Articles

Advising the President: Separation of Powers and the Federal Advisory Committee Act

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I am indebted to my family, friends, and colleagues at LSU for their encouragement. I especially appreciate comments on early drafts of this Article from Theodore Blumoff, James Bowers, Nelson Lund, David Marblestone, and John McGinnis. I was aided in this effort by capable research assistants David Clark, Jonathan Hirsch, and Preston Marx III.

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Congressmen are always advising Presidents to get rid of Presidential advisers. That is one of the most constant threads that runs through American history and Presidents ordinarily do not pay attention . . . .¹

I. INTRODUCTION

In 1817 President James Monroe dispatched former U.S. Attorney General Caesar A. Rodney, Baltimore lawyer Theodorick Bland, and Chief Clerk of the State Department John Graham to South America, in anticipation of possible diplomatic recognition of the former Spanish colonies. Later that year, President Monroe told Congress that he had appointed “three distinguished citizens” as commissioners

[t]o obtain correct information on every subject in which the United States are interested; to inspire just sentiments in all persons in authority, on either side, of our friendly disposition so far as it may comport with an impartial neutrality, and to secure proper respect to our commerce in every port and from every flag . . . .²

Only after the commission departed did the President request an appropriation of \$30,000 to pay for the trip.

Congress was not immediately persuaded of either the wisdom or the legality of the President’s act. Speaker of the House Henry Clay claimed that the President had “made these appointments without the authority of the Constitution, or of any law recognizing them” and the “constitutional point it involved . . . made it obnoxious.”³ Congress ultimately acquiesced in the President’s request. Nonetheless, it refused to appropriate the money for the particular mission, lest it be “supposed that the persons sent by the President were official characters . . . [whose] appointments should be submitted to the Senate,” rather than mere “agents appointed under the discretion of the Executive to acquire information.”⁴ Instead, Congress appropriated \$30,000 to a contingent fund, leaving to the President’s discretion the occasion for its use.⁵

In January 1993 President Bill Clinton appointed a Task Force on Health Care Reform, which comprised six members of the Cabinet, senior White

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1. President’s News Conference, 1963 PUB. PAPERS 375 (John F. Kennedy, May 8, 1963).

2. James Monroe, First Annual Message, in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 1817, at 583 (James D. Richardson ed., New York, Bureau of National Literature, Inc. 1897).

3. 32 ANNALS OF CONG. 1466 (1818).

4. *Id.* at 1652 (statement of Rep. Forsyth).

5. *Id.* The commissioners returned in so much disagreement over their findings that they were unable to prepare a joint report. *See id.* at 1967–2316 (report of Caesar A. Rodney); *see also* HARRY AMMON, JAMES MONROE: THE QUEST FOR NATIONAL IDENTITY 428–29 (1971); WILLIAM P. CRESSON, JAMES MONROE 301 (Archon Books 1971) (1946); HENRY M. WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 220–22, 416–19 (1929).

House officials, and the First Lady, who served as chair.⁶ Of this group, only the First Lady received no federal salary and held no office cognizable under the laws of the United States.⁷

Shortly thereafter, various associations sought a preliminary injunction to compel the Task Force to make its meetings public. Under the terms of the Federal Advisory Committee Act (FACA),⁸ an advisory body that includes at least one person who is not a full-time federal officer or employee must conduct public meetings and open its records to public inspection. The plaintiffs claimed that the President, by formally seeking the views of the First Lady, brought the Task Force within the purview of the Act. While the district court held FACA unconstitutional, the court of appeals ruled that the First Lady was a full-time federal employee and thereby avoided the application of the Act.⁹

This Article examines the tensions between Congress, the judiciary, and the President over presidential use of advisory committees.¹⁰ It argues that courts, in attempting to avoid difficult constitutional questions, have misread FACA. Properly construed, FACA violates separation of powers by limiting the terms on which the President can acquire information from nongovernmental advisory committees. Part II places the debate over FACA in context by exploring the extensive history of presidential reliance on outside advisers. From George Washington to Bill Clinton, presidents have appointed, with or without prior authorization from Congress, informal observers or advisers like James Monroe's "commissioners." Holding no official advisory position in the federal government, these advisers are simply private citizens called upon by the President to offer their views and assistance on particular matters.

