



# Federal Advisory Committees: An Overview

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March 22, 2010

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R40520

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**CRS Report for Congress**  
*Prepared for Members and Committees of Congress*

011173008

## Summary

Federal advisory committees—which may also be designated as commissions, councils, or task forces—are created as provisional advisory bodies that can circumvent bureaucratic constraints to collect a variety of viewpoints on specific policy issues. Advisory bodies have been created to address a host of issues, ranging from policies on organ donation to the design and implementation of the Department of Homeland Security. These committees are often created to help the government manage and solve complex or divisive issues. Such committees may be mandated to render independent advice or make recommendations to various bodies within the federal government by congressional statute, created by presidential executive order, or required by fiat of an agency head.

Congress formally acknowledged the merits of using advisory committees to acquire viewpoints from business, academic, governmental, and other interests when it passed the Federal Advisory Committee Act (FACA) in 1972 (5 U.S.C. Appendix—Federal Advisory Committee Act; 86 Stat. 770, as amended). Enactment of FACA was prompted by the belief of many citizens and Members of Congress that such committees were duplicative, inefficient, and lacked adequate control or oversight. Additionally, some citizens believed the committees failed to sufficiently represent the public interest—an opinion punctuated by the closed-door meeting policies of many committees. FACA mandated certain structural and operational requirements for many federal committees, including formal reporting and oversight procedures for the advisory bodies. FACA requires that committee membership be “fairly balanced in terms of the points of view represented,” and advice provided by committees be objective and accessible to the public. Additionally, FACA requires nearly all committee meetings be open to the public. Pursuant to statute, the General Services Administration (GSA) maintains and administers management guidelines for federal advisory committees. During FY2009, GSA reported a total of 924 active committees with nearly 82,000 total members that provided advice and recommendations to 50 federal agencies. The total operating costs for these committees in FY2009 was \$361,493,408. Agency administrators, the President, and Congress continue to create federal advisory committees in the 111<sup>th</sup> Congress.

Committees that fit certain FACA criteria and are created by the executive branch are governed by FACA guidelines. FACA was designed to eliminate duplication of committee expertise and make advisory bodies in the executive branch more transparent. Congress may decide, however, to place FACA requirements on a body that it statutorily created. Existing statutes are sometimes unclear as to whether a congressionally created committee would have to comply with FACA requirements—except in cases when the statute explicitly mandates FACA’s applicability.

Legislation (H.R. 1320) was reintroduced in the 111<sup>th</sup> Congress that would, among other actions, require members of advisory committees be selected without regard to their partisan affiliation. Also pursuant to the legislation, executive branch agency heads would be authorized to require members serving on agency advisory committees to fully disclose any actual or potential conflicts of interest. Additionally, GSA’s Administrator would be given authority to create regulations and guidelines to further ensure that an advisory committee offered impartial advice and recommendations. The bill would also require each advisory committee to create a website, publish advance notice of meetings, and provide public access to proceedings on its website. The bill was sent to the House Committee on Oversight and Government Reform, and reported from the committee on June 4, 2009. The bill was placed on the Union Calendar, but no further action was taken.

## Contents

Introduction .....	1
History .....	2
The Department of Justice.....	3
Congressional Action .....	4
The President and the Executive Branch.....	4
Congressional Reaction.....	5
The Federal Advisory Committee Act.....	8
Subsequent Amendments .....	9
Contemporary FACA .....	10
Studies on Federal Advisory Committees .....	11
When FACA Applies.....	13
FACA and the 111 <sup>th</sup> Congress .....	15
Creating a FACA Committee.....	15
Establishment and Mandate.....	15
Membership .....	16
Compensation and Travel.....	18
Committee Staff.....	18
Committee Reports .....	18
Committee Powers.....	19
Bylaws and Procedures .....	19
Funding .....	20
Committee Termination.....	20
Analysis.....	20

## Contacts

Author Contact Information .....	21
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## Introduction

Since 1974, Presidents and executive branch agencies have been creating federal advisory committees to gain expertise from outside the federal government. These federal advisory committees have historically been created on an ad hoc, provisional basis. The entities are often created to bring together various experts—often with divergent opinions and political backgrounds—to examine an issue and recommend statutory, regulatory, or other actions. Federal advisory committees may be created because they have fewer administrative requirements placed on them than other investigatory entities.

In 1972, Congress formally instituted federal use of advisory committees with the enactment of the Federal Advisory Committee Act (FACA).<sup>1</sup> Advisory bodies established or utilized by the President or agency heads in the executive branch are governed by FACA guidelines if they fit certain criteria.<sup>2</sup> Advisory bodies statutorily mandated may or may not be obligated to follow FACA requirements—often depending on who appoints committee members and to whom the committee must report its findings.

Congress, the President, and executive branch agency heads often create advisory bodies to generate expert advice and recommendations. Whether called commissions, committees, councils, or task forces, these entities have addressed a gamut of public policy issues. Some of these advisory committees may offer recommendations on topics ranging from organ transplant practices<sup>3</sup> to improving operations at the Department of Homeland Security.<sup>4</sup>

Pursuant to statute, the General Services Administration (GSA) maintains and administers management guidelines for federal advisory committees. During FY2009, GSA reported a total of 924 active committees with nearly 82,000 total members that provided advice and recommendations to 50 federal agencies. The total operating costs for these committees in FY2009 was \$361,493,408. Agency administrators, the President, and Congress are likely to continue creating federal advisory committees throughout the 111<sup>th</sup> Congress.

On March 5, 2009, Representative William Lacy Clay reintroduced The Federal Advisory Committee Act Amendments of 2009 (H.R. 1320) in the 111<sup>th</sup> Congress. H.R. 1320 would require that members of advisory committees be selected without regard to their partisan affiliation.<sup>5</sup> Moreover, executive branch agency heads would be authorized to require that members serving on agency advisory committees fully disclose any actual or potential conflicts of interest. GSA's Administrator would be given authority to create regulations and guidelines to further ensure that an advisory committee offered impartial advice and recommendations.<sup>6</sup> Pursuant to the bill,

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<sup>1</sup> See the Federal Advisory Committee Act (FACA; 5 U.S.C. Appendix—Federal Advisory Committee Act; 86 Stat. 770, as amended).

<sup>2</sup> Pursuant to FACA, advisory bodies are subject to the act's guidelines if they have at least one member who is not a federal employee, and if their membership is determined predominantly by the executive branch, among other qualifications. 5 U.S.C. Appendix § 3.

<sup>3</sup> U.S. Department of Health and Human Services, Advisory Committee on Organ Transplantation (42 U.S.C. § 217a).

<sup>4</sup> U.S. Department of Homeland Security, Homeland Security Advisory Council (6 U.S.C. § 451).

<sup>5</sup> H.R. 1320 Sec. 2(b).

<sup>6</sup> These regulations and guidelines would apply to all FACA committees and subcommittees.

advisory body subcommittees would have to adhere to FACA requirements. Currently, such subcommittees are not covered by FACA. Also, advisory committees would be required to create websites, and publish advance notice of meetings and provide access to their proceedings on these websites. H.R. 1320 was sent to the House Committee on Oversight and Government Reform, and was reported from the committee on June 4, 2009. The legislation was placed on the Union Calendar that same day, but no further action was taken. H.R. 1320 may clarify certain transparency requirements for federal advisory committees and their members. While the bill could make federal advisory committees more accessible to Congress and the public, it would also grant the GSA—an executive branch agency—greater control over how FACA committees determine their recommendations. Such action may remove some congressional control from FACA committee operations.

Similar legislation was introduced in the 110<sup>th</sup> Congress (H.R. 5687). The bill passed the House on June 24, 2008, but was not reported out of the Senate Committee on Homeland Security and Governmental Affairs.

## History

Although FACA committees did not exist until 1974, George Washington is often credited with initiating a tradition of presidential use of outside expertise when, in 1794, he appointed an ad hoc group of commissioners to investigate the Whiskey Rebellion.<sup>7</sup> Since 1842, Congress has legislated control over federal advisory bodies—mostly by limiting funding and committee member pay. In 1842, for example, a law was enacted that prohibited payment to “any commission or inquiry, except courts martial or courts of inquiry in the military or naval service” without explicit “special appropriations.”<sup>8</sup> Similarly, in 1909, another law was enacted that prohibited appropriation to “any commission, council, board, or other similar body ... unless the creation of the same shall be or shall have been authorized by law.”<sup>9</sup> The law also prohibited the detailing of any federal employee to work on an unauthorized commission.

