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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 8 1981
JAMES F. DAVEY, Clerk

NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiff,	)	
vs.	)	Civil Action No. 81-944
JAMES EDWARDS, et al., Defendants.	)	

MEMORANDUM OPINION

This action, brought under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. (1976), is before the court on cross-motions for summary judgment. Jurisdiction is based on 28 U.S.C. § 1331 and § 1361. There is no genuine issue of material fact. For the reasons that follow, we find that plaintiff is entitled to summary judgment.

Facts

On March 20, 1981, President Ronald Reagan sent a memorandum to Secretary of Energy James Edwards discussing appropriations for the Department of Energy's (DOE) "civilian nuclear budget." In closing, the President stated,

> I wish to emphasize that the Department of Energy should consult with industry to determine which regulatory barriers are of greatest concern to it and, working with the Vice President's Task Force on Regulatory Review, should develop recommendations for my further review on how to create a more favorable climate for private [nuclear fuel] reprocessing efforts.

Appendix A to Complaint. On April 7, 1981, Secretary Edwards sent a letter to representatives of thirteen companies "interested"[1/]

1/ Defendants' Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 5.

in nuclear fuel reprocessing, stating,

> The policy of the Reagan Administration is to encourage private sector participation in nuclear spent fuel reprocessing at an early time. . . .
>
> [I]f we are to be successful in overcoming [past commercial sector reprocessing] failures, we need to assess private interest in reprocessing and examine (in a participative manner) what needs to be done to permit nongovernmental operation of commercial nuclear storage and reprocessing facilities.
>
> To begin this process, I am writing to invite you or a representative of your organization to a meeting in the Department of Energy on April 23, 1981, to discuss several issues with officials from the Department. Examples of issues we would like to review and discuss during the course of this meeting include:
>
> °Industry views on the need and timing for the establishment of commercial nuclear fuel reprocessing capability in the United States.
>
> . . .
>
> °Review of policy and regulatory issues that are obstacles to private industry.
>
> . . .
>
> Following this meeting, we may schedule another meeting which the Deputy Secretary or I may attend. . . . I view this meeting as an important first step in assessing private sector investment potential in nuclear fuel reprocessing.

Appendix B to Complaint. A representative of plaintiff requested and was denied permission to attend the April 23rd meeting.[2/]

Plaintiff filed this action on April 21, 1981, seeking a declaratory judgment that the group to be convened on April 23 constituted an "advisory committee" subject to the requirements of FACA.[3/] On April 22, after a hearing, we denied plaintiff's motion for a temporary restraining order. The April 23rd meeting proceeded as scheduled. Defendants have provided plaintiff with minutes of the meeting, but no transcript was made. The parties have filed cross-motions for summary judgment.

2/ Representatives of other groups also asked and were denied permission to attend the meeting. Plaintiff's representative and others who expressed interest were offered, and accepted, an opportunity to meet separately with the Acting Under Secretary of Energy on April 24, 1981, to discuss fuel reprocessing. Defendants' Answers to Interrogatory No. 3.

3/ Plaintiff also sought injunctive relief to mandate compliance with FACA's requirements.

Discussion

The only issue before us is whether the group that met with DOE officials on April 23 was an "advisory committee" as defined by § 3(2) of FACA. That section provides, in pertinent part,

> For the purpose of this Act--
>
> . . .
>
> (2) The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof. . . which is--
>
> . . .
>
> (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. . . .

5 U.S.C. app. § 3(2) (1976). Because the statutory definition of "advisory committee" is broad and imprecise,[4/] courts have looked to a combination of factors to determine whether a given group should be subject to FACA. See generally National Nutritional Foods Association v. Califano, 603 F.2d 327 (2d Cir. 1979); Center for Auto Safety v. Cox, 580 F.2d 689 (D.C.Cir. 1978); Consumers Union of United States, Inc. v. Department of Health, Education, and Welfare, 409 F. Supp. 473 (D.D.C. 1976); Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975), vacated as moot, No. 75-1969 (D.C.Cir. Jan. 10, 1977); Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974).

Taking into account the particular facts presented here, we find that the balance of factors tips in favor of inclusion within § 3(2)'s definition of "advisory committee." The group was selected and the meeting convened by the Secretary of Energy after a request by the President that DOE "consult with industry to determine which regulatory barriers are of greatest concern to it" and "develop recommendations for [the President's] further review." Appendix A to Complaint. Cf. Consumers Union, supra, at 476-77 (industry group was not advisory committee where it approached agency seeking agency's comments on proposal to be implemented by industry group itself).

4/ Nader v. Baroody, 396 F. Supp. 1231, 1232 (D.D.C. 1975), vacated as moot, No. 75-1969 (D.C.Cir.Jan. 10, 1977).

The purpose of the meeting was to discuss with industry representatives the government's stated policy of "encourag[ing] private sector participation in nuclear spent fuel reprocessing at an early time," and a list of issues was specified in advance. Appendix B to Complaint; Exhibit A to Affidavit of Raymond G. Romatowski. See National Nutritional Foods, supra, at 329, 334-36 (ad hoc one-time-only group of five physicians was advisory committee where agency sought its "assist[ance]. . . in selecting the best course of action for 'regulating' [dietary product]"). Cf. Nader, supra, at 1234 (FACA applicable to groups organized "to make recommendations on an identified governmental policy for which specified advice was being sought;" informal groups that met with executive branch officials "to encourage an exchange of views," id. at 1232, on no particular topic was not advisory committee because "not conducted for the purpose of obtaining advice on specific subjects indicated in advance," id. at 1234-35). At the meeting, the industry representatives advised DOE officials that "clear signals in favor of nuclear power" and "continued Government support of reprocessing" would be prerequisites to private investment. M. Lawrence (Acting Director, Office of Nuclear Fuel Cycle, DOE), Minutes of 4/23/81 Meeting on Nuclear Fuel Reprocessing, Defendants' Response to Request to Produce Documents, ¶¶ 13, 15, 20, 23, and 29. The representatives recommended tax credits for nuclear plants, a "COMSAT-type" corporation to provide reprocessing, government purchase of a reprocessing plant at Barnwell, South Carolina, prompt licensing of plants, indemnification against licensing delays, and reduction of regulatory requirements. Id. at ¶¶ 6, 7, 12, 23, 26, 29, and 34.[5/] These considerations, taken together, place the April 23rd group within the scope of § 3(2) of FACA.[6/]

5/ The minutes of the meeting clearly reflect that the representatives in attendance provided DOE officials with the views and positions of their companies as well as with specific recommendations for spurring private investment in reprocessing. We therefore cannot accept defendants' characterization of the representatives' contributions as purely "factual data."

6/ Defendants' assertion that the group will not be reconvened does not change this result. An advisory committee may meet only once. National Nutritional Foods, supra, at 335-36. When Congress adopted the definition of "advisory committee" for § 3(2) from § (4) of Executive Order 11671 (June 5, 1972), it did not include the Order's provision that the group meet "on a recurring basis." National Nutritional Foods, supra, at 335 n. 7, citing Source Book on FACA, 95th Cong., 2d Sess. at 334.

Defendants assert that acceptance of plaintiff's argument will require application of FACA to any meeting between a governmental official and more than one "nongovernmental entity," and have emphasized the extreme hardships that literal compliance with FACA may impose on the effective carrying out of governmental objectives. We are in agreement with defendants' apprehensions but can only point out that requests for relief must be directed to the one body responsible for enacting FACA, i.e., the Congress of the United States. In the meantime, we are bound by the statute as written and construed. On the other hand, we emphasize that our decision is a narrow one, and holds only that where an agency head, acting under the President's direction, calls together industry representatives to gain industry views and recommendations on a specific identified government policy, that group is an "advisory committee" for purposes of FACA.

Since the meeting in dispute has already taken place, and defendants have represented to the court that no further meetings will be held, we need not decide which procedural requirements of FACA are applicable. Cf. Center for Auto Safety, supra, at 694-95. For the same reason, we see no need for an injunction. See National Nutritional Foods, supra, at 336.

An order consistent with the foregoing has been entered this day.

J. H. Pratt

John H. Pratt
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JAMES F. DAVEY, Clerk

NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiff,	)	
vs.	)	Civil Action No. 81-944
JAMES EDWARDS, et al., Defendant.	)	

ORDER

Upon consideration of the parties' cross-motions for summary judgment and the entire record in this matter, and for the reasons set forth in the accompanying memorandum opinion, it is by the court this 8th day of September, 1981,

ORDERED that defendants' motion for summary judgment be and the same hereby is denied, and it is

ORDERED that plaintiff's cross-motion for summary judgment be and the same hereby is granted, and it is

ORDERED that plaintiff's request for an injunction be and the same is hereby denied, and it is

FURTHER ORDERED that this action shall stand dismissed.

J. H. Pratt
John H. Pratt
United States District Judge

[Pratt, J.]