Although presidents have long regarded it as their prerogative to appoint and consult outside advisers, Congress has not reacted consistently to such presidential practices, at times questioning presidential authority or restricting the President's spending, and at other times acquiescing by agreeing to fund the President's committees or ignoring the practice altogether. With FACA, Congress for the first time enacted nonspending restrictions on the President's

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6. President's Remarks on Health Care Reform, 29 WEEKLY COMP. PRES. DOC. 96 (Jan. 25, 1993).

7. Cf. 3 U.S.C. § 105(e) (1988) (authorizing assistance and services to President's spouse for helping in discharge of President's duties and responsibilities).

8. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. at 1175 (1988)).

9. Association of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993), *rev'g* 813 F. Supp. 82 (D.D.C. 1993).

10. The terms "commission," "advisory committee," and "presidential advisory committee" have a variety of definitions. See George B. Galloway, *Presidential Commissions*, 1 EDITORIAL RES. REP. 351, 351-52 (1931). I use the term "advisory committee" in a way that is generally consistent with the Federal Advisory Committee Act, which defines "advisory committee" as "any committee, board, commission, council, conference, panel, task force, or other similar group" that provides "advice or recommendations" to the President, and excludes such bodies that also exercise operational functions. See Federal Advisory Committee Act §§ 3(2), 9(b).

use of advisory committees. Passed in 1972, FACA established guidelines for the composition and conduct of advisory committees. It governs their charters and duration, and it requires committees—whether created by Congress, established by the President, or “utilized” by the President (although neither created by Congress nor established by the President)—to open their meetings and records to the public. FACA represented a significant change in the uncertain historical balance between Congress and the President over his use of advisory committees.

In *Public Citizen v. United States Department of Justice*,¹¹ the Supreme Court altered the balance again, this time ostensibly in favor of the President. The Court held that when the President consulted with the American Bar Association’s (ABA) Standing Committee on the Federal Judiciary, a committee neither established nor funded by the federal government, he did not “utilize” the committee within the meaning of FACA. Ignoring the record of interbranch conflict and selectively citing FACA’s legislative history, the Court narrowly interpreted FACA’s scope to avoid addressing its implications for the separation of powers. The Court in *Public Citizen* was, as Part III demonstrates, quite wrong in its reading of the Act. Congress intended to test the outer reaches of its authority by extending FACA to advisory committees neither established nor funded by the federal government. Although the Court’s decision relieved, at least temporarily, some of the tension between Congress and the President over his use of advisory committees, it did so at the expense of constitutional and statutory clarity.

The Court’s obfuscation in *Public Citizen* leaves us with the question with which we began: What powers does the President have to consult with outside advisers? And if Congress decides to control that relationship, can its efforts extend beyond simple control of the purse? I explore these difficult questions in Part IV. I conclude that the President does have the power to consult with outside advisers, and that FACA unconstitutionally infringes upon that power. FACA fails to draw a distinction between congressionally created advisory committees and presidentially created advisory committees, and assumes congressional authority to control both. Thus, where Congress might have the power to compel consultation, in FACA Congress seized the power to forbid it; where Congress might have the power to expand the sources of information available to the President, in FACA Congress seized the power to restrict it. FACA constrains the President’s power to consult with advisory committees he has established or utilized, including those that are funded privately. FACA therefore allows the President to acquire information from nongovernmental advisory committees only on Congress’ terms. In the process, FACA exceeds the powers of Congress and diminishes long-recognized presidential powers.

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11. 491 U.S. 440 (1989).