By the 20<sup>th</sup> century some Members of Congress believed the executive branch’s advisory bodies were inefficient and not accessible to the public. Some Members believed that the public harbored concerns that a proliferation of federal advisory committees had created inefficient duplication of federal efforts.<sup>10</sup> Moreover, some citizens argued that the advisory entities did not reflect the public will, a point that was punctuated by many committees’ policies of closed-door meetings. Congress was called on to increase committee oversight and gain some control over the proliferating advisory boards.<sup>11</sup> To meet that end, Congress wrote the Federal Advisory Committee Act (FACA; 5 U.S.C. Appendix; 86 Stat. 770, as amended). The legislation was enacted in 1972 and requires advisory bodies that fit certain criteria to report annually a variety of information, including membership status and progress, to the Government Services

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<sup>7</sup> “Whiskey Insurrection in Western Pennsylvania,” in *Pennsylvania Archives*, ed. John B. Linn and Wm.H.Egle, 2<sup>nd</sup> Series, vol. 4 (Harrisburg, PA: Clarence M. Busch, State Printer of Pennsylvania, 1794), pp. 155-164.

<sup>8</sup> 5 Stat. 533. (1842).

<sup>9</sup> 35 Stat. 1027. (1909).

<sup>10</sup> See, for example, U.S. Congress, Senate Committee on Government Operations, *The Federal Advisory Committee Act*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972), pp. 5-6.

<sup>11</sup> U.S. Congress, Senate Committee on Government Operations, *The Federal Advisory Committee Act*, Report to accompany S. 3529, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972).

Administration (GSA). GSA then reports aggregated advisory body information to Congress annually.<sup>12</sup>

## The Department of Justice

In the 1940s and 1950s a variety of private sector industries had been creating advisory committees that attempted to influence federal governmental operations. In the 1950s, some of these entities were created under official auspices, using guidelines formulated by the Department of Justice (DOJ) in 1950.<sup>13</sup> These entities operated without explicit legislative or executive branch authority, but attempted to affect federal policies and practices. Government officials—including both the legislative and executive branches—as well as members of the general public grew concerned that these ad hoc committees were overstepping their authority.

At various points within that era, the Department of Justice (DOJ) released legal opinions on the creation, structure, and oversight of advisory committees. A 1944 statement by then-Attorney General Francis Biddle, for example, outlined limits to private industry’s ability to form advisory committees that offered unsolicited policy advice to the government. According to Biddle’s statement, “the responsibility for the formation of an industry committee to advise any particular department of the government is the responsibility of that department.”<sup>14</sup>

A 1955 opinion released from the Office of the Deputy Attorney General created a five-pronged collection of guidelines for the creation of a valid federal advisory committee.

1. There must be either statutory authority for the use of such a committee, or an administrative finding that use of such a committee is necessary in order to perform certain statutory duties.
2. The committee’s agenda must be initiated and formulated by the government.
3. Meetings must be called and chaired by full-time government officials.
4. Complete minutes must be kept of each meeting.
5. The committee must be purely advisory, with government officials determining the actions to be taken on the committee’s recommendations.<sup>15</sup>

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<sup>12</sup> Effective May 15, 2000, P.L. 104-66 eliminated the requirement that GSA submit an annual report on FACA committees to Congress. GSA’s Administrator, however, is required by FACA to “institute a comprehensive review of the activities and responsibilities of each advisory committee” and recommend to Congress, the President, or the relevant agency head any actions he or she believes should be taken. The review is conducted annually. 5 U.S.C. Appendix § 7.

<sup>13</sup> U.S. Congress, House Committee on the Judiciary, Antitrust Subcommittee (Subcommittee No. 5), *WOC’s [Without Compensation Government Employees] and Government Advisory Groups*, Hearings, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., August 4, 1955, S.Hrg. Part 1 (Washington: GPO, 1955), pp. 586-587. The public, throughout the 1940s and 1950s, was concerned about the power of these advisory committees to influence agencies’ policy decisions. The DOJ, in a document released on April 26, 1944, stated that it had “no objection” to the creation of such advisory bodies, and that they did not violate antitrust laws as long as they did not determine policy. *Ibid.* pp. 585-586.

<sup>14</sup> U.S. Congress, House Committee on the Judiciary, Antitrust Subcommittee (Subcommittee No. 5), *WOC’s [Without Compensation Government Employees] and Government Advisory Groups*, Hearings, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., August 4, 1955, S.Hrg. Part 1 (Washington: GPO, 1955), pp. 586-587.

<sup>15</sup> Peyton Ford, Deputy Attorney General, *Letter to All Agencies Regarding Advisory Committees*, U.S. Department of Justice, GPO, October 19, 1950, available in U.S. Congress, House Committee on the Judiciary, Antitrust Subcommittee (Subcommittee No. 5), *WOC’s [Without Compensation Government Employees] and Government* (continued...)

## Congressional Action

On January 22, 1957, Representative Dante Fascell introduced a bill that would have made the DOJ's five advisory committee requirements law (H.R. 3378). The bill noted "an increasing tendency among Government departments and agencies to utilize the services of experts and consultants as advisory committees or other consultative groups," but warned that "protection of the public interest requires that the activities of such committees and groups be made subject to certain uniform requirements."<sup>16</sup>

In addition to making the five DOJ standards law, the bill would have required the President to submit to Congress an annual report "detailing the membership of each advisory committee used by each Federal department or agency; the function of each such committee; and the extent to which the operations of the committees have complied with the Standards provided in this Act."<sup>17</sup> The bill, as amended, passed the house on July 10, 1957. The bill was sent to the Senate and referred to the Government Operations Committee, but no further action was taken.

## The President and the Executive Branch

In 1962, President John F. Kennedy issued an executive order (E.O. 11007) that reinforced the DOJ advisory committee requirements.<sup>18</sup> The executive order defined an advisory committee as

any committee, board, commission, council, conference, panel, task force, or other similar group ... that is formed by a department or agency of the Government in the interest of obtaining advice or recommendations ... that is not composed wholly of officers or employees of the Government.<sup>19</sup>

E.O. 11007 also limited the lifespan of all federal advisory committees to "two years from the date of its formation" unless special actions were taken by an agency or department head to continue the committee.

On March 2, 1964, the Bureau of the Budget issued Circular No. A-63, which laid out the executive branch's policies for creating, maintaining, and terminating advisory committees. The circular included guidelines that discouraged dual chairmanships, required annual status reports to the Bureau of the Budget, and compelled all advisory entities not created by statute to be called committees—not commissions, councils, or boards. Throughout the early 1960s and early 1970s, while Congress was holding hearings to determine effective ways to gain oversight and control

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(...continued)

*Advisory Groups*, Hearings, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., August 4, 1955, S.Hrg. Part 1 (Washington: GPO, 1955), pp. 586-587.

<sup>16</sup> H.R. 3378, 85<sup>th</sup> Congress, 1<sup>st</sup> Session.

<sup>17</sup> A copy of H.R. 3378 is available in U.S. Congress, the Senate Committee on Governmental Affairs's Subcommittee on Energy, Nuclear Proliferation, and Federal Services, *Federal Advisory Committee Act* (Public Law 92-463), Source Book: Legislative History, Texts, and other Documents, 95<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 1978 (Washington: GPO, 1978), pp. 37-39.

<sup>18</sup> U.S. President, "Prescribing Regulations for the Formation and use of Advisory Committees," *27 Federal Register* 1875, February 26, 1962.

<sup>19</sup> A copy of H.R. 3378 is available in U.S. Congress, the Senate Committee on Governmental Affairs's Subcommittee on Energy, Nuclear Proliferation, and Federal Services, *Federal Advisory Committee Act* (Public Law 92-463), Source Book: Legislative History, Texts, and other Documents, 95<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 1978 (Washington: GPO, 1978), pp. 111-115.

over advisory committees, executive branch representatives maintained that legislation was unnecessary and used Circular No. A-63 as evidence of systematic oversight of advisory committees.