C.A. 81-944 (Nat. Resources Defense Council v. Edwards)

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(633-4954)

advisory committees

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977

(CARTER ADMINISTRATION)

TITLE	AUTHORITY
PRESIDENTIAL ADVISORY BOARD ON AMBASSADORIAL APPOINTMENTS	Executive Order 11970, 2/5/77
WHITE HOUSE CONFERENCE FOR THE BUSINESS COMMUNITY	Presidential remarks, 2/9/77
COMMISSION ON SELECTION OF THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION	Executive Order 11971, 2/11/77
UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION	Executive Orders 11972, 2/14/77; 11993, 5/24/77; and 12059, 5/11/7
PRESIDENT'S COMMISSION ON MENTAL HEALTH	Executive Order 11973, 2/17/77
PRESIDENTIAL COMMISSION ON AMERICANS MISSING AND UNACCOUNTED FOR IN SOUTHEAST ASIA	State Department announcement: 2/25/77
INTERAGENCY OIL POLLUTION TASK FORCE	Fact Sheet, 3/16/77
INTERAGENCY COMMITTEE FOR THE PURCHASE OF UNITED STATES SAVINGS BONDS	Executive Order 11981, 3/29/77
INTERAGENCY COMMITTEE TO COORDINATE DAM SAFETY PROGRAMS (The President directed the Chairman of the Federal Coordinating Council for Science, Engineering and Technology to convene an ad hoc Interagency Committee)	Presidential Memorandum, 4/23/77
PANEL ON SAFETY OF DAMS (The President directed the Director of the Office of Science and Technology Policy to arrange for the review of agency regulations, procedures and practices and of the proposed federal dam safety guidelines, by a panel of recognized experts)	Presidential Memorandum, 4/23/77
NATIONAL COMMISSION ON NEIGHBORHOODS	Public Law 95-24, 4/30/77
PRESIDENTIAL TASK FORCE ON THE DISTRICT OF COLUMBIA	Press Release, 5/3/77
COMMITTEE ON SELECTION OF FEDERAL JUDICIAL OFFICERS	Executive Order 11992, 5/24/77
EXECUTIVE COMMITTEE ON REORGANIZATION	Press Release, 6/2/77
PRESIDENT'S COMMISSION ON MILITARY COMPENSATION	Executive Order 11998, 6/27/77
TASK FORCE ON WOMEN BUSINESS OWNERS	Presidential Memorandum, 8/4/77
WHITE HOUSE CONFERENCE ON BALANCED NATIONAL GROWTH AND ECONOMIC DEVELOPMENT, 1978	Press Release, 8/4/77 (Public Law 94-487, 10/12/76, requested)
INTERAGENCY TASK FORCE TO CONSIDER WAYS TO STRENGTHEN THE FEDERAL ROLE IN PROTECTING WORKPLACE SAFETY AND HEALTH	Presidential Memorandum, 8/5/77

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

NATIONAL COMMISSION ON AIR QUALITY	Public Law 95-95, 8/7/77
INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT	Acceptance of United States membership on 8/15/77
ADVISORY BOARD ON THE NEGOTIATIONS WITH CANADA CONCERNING TOLL INCREASES ON THE SAINT LAWRENCE SEAWAY AND THE WELLAND CANAL	Public Law 95-105, 8/17/77
WORKING GROUP ON FOOD AND AGRICULTURAL POLICY (The President directed the Secretary of Agriculture to form this group)	Presidential Memorandum, 9/30/77
WORLD HUNGER WORKING GROUP	Presidential Memorandum, 9/30/77
DEPARTMENT OF ENERGY	Public Law 95-91, 8/4/77, effective 10/1/77
WHITE HOUSE CONFERENCE ON STEEL	Press Release, 10/6/77
STATISTICAL POLICY COORDINATION COMMITTEE	Executive Order 12013, 10/7/77
INTERAGENCY TASK FORCE ON STEEL	President's Press Conference, 10/13/77
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION	Public Law 95-164, 11/9/77
NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES	Executive Order 12022, 12/1/77
OFFICE OF ADMINISTRATION, EXECUTIVE OFFICE OF THE PRESIDENT	Reorganization Plan Number 1 of 1977 - effective 12/4/77
PRIVACY COORDINATING COMMITTEE (Domestic Policy Staff)	Eizenstat memorandum, 12/12/77
NONFUEL MINERALS POLICY COORDINATING COMMITTEE (Domestic Policy Staff)	Eizenstat memorandum, 12/12/77
NATIONAL COMMISSION ON SOCIAL SECURITY	Public Law 95-216, 12/20/77
NATIONAL FOREIGN INTELLIGENCE BOARD	Executive Order 12036, 1/24/78
WHITE HOUSE CONFERENCE ON FAMILIES, 1979	Presidential Statement, 1/30/78 (to convene 12/9-13/79)
FEDERAL COORDINATING COUNCIL FOR SCIENCE, ENGINEERING, AND TECHNOLOGY	Executive Order 12039, 2/24/78, effective 2/26/78
INTERAGENCY NUCLEAR WASTE MANAGEMENT TASK FORCE	Presidential Memorandum, 3/13/78
INTERNATIONAL COMMUNICATION AGENCY	Reorganization Plan Number 2 of 1977 - effective 4/1/78

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

UNITED STATES ADVISORY COMMISSION ON INTERNATIONAL COMMUNICATION, CULTURAL AND EDUCATIONAL AFFAIRS	Reorganization Plan Number 2 of 1977 - effective 4/1/78
NATIONAL ADVISORY COMMITTEE FOR WOMEN	Executive Order 12050, 4/4/78
INTERDEPARTMENTAL TASK FORCE (WOMEN)	Executive Order 12050, 4/4/78
CABINET-LEVEL TASK FORCE ON EXPORTS	Presidential Remarks, 4/11/78
NATIONAL COMMISSION ON THE INTERNATIONAL YEAR OF THE CHILD, 1979	Executive Order 12053, 4/14/78
PRESIDENT'S COMMISSION ON FOREIGN LANGUAGE AND INTERNATIONAL STUDIES	Executive Order 12054, 4/21/78
WHITE HOUSE CONFERENCE ON EDUCATION, 1980	Public Law 95-272, 5/3/78 (NOTE: The Conference was never held and the Congress did not extend the reporting date beyond 12/1/80)
NATIONAL CONFERENCE COMMITTEE (WHITE HOUSE CONFERENCE ON EDUCATION, 1980)	Public Law 95-272, 5/3/78 (NOTE: Members were never appointed)
NATIONAL CONFERENCE PLANNING COUNCIL ON THE ARTS	Public Law 95-272, 5/3/78
NATIONAL PLANNING COUNCIL ON THE HUMANITIES	Public Law 95-272, 5/3/78
INDUSTRIAL INNOVATION COORDINATING COMMITTEE	Press Release, 5/11/78
SMALL BUSINESS CONFERENCE COMMISSION	Executive Order 12061, 5/18/78
TASK FORCE ON GOVERNMENT EFFICIENCY (ANTI-INFLATION)	Special Representative for Trade Negotiations Press Briefing, 5/18/78
PRESIDENT'S COMMISSION ON THE COAL INDUSTRY	Executive Order 12062, 5/26/78
WHITE HOUSE CONFERENCE ON THE FUTURE OF THE COAL INDUSTRY	Executive Order 12062, 5/26/78
UNITED STATES TAX COURT NOMINATING COMMISSION	Executive Order 12064, 6/5/78
UNITED STATES COURT OF MILITARY APPEALS NOMINATING COMMISSION	Executive Order 12063, 6/5/78
PRESIDENT'S COMMISSION ON PENSION POLICY	Executive Order 12071, 7/12/78
INFORMATION SECURITY OVERSIGHT OFFICE	Executive Order 12065, 6/28/78
INTERAGENCY INFORMATION SECURITY COMMITTEE	Executive Order 12065, 6/28/78

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

INTERAGENCY COMMITTEE TO IMPLEMENT FINDINGS OF THE PRESIDENT'S INTERAGENCY TASK FORCE ON WOMEN BUSINESS OWNERS	Presidential Memorandum, 7/10/78
INTERAGENCY COORDINATING COUNCIL	Executive Order 12075, 8/16/78
NATIONAL CONSUMER COOPERATIVE BANK	Public Law 95-351, 8/20/78
OFFICE OF SELF-HELP DEVELOPMENT AND TECHNICAL ASSISTANCE, NATIONAL CONSUMER COOPERATIVE BANK	Public Law 95-351, 8/20/78
PRESIDENTIAL COMMISSION ON WORLD HUNGER	Executive Order 12078, 9/5/78
ENERGY COORDINATING COMMITTEE	Executive Order 12083, 9/27/78
EXECUTIVE COUNCIL, ENERGY COORDINATING COMMITTEE	Executive Order 12083, 9/27/78
JUDICIAL NOMINATING COMMISSION FOR THE DISTRICT OF PUERTO RICO	Executive Order 12084, 9/29/78
SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY	Public Law 95-412, 10/5/78
VETERANS' FEDERAL COORDINATING COMMITTEE	Presidential Memorandum, 10/10/78
OFFICE OF PERSONNEL MANAGEMENT	Reorganization Plan Number 2 of 1978, effective 1/1/79 and Public Law 95-454, 10/13/78, effective 1/11/79
MERIT SYSTEMS PROTECTION BOARD	Reorganization Plan Number 2 of 1978, effective 1/1/79 and Public Law 95-454, 10/13/78, effective 1/11/79
FEDERAL LABOR RELATIONS AUTHORITY	Reorganization Plan Number 2 of 1978, effective 1/1/79 and Public Law 95-454, 10/13/78, effective 1/11/79
FEDERAL SERVICE IMPASSES PANEL	Reorganization Plan Number 2 of 1978, effective 1/1/79 and Public Law 95-454, 10/13/78, effective 1/11/79
SPECIAL PANEL (Applicable Actions Involving Discrimination)	P.L. 95-454, 10/13/78, effective 1/11/79
WHITE HOUSE CONFERENCE ON AGING, 1981	Public Law 95-478, 10/18/78 (To be held in December of 1981)
NATIONAL PRODUCTIVITY COUNCIL	Executive Order 12089, 10/23/78
OFFICE OF GOVERNMENT ETHICS	Public Law 95-521, 10/26/78

