C. Cir. 1976) (using the inter-agency memorandum exemption to allow an advisory committee to keep its meetings closed).

†n221. *AAPS v. Clinton*, 813 F. Supp. 82, 93 (D.D.C. 1993) (concluding that sections 10(a)(1), 10(a)(3), and 10(c) of **FACA** detrimentally affect the candor of advisory committee deliberations and hence prevent the President from receiving advice necessary to recommend legislation to Congress).

†n222. *Nixon I*, 418 U.S. 683, 711 (1974) (To the extent the privilege "relates to the effective discharge of a President's powers, it is constitutionally based."); *Nader v. Baroody*, 396 F. Supp. 1231, 1234 n.5 (D.D.C. 1975) (noting that the constitutional issue arises because **FACA** impinges upon the President's effective discharge of a constitutional power, not because it impinges the executive privilege).

†n223. Cardozo, *supra* note 1, at 11. "The statutory statement of purposes refers to [the] 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." *Id.*

†n224. Scholars have noted that invocation of the executive privilege is a means of hiding

inefficiency, and maladministration. Cox, *supra* note 104, at 1433. The proposed amendment prevents this avoidance.

✚n225. One commentator noted:

Communications to and from the President may be constitutionally protected to the extent determined by the Judicial Branch, but since Congress creates the executive departments and agencies it may be empowered to legislate concerning legislative and public access to their internal affairs.

Cox, *supra* note 104, at 1419. Professor Tribe agreed that it is the right of the Judiciary to evaluate the propriety of a claim of executive privilege and that such an evaluation involves a determination whether the information falls within a privilege and whether a privilege should be honored in the particular procedural setting. Tribe, *supra* note 7, at 277. Professor Tribe further commented:

Although respect for the Presidency and concern for the political implications of a confrontation with a co-equal branch of government doubtless induce the courts to tread more circumspectly when the President, rather than a subordinate executive official, asserts a privilege, the Judiciary is nonetheless responsible for determining whether a privilege obtains.

Id.

✚n226. In the context of a conflict between the privilege and **FACA**, the Court must balance the President's interest in confidentiality in discussions with and between his aides and advisors, including those who are members of the public, against Congress's and the public's need for access to the information. This analysis must take into consideration the function being performed by the President in seeking advice, such as recommending legislation to Congress, as in *AAPS v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), or nominating Justices, as in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989). When the President is exercising a constitutional function, the privilege weighs heavily against the public's right to know. See, e.g., *Nixon I*, 418 U.S. at 711. Moreover, a general need for information asserted by the public or interested parties is far less compelling than the needs of a criminal or civil defendant for evidence at trial. See *id.* at 683 (holding that criminal defendant's need for evidence outweighs President's claim of privilege); *Halperin v. Kissinger*, 401 F. Supp. 272 (D.D.C. 1975) (finding that plaintiffs in civil suit were entitled to take former President Nixon's deposition where they sought damages for illegal wiretapping of their home telephone and where Nixon had occasionally accepted personal responsibility for the surveillance program at issue); Tribe, *supra* note 7, at 283 (noting that the argument for disclosure is more compelling when the request is made by a defendant in a civil suit brought by the government).

The privilege was overcome by Congress's interest in preserving Presidential materials and maintaining access to them for lawful historical and governmental purposes in *Nixon II*. *Nixon II*, 433 U.S. 425, 452 (1977). The Court concluded that screening Presidential materials by professional archivists would not impede candid communications between the President and his advisors. *Id.* at 451. The Court was also convinced that the regulations

restricting public access to the materials would be adequate to preserve confidentiality. Id. But see AAPS, 997 F.2d 898, 924, 925 (D.C. Cir. 1993) (Buckley, J., concurring) (commenting that the intrusion imposed by **FACA** is great and the purposes underlying the Act are not sufficient to justify interfering with the executive privilege).

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