On June 5, 1972, just months prior to congressional passage of the Federal Advisory Committee Act, then-President Richard M. Nixon issued Executive Order 11671, which delineated new operating, transparency, and oversight standards for advisory entities. The order incorporated many of the elements within the bill that was to become FACA, including vesting the Office of Management and Budget (OMB—formerly the Bureau of the Budget) with oversight responsibilities for committee management.<sup>20</sup>

## Congressional Reaction

Congress held a series of hearings to examine the executive branch’s use of federal advisory committees throughout the late 1960s and early 1970s. During an introduction to one of the hearings, Senate Committee on Government Operations’ Subcommittee on Intergovernmental Relations Chairman Edmund S. Muskie stated that Congress was using the hearings to examine “two fundamentals, disclosure and counsel, the rights of people to find out what is going on and, if they want, to do something about it.”<sup>21</sup> More than 30 witnesses testified before the Senate Subcommittee on Intergovernmental Relations over 12 days of hearings—from June 10 through June 22, 1971.<sup>22</sup> As a result of the hearings, some Members concluded that advisory committees were “a useful means of furnishing expert advice, ideas and recommendations as to policy alternatives” but “there [were] numerous such advisory bodies that are duplicative, ineffective and costly, and many which have outlived their usefulness, and that neither the Federal agencies, the Executive Office of the President, nor the Congress, have developed any effective mechanisms for evaluating.”<sup>23</sup>

In December 1970, the House Committee on Government Operations’ Special Studies Subcommittee issued a comprehensive report titled “Role and Effectiveness of Federal Advisory Committees,” which compiled research and information gathered from federal agencies from 1969 through 1970.<sup>24</sup> The studies included policy recommendations for advisory bodies. On February 2, 1971, Representative John Mongan introduced the Federal Advisory Committee Standards Act (H.R. 4383), which incorporated many of the study’s recommendations.

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<sup>20</sup> Executive Order 11671, “Committee Management,” 37 *Federal Register* 11307, June 7, 1972.

<sup>21</sup> U.S. Congress, Senate Committee on Government Operations, *The Federal Advisory Committee Act*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972), p. 5.

<sup>22</sup> Many additional hearings related to federal advisory committees were held between 1969 and 1971. The House Committee on Government Operations, for example, held hearings on *Presidential Advisory Committees* on May 26 and 27, 1970. The Senate Committee on Government Operations held 12 days of hearings starting in June 1971, which resulted in more than 1000 pages of testimony and various evidentiary materials. See, U.S. Congress, Senate Committee on Government Operations’ Subcommittee on Intergovernmental Relations Subcommittee, *Advisory Committees*, Hearings, 92<sup>nd</sup> Cong, 1<sup>st</sup> sess., June 10, 11, 15, 17, and 22; July 13, 17, 18; Oct. 6, 7, 8, and 11, 1971 (Washington: GPO, 1971).

<sup>23</sup> U.S. Congress, Senate Committee on Government Operations, *The Federal Advisory Committee Act*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972), pp. 5-6.

<sup>24</sup> U.S. Congress, House Committee on Government Operations, Special Studies Subcommittee, *The Role and Effectiveness of Federal Advisory Committees*, Forty-third Report, 91<sup>st</sup> Cong., 2<sup>nd</sup> sess., December 11, 1970, H.Rept. 91-1731 (Washington: GPO, 1970).



The bill addressed the responsibilities of Congress, the director of the OMB, the President, and agency heads to control and maintain federal advisory bodies. For example, congressional committees with legislative jurisdiction over particular issues were to review all advisory bodies related to that topic. The congressional committees were then to eliminate any statutorily created advisory bodies they believed were duplicative, clarify advisory body missions, and ensure that adequate staff and resources were assigned to advisory bodies under their jurisdiction. Additionally, the congressional committees were to make certain the ad hoc advisory committees had “a date established for termination and for submission of the committee report.”<sup>25</sup> The director of the OMB was to conduct a “comprehensive review” of duplicative advisory bodies and recommend to the relevant authority whether they should be eliminated or merged into existing advisory entities. The director was to work with Congress and agency heads to “provide advice, assistance, guidance, and leadership to advisory committees.”<sup>26</sup>

In the Senate, Senator William V. Roth, Jr., and others, introduced a similar bill (S. 1964)<sup>27</sup> “to authorize the Office of Management and Budget to establish a system of governing the creation and operation of advisory committees throughout the Federal Government.”<sup>28</sup> During his introductory remarks on May 26, 1971, Senator Roth acknowledged a lack of congressional oversight of the more than 2,600 such advisory entities operating in the federal government.

Advisory committees have contributed substantially to the effectiveness of the Federal Government in the past. But as the function of Government has become more complex and the decisions more difficult, numerous advisory committee have sprung up to advise the President and other decision-makers in the Federal Agencies and the Congress. Over 2,600 interagency and advisory committees exist today and it is possible that this figure could be as high as 3,200.

In spite of the large number of advisory committees and their participation in the process of government, Congress has neglected to provide adequate controls to supervise their growth and activity. As a result, the use of committees or advisory groups has come under strong attack in the press and other media as wastes of time, money, and energy. The creation of another committee is often viewed by the public as another indication of inefficiency and indecisiveness in Government.<sup>29</sup>

S. 1964 was referred to the Senate Committee on Government Operations. No further action was taken on the bill.

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<sup>25</sup> U.S. Congress, Senate Committee on Government Operations, *The Federal Advisory Committee Act*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972), p. 259. Also available at Rep. John Monagan, “Introduction of a Bill to Regulate Presidential Advisory Committees,” introduction of legislation, *Congressional Record*, February 17, 1971, p. H2750.

<sup>26</sup> *Ibid.*

<sup>27</sup> Three bills related to federal advisory committees (including S. 1964) were introduced in the Senate during the 92<sup>nd</sup> Congress. The Open Advisory Committee Act (S. 3067) sought to establish standards for all advisory committees not composed entirely of government employees by requiring one-third of each committee to be composed of public (non-industry) representatives. Like S. 1964, the Federal Advisory Committee Efficiency Act (S. 2064) sought to standardize advisory committee oversight and management, but it also aimed to increase the transparency of such entities by requiring publication of transcripts from advisory committee proceedings when they were requested.

<sup>28</sup> U.S. Congress, Senate, *Journal of the Senate*, 92<sup>nd</sup> Cong., 1<sup>st</sup> sess., May 26, 1971 (Washington: GPO, 1971), p. 381.

<sup>29</sup> U.S. Congress, Senate Committee on Government Operations, *The Federal Advisory Committee Act*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972), p. 259. Also available at Rep. John Monagan, “Introduction of a Bill to Regulate Presidential Advisory Committees,” introduction of legislation, *Congressional Record*, February 17, 1971, pp. 4-5.

On May 9, 1972, Members of the House voted overwhelmingly (357 to 9) to approve H.R. 4383, with several amendments, including the addition of “openness provisions” that required public notice of advisory body meetings and public access to advisory body files under the Freedom of Information Act (5 U.S.C. § 552). The bill was then sent to the Senate.

In the Senate, a new bill was introduced by 12 Senators. S. 3529, introduced on April 25, 1972, merged the goals of a number of pending advisory committee bills. According to the Senate report that accompanied the bill, S. 3529 aimed to make advisory committees less redundant and more accessible.

The purpose of S. 3529 is to: strengthen the authority of Congress and the executive branch to limit the use of Federal advisory committees to those that are necessary and serve an essential purpose; provide uniform standards for the creation, operation, and management of such committees; provide that the Congress and the public are kept fully and currently informed as to the number, purposes, membership, and costs of advisory committees, including their accomplishments; and assure that Federal advisory committees shall be advisory only.<sup>30</sup>

Within the Senate, debate on advisory committees centered on whether to make public participation and transparency of meetings and recordkeeping mandatory. S. 3529 required facilitating public information requests by making committee records subject to the Freedom of Information Act (FOIA). The bill, however, did not include explicit requirements for committee membership or participation. When the bill came up for vote on the Senate floor, an amendment was added exempting committees that furnish “advice or recommendations only with respect to national security or intelligence matters” from reporting requirements.<sup>31</sup> Another amendment exempting the Federal Reserve Advisory Council was also added to the bill. S. 3529 passed the Senate by voice vote on September 12, 1972.<sup>32</sup> The Senate then struck all the House language of H.R. 4383 and replaced it with that of S. 3529. The Senate then passed H.R. 4383 as amended.