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

NATIONAL COMMISSION FOR EMPLOYMENT POLICY (formerly called the National Commission for Manpower Policy)	Public Law 95-524, 10/27/78
REGULATORY COUNCIL	Presidential Memorandum, 10/31/78
PRESIDENT'S COMMISSION ON THE HOLOCAUST	Executive Order 12093, 11/1/78
NATIONAL COUNCIL ON QUALITY IN EDUCATION	Public Law 95-561, 11/1/78, effective 10/1/78
ADVISORY PANEL ON FINANCING ELEMENTARY AND SECONDARY EDUCATION	Public Law 95-561, 11/1/78, effective 10/1/78
COMMISSION ON PROPOSALS FOR THE NATIONAL ACADEMY OF PEACE AND CONFLICT RESOLUTION	Public Law 95-561, 11/1/78, effective 10/1/78
COMMISSION ON THE REVIEW OF THE FEDERAL IMPACT AID PROGRAM	Public Law 95-561, 11/1/78
NATIONAL ADVISORY COMMUNITY INVESTMENT BOARD	Public Law 95-568, 11/2/78
NATIONAL ALCOHOL FUELS COMMISSION	Public Law 95-599, 11/6/78
INTERAGENCY COMMITTEE ON HANDICAPPED RESEARCH	Public Law 95-602, 11/6/78
NATIONAL COUNCIL ON THE HANDICAPPED	Public Law 95-602, 11/6/78
NATIONAL INSTITUTE OF HANDICAPPED RESEARCH	Public Law 95-602, 11/6/78
ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD	Public Law 95-602, 11/6/78
PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH	Public Law 95-622, 11/9/78
OFFICE OF MINORITY ECONOMIC IMPACT, DEPARTMENT OF ENERGY	Public Law 95-619, 11/9/78
INTERAGENCY COMMITTEE TO CONDUCT A STUDY ON THE SOCIOECONOMIC IMPACTS OF INCREASED COAL PRODUCTION AND OTHER ENERGY DEVELOPMENT	Public Law 95-620, 11/9/78, effective 5/8/79
NATIONAL CREDIT UNION ADMINISTRATION BOARD	Public Law 95-630, 11/10/78, effective 3/10/79
ENDANGERED SPECIES COMMITTEE	Public Law 95-632, 11/10/78
REVIEW BOARD TO THE ENDANGERED SPECIES COMMITTEE	Public Law 95-632, 11/10/78
PRESIDENT'S COMMISSION ON THE COAL INDUSTRY (Reestablished)	Executive Order 12103, 12/14/78
WHITE HOUSE CONFERENCE ON THE FUTURE OF THE COAL INDUSTRY (Reestablished)	Executive Order 12103, 12/14/78

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

INTERAGENCY COMMITTEE ON REFUGEE AFFAIRS	Presidential Memorandum, 2/28/79
UNITED STATES - CHINA JOINT ECONOMIC COMMITTEE	United States and Chinese officials agreed to basic terms in China on 3/1/79
FEDERAL EMERGENCY MANAGEMENT AGENCY	Reorganization Plan Number 3 of 1978 - effective 4/1/79
PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND	Executive Order 12130, 4/11/79
INTERAGENCY GROUP ON UNITED STATES POLICY TOWARDS MEXICO	Presidential Memorandum, 4/26/79
INTERDEPARTMENTAL COMMITTEE ON DOMESTIC VIOLENCE	Presidential Memorandum, 4/27/79
UNITED STATES - JAPAN ECONOMIC RELATIONS GROUP	By President Carter and Prime Minister Ohira of Japan, at a bilateral meeting in Washington, D.C., on 5/2/79
EXECUTIVE GROUP TO COMBAT FRAUD AND WASTE IN GOVERNMENT	Presidential Memorandum, 5/3/79
PRESIDENTIAL MANAGEMENT IMPROVEMENT COUNCIL	Presidential Memorandum, 5/3/79 and Executive Order 12148, 7/20/79
PRESIDENT'S ADVISORY COMMITTEE FOR WOMEN	Executive Order 12135, 5/9/79
PEACE CORPS ADVISORY COUNCIL	Executive Order 12137, 5/16/79
INTERAGENCY COMMITTEE ON WOMEN'S BUSINESS ENTERPRISE	Executive Order 12138, 5/18/79
ECONOMIC POLICY GROUP	Presidential Memorandum, 5/30/79
WHITE HOUSE MANAGEMENT TASK FORCE ON ENERGY SHORTAGES	Press Release, 6/22/79
EXECUTIVE POLICY BOARD FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM	Reorganization Plan Number 1 of 1979, effective 7/1/79
FEDERAL LEGAL COUNCIL	Executive Order 12146, 7/18/79
UNITED STATES INTERNATIONAL DEVELOPMENT COOPERATION AGENCY	Reorganization Plan Number 2 of 1979, Sections 2 and 3, effective 7/19/79
EMERGENCY MANAGEMENT COUNCIL	Executive Order 12148, 7/20/79
PLANT ENFORCEMENT TASK FORCE	Presidential Memorandum, 8/2/79
WILDLIFE LAW ENFORCEMENT TASK FORCE	Presidential Memorandum, 8/2/79
INTERAGENCY TASK FORCE ON TROPICAL FORESTS	Presidential Memorandum, 8/2/79

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

FEDERAL INTERAGENCY COMMITTEE ON NOISE	Presidential Memorandum, 8/2/79
INTERAGENCY INTEGRATED PEST MANAGEMENT COORDINATING COMMITTEE	Presidential Memorandum, 8/2/79
ACID RAIN COORDINATION COMMITTEE	Presidential Memorandum, 8/2/79
PRESIDENT'S MANAGEMENT IMPROVEMENT COUNCIL	Executive Order 12157, 9/14/79
CONSUMER AFFAIRS COUNCIL	Executive Order 12160, 9/26/79
INSTITUTE FOR SCIENTIFIC AND TECHNOLOGICAL COOPERATION	Public Law 96-53, 8/14/79 and Executive Order 12163, effective 10/1/79
COUNCIL ON INTERNATIONAL SCIENTIFIC AND TECHNOLOGICAL COOPERATION	Public Law 96-53, 8/14/79 and Executive Order 12163, effective 10/1/79
PANAMA CANAL COMMISSION	Panama Canal Treaty, eff. 10/1/79 and Public Law 96-70, 9/27/79
PANAMA CANAL CONSULTATIVE COMMITTEE	Panama Canal Treaty, eff. 10/1/79 and Public Law 96-70, 9/27/79
JOINT COMMISSION ON THE ENVIRONMENT	Panama Canal Treaty, eff. 10/1/79 and Public Law 96-70, 9/27/79
JOINT SEA LEVEL CANAL STUDY COMMITTEE	Panama Canal Treaty, eff. 10/1/79 and Public Law 96-70, 9/27/79
INTERAGENCY TASK FORCE - WHITE HOUSE CONFERENCE ON FAMILIES	Presidential Memorandum, 10/15/79
INTERGOVERNMENTAL ADVISORY COUNCIL ON EDUCATION	Public Law 96-88, 10/17/79
FEDERAL INTERAGENCY COMMITTEE ON EDUCATION	Public Law 96-88, 10/17/79
PRESIDENT'S COMMISSION FOR A NATIONAL AGENDA FOR THE EIGHTIES	Executive Order 12168, 10/24/79
NATIONAL TASK FORCE ON RIDESHARING	Press Release and Fact Sheet, 10/25/79
UNITED STATES HOLOCAUST MEMORIAL COMMISSION	Executive Order 12169, 10/26/79
TRADE NEGOTIATING COMMITTEE	Executive Order 12188, 1/2/80
NATIONAL COMMISSION ON ALCOHOLISM AND OTHER ALCOHOL-RELATED PROBLEMS	Public Law 96-180, 1/2/80
WHITE HOUSE CONFERENCE ON REGULATORY REFORM	Presidential Remarks, 1/11/80

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

WHITE HOUSE CONFERENCE ON SMALL BUSINESS, 1979	Opening plenary session, 1/13/80 (Public Law 96-71, 3/28/77, requested)
ADVISORY COMMITTEE ON SMALL AND MINORITY BUSINESS OWNERSHIP	Executive Order 12190, 2/1/80
FEDERAL FACILITY RIDESHARING PROGRAM	Executive Order 12191, 2/1/80
STATE PLANNING COUNCIL ON RADIOACTIVE WASTE MANAGEMENT	Executive Order 12192, 2/12/80
CABINET LEVEL COMMITTEE ON THE INTERNATIONAL LABOR ORGANIZATION	Presidential Memorandum, 2/13/80
NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS	Letters of appointment, 2/16/80 and Public Law 94-241, 3/24/76
RADIATION POLICY COUNCIL	Executive Order 12194, 2/21/80
PRESIDENT'S COMMISSION ON UNITED STATES - LIBERIAN RELATIONS	Executive Order 12195, 2/22/80
NUCLEAR SAFETY OVERSIGHT COMMITTEE	Executive Order 12202, 3/18/80
INTERAGENCY TASK FORCE ON THRIFT INSTITUTIONS	Presidential Remarks on the signing of H.R. 4986, 3/31/80 (Public Law 96-281), which requested the Task Force
MAINE POTATO GROWERS TASK FORCE	Press Release, 4/1/80
FEDERAL INTERAGENCY TASK FORCE ON SPINAL INJURIES	Presidential Remarks, 5/1/80
SUPPLEMENTAL HEALTH INSURANCE PANEL	Public Law 96-265, 6/9/80
PRESIDENT'S COMMITTEE ON THE INTERNATIONAL LABOR ORGANIZATION	Executive Order 12216, 6/18/80
UNITED STATES SYNTHETIC FUELS CORPORATION	Public Law 96-294, 6/30/80
SOLAR ENERGY AND ENERGY CONSERVATION BANK	Public Law 96-294, 6/30/80
OFFICE OF ALCOHOL FUELS	Public Law 96-294, 6/30/80
ACID PRECIPITATION TASK FORCE	Public Law 96-294, 6/30/80
MOTOR CARRIER RATEMAKING STUDY COMMISSION	Public Law 96-296, 7/1/80
PRESIDENT'S COUNCIL FOR ENERGY EFFICIENCY	Press Release, 7/22/80
TASK FORCE ON GLOBAL RESOURCES AND ENVIRONMENT	2 Presidential Memoranda and Statement, 7/24/80