II. CONGRESS AND PRESIDENTIAL ADVISORY COMMITTEES: A HISTORY OF LEGISLATION

A. *Presidential Advisory Committees: Their Use and Abuse*

Presidents of the United States have long recognized the need for outside advisers. Unlike Congress, which has established a formal mechanism to hear the advice of experts and receive the views of private citizens, and unlike the federal courts, which engage in an even more formal hearing process, the executive branch must employ less systematic means of obtaining views from the private sector.¹² Presidents have frequently either constituted a group of outside persons—an advisory committee—or looked to a preexisting group for advice on domestic and foreign matters.¹³ These groups are not part of the formal structure of our government. Typically occupying little or no government office space, they have no authority to bind the government. As President Herbert Hoover stated, advisory committees “are not for executive action (for which they are anathema), but are one of the sound processes for the search, production, and distribution of the truth.”¹⁴ Yet advisory committees have served and continue to serve prominent public functions, from Hoover’s National Commission on Law Observance and Enforcement (the Wickersham Commission), established to advise on the enforcement of Prohibition-era laws; Roosevelt’s commission to investigate the attack on Pearl Harbor (the Roberts Commission); Johnson’s Commission on the Assassination of President Kennedy (the Warren Commission); Johnson’s National Advisory Commission on Civil Disorders (the Kerner Commission); Reagan’s Special Review Board on the role of the National Security Council in the Iran-Contra

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12. Delegates to the Constitutional Convention unsuccessfully proposed the creation of a privy council as a permanent advisory body to the President. The task of the privy council would have been to “advise [the President] in the matters respecting the execution of his office, which he shall think proper to lay before them; but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt.” 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (photo. reprint 1987) (J. Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES]; see also NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 60, 481 (W.W. Norton & Co. 1987) (1893). James Wilson opposed such a council, “which oftener serves to cover, than prevent malpractices.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97 (Max Farrand ed., 1911) [hereinafter FARRAND].

13. At the end of fiscal year 1992, the President, in an annual report prepared by the General Services Administration (GSA), reported some 1141 executive branch advisory committees. More than 70% were established by congressional initiative; of these, Congress directed the President to establish 439, and authorized the President to establish and consult with another 360. Federal agencies established 407 of the existing advisory committees, and 24 were established at the express direction of the President. The GSA classified only 57 as “presidential advisory committees.” GENERAL SERVICES ADMINISTRATION, TWENTY-FIRST ANNUAL REPORT OF THE PRESIDENT ON FEDERAL ADVISORY COMMITTEES 8, 12 (1993) [hereinafter TWENTY-FIRST ANNUAL REPORT OF THE PRESIDENT].

14. Letter from Herbert Hoover to W.C. Thompson (Jan. 1930), quoted in Galloway, *supra* note 10, at 357.

Affair (the Tower Commission); Bush's National Education Goals Panel on the future of American education; to Clinton's Health Care Task Force.¹⁵

Presidential advisory committees are generally created in one of four ways.¹⁶ First, Congress creates advisory committees for the President.¹⁷ Second, Congress may authorize or direct the President to establish an advisory committee; the President then establishes the committee in response to the authorization.¹⁸ Third, the President may create an advisory committee on his own initiative and announce its formation by executive order, proclamation, or press release.¹⁹ Fourth, the President may request that private citizens or

15. President's Inaugural Address, 1929 PUB. PAPERS 4 (Mar. 8, 1929) (Wickersham Commission); Exec. Order No. 8983, 6 Fed. Reg. 6569 (1941) (Roberts Commission); Exec. Order No. 11,130, 3 C.F.R. 795 (Comp. 1963) (Warren Commission); Exec. Order No. 11,365, 3 C.F.R. 310 (Comp. 1967) (Kerner Commission); Exec. Order No. 12,575, 51 Fed. Reg. 43,718 (1986) (Tower Commission); Joint Statement, 1990 PUB. PAPERS 1078 (July 31, 1990) (National Education Goals Panel); President's Remarks on Health Care Reform, *supra* note 6, at 96 (Health Care Task Force).

Congress subsequently codified the creation of three of these commissions established by executive order: the Wickersham Commission, Pub. L. No. 70-1034, 45 Stat. 1613 (1929); the Roberts Commission, Pub. L. No. 77-370, 55 Stat. 853 (1941); and the Warren Commission, Pub. L. No. 88-202, 77 Stat. 362 (1963). The D.C. Circuit held that the Health Care Task Force, chaired by the First Lady, was not an advisory committee within the meaning of FACA, although its subgroups were subject to FACA. *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915-16 (D.C. Cir. 1993), *see infra* notes 216-23 and accompanying text.

16. *See generally* CARL M. MARCY, *PRESIDENTIAL COMMISSIONS 7-16* (1945), *TERRENCE R. TUTCHINGS, RHETORIC AND REALITY: PRESIDENTIAL COMMISSIONS AND THE MAKING OF PUBLIC POLICY* 17-21 (1979) (discussing circumstances surrounding creation of commissions); *THOMAS R. WOLANIN, PRESIDENTIAL ADVISORY COMMISSIONS 54-72* (1975) (explaining how presidents create commissions).