A conference report that reconciled differences between the House and Senate versions of H.R. 4383 was published on September 18, 1972. The final bill included reporting requirements for advisory committees planning to hold meetings, and ensured public inspection of advisory committee materials would be possible. The conference report was adopted by the Senate on September 19, 1972, and by the House on September 20. President Nixon signed the Federal Advisory Committee Act into law (P.L. 92-463) on October 6, 1972. Following the signing of FACA, then-President Nixon rescinded E.O. 11671, which previously had been the primary document guiding the creation and operation of federal advisory bodies.<sup>33</sup>

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<sup>30</sup> U.S. Congress, Senate Committee on Government Operations, *Federal Advisory Committee Act*, report to accompany S. 3529, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972), p. 1.

<sup>31</sup> Amendment offered by Senator Lee Metcalf, “Federal Advisory Committee Act,” Senate debate, *Congressional Record*, daily edition, vol. 118, part 23 (September 12, 1972) p. S30272.

<sup>32</sup> Amendment offered by Senator Jacob Javitz, “Federal Advisory Committee Act,” Senate debate, *Congressional Record*, vol. 118, part 23 (September 12, 1972), p. S30273.

<sup>33</sup> Executive Order 11686, “Committee Management,” *Federal Register*, vol. 37 (Oct. 7, 1972), p. 21421.

## The Federal Advisory Committee Act

FACA addressed many congressional and citizen concerns about federal advisory committees. The law established the first statutory requirements for management of, access to, and oversight of federal committees. The act required all advisory committees to “be advisory only,” and the issues on which they offered determinations were to be “determined, in accordance with law, by the official, agency, or officer involved.”<sup>34</sup> The law allocated a variety of oversight and management responsibilities to the standing committees of Congress, OMB, agency heads, and the President.

FACA required congressional committees to determine whether existing federal advisory committees that fell under their legislative jurisdiction were necessary or redundant. Congress was also to determine if the entities were “fairly balanced in terms of the points of view represented and the functions to be performed.”<sup>35</sup> The committees were to be created with enough autonomy from the appointing power (Congress, the President, or an agency head) as to not be unduly influenced by it. Reporting requirements were to be clearly stipulated, and proper funding and staffing were to be provided.

OMB was to oversee the management of advisory committees. The OMB director’s first mandated task was to review, concurrently with Congress, existing advisory entities to determine whether they should be abolished.<sup>36</sup> The director was to create operating policies for advisory committees, and provide “advice, assistance, and guidance” to entities “to improve their performance.” The guidelines were to include pay rates for members, staff, and consultants—and catalog overall costs for the committees that were to be used for budget recommendations to Congress.<sup>37</sup>

Agencies’ heads were to ensure proper implementation of OMB’s guidelines, and to “maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.”<sup>38</sup>

The President was required to report to Congress—within one year of receiving advice from an advisory entity—his determination for action (or inaction) on the committee’s recommendation. The President was also required to report annually to Congress the “activities, status, and changes in the composition of advisory committees in existence during the preceding year.”<sup>39</sup> Advisory committees related to national security were exempted from reporting requirements.

The law authorized only Congress, the President, or an agency head to create an advisory committee. FACA required all committees be chartered prior to their operation. A charter was required to include the committee’s objectives, the support agency, the committee’s duties, the estimated operating costs, the estimated number of committee meetings, and the anticipated

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<sup>34</sup> P.L. 92-463. (1972).

<sup>35</sup> *Ibid.*, 86 Stat. 771. (1972).

<sup>36</sup> In December 1977, the duties charged to OMB were reassigned to the General Services Administration (GSA) by E.O. 12024.

<sup>37</sup> *Ibid.*; 86 Stat. 773. (1972).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*; 86 Stat. 772. (1972).

termination date, among other information. Unless the President qualified the subject matter as pertinent to the national security of the country, committee meetings were required to be advertised in the *Federal Register* and open to the public.

## Subsequent Amendments

In the 37 years since FACA's enactment, congressional oversight hearings have resulted in legislative attempts to clarify the statute. One substantial modification to FACA was the 1977 Federal Advisory Committee Act, which incorporated the Sunshine Act (P.L. 94-409) into the law.<sup>40</sup> The Sunshine Act is specifically designed to make government agency meetings more publicly accessible and transparent. Additional executive orders have been issued since the law's inception; many of them abolished particular federal advisory committees or lengthened the lifespan of others.<sup>41</sup>

From 1983 through 1989, legislation was introduced in Congress to strengthen FACA's management controls, as well as to establish new ethical, financial, and conflict-of-interest disclosure requirements for committee members.<sup>42</sup> None of these bills were enacted.

On February 10, 1993, President William J. Clinton issued Executive Order 12838, which required each executive department to "terminate not less than one-third of the advisory committees subject to FACA (and not required by statute) ... by the end of fiscal year 1993."<sup>43</sup> Agency heads were required to review all advisory committees under their jurisdictions and eliminate them or justify in writing why they were necessary to continue. Committees would need approval from the OMB director to continue operation.

On October 5, 1994, Alice M. Rivlin, then acting director of OMB, released a circular detailing management policies for remaining FACA committees.<sup>44</sup> The circular reinforced the Clinton Administration's decision to reduce the number of advisory committees and cut costs. It also laid

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<sup>40</sup> The Sunshine Act was signed into law on September 13, 1976.

<sup>41</sup> See E.O. 11145, March 7, 1964; E.O. 11183, October 3, 1964; E.O. 11287, June 28, 1966; E.O. 12131, May 4, 1979; E.O. 12196, February 26, 1980; E.O. 12216, June 18, 1980; E.O. 12345, February 2, 1982; E.O. 12367, June 15, 1982; E.O. 12382, September 13, 1982; E.O. 12871, October 1, 1993; E.O. 12900, February 22, 1994; E.O. 12905, March 25, 1994; E.O. 12876, November 1, 1993; E.O. 12882, November 23, 1993; E.O. 12994, March 21, 1996; E.O. 13038, March 11, 1997; E.O. 13054, July 7, 1997; E.O. 12864, September 15, 1993; E.O. 12891, January 15, 1994; E.O. 12946, January 20, 1995; E.O. 12964, June 21, 1995; E.O. 13015, August 22, 1996; E.O. 12974, September 29, 1995; E.O. 13065, October 22, 1997; EO 13065, October 22, 1997. In December 1977, one more significant Executive Order, E.O. 12024, transferred advisory committee oversight duties from the Director of OMB to the Administrator of General Services. Executive Order 12024, "Relating to the Transfer of Certain Advisory Committee Functions," 42 *Federal Register* 61445, December 1, 1977.

<sup>42</sup> S. 1641, introduced July 19, 1983, would have prohibited partisanship inquiries of potential advisory committee appointees; S. 2127, introduced Nov. 17, 1983, would have prohibited the creation of advisory committees if similar information was available from other sources in the federal government and would have required termination of any committee that was deemed "too expensive"; S. 2721, introduced Aug. 10, 1988, incorporated many ideas found in S. 2127, and required all committee considerations be delineated in its charter and that all business was to be conducted at official meetings; and S. 444, introduced Feb. 23, 1989, would have required the President to announce by directive any committee creation, and agency heads would have had to publish committee creations in the *Federal Register*.

<sup>43</sup> Executive Order 12838, "Termination and Limitation of Federal Advisory Committees," 58 *Federal Register* 28, February 10, 1993.

<sup>44</sup> U.S. Office of Management and Budget, OMB Circular No. A-135 as Applied to FACA, Oct. 5, 1994, at <http://www.whitehouse.gov/omb/rewrite/circulars/a135/a135.html>.

out the criteria GSA was to use when evaluating the utility of existing advisory bodies, and it required GSA to create a variety of operating and reporting guidelines for advisory committees.