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

WHITE HOUSE COAL ADVISORY COUNCIL	Executive Order 12229, 7/29/80
COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS	Public Law 96-317, 7/31/80
COMMISSION ON NATIONAL DEVELOPMENT IN POSTSECONDARY EDUCATION	Public Law 96-374, 10/3/80
NATIONAL PERIODICAL SYSTEM CORPORATION	Public Law 96-374, 10/3/80
NATIONAL COMMISSION ON STUDENT FINANCIAL ASSISTANCE	Public Law 96-374, 10/3/80
NATIONAL GRADUATE FELLOWS PROGRAM FELLOWSHIP BOARD	Public Law 96-374, 10/3/80
NATIONAL AFRO-AMERICAN HISTORY AND CULTURE COMMISSION	Public Law 96-430, 10/10/80
TAHOE FEDERAL COORDINATING COUNCIL	Executive Order 12247, 10/15/80
BOARD OF EXAMINERS FOR THE FOREIGN SERVICE	Public Law 96-465, 10/17/80
BOARD OF THE FOREIGN SERVICE	Public Law 96-465, 10/17/80
WHITE HOUSE TASK FORCE ON THE MUSHROOM INDUSTRY (Import Competition)	Presidential Memorandum, 10/17/80
NATIONAL ADVISORY COMMISSION ON RESOURCE CONSERVATION AND RECOVERY	Public Law 96-482, 10/21/80
PRESIDENT'S TASK FORCE ON HOUSING FOR THE EIGHTIES	Fact Sheet, 10/8/80
ADVISORY COMMITTEE ON HOUSING	Press Release, 10/30/80
ALASKA LAND USE COUNCIL	Public Law 96-487, 12/2/80
WHITE HOUSE CONFERENCE ON COAL EXPORTS	Presidential Remarks, 12/15/80
AFRICAN DEVELOPMENT FOUNDATION	Public Law 96-533, 12/16/80
NATIVE HAWAIIANS STUDY COMMISSION	Public Law 96-565, 12/22/80
RED RIVER COMPACT COMMISSION	Public Law 96-564, 12/22/80
INTERAGENCY EMPLOYEE BENEFIT COUNCIL	Executive Order 12262, 1/7/81
PRESIDENT'S COMMITTEE ON SMALL BUSINESS POLICY	Executive Order 12269, 1/15/81
PRESIDENT'S COUNCIL ON SPINAL CORD INJURY	Executive Order 12270, 1/15/81
DESIGN LIAISON COUNCIL	Executive Order 12275, 1/16/81

ORGANIZATIONS ESTABLISHED SINCE JANUARY 20, 1977 (Cont'd)

PRESIDENT'S COMMISSION ON HOSTAGE COMPENSATION	Executive Order 12285, 1/19/81
IRAN-UNITED STATES CLAIMS TRIBUNAL	Agreement, 1/19/81

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

NATIONAL ANTI-HUNGER COALITION, ET AL., Plaintiffs,	)	
v.	)	Civil Action No. 82-3592
EXECUTIVE COMMITTEE OF THE PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL, ET AL., Defendants.	)	FILED FEB 2 [illegible] JAMES F. [illegible], Clerk

MEMORANDUM

This case comes before the Court on cross-motions and requires the Court to interpret the application of the Federal Advisory Committee Act, 5 U.S.C. App. I, as it impinges on an advisory committee survey now being conducted for the President at his request.

On February 18, 1982, President Reagan announced his intention to establish a "Private Sector Survey on Cost Control in the Federal Government." Its purpose was to call on the expertise of "leaders from the business, labor, and academic communities" to obtain detailed management and cost control advice with a view towards reducing runaway costs in the federal sector.1/

By Executive Order No. 12369, 47 Fed. Reg. 28899 (July 2, 1982), the President established the Executive Committee of the Private Sector Survey. The Executive Committee was

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1/ July 15, 1982, White House Press Release at 2, attached to plaintiffs' motion for a preliminary injunction, filed December 22, 1982.

to be composed of no more than 150 citizens appointed by the President from the private sector.[2/] It was to conduct in-depth reviews of Executive branch operations and to advise the President, the Secretary of Commerce and the heads of other federal agencies.

The Executive Order also provided that "[t]he Committee is to be funded, staffed and equipped . . . by the private sector without cost to the Federal Government." Id. To implement this objective, the Foundation for the President's Private Sector Survey on Cost Control was established. The Foundation, a non-profit corporation of the District of Columbia, made an agreement with the Secretary of Commerce on July 7, 1982, under which it was to provide assistance to the Committee including facilities and staff support. The Foundation's Management Office has organized thirty-six "task forces," each co-chaired by two or more members of the Committee, to do the "preliminary work of the survey, including fact-gathering, statistical evaluations, and the formulation of preliminary reports."[3/] Twenty-two of the task forces are assigned to study particular agencies, and the remaining fourteen are studying cross-agency functions. Apart from the chairmen, none of the task force members are

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2/ The President increased the size of the Committee to not more than 170 members by Executive Order 12398, 48 Fed. Reg. 377 (January 5, 1983).

3/ Affidavit of Kenneth Millian at 6, 7, filed with defendants' motion to dismiss, January 20, 1983.

members of the Committee, nor do the task forces have any authority to make recommendations to agencies or to the President.

Plaintiffs are individual recipients of federal food assistance benefits and the National Anti-Hunger Coalition, a group whose primary objective is "alleviation of hunger and malnutrition in this country through the participation of poor persons in policy decisions which affect their lives." Plaintiffs' memorandum filed December 22, 1982, at 6. Because of their concern that the Survey's submissions to the Committee may affect benefits available under federal food assistance programs, plaintiffs first sought access under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. I, § 10, to all documents being generated by three task forces reviewing federal feeding programs. That access was denied and this suit followed.

Plaintiffs allege that the Survey is in violation of the FACA because the membership of the Executive Committee is not "balanced," as required by that Act, and because the task forces are "subcommittees" covered by the Act and consequently must give plaintiffs access to their documents and permit plaintiffs to participate in task force meetings and activities being conducted to develop initial proposals for the Survey. Plaintiffs seek a preliminary injunction granting full relief and defendants in turn have filed a motion to dismiss alleging that plaintiffs lack standing under the FACA and asserting that in any case neither the

Executive Committee nor the task forces are operating in violation of that Act. Depositions have been taken and affidavits and documents filed. The parties have agreed the motions should be treated as cross-motions for summary judgment and after full argument and briefs the matter is ripe for determination.

I. The Federal Advisory Committee Act

The FACA defines an "advisory committee" as follows:

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is--
>
> (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, ...

5 U.S.C. App. I, § 3(2).

All advisory committees meeting this definition are subject to numerous requirements. Committee meetings must be open to the public, notice of meetings must be published in the Federal Register, and all records, reports, and other documents generated by the committee must be open to public inspection. 5 U.S.C. App. I, § 10. There is also a requirement that membership of the committee be "balanced in terms of the points of view represented." 5 U.S.C. App. I, § 5(b)(2).

II. Standing

Defendants at oral argument acknowledged that, under several recent cases in this Circuit, plaintiffs have standing to challenge violations of § 10 of the FACA, which outlines required advisory committee procedures such as open meetings, access to documents and records, and so forth. The requirement of "balanced" membership, however, occurs in § 5 of the Act. Because no court has actually granted standing under that section, defendants still argue that no judicial review is available as to that section. In Physician's Education Network, Inc. v. HEW, 653 F.2d 621, 622-23 (D.C. Cir. 1981), this Circuit dealt with a plaintiff alleging unbalanced membership under § 5 of the FACA. In dicta, the court noted that a plaintiff denied actual representation on an advisory committee would have standing under the FACA. The Court's discussion of standing made no distinction between requirements under § 5 and requirements under § 10 of the Act. Nor is any distinction readily apparent to this Court. Under the circumstances of this case plaintiffs will be granted standing to challenge committee membership as well as to question the committee's compliance with the procedural requirements of the Act.[4/]

4/ Plaintiffs have also alleged a cause of action against defendants under the Administrative Procedure Act (APA), 5 U.S.C. § 706, apparently to support their view that judicial review of defendant's actions is available. Plaintiffs' memorandum in opposition to defendants' motion to dismiss, filed February 4, 1983, at 12. In particular,
(footnote continued on p. 6)

III. The Executive Committee

As defendants concede, the Executive Committee is subject to the Act's requirements. Defendants allege, and plaintiffs do not dispute, that the Executive Committee has complied and will comply with the procedural requirements found in § 10 of the Act. The Executive Committee has already held an open, public meeting on February 4, 1983, in full accordance with FACA requirements. A subcommittee consisting of 30 committee members, also subject to FACA requirements, was created at that meeting to conduct a series of further public meetings commencing in March of 1983 at which the subcommittee will consider findings and recommendations drafted by task forces and cleared through the Management Office of the Foundation. Those findings and recommendations will be available to the public for written comments at least two weeks before they are considered at a meeting of the subcommittee. After reviewing the task forces' material and the public comments thereon the subcommittee will formulate recommendations to be sent to the President. The full Executive Committee will be reconvened, again in accord with the FACA, to formulate a

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(footnote continued from the preceding page)
plaintiffs allege that defendant Department of Commerce has acted arbitrarily and capriciously because the Committee and task forces do not have a "balanced" membership as required by the FACA and Commerce's implementing guidelines. Because the Court finds that plaintiffs have standing it is not necessary to address the issues of whether plaintiffs have a cause of action under the APA and whether the events complained of constitute "agency action" reviewable under its provisions.

summary recommendation which will also be sent to the President. There is no dispute that plaintiffs will be able to participate in the Executive Committee's and subcommittee's formulation of recommendations.