17. *E.g.*, Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901-2926, 104 Stat. 1485, 1808-24 (codified as amended at 10 U.S.C. § 2687 (1988 & Supp. IV 1992)) (creating Defense Base Closure and Realignment Commission); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 2101, 101 Stat. 1330, 1330-33 (creating National Economic Commission). Although the Base Closure Commission was created by statute and the commissioners were appointed by and with the advice and consent of the Senate, the Commission was announced as a presidential commission, 56 Fed. Reg. 12,712 (1991), and is listed as a presidential advisory committee, *TWENTY-FIRST ANNUAL REPORT OF THE PRESIDENT*, *supra* note 13, at 41.

At times the President is the unwilling recipient of an advisory committee. *E.g.*, Pub. L. No. 90-100, 81 Stat. 253 (1967) (creating Commission on Obscenity and Pornography); *see WOLANIN, supra* note 16, at 58. President Nixon publicly rejected the Commission's findings. *See Statement About the Report of the Commission on Obscenity and Pornography*, 1970 PUB. PAPERS 940 (Oct. 24, 1970).

18. *E.g.*, 19 U.S.C. § 2155(b)-(c) (1988) (authorizing formation of Advisory Committee for Trade Policy and Negotiations and its various policy and sector advisory committees). The President delegated his authority under the law to the Secretary of Commerce and the U.S. Trade Representative, and they established the advisory committee by joint announcement. 45 Fed. Reg. 14,090 (1980), *see also* 15 U.S.C. § 5511(b) (Supp. IV 1992) (directing establishment of High-Performance Computing Advisory Committee). The High-Performance Computing Advisory Committee has not been established, although the Clinton Administration has indicated its intention to establish one. 58 Fed. Reg. 49,025, 49,028 (1993).

On occasion Congress has given the President general authority to create advisory committees to assist in particular areas. *See* 22 U.S.C. § 502 (1988) (authorizing advisory committees generally to assist in Inter-American relations); *id.* § 2103(e) (authorizing committees generally to advise on health sciences), *id.* § 2456(d) (authorizing advisory committees generally to support foreign study programs).

19. *E.g.*, Exec. Order No. 12,878, 58 Fed. Reg. 59,343 (1993) (creating Bipartisan Commission on Entitlement Reform); Exec. Order No. 12,864, 58 Fed. Reg. 48,773 (1993) (creating U.S. Advisory Council on the National Information Infrastructure); Joint Statement, *supra* note 15, at 1078 (creating National Education Goals Panel); President's Remarks on Health Care Reform, *supra* note 6, at 96 (creating President's Task Force on National Health Reform by press release). As noted, the status of the Task Force is uncertain. *See supra* note 15. There is no apparent legal distinction between an advisory committee created by executive order and one created by a press release. *Cf. WOLANIN, supra* note 16, at 63-64.

bodies form an advisory committee, or he may use committees already established privately.²⁰

Advisory committees serve various purposes.²¹ The obvious and publicly invoked justification for advisory committees is the government's genuine need for information or advice, which the committees can provide at relatively little cost to the government. In addition, advisory committees serve a civic republican function by broadening the field from which the government seeks policy advice.²² As Professor Herring noted more than fifty years ago, "the broadening of administrative authority is an indication that the legislative body has reached the periphery of its own competence. The advisory committee provides a means of introducing the opinion of the governed at a highly strategic point . . . [and] brings bureaucracy into closer accord with those it must govern."²³

The government also uses advisory committees to legitimize agency viewpoints. An agency decisionmaker may have reached a tentative or even a firm conclusion about a particular matter, and may look to an advisory committee to validate that conclusion.²⁴ Politically, the agency's decision will not be salable without some outside, "neutral" support.²⁵ Thus, "[w]hat the

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(noting that advisory committees created by executive order are more likely to be funded by presidential resources, while advisory committees announced by press release tend to be funded by agency resources).

20. Because their formation lacks the ceremony of a statute, executive order, or press release, these advisory committees are difficult to identify. *E.g.*, *The Voices for States and Localities*, 13 NAT'L