In 1995, two FACA-related laws were enacted. The first exempted intergovernmental advisory actions—official advisory efforts between federal officers and officers of state, local, or tribal governments—from FACA (P.L. 104-4). The second was a law that eliminated GSA's annual reporting requirements to Congress (P.L. 104-66). Pursuant to the law, GSA stopped creating its Annual Report to Congress in 1998, but GSA officials continue to collect and examine data on FACA committees and publish it in the Annual Comprehensive Review, an additional oversight document required by FACA. The Review is used to determine whether advisory bodies are executing their missions and adhering to statutes, or whether they are in need of revision or abolition.<sup>45</sup> The Federal Advisory Committee Act Amendments of 1997 (P.L. 105-153) provided for public comment of committee membership and public attendance at committee meetings for advisory bodies that existed within the National Academy of the Sciences or the National Academy of Public Administration.

## Contemporary FACA

In 2009, FACA guidelines governed the operation, oversight, and termination parameters for 924 federal advisory committees. Nearly 82,000 advisory committee members provided advice and recommendations to 50 federal agencies under FACA's authority. In FY2009, the total operating costs for these committees was \$361,493,408.<sup>46</sup>

FACA requires that the advice provided by these committees be objective and accessible to the public. All committee meetings that are bound by FACA are presumptively open to the public, with certain specified exceptions.<sup>47</sup> Adequate notice of meetings must be published in advance in the *Federal Register*. Subject to the requirements of the Freedom of Information Act, all papers, records, and minutes of meetings must be made available for public inspection. Membership must be “fairly balanced in terms of the points of view represented and the functions to be performed,” and the committee should “not be inappropriately influenced by the appointing authority or by any special interest.”<sup>48</sup>

All advisory committees that are subject to FACA must file a charter every two years with the GSA.<sup>49</sup> The charter must include the advisory body's mandate and duties, frequency of meetings, and membership requirements. GSA is required annually to review advisory committee accomplishments, respond to inquiries from agencies who seek to create new advisory bodies, and

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<sup>45</sup> 5 U.S.C. Appendix § 7(b).

<sup>46</sup> All FACA committee totals and costs are supplied by the U.S. General Services Administration's FACA Database, <http://fido.gov/facadatabase/>.

<sup>47</sup> These exemptions include entities created within the Central Intelligence Agency or the Federal Reserve System, or created by 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. 5 U.S.C. Appendix § 4.

<sup>48</sup> 5 U.S.C. Appendix § 5(2).

<sup>49</sup> 5 U.S.C. Appendix § 14(a)(B)(2). Congress can override this two-year re-chartering requirement by writing into statute the lifespan of the committee. Congress may authorize a committee to exist for as long as it deems necessary.

maintain an online, publicly accessible database of FACA bodies that includes a variety of information about each entity.<sup>50</sup>

According to FACA, advisory entities that have at least one member who is not a federal employee are subject to the act.<sup>51</sup> Pursuant to FACA, a Committee Management Officer (CMO) must be hired by the agency head of each agency that has advisory committees. These CMOs must supervise “the establishment, procedures, and accomplishments of advisory committees established by that agency.”<sup>52</sup> Moreover, the CMO is required to maintain advisory committee “reports, records, and other papers” related to the entity’s proceedings and ensure that the body adheres to the Sunshine Act (5 U.S.C. § 552).<sup>53</sup> Also pursuant to FACA, a “designated federal official” must be present at committee meetings to call and adjourn meetings.<sup>54</sup> According to OMB Circular No. A-135, FACA committees must be “essential to the performance of a duty or responsibility conveyed upon the executive branch by law.”<sup>55</sup> The circular then states the following:

Advisory committees should get down to the public’s business, complete it and then go out of business. Agencies should review and eliminate advisory committees that are obsolete, duplicative, low priority or serve a special, rather than national interest.<sup>56</sup>

All committees created since FACA’s enactment are required to expire after two years, unless legislation creating the entity specifies otherwise or the entity is renewed by the power that created it.<sup>57</sup>

## Studies on Federal Advisory Committees

Scholarship on federal advisory bodies includes examinations of the ways Congress can design more effective committees<sup>58</sup> and studies that explore whether they serve presidential interests.<sup>59</sup> In addition to competing theories on whom advisory committees serve, scholars do not agree on a proper definition for the entities.<sup>60</sup> Although the definition of an advisory body can vary across the federal government, FACA-governed entities are defined specifically within the act as

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<sup>50</sup> See the FACA Database FIDO.GOV, at <http://fido.gov/facadatabase/>. In June 1998, the General Accounting Office (now the Government Accountability Office) found that GSA was not adequately performing many FACA requirements, including failing to comprehensively review each advisory committee annually. GSA responded to GAO’s comments by noting the reduction in the number of FACA committees. The 1998 report is GAO’s most recent investigation into GSA’s FACA oversight.

<sup>51</sup> 5 U.S.C. Appendix § 3(2)(c)(i).

<sup>52</sup> 5 U.S.C. Appendix § 8.

<sup>53</sup> *Ibid.*

<sup>54</sup> 5 U.S.C. Appendix § 10(e).

<sup>55</sup> U.S. Office of Management and Budget, OMB Circular No. A-135 as Applied to FACA, Oct. 5, 1994.

<sup>56</sup> *Ibid.*

<sup>57</sup> 5 U.S.C. Appendix § 14.

<sup>58</sup> Steven J. Balla and John R. Wright, “Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy,” *American Journal of Political Science*, vol. 45, no. 4 (October 2001), pp. 779-812.

<sup>59</sup> Thomas R. Wolanin, *Presidential Advisory Commissions, Truman to Nixon* (Madison, WI: University of Wisconsin Press, 1975).

<sup>60</sup> This statement refers to advisory committees throughout government, including those that are not FACA bound. FACA provides a more detailed definition, thereby narrowing the advisory bodies that are included within its (continued...)

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 – established by statute or reorganization plan, or established or utilized by the President, or 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, except that such term excludes any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.<sup>61</sup>

Also pursuant to statute, FACA entities are prohibited from creating policy or issuing regulations. Their role is to remain strictly advisory.<sup>62</sup>

One scholar stated that advisory committees have traditionally allowed a President to “deflect blame, buy time, and give the appearance of action on issues that are too politically charged, too difficult, to solve.”<sup>63</sup>

In addition, however, various scholars have noted that commissions are used by presidents to garner greater public support for a policy to which the president is already committed; show symbolic concern over a situation at the highest level of government; establish a fact base for others to use; respond to crises; deflect political heat from the president and allow passions to cool when issues become explosive; overcome the “stovepipes” and parochial thinking of the permanent bureaucracy; gather more information about a problem and its policy alternatives; forge consensus among the interests represented on the commission itself; and change the hearts and minds of men.<sup>64</sup>

One study attempts to group commissions into three categories: agenda commissions, which aim to attract support and attention to presidential policy initiatives; information commissions, which are designed to give “new ideas, new facts, and new analysis to policymakers”; and political constellation commissions, which seek to “foster consensus, compromise, and cooperation in a policy domain.”<sup>65</sup>

Another scholar who examined the impetus for committee creation found that some committees are created to acquire new ideas from outside experts. He added, however, that committees may be created to allow politicians to avoid blame for issues that are too cumbersome or too politically charged. Moreover, he stated that Members of Congress may create committees because of the immense workload of legislators. Creating an advisory committee can “pare down Congress’s workload to more manageable dimensions or to handle and manage a problem in a timely manner.”<sup>66</sup>

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(...continued)

boundaries, but—as noted earlier in this report—uncertainties over whether some advisory committees should follow FACA remain.

<sup>61</sup> 5 U.S.C. Appendix § 3(2).

<sup>62</sup> 5 U.S.C. Appendix § 2(6).

<sup>63</sup> Amy B. Zegart, “Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions,” *Political Studies Quarterly*, vol. 34, no. 2 (June 2004), p. 372. Zegart specifically refers to presidential commissions, but agency heads and Members of Congress may create advisory bodies for similar reasons.

<sup>64</sup> *Ibid.*, p. 372.

<sup>65</sup> *Ibid.*, pp. 374-376.

<sup>66</sup> Colton C. Campbell, “Creating an Angel: Congressional Delegation to Ad Hoc Commissions,” *Congress & The* (continued...)