In addition to these procedural requirements, however, § 5 of the FACA also requires that "the membership of the advisory committee . . . be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. I, § 5(b)(2). Plaintiffs contend that the Executive Committee is not, in fact, "balanced." They note that virtually all of the Committee members are executives of major corporations; one is from the labor community, and two are academics. They urge a lack of balance because there are no public interest advocates and no beneficiaries of federal food assistance programs such as the individual plaintiffs among the Committee's membership.

Nowhere in the FACA is the meaning of the term "balanced" explained. Interpreted most broadly, it would take far more than a mere 150 individuals to ensure that every point of view concerned with the financial administration of federal programs be represented. Congress implicitly recognized the unworkability of such a requirement when it described "balanced" in terms of "the functions to be performed by the advisory committee."

In this case, the function to be performed by the Private Sector Survey is narrow and explicit. The

President's express intent in establishing the survey was to apply to federal programs the expertise of leaders in the private sector with "special abilities to give detailed advice on cost-effective management of large organizations." White House Press Release, supra, at 1. In order to accomplish this objective, the President of necessity gathered the Committee members not from the public at large, but from the private sector. He selected those who have experience in the fiscal management of large private organizations. Surely Congress did not intend to prohibit the President from seeking specialized advice and while one may speculate that different choices might have been made to accomplish the President's objective the simple gathering of a discrete group of experts in a particular narrow field is not in itself enough to render such an advisory committee unbalanced in the sense of the FACA.[a5/]

5/ Plaintiffs have alleged that the Committee has departed from its narrow mandate and in fact is researching and considering substantive changes in federal programs. The sole support for this contention is the affidavit of Robert Greenstein, the director of a private consulting organization, who claims that some members of a task force met with him to discuss entitlement programs and "clearly indicated in the conversation that [they] were looking at basic policy changes involving benefit levels in programs such as food stamps, as well as management and administrative issues." Affidavit of Robert Greenstein at 2, attached to plaintiffs' motion for a preliminary injunction, filed December 22, 1982. The remarks and opinions of a task force member, speaking with a private consultant, are not enough to indicate that the task forces are in fact developing recommendations for substantive program changes. Deposition testimony taken by plaintiffs suggests that task force members in fact regard their role as one of administrative and management experts only. See Deposition of John Bode, filed February 10, 1983, transcript at 45 (Bode Tr.); Deposition of Mary Jarratt, filed February 10,
(footnote continued on p. 9)

The "imbalances" to which plaintiffs point are, in fact, simply irrelevant to the ability of the Executive Committee to perform its limited function fairly and impartially. To require the Committee to contain members of public interest groups or members of the public receiving federal benefits would operate not to "balance" viewpoints but to change the cost-control function of the "private sector" survey. Plaintiffs have failed to demonstrate any imbalance in the Executive Committee within the meaning of the FACA. Thus it is unnecessary to confront plaintiffs' far-reaching suggestion that Congress contemplated that the courts should be placed in the role of reviewing the President's choice of advisors.6/

IV. The Task Forces

Plaintiffs further allege that the task forces utilized by the Foundation, as described earlier, are "advisory committees" under the FACA and therefore also subject to the

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(footnote continued from preceding page)
1983, transcript at 5 (Jarratt tr.); and Deposition of Richard W. Strauss, filed February 10, 1983, transcript at 46 (Strauss tr.). More importantly, the task forces completely lack any authority to recommend substantive policy changes and there is no indication that either the President or any agency would solicit or accept the views of a task force member on any substantive issues.

6/ It is also unnecessary to reach defendant's argument that, because the requirement of balanced membership is described in the FACA as a "guideline" which "shall be followed by the President" to the extent it is "applicable," 5 U.S.C. App. I, § 5(c), it in fact imposes no requirement of compliance on the President and is merely hortatory.

same procedural requirements as the subcommittee and the Committee itself. The Court, however, agrees with defendants that the task forces are not subject to FACA requirements. They do not directly advise the President or any federal agency, but rather provide information and recommendations for consideration to the Committee. Consequently, they are not directly "established or utilized" by the President or any agency "in the interest of obtaining advice or recommendations." 5 U.S.C. App. I, § 3(2).

There is no question that the task forces are intimately involved in the gathering of information about federal programs and the formulation of possible recommendations for consideration of the Committee. That is not enough, however, to render them subject to the FACA. The Act itself applies only to committees "established or utilized <u>by</u>" the President or an agency "in the interest of obtaining advice or recommendations <u>for</u> the President or one or more agencies." 5 U.S.C. App. I, § 3(2) (emphasis added). The Act does not cover groups performing staff functions such as those performed by the so-called task forces.

The task forces at issue do not provide advice directly to the President or any agency, but rather are utilized by and provide advice to only the Executive Committee, which then provides advice to the President or agency. The distinction is not just a semantic one.[7/] Before the Committee can produce final recommendations, it must gather information, explore options with agencies to get comments and reactions, and evaluate alternatives. Plaintiffs admit that, under their proposed interpretation of the Act, the procedural requirements of the FACA would apply to these preliminary actions. But surely Congress did not contemplate that interested parties like the plaintiffs should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering and preliminary decision-making process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy recommendations. The language of the statute itself distinguishes between advisory committee members and advisory committee staff. Compare 5 U.S.C. App. I, § 5(b)(2) with § 5(b)(5). Staff would be expected to perform exactly the sort of functions performed by the task forces at issue -- gathering information, developing work plans, performing studies, drafting reports and even

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7/ See Lombard v. Handler, 397 F. Supp. 792 (D.D.C. 1975), aff'd without opinion, 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977) (the Environmental Protection Agency entered a contractual relation with the National Academy of Sciences under which the Academy conducted certain studies. The academy in turn relied on its Committee on Motor Vehicle Emissions (CMVE). The CMVE was held not to be a committee subject to FACA in part because "it appears that the E.P.A. is "utilizing" the Academy itself, and not the C.M.V.E." Id. at 800).

discussing preliminary findings with agency employees.

There is no reliable evidence that the task forces at issue have gone beyond such functions and have actually started advising agencies on policy recommendations. If the task forces were in fact providing advice directly to agencies, they might indeed be functioning as advisory committees within the meaning of the Act. However, not only do the task forces lack authority to do this but plaintiffs have wholly failed to demonstrate by deposition or otherwise that such is the case. Defendants, challenging plaintiffs' assertion, point to depositions taken during the course of plaintiffs' discovery which suggest that the task force members in fact were not advising agencies and were completely aware they lacked authority to do so. The depositions also suggest that the agency employees meeting with the task force members did not regard their discussions as advisory and had no intention of taking any action based on those discussions. Bode tr. at 26, 28, 53-57, 50; Jarratt tr. at 28, 34-36; Strauss tr. at 53-58. In sum, plaintiffs have completely failed to introduce any evidence suggesting that the task forces are in fact operating in an advisory capacity rather than simply providing information and draft proposals to the Executive Committee.

V. Conclusion

It is clear that Congress in passing the FACA wished to create some controls and standards governing the advisory committee process, to control the proliferation and expense of such committees and to ensure that Congress and the public retain access to information regarding their number, membership and activities. 5 U.S.C. App. I, § 2. However, the statute that resulted is another example of unimpressive legislative drafting. It is obscure, imprecise, and open to interpretations so broad that in the present context at least it would threaten to impinge unduly upon prerogatives preserved by the separation of powers doctrine. Not surprisingly, litigants seize on such uncertainties and may try to press statutory claims beyond constitutional boundaries. The courts do not welcome their role in such disputes. Many with considerable merit on their side criticize the involvement of federal courts in matters of this kind although the fault lies primarily with congressional drafting. If more expertise were applied to such enactments to ensure that Congress states with more precision what it intends, the rules of the game would be more sharply drawn and court involvement could be less.

The present controversy is a good example of this phenomenon. 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.

The Court's task in the absence of clear indications in the statute or its legislative history to the contrary must be to achieve a common-sense interpretation. Congressional concerns must be accommodated in a manner that produces a constitutional result, in this instance to leave the President with substantial freedom to formulate policy recommendations free from excessive intrusion. If the Act were interpreted as plaintiffs suggest the effort of the President to seek fiscal advice from the private sector would come to a total halt and the attempt to formulate efficient fiscal management of the government would bog down in a plethora of hearings, demands for document access and increasing time-consuming litigation. In the context of this case, the language of the statute reviewed in light of those concerns demands that this Court grant summary judgment for defendants and deny plaintiffs relief.

The Court holds that the Executive Committee is balanced within the meaning of the Act and the task forces are not subject to the Act's procedural requirements because the task forces are not utilized by the President or the agencies for advice or recommendations. Defendants' motion to dismiss is granted and the complaint is dismissed.