Since FACA's enactment, scholars and practitioners of government have debated whether advisory bodies, in fact, increase public interaction with the federal government.<sup>67</sup> Other debates continue over whether advisory committees have a positive effect on the federal government,<sup>68</sup> or if they are a symptom of a federal government that is not performing properly.<sup>69</sup>

## When FACA Applies

As noted earlier, FACA 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" that is "established by statute or reorganization plan," "established or utilized by the President," or "established or utilized by one or more agencies." All advisory bodies that fit this definition, however, are not necessarily entities that must adhere to FACA. The *Code of Federal Regulations* defines an advisory committee nearly identically to FACA's definition, but adds that the body must be created "for the purpose of obtaining advice or recommendations for the President or on issues or policies within the scope of an agency official's responsibilities."<sup>70</sup> In short, FACA applies when an advisory committee is "either 'established' or 'utilized' by an agency."<sup>71</sup> Pursuant to FACA, any advisory body that performs a regulatory or policy-making function can not be a FACA entity.

Although both FACA and the *Code of Federal Regulations* define advisory committees, it may sometimes be unclear whether some advisory committees—especially those created by statute—must adhere to FACA requirements. Advisory bodies created by the executive branch that fit FACA criteria are governed by FACA.<sup>72</sup> Advisory bodies that are created by statute, however, may or may not be obligated to follow FACA requirements—often depending on who appoints committee members and to whom the committee must report its findings.<sup>73</sup> If, for example, a statutorily created advisory committee reported only to Congress and to no one within the

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(...continued)

*Presidency*, vol. 25, no. 2 (Autumn 1998), pp. 161-182.

<sup>67</sup> Brian C. Murphy, "Implementation of the Federal Advisory Committee Act: An Overview," *Government Publications Review*, vol. 9 (January-February 1982), pp. 3-27; Jerry Mitchell, "Representation in Government Boards and Commissions," *Public Administration Review*, vol. 57, no. 2 (March - April 1997), pp. 160-167.

<sup>68</sup> William H. Miller, "Advisory Committee: The Invisible Branch of Government," *Industry Week*, February 23, 1976, pp. 30-40, 40-45, 47-48; Gary J. Schmitt, "Why Commissions Don't Work," *The National Interest*, vol. 15 (Spring 1989), pp. 58-66.

<sup>69</sup> Francis E. Rourke and Paul R. Schulman, "Adhocracy in Policy Development," *The Social Science Journal*, vol. 26, no. 2 (April 1989), pp. 131-142.

<sup>70</sup> 41 C.F.R. § 102-3.25.

<sup>71</sup> 41 C.F.R. Appendix to Subpart A of § 102-3.

<sup>72</sup> The Homeland Security Advisory Council is an example of a FACA advisory committee that was created by an agency and reports to the agency's head (the Secretary of the Department of Homeland Security (DHS)). The advisory body was created by statute (6 U.S.C. § 451), which gave DHS authority to create advisory committees. It was DHS, however, that drafted the council's charter and defined its mission, membership, and duties. More information about the Homeland Security Advisory Council is available in the FACA Database, <http://fido.gov/facadatabase/default.asp>.

<sup>73</sup> The Advisory Committee on Student Financial Assistance was created by statute (20 U.S.C. § 1098), but is subject to FACA. U.S. Code defines the committee's mission, membership, duties, and reporting requirements. More information about the Advisory Committee on Student Financial Assistance is available in the FACA Database, <http://fido.gov/facadatabase/default.asp>. The National Commission on Terrorist Attacks Upon the United States (commonly referred to as the 9-11 Commission) is not subject to FACA, and is explicitly exempted from the act in its charter. The statute creating the committee (P.L. 107-306; 116 Stat. 2408), however, required the committee to hold public meetings "to the extent appropriate" and to "release public versions of the reports."



executive branch, FACA guidelines likely would not apply.<sup>74</sup> If, however, the same committee reported to both Congress and the President, it is unclear whether FACA guidelines would apply. According to GSA, it is generally up to the agency that hosts the advisory body to determine whether FACA statutes are applicable.<sup>75</sup> To avoid confusion over whether a committee is governed by FACA, Members of Congress can include a clause within committee-creating legislation to explicitly clarify whether a committee is to be subject to FACA.

While FACA guidelines may improve both the reality and perception of transparent governmental operation and accessibility, the guidelines may also place a number of additional chartering, record-keeping, notification, and oversight requirements on the entity. In particular, agencies have claimed that compliance with the various FACA requirements are cumbersome and resource intensive, thereby reducing the ability of committees to focus on substantive issues in a spontaneous and timely fashion.<sup>76</sup> Moreover, other scholars have argued that the scope of the openness requirements could have the practical effect of stifling candid advice and discussion within a committee.<sup>77</sup> Congress may choose to exempt a congressionally created advisory body from FACA to allow it to operate more quickly than FACA guidelines would permit. For example, the requirement that all meetings be posted “with timely notice” in the *Federal Register*<sup>78</sup> can slow down the daily operations of an advisory body, which will typically not hold meetings until 15 days after the notice is published.

Committees that consist entirely of part- or full-time federal employees are explicitly exempted from FACA, as are committees created by the National Academy of Sciences or the National Academy of Public Administration.<sup>79</sup> Committees created by or operating within the Central Intelligence Agency or the Federal Reserve System are also FACA exempt.<sup>80</sup> Some specific committees—for example the Commission on Government Procurement—have been identified by statute as FACA exempt as well (P.L. 105-153).

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<sup>74</sup> FACA was initially created to help both the public and Members of Congress better understand and oversee the burgeoning number of advisory committees being placed within the executive branch agencies – predominantly created by agency heads and the President. A January 26, 1997 memorandum from DOJ to the GSA’s acting general council found, in one case of uncertain FACA application, that “the majority of the Commissioners were congressionally appointed; that the congressional leadership controlled the choice of the Commission’s Chair; and that the Commission carried out only information-gathering and advisory functions, which need not be performed by the executive branch.” The entity, therefore, was determined to be outside the scope of FACA. The memorandum added that even in cases where congressional actors determined a minority of appointees, the entity could still be outside the realm of FACA. See U.S. Department of Justice, *Applicability of 18 U.S.C. § 208 To National Gambling Impact*, Memorandum for the Acting Counsel General Services Administration, January 26, 1997, footnotes 2 and 15, at [http://www.usdoj.gov/olc/hewitt4.htm#N\\_2\\_](http://www.usdoj.gov/olc/hewitt4.htm#N_2_).

<sup>75</sup> Information provided electronically to the author by GSA on January 16, 2009. The agency’s Committee Management Officer (CMO) or the FACA attorney may determine whether FACA is applicable. Most agencies do have FACA attorneys, according to GSA, but they are not statutorily required to have such a position. If a committee’s FACA status is disputed, a court order may determine whether FACA should apply to the entity.

<sup>76</sup> Stephen P. Croley and William F. Funk, “The Federal Advisory Committee Act and Good Government,” *Yale Journal on Regulation*, vol. 14, no. 2 (Spring 1997), pp. 503-504.

<sup>77</sup> Dover A. Norris-York, “The Federal Advisory Committee Act: Barrier Or Boon to Effective Natural Resource Management,” *Environmental Law*, vol. 26 (1996), pp. 419, 425-426.

<sup>78</sup> 5 U.S.C. Appendix § 9(2).

<sup>79</sup> 5 U.S.C. Appendix § 3.

<sup>80</sup> 5 U.S.C. Appendix § 4.

## **FACA and the 111<sup>th</sup> Congress**

On March 5, 2009, Representative William Lacy Clay reintroduced legislation (H.R. 1320) in the 111<sup>th</sup> Congress. The bill would require that members of advisory committees be selected without regard to their partisan affiliation. Pursuant to the legislation, which is known as the Federal Advisory Committee Act Amendments of 2009, executive branch agency heads would be authorized to require members serving on advisory committees to fully disclose any actual or potential conflicts of interest. The GSA Administrator would be given authority to create regulations and guidelines to further ensure that an advisory committee offered impartial advice and recommendations. These regulations and guidelines would apply to all FACA committees and subcommittees. Also, advisory committees would be required to create websites on which they would publish advance notice of meetings and provide access to proceedings. The bill was sent to the House Committee on Oversight and Government Reform, and ordered to be reported from the committee on March 10, 2009. The bill was reported on June 4, 2009, and then placed on the Union Calendar that same day. No further action was taken on the bill.

The bill would clarify certain transparency requirements for federal advisory committees and their members. While the bill could make federal advisory committees more accessible to the Congress and the public, it would also grant the GSA—an executive branch agency—greater control over how FACA committees generate their recommendations. Such action would remove some congressional control from FACA committee operations.

H.R. 1320 is similar to legislation introduced April 4, 2008, by Representative Clay in the 110<sup>th</sup> Congress (H.R. 5687). The Federal Advisory Committee Act Amendments of 2008 passed the House on June 24, 2008. On June 25, the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. No further action was taken on the bill.

## **Creating a FACA Committee**

Among the considerations pertinent to the creation of an advisory committee and to its composition, operation, and effectiveness are the following: defining the committee's purpose, establishing committee membership, defining committee duties, setting the committee's powers, allocating proper support staff and office space, and mandating the committee's reporting requirements.

### **Establishment and Mandate**

Each committee must be given both a name and certain duties to fulfill. In many committee charters the entity is introduced by name and then a brief statement of mission is offered. The charter's language may include highlights of agency, presidential, or congressional findings that prompted the committee's creation—but such findings are not required. The charter must identify the authority for the establishment of the committee, including any statutes or other executive branch documents that authorized or required its creation. Advisory committees can be authorized by statute, required by statute, created by executive order, or created by agency authority. The President's Board of Advisors on Historically Black Colleges and Universities, for example, is authorized by E.O. 13256 of February 12, 2002. On September 28, 2007, E.O. 13446 renewed the board through September 30, 2009. On September 29, 2009, E.O. 13511 renewed the board through September 30, 2011. In contrast, the Air Traffic Procedures Advisory Committee was

created by agency authority. Its powers and mission are detailed in its charter, which is available in the FACA Database.<sup>81</sup>

Once committee authority is established, the charter often includes a section on “duties” and “function” specifying the committee’s mandate or responsibilities. The 2010 Dietary Guidelines Advisory Committee within the Department of Agriculture, for example, has its duties delineated as both “advisory” and “time-limited.”

The Committee shall provide independent, science-based advice and recommendations for the development of the Dietary Guidelines for Americans, 2010 which form the basis of Federal nutrition programs, nutrition standards, and nutrition education for the general public.... The Committee shall be established for the single, time-limited task of reviewing the 2005 edition of the Dietary Guidelines for Americans and determining if, on the basis of current scientific and medical knowledge, revision is warranted.<sup>82</sup>

A committee’s powers and objectives are best stated in specific terms to guide the panel’s members and staff in carrying out their responsibilities. Charters should authorize enough autonomy to ensure that the advisory body operates independently of the agency that hosts it as well as the authority that created it. The assigned objectives should be realistically achieved within the time constraints placed on the committee. The committee will also need time to acquire staff, find suitable office space, and work out other logistical concerns. Upon completion of these objectives, the committee will need additional time to create a final report, file any required records, and vacate the office space.

## **Membership**

There are few restrictions on the membership of FACA committees. As noted earlier in this report, all FACA committees must have at least one member who is not a “full-time, or permanent part-time” officer or employee of the federal government.<sup>83</sup> Membership must also “be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”<sup>84</sup> Federal ethics statutes and regulations also may affect committee membership.<sup>85</sup>

When designing an advisory committee, however, the entity should be designed to ensure completion of the intended mission. The size of the committee should be small enough to allow all members a chance to communicate their expertise and opinion, but large enough to maintain a quorum even when a few members are absent. Size and member appointment, therefore, will largely depend on the committee’s functions and mandate. Members are often appointed on a

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<sup>81</sup> See the FACA Database at <http://fido.gov/facadatabase/>.

<sup>82</sup> U.S. Department of Agriculture, “Charter of the 2010 Dietary Guidelines Advisory Committee,” available at the FACA Database, <http://fido.gov/facadatabase/>.

<sup>83</sup> 5 U.S.C. Appendix § 3.

<sup>84</sup> 5 U.S.C. Appendix § 5.

<sup>85</sup> Federal ethics rules may prevent federal employees with a real or perceived conflict of interest from serving on certain advisory committees. Conflict of interest statutes and regulations from the U.S. Office of Government Ethics would apply to advisory bodies in which the members were full-time federal employees or special government employees (SGEs), pursuant to 18 U.S.C. § 202(a). SGEs must adhere to all federal ethics requirements in 18 U.S.C. §§ 201, 203, 205, 207, and 208. Advisory committee members who are designated as representatives (instead of SGEs) are not subject to federal ethics requirements.

staggered schedule to ensure that there are always a few continuing committee members serving at any given time. Some committees are designed to include specific members of the federal government or their designees. For example, among the 15 committee members written into the charter of the U.S. Military Academy Board of Visitors are

- the chairperson of the Committee on Armed Services of the Senate, or designee;
- three other members of the Senate designated by the Vice President or the President pro tempore of the Senate, two of whom are members of the Senate Committee on Appropriations; and
- the chairperson of the Committee on Armed Services of the House of Representatives, or designee.

Other committee charters contain specific language in their charters that describe certain qualifications or expertise required for membership. The Exxon Valdez Oil Spill Public Advisory Committee Charter, for example, created a 15-member committee to be filled by members with the following areas of expertise or qualifications:

- aquaculturist/mariculturist (e.g., fish hatcheries and oyster/shellfish farming);
- commercial fisher (e.g., commercial fishing for salmon, halibut, herring, shellfish and bottom fish; including boat captains and crews, cannery owners/operators, and fish buyers);
- commercial tourism business person (e.g., promoting or providing commercial travel or recreational opportunities, including charter boating, guiding services, visitor associations, boat/kayak rental);
- recreation user (e.g., recreation activities that occur within the area, including kayaking, power boating, sailing, sightseeing);
- conservationist/environmentalist (e.g., organizations interested in the wise use and protection of natural resources);
- local government (e.g., incorporated cities and boroughs in the affected area);
- Native landowner (e.g., regional or village corporations in the affected area established by the Alaska Native Claims Settlement Act);
- tribal government (e.g., federally recognized tribes in the affected area);
- scientist/technologist (e.g., organizations, institutions, and individuals involved in, or with expertise in, scientific and research aspects of the affected area/resources and/or the effects of the oil spill and/or the technical application of scientific information);
- sport hunter/fisher (e.g., hunting and/or fishing for pleasure);
- subsistence user (e.g., customary and traditional use of wild renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles; and for customary trade);
- regional monitoring program operator (e.g., monitoring and reporting on environmental conditions in the affected area, including monitoring for pollution and the status of biological resources);

- marine transportation operator (e.g., transport of goods and services in marine waters, including piloting, tug operations, barge operations, oil tankers and pipelines, shipping companies); and
- public-at-large (e.g., representing the affected area of the oil spill and its people, resources, and/or economics).<sup>86</sup>

Still other charters include membership positions for Members of Congress, the President, or agency heads to appoint. By granting appointment powers to a variety of federal institutions and to those with a variety of viewpoints, a committee can gain a widespread base of support. With a varied membership, however, the entity that created the committee may lose some control over the actions or direction of the advisory body because the members may not reflect the desired ends of Congress, the President, or an agency head. A multifarious membership may also make the final report more difficult to create because there may be little agreement on what recommendations or advice should be given.

## **Compensation and Travel**

Advisory panel members who are not employees or officers of the federal government may or may not receive compensation for their work on a committee. The authority that designs the committee also determines whether committee members are to receive pay, and—if they are paid—their pay level. Neither committee members nor staff may be paid more than the equivalent of Executive Level IV (\$155,500 for 2010). Committee members and staff may also be paid for travel expenses as well as a per diem.<sup>87</sup>

## **Committee Staff**

Advisory committee staff must be assembled quickly if the entity is to complete its mission in the time allotted. Generally speaking, most committees include an executive director, staff members, committee members, and—occasionally—outside consultants.<sup>88</sup> While committee staff may draft most of what will become a committee’s final report, committee members approve the final product.