UNITED STATES DISTRICT JUDGE

February 24, 1983.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

NATIONAL ANTI-HUNGER COALITION, ET AL.,

Plaintiffs,

v.

EXECUTIVE COMMITTEE OF THE PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL, ET AL.,

Defendants.

Civil Action No. 82-3592

FILED

FEB 24 1983

JAMES F. DAVEY, Clerk

ORDER

For the reasons stated in the Court's Memorandum filed herewith, it is

ORDERED that plaintiffs' motion for a preliminary injunction is denied, defendants' motion to dismiss is granted and the complaint is hereby dismissed.

Gerhard A. Gesell

UNITED STATES DISTRICT JUDGE

February 24, 1983.

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

July 9, 1982

MEMORANDUM

SUBJECT: Members of Federal Advisory Committees and the Conflict-of-Interest Statutes

FROM: J. Jackson Walter
Director
Jack Walter

TO: Heads of Departments and Agencies of the Executive Branch

INTRODUCTION

The purpose of this memorandum is to discuss the applicability of the conflict-of-interest statutes, 18 U.S.C. § § 202-209, to persons not regularly employed in the Federal Government who accept appointments as members of an advisory committee, board, commission or the like established in a department or agency of the Executive Branch (hereafter "advisory committee" or "committee"). We have been moved to this task both by uncertainties voiced to us concerning this subject and by an occasional flat assertion that advisory committee members, without exception, are outside the coverage of § § 202-209.

We believe it will be helpful to the departments and agencies and committee members (1) to identify the factors relevant to a determination under existing authority whether or not the persons who are members of a given committee are bound by provisions of the conflict-of-interest laws and (2) by way of illustration, to apply the factors to the memberships of a number of committees now or formerly in existence.

BACKGROUND

Sections 202-209 of Title 18, United States Code, were enacted in 1962 by Public Law 87-849, 76 Stat. 1119, to replace similar laws that had in many ways become outmoded. Those laws in general had been read both in Congress and the Executive Branch to cover persons not otherwise employed by the Government who performed services for it on a temporary or intermittent basis, either singly or as members of advisory committees.[1] Moreover, they were read to apply to such individuals with the same force and scope as they applied to full-time employees.[2] As a result a highly qualified person who was a partner in, or employed by, an enterprise that had dealings with the Government often could not be recruited by an agency for occasional service because it could not assure him that he or the enterprise would be free of restrictions that were unreasonable in the light of his projected duties.[3]

Although Congress had provided relief for a number of agencies by granting to members of their statutorily created advisory committees limited exemptions from the conflict-of-interest laws,[4] those laws before 1963 by and large remained an appreciable deterrent to the Government's obtaining needed part-time services. One of the main purposes of the new legislation was to facilitate the recruitment of experts for part-time assistance "without relaxing basic ethical standards or permitting actual conflicts of interest."[5] Congress achieved this purpose by creating in 18 U.S.C. § 202(a) the category of "special Government employees" (SGE's), which includes most individuals who serve less than full-time. Section 202(a) in general defines an SGE as an officer or employee of the Government who is appointed or employed to serve it, with or without compensation, for not more than 130 days during any period of 365 consecutive days either full-time or intermittently.[6] SGE's are treated less restrictively in 18 U.S.C. § § 203, 205 and 209 than are regular employees, but not in § § 207 and 208.

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1 There is no substantive difference between an appointee providing advisory service individually and one doing so as a member of a committee. Advisory groups are formed by departments and agencies to carry out collegially the same functions as experts perform working singly. Cf. H. Rept. 2894, 84th Cong., 2d Sess. 5 (1956).

2 See 42 Op. A.G. 111, at 112, 115 (1962). See also United States v. Mississippi Valley Generating Co., 364 U.S. 520, 552 (1961), where the Supreme Court held that an intermittent consultant to the Bureau of the Budget (a precursor of the Office of Management and Budget) who took no oath of office, had no tenure and received no salary was an "officer or agent" of the United States within the compass of 18 U.S.C. § 434, the statute replaced in 1962 by 18 U.S.C. § 208.

3 For example, 18 U.S.C. § 281, the antecedent of the current 18 U.S.C. § 203, was in general construed to prevent a privately employed person who served an agency as an intermittent consultant or adviser, or as a member of an advisory committee, from representing his private employer before any federal agency regardless of the subject matter involved. See 42 Op. A.G. 111 at 121-124.

4 See, for example, 42 U.S.C. § 1314(h), 42 U.S.C. § 2203 and 50 U.S.C. App. § 2160(c).

5 S. Rept. 2213, 87th Cong., 2d Sess. 7 (1962).

6 Procedures and rules for the designation of SGE's by the departments and agencies of the Executive Branch are set forth in the Federal Personnel Manual, Chapter 735, Appendix C, which is entitled "Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees)" (hereafter referred to as "Appendix C").

As a corollary to the enactment of § 202(a) and the provisions relating to SGE's in the sections that followed it, Congress at the same time enacted a separate provision, § 2 of Public Law 87-849, that foreclosed, as to § § 203-209, the carryover of any of the ad hoc statutory exemptions that were then on the books for the benefit of consultants or advisory committee members in the Executive Branch. Congress thus announced, in effect, that it had established conflict-of-interest measures with regard to those nonregular employees that gave due regard to their proper interests and to those of the Government as well—measures that eliminated the need for ad hoc corrective adjustments in the future.

CHARACTERISTICS OF ADVISORY COMMITTEES AND THEIR MEMBERSHIPS

1. Governing Standards of Appendix C.

The Legislative and Judicial Branches of Government aside, the conflict-of-interest statutes by their terms apply only to an "officer or employee" of the Executive Branch.[7] Almost without exception advisory committee members in that Branch are expected by their host agencies to perform services so infrequently as to require the agencies to place those who are employees in the ranks of the SGE's. For this reason, the authoritative guidelines for an agency's determination whether members of one of its advisory committees are employees for purposes of § § 202-209 appear in Appendix C, which pertains mostly to SGE's.[8]

Appendix C stems from President Kennedy's Memorandum to the Heads of Executive Departments and Agencies, dated February 9, 1962, and entitled "Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government."[9] The chief purpose of the Memorandum, which was issued about a year before 18 U.S.C. § § 202-209 came into force, was to lay down rules and standards derived from the existing statutes for the guidance of agencies in their employment of part-time advisory personnel, including committee members. A paragraph headed "Industry, Labor or Agricultural Representatives" informed the agencies that" [i] t is occasionally necessary to distinguish consultants and advisers from persons speaking for a firm or an industry, or for labor or agriculture, or in some other representative capacity" and went on to state that a consultant or adviser is a person who serves as an employee, while an outside

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7 The term "employee" will be used hereafter to include an officer unless the context indicates otherwise.

8 See n. 6, supra.

9 3 C.F.R., 1959-1963 Comp. p. 818.

representative is not an employee and therefore not within the scope of the conflict-of-interest laws.[10]

On May 2, 1963, President Kennedy replaced the Memorandum of February 9, 1962, with one entitled "Preventing Conflicts of Interest on the Part of Special Government Employees" that reflected the intervening enactment of § § 202-209.[11] The new document essentially restated the paragraph described above and then added to it a list of five principles for use in making the determination it required. The revised paragraph and appended principles read as follows:[12]

> INDUSTRY, LABOR, AGRICULTURAL OR OTHER REPRESENTATIVES
>
> It is occasionally necessary to distinguish between consultants and advisers who are special Government employees and persons who are invited to appear at a department or agency in a representative capacity to speak for firms or an industry, or for labor or agriculture, or for any other recognizable group of persons, including on occasion the public at large. A consultant or adviser whose advice is obtained by a department or agency from time to time because of his individual qualifications and who serves in an independent capacity is an officer or employee of the Government. On the other hand, one who is requested to appear before a Government department or agency to present the views of a non-governmental organization or group which he represents, or for which he is in a position to speak, does not not act as a servant of the Government and is not its officer or employee. He is therefore not subject to the conflict of interest laws and is not within the scope of this memorandum. However, the section of this memorandum headed "Ethical Standards of Conduct" sets forth rules of ethics by which he should be guided even though not in the status of a Government official, and the agency before which he appears should call that section to his attention.
>
> The following principles are useful in arriving at a determination whether an individual is acting before an agency in a representative capacity:
>
> (1) A person who receives compensation from the Government for his services as an adviser or consultant is its employee and not a representative of an outside group. However, the Government's payment of travel expenses and a per diem allowance does not by itself make the recipient an employee.

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10 Id., at p. 824. This paragraph was the first published expression by the Government of the difference in status of employee-advisers and representative-advisers under the conflict-of-interest statutes.

11 Id., at p. 834.

12 Id., at p. 842.

(2) It is rare that a consultant or adviser who serves alone is acting in a representative capacity. Those who have representative roles are for the most part persons serving as members of an advisory committee or similar body utilized by a Government agency. It does not follow, however, that the members of every such body are acting as representatives and are therefore outside the range of the conflict of interest laws. This result is limited to the members of committees utilized to obtain the views of non-governmental groups or organizations.

(3) The fact that an individual is appointed by an agency to an advisory committee upon the recommendation of an outside group or organization tends to support the conclusion that he has a representative function.

(4) Although members of a governmental advisory body who are expected to bind outside organizations are no doubt serving in a representative capacity, the absence of authority to bind outside groups does not require the conclusion that the members are Government employees. What is important is whether they function as spokesmen for non-governmental groups or organizations and not whether they can formally commit them.

(5) Where an adviser or consultant is in a position to act as a spokesman for the United States or a government agency—as, for example, in an international conference—he is obviously acting as an officer or employee of the Government. (emphasis added)

The second Presidential memorandum remained on the books as such until 1965 when it was rescinded by operation of a provision in President Johnson's Executive Order 11222 of May 8, "Prescribing Standards of Ethical Conduct for Government Officers and Employees."[13] Section 601 of the Executive Order delegated to the Civil Service Commission (the ancestor of the Office of Personnel Management) the statutory authority of the President to establish regulations for the conduct of persons in the civil service. Section 701(a) directed the Commission to issue "appropriate regulations and instructions" to implement the standards of conduct, etc. set forth in the Order for observance by the agencies and employees of the Government. Section 703(e) rescinded the Memorandum of May 2, 1963, effective the date of the Commission's issuance of regulations under § 701(a). Those regulations were published October 1, 1965.[14]

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13 3 C.F.R., 1964-1965 Comp. p. 306.

14 30 Fed. Reg. 12529.

In pursuance of an understanding with interested agencies at the time Executive Order 11222 was drafted, the Civil Service Commission on November 9, 1965, reinstated the most significant portions of the May 2, 1963, Memorandum, including the provisions quoted above. It did so by publishing them as instructions of Government-wide applicability in the form of Appendix C. Thus, those instructions, although no longer clothed in the raiment of a presidential command, have their original force since they were issued by the Commission (and are maintained by the Office of Personnel Management) in the exercise of expressly delegated presidential authority.

2. Comparison between Distinction Made in Appendix C and Definitions That Apply in Title 5, United States Code

The proscriptions of 18 U.S.C. § § 202-209 apply to a person who serves the Executive Branch only if he or she acts in the capacity of an "officer or employee" of the Government.[15] However, none of these sections of the criminal code nor any other of the penal laws contains a definition of that term as it stands by itself or as modified in various ways in § § 202-209. On the other hand, 5 U.S.C. § § 2104 and 2105 define "officer" and "employee" respectively and are instructive here. They provide that for the purposes of Title 5, a person is regarded as an officer or employee of the United States if he (1) is appointed by a federal officer or employee, (2) is engaged in the performance of a federal function under law and (3) is subject to the supervision of a federal officer or employee.

The first criterion of § § 2104/5, a formal appointment, is met in Appendix C by paragraphs (a) - (d), which contain detailed rules for "obtaining and utilizing the services of . . . temporary or intermittent employee[s]." Paragraph (e) makes those rules applicable in the case of an advisory committee member who is serving in an independent capacity:

> (e) When a person is serving as a member of an advisory committee, board or other group, and is by virtue of his membership thereon an officer or employee of the United States, the requirements of paragraphs (a), (b), (c) and (d) should be carried out to the same extent as if he were serving the sponsoring agency separately and individually.

The second requirement of the Title 5 definitions, that for an individual to be an employee he must be engaged in the performance of a federal function, is paralleled in Appendix C by the instruction that of the persons, including committee members, who serve the Government temporarily or intermittently, only those who do so in an independent capacity are its employees. To characterize an industry representative or the like as a federal functionary is a contradiction in terms. Although he may well furnish valuable information or advice to his host agency, that benefit to it does not produce the legal status of a federal employee for him any more than it would if he were to use the same material for the benefit of his private employer in a public speech or article that came to the agency's attention.

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15 See the first sentence of Subpart 1, supra.

The third requirement of § § 2104/5, that to be an employee, an individual must carry on his duties under the supervision of another employee, is important in distinguishing the former's status from the status of an independent contractor who provides a service to an agency. The contractor is not hired under the civil service laws and is not subject to the supervision that inheres in an employee-supervisor relationship in the civil service. More to the point, he is not an employee for the purposes of 18 U.S.C. § § 202-209.[16]

The third factor is not important with respect to advisory committees because in contrast to business organizations, universities, research foundations and other permanent entities able to carry out advisory activities, committees are rarely brought into the service of an agency by means of a contract. However, it is worthwhile to mention an issue that could arise in connection with the conflict-of-interest statutes if an agency were to create an advisory committee and then enter into a contract with it or each of its members individually. The issue is whether the agency would in practice exercise supervision over the operations of the committee and the formulation of judgments by its members that was great enough to taint the contract as a device for concealing their true status as SGE's under § § 202-209.[17] If an agency, for example, were to convene a committee and award the members a contract pursuant to which they (1) produced, after independent study, an advisory paper dealing with a problem that the agency's staff was too busy to resolve on its own and (2) delivered the paper without antecedent clearance from the staff or agency head, the committee members would properly have been deemed contractors. However, if the committee worked routinely subject to the scrutiny of the staff and with a significant amount of guidance from it, the members would be open to the charge that they actually served as SGE's and were subject to § § 202-209. As appears from these examples, the question is one of degree.[18] The same is true in other areas of the law where the distinction between an employee and an independent contractor is recognized.[19]

Returning to Appendix C, it is fair to say that its precepts for determining whether a member of a committee is to be classified as an employee of the United States, and therefore become subject to the constraints of § § 202-209, are validated by the definitions of "officer" and "employee" in the civil service code.

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16 Cf. B. Manning, Federal Conflict of Interest Law 32 (Harvard U. Press 1964). See also 37 Op. A.G. 204 (1933).

17 B. Manning, supra, at 32.

18 Id.

19 See, for example, United States v. Orleans, 425 U.S. 807 (1976) (tort claims); NLRB v. Hearst, 322 U.S. 111 (1944) (labor).

Once the sponsoring agency of a committee has determined whether the members are to be employees or representatives, the agency must mark its records accordingly. If the members are to be carried as employees, either with or without compensation, the agency must also classify them on its records either as SGE's or regular employees, depending on the expected frequency and duration of their periods of duty.[20]

3. Individuals Outside the Government Who Advise an Official Informally

A federal official may occasionally receive unsolicited, informal advice from an outside individual or group of individuals regarding a particular matter or issue of policy that is within his official responsibility. Or he may himself bring up an agency matter or policy issue informally with one or more outsiders in order to obtain their views. An incident of this sort sometimes prompts the inquiry whether the outsiders have become SGE's of the agency. In general, the answer is that they have not, for they are not possessed of appointments as employees nor do they perform a federal function.

However as so often happens in considering the applicability of the conflict-of-interest laws, a generality is insufficient here and a caveat is in order. An official should not hold informal meetings more or less regularly with a non-federal individual or group of individuals for the purpose of obtaining information or advice for the conduct of his office. If he does so, he may invite the argument that willy-nilly he has brought them within the range of 18 U.S.C. § § 202-209. The following passage from Manning's Federal Conflict of Interest, at pp. 29-30, makes the point well:

> . . . One does not become an "employee of the United States" merely by voicing an opinion on government matters to a federal official at a cocktail party. The distinction may be shadowy in a particular case, and each situation must be judged on its own facts. Formalities can play an important part. In the ordinary situation, a person will not be considered to be a consultant-employee if he does not bear a formal appointment, is not enrolled on the personnel roster of the relevant agency, has no government personnel file in his name, and has not been sworn in or signed the customary oath of a government employee. Other factors that might be relevant can be conjectured. Is the person's advice solicited frequently? Is it sought by one official, who may be a personal friend, or impersonally by a number of persons in a government agency that needs expert counsel? Do meetings take place during office hours? Are they conducted in the government office, and does, perhaps, the adviser maintain a desk or working materials in government facilities?
>
> Of recent years, careful counsel have become increasingly conscious that the edges of the government employment relationship are blurred and that relatively little contact with government operations may be needed to open the risk of classification as an "employee of the United States" subject to the disabilities of the conflict of interest laws.

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20 Appendix C, paragraphs (a) - (e).

FEDERAL ADVISORY COMMITTEE ACT (FACA)

FACA is of interest here mainly because of its recognition that in addition to Congress, not only the President but also the heads of departments or agencies have the inherent power to establish advisory committees.[21] Although specifying necessarily different formal procedures for the establishment of the three types of committees, the Act makes no substantive distinctions among them relative to their powers or functions. On the other hand, it requires with respect to all three that membership "be fairly balanced in terms of the points of view represented and the functions to be performed by the committee."[22] This language asserts a standard of fairness but is short of being a command that every advisory committee must consist of individuals who represent the interests of persons or entities outside the Government.

EXAMPLES OF ADVISORY COMMITTEES

Federal advisory committees were few in number before World War II but have since become more widely used, especially in large departments and agencies with complex programs. Congress is responsible for the creation of an appreciable number of them, notably in the collection of agencies that now comprise the Department of Energy. It will be useful to examine a few congressionally founded committees located there and elsewhere, along with others brought into being by the President or department heads, in order to differentiate those whose members are not employees of the United States from those whose members are in that class.

Energy Research Advisory Board (ERAB)

The Secretary of Energy is authorized by the provisions of 42 U.S.C. § 7234 (Supp. III) "to establish in accordance with the Federal Advisory Committee Act such advisory committees as he may deem appropriate." The statute provides authorization for the Secretary to pay the travel expenses of committee members but omits authorization for compensating them.

Section 7234 contains a provision making 15 U.S.C. § 776, an earlier piece of energy legislation, applicable to advisory committees chartered by the Secretary or transferred to his department. Section 776 requires that the Secretary

> endeavor to insure that each [of his advisory committees] is reasonably representative of the various points of view and functions of the industry and users affected, including those of residential, commercial and industrial consumers, and shall include, where appropriate, representation from both State and local governments, and from representatives of State regulatory utility commissions, selected after consultation with the respective national associations.