## **Committee Reports**

In addition to a final report, some committees may be required to make interim or annual reports to the President, Congress, or department heads. These reports are often listed in the “duties” section of a committee’s charter. A committee’s recommendations are strictly advisory and cannot make policy action by recipients of the report.

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<sup>86</sup> From the U.S. Department of the Interior, “Exxon Valdez Oil Spill Public Advisory Committee Charter,” available at the FACA Database, <http://fido.gov/facadatabase/>. The charter requires that one member represent each of the areas of expertise, except two members are to be appointed from the public-at-large.

<sup>87</sup> Per diem rate varies by date and location. According to GSA, the smallest per diem is currently \$46 for meals and incidental expenses and \$70 for lodging, [http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA\\_BASIC&contentId=17943](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=17943).

<sup>88</sup> FACA entities may use the services of outside consultants in accordance with 5 U.S.C. § 3109(b). Federal employees may also be detailed to staff an advisory committee.

In the case of a presidential advisory committee,<sup>89</sup> however, the President must submit to Congress—within a year of receiving a committee’s final report—any actions he will take on the recommendations. If the President does not make policy changes resulting from the recommendations, he must explain his inaction.<sup>90</sup>

A statute that creates a FACA committee can include instructions for the entities that receive a final report. For example, a statute can require the President to send a report to Congress with policy suggestions that are based on the committee’s recommendations. The effort the President may put into creation of that report, however, may largely correspond to the administration’s interest in the committee and its findings. If the President is not particularly interested in the committee’s issues or mission, he may not place much effort into a required report to Congress. He also may not give much attention to the advisory body’s recommendations overall.

## **Committee Powers**

Explicit authority may be needed to accomplish certain special duties for which an advisory body may be responsible. Many committees are granted authority to hold hearings, take testimony, receive evidence, use the franking privilege,<sup>91</sup> accept certain donations, and permit volunteers to work on the staff. Vesting a committee with subpoena power, however, is done on a very selective basis—and is largely dependent upon the mission of the panel. A document search of the FACA Database found no current advisory committee charters that provide subpoena powers. One charter, however, explicitly denied the entity such authority.<sup>92</sup>

## **Bylaws and Procedures**

Specific procedural requirements—like quorum qualifications—can often be found in committee charters. Other bylaws, including election procedures to determine a chairperson, to tally committee votes, to fill membership vacancies, and to produce reports may be included in the charter. Committee procedures may be included in the legislation that creates an advisory body. If committee procedures are provided by statute, Congress may have greater control over the body’s operations, procedures, and outcomes. Conversely, if procedures are in statute, the advisory body may not have the autonomy to conduct meetings that provide for optimal opportunity to share candid advice and present new ideas.

Unless an advisory committee charter states otherwise, the General Services Administration’s designated federal officer<sup>93</sup> is responsible for approving or calling the meeting of the committee,

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<sup>89</sup> A presidential advisory committee directly advises the President. See 5 U.S.C. Appendix § 3.

<sup>90</sup> 5 U.S.C. Appendix § 6.

<sup>91</sup> For more information on the franking privilege, see CRS Report RL34274, *Franking Privilege: Historical Development and Options for Change*, by Matthew Eric Glassman.

<sup>92</sup> See the Cedar Creek & Bell Grove National Historical Park Advisory Commission Charter, available at the FACA Database, <http://fido.gov/facadatabase/>. The Cedar Creek & Bell Grove National Historical Park Advisory Commission is authorized by Congress to operate until December 8, 2020.

<sup>93</sup> GSA assigns a designated federal officer (DFO) to each FACA committee. Other duties of the DFO include maintenance of required records on costs and membership, oversight of efficient committee operations, maintenance of records for availability to the public, and provision of copies of committee reports to the Committee Management Officer for forwarding to the Library of Congress. 5 U.S.C. Appendix §10(3)(e).

approving the committee agenda (except for presidential advisory committees), adjourning meetings when it is determined to be in the public interest, and certifying minutes.<sup>94</sup>

## **Funding**

According to GSA's FACA Database, in 2009, the federal government spent more than \$361,493,408 on FACA committees—including operation of advisory bodies, compensation of members and staff, and reimbursement of travel and per diem expenses. According to GSA, \$45.6 million was spent on committee member pay (both federal and non-federal members) and \$172 million was spent on staff. An additional \$15.4 million was spent on consultants to FACA committees.<sup>95</sup>

Congress may directly fund a committee through the appropriations process, or it may carve out funding within an agency's annual appropriation. If a federal advisory body is not explicitly prohibited from doing so, it may also be funded through private donations. A committee charter may include a determination as to whether an entity may accept such private financial gifts. If a committee is permitted to accept donations or other, in kind, gifts, the authority that created the advisory body may require detailed recordkeeping of such donations in order to maintain transparency and to avoid the perception of undue influence.

## **Committee Termination**

Unless statutorily mandated or otherwise extended by the President or a federal officer,<sup>96</sup> an advisory committee will automatically terminate, pursuant to FACA, two years after its establishment. Consequently, most advisory committees must be rechartered with GSA every two years. Most national study committees created by statute are mandated to terminate 30 days after the submission of the final report, giving staff time to prepare the office for closing.

## **Analysis**

Congress has continued to use FACA as a way to gain greater control and oversight of committees created by the President or executive branch agency heads. FACA can also be used to generate increased transparency and enforce consistent recordkeeping among all advisory committees—whether they are created by the legislative or the executive branch.

Despite FACA's public notice, public access, and other reporting requirements, some parts of the act remain unclear. Whether an advisory committee should adhere to FACA, for example, is often open to legal interpretation. Congress may choose to enact legislation that would more clearly define which advisory bodies are subject to FACA.

The applicability of FACA is most clear when a committee has been created by the President or an agency head. If such a body performed only advisory duties, included at least one member

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<sup>94</sup> 41 C.F.R. §§ 102-3.120 and 102-3.165.

<sup>95</sup> See FACA Database, <http://fido.gov/facadatabase/>.

<sup>96</sup> The federal officer must be the agency head who created the advisory body. 5 U.S.C. Appendix § 14(A).

who is not a federal employee, and reported its findings to either an executive branch agency or the President, FACA will, most likely, apply. If, however, that same committee was created by statute and reported to both Congress and the President, its FACA status would be less certain.

FACA was primarily created to enhance congressional tools for oversight of executive branch advisory bodies. Congress, however, may choose to pass legislation that would require all advisory bodies to adhere to FACA statutes. Such an action could curb Congress's ability to create committees that have the flexibilities to act more quickly than a FACA committee—because non-FACA entities would not need to comply with all of the act's reporting and transparency requirements.

The 111<sup>th</sup> Congress could clarify whether any committees created by or reporting to Congress should be considered FACA committees. Under this option, only a committee whose statutory charter explicitly stated that FACA should apply would be required to adhere to the act. Additionally, Members of Congress could place certain desired FACA elements within a committee's statutory authority to tailor an advisory body to the desired amounts of both flexibility and oversight. If Congress were to enact legislation exempting congressionally created committees from FACA, concerns about transparency in government may arise. Congress may choose not to enact legislation, which would leave the FACA status of some advisory bodies uncertain. This uncertainty could culminate in legal challenges.

Members of Congress may also choose to clarify whether federal advisory committee members must abide by ethics requirements that are placed on federal employees. Under current GSA regulations, "agency heads are responsible for ensuring that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes and other Federal ethics rules."<sup>97</sup> Not all committee members must adhere to federal ethics codes, according to the *Code of Federal Regulations*.<sup>98</sup> If a committee member is designated as a special government employee, under 18 U.S.C. § 202(a), then he or she is subject to federal ethics regulations. If, however, the employee is deemed a "representative," federal ethics codes may not apply. Congress may choose to clarify whether FACA members are to adhere to federal ethics regulations. Such action could increase trust in advisory bodies and prevent claims of bias or improper action. Congress could, on the other hand, permit agency heads to maintain the authority to determine committee members' federal status, as well as determine if unethical actions have taken place. In this case, FACA bodies could be more vulnerable to claims of bias or improper action.

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<sup>97</sup> 41 C.F.R. § 102-3, Subpt. C, App. A.

<sup>98</sup> Ibid.