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21 5 U.S.C. App. I, § 3(2).

22 5 U.S.C. App. I, § 5(b)(2) and (c).

ERAB is a committee organized under 42 U.S.C. § 7234, as supplemented by 15 U.S.C. § 776, and the Secretary's notice of establishment embodies language similar to that quoted above.[23] It is apparent therefore that ERAB is a body of persons who, in the language of Appendix C "speak for firms, or an industry, or for labor or agriculture, or for any recognizable group of persons, including, on occasion, the public at large."[24] Accordingly, the members of ERAB are not federal employees (SGE's) and not within the coverage of 18 U.S.C. § § 202-209.

The following admonition that appears in Appendix C, at C-5, should be borne in mind by the Department of Energy with regard to ERAB and other representative advisory committees, as well as by other departments and agencies that utilize committees of that kind:

> . . . [A] n advisory group may of necessity be composed largely or wholly of persons of a common class or group whose employers [or clients] may benefit from the advice given . . . In all these circumstances, particular care should be exercised to exclude his employer's or client's contracts or other transactions with the Government from the range of the . . . adviser's duties.

Solar Photovoltaic Energy Advisory Committee (SPEAC)

SPEAC, which also serves the Secretary of Energy, differs in its origin from ERAB since it is a committee established directly by Congress, 42 U.S.C. § 5588 (Supp. III), rather than by a department or agency head under authority given by Congress. SPEAC has 13 members, including 11 appointed by the Secretary from "industrial organizations, academic institutions, professional societies or institutions, and other sources as he sees fit," and two members of the public appointed by the President. These provisions of themselves do not characterize SPEAC as a representative committee. However, 42 U.S.C. § 5588(d) provides that 42 U.S.C. § 7234, the statute under which ERAB was organized and which brings 15 U.S.C. § 776 into play, is applicable to SPEAC, thus making it possible for the Secretary to organize it as a representative committee, like ERAB. In fact, the Department of Energy has made SPEAC a separate component of ERAB.[25]

Federal Photovoltaic Utilization Program Advisory Committee (FPUPAC)

FPUPAC was a temporary committee created by legislation, 42 U.S.C. § 8277 (Supp. III), with a termination date of October 1, 1981. It was composed of the heads of certain federal departments and agencies specified by Congress plus other persons selected by the Secretary of Energy, whom it served. FPUPAC is included in this list of examples to contrast its nonfederal membership with that of SPEAC. Congress did not invoke the provisions of 42 U.S.C. § 7234 and 15 U.S.C. § 776 in founding FPUPAC. It went no further than instructing the Secretary to appoint non-governmental persons

> to the extent necessary to assure that the membership of the committee will be fairly balanced in terms of the point [sic] of view represented and the functions to be performed by the committee.

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23 43 Fed. Reg. 24130, June 2, 1978.

24 Page 2 footnote 6 supra.

25 Letter from the Secretary of Energy to Anthony W. Adler, dated May 12, 1980.

This language was taken from § 5(b)(2) of the Federal Advisory Committee Act and, as stated above, does not call for setting up a representative committee. In its notice of the establishment of FPUPAC, the Energy Department made the following statement:[26]

> The advice and recommendations of the Advisory Committee will not be inappropriately influenced by...any special interest, <u>but will instead be the result of the Advisory Committee's independent judgment</u> (emphasis added).

The non-federal members of the committee were therefore SGE's of the Energy Department during their service and were within the reach of 18 U.S.C. § § 202-209.

<u>High Energy Physics Advisory Panel (HEPAP)</u>

<u>DOE/NSF Science Advisory Committee (SAC)</u>

These Department of Energy committees established by the Secretary are of particular interest because their respective members have been directed to act as independent advisers rather than in the representative fashion spelled out by 42 U.S.C. § 7234 <u>cum</u> 15 U.S.C. § 776. The Secretary has written the persons appointed to either of the committees as follows:[27]

> ...each member is asked to serve as an individual, to exercise his judgment in the best interests of the national [program of his committee] and not to represent any special or parochial interests.

This instruction places the members of the committees in the ranks of the SGE's and thus binds them by the proscriptions of § § 202-209. Since the language of 15 U.S.C. § 776, <u>supra</u>, is precatory in essence, it does not preclude the Energy Department from the issuance of the instruction.

<u>Intergovernmental Advisory Council on Education (IACE)</u>

IACE is included as an example of a Congressionally ordained committee all of whose members are appointed by the President. It was originated by 20 U.S.C. § 3423 (Supp. III), a provision of the Department of Education Organization Act. for the purpose of providing assistance and recommendations to the President and the Secretary of Education. The committee has 20 members of whom six must be elected state and local officials, five must represent "public and private elementary and secondary education," five must represent "public and private postsecondary education" and four are members of the public, "including parents of students and students." In making his appointments the President is required to consult with representatives of the groups from which the four clusters of members are to be selected. These statutory directives are clear indicia that IACE is a representative body. <u>Cf.</u> Appendix C.

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26 44 Fed. Reg. 27234, May 9, 1979.

27 <u>E.g.</u>, letters to Dr. Martin L. Perl, of HEPAP, dated Nov. 5, 1981, and Prof. Herman Feshbach, Chairman, SAC, dated Mar. 16, 1981.

National Professional Standards Review Council (NPSRC)

The charter of this body is § 1163 of the Social Security Act, as amended, 42 U.S.C. § 1320c-12. NPSRC consists of 11 physicians not otherwise in the employ of the United States who are appointed by the Secretary of Health and Human Services. The specifications of § 1163 for membership are such as to make the 11 physicians the representatives of their practicing colleagues throughout the nation. Nevertheless the members are employees of the Government because § 1163 provides that they are entitled to receive compensation at a daily rate not in excess of that of GS-18. The factor of compensation is decisive.[28]

President's Commission on Housing (PCH)

This advisory committee was brought into being by the President on his own by means of Executive Order 12310 of June 17, 1981. Section 2 provides simply that it is to have "not more than twenty-two (22) members from private life and from state and local governments who shall be appointed by the President." The Order, which in general instructs PCH to advise the President and the Secretary of Housing and Urban Development concerning the development of a national housing policy, directs that the members serve without compensation but with payment for travel expenses.

Despite the lack of pay for their work, it is evident that the members of PCH are employees of the Government. There is nothing in the Executive Order to characterize them as representatives of outside interests and it is unquestionable that they perform a federal function.

National Petroleum Council (NPC)

NPC is one of the oldest non-statutory advisory committees now functioning. It presently serves the Secretary of Energy but was created by the Secretary of the Interior in 1946 "as a source for advice on all matters related to oil and gas."[29] Its membership is drawn for the greatest part from the petroleum industry and is representative of the industry's various segments.[30]

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28 See n. 10, supra.

29 Metcalf v. National Petroleum Council, 553 F. 2d. 176, 177 (C.A.D.C. 1977). This case, in which the plaintiff attempted to raise an issue under the "fairly balanced" membership requirement of FACA, § 5(b)(2), was disposed of by the Court on the ground that the plaintiff had no standing to sue.

30 Id., at 179.

Since the Interior Department deliberately set up NPC as a representative advisory committee and did not provide compensation to its members, it never considered them to be federal employees. This position was confirmed by the Justice Department in 1962, while the forerunners of 18 U.S.C. § § 202-209 and President Kennedy's Memorandum of February 9, 1962, supra, were still in force.[31]

Labor Research Advisory Council (LRAC)

Business Research Advisory Council (BRAC)

These councils were formed by the Secretary of Labor in an exercise of his inherent powers of management—i.e., without statutory command or authorization—to advise the Commissioner of Labor Statistics in his Department.

The Secretary's notice of the establishment of LRAC states:[32]

> Council membership and participation in the Council and its committees are broadly representative of the union organizations in the United States. These include representation from organizations of all sizes of membership, with national coverage which reflects the geographical, industrial sectors of the economy.

This pronouncement characterizes LRAC's membership as representational and places it beyond the thrust of § § 202-209.

The notice of establishment of BRAC presents a contrasting description of membership:[33]

> Council membership is selected to assure a technically competent group of economists, statisticians and industrial relations experts who represent a cross section of American business and industry. The members serve in their individual capacities, not as representatives of their companies or organizations.

Whatever the degree of contradiction produced by the use of "represent" in the first sentence, the second sentence fixes the status of BRAC's members. They are employees of the Labor Department and subject to the restraints of § 202-209 on SGE's.

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31 Letter from Deputy Attorney General Katzenbach to Assistant Secretary of the Interior Kelly, Aug. 11, 1962.

32 45 Fed. Reg. 80599, Dec. 5, 1980.

33 Id.

CONCLUSION

From the foregoing discussion, it will be seen that Congress, the President and the heads of Executive departments and agencies all have the power to establish advisory committees. Incident to each exercise of that power, the host department or agency of a committee must determine whether the non-federal members will or will not be employees of the United States for the purposes of 18 U.S.C. § 202-209 and, if employees, whether they will or will not be SGE's. Passing the payment of compensation, which entails employee status, whether that status or the alternative is intended by Congress, the President or a parent department or agency is to be ascertained from the language used in the enabling legislation, Executive Order, committee charter or other pertinent document to describe the role of the committee members. The choices are two: (1) the use of words to command the members to exercise individual and independent judgment, or (2) the use of words to characterize them as the representatives of individuals or entities outside the Government who have an interest in the subject matter assigned to the committee. Where the language does not articulate a deliberate choice, it is fair to conclude that a member is an employee of the United States, for that is the usual status of someone appointed by an officer or agency of the Government to serve it. See the example of the President's Commission on Housing, supra at p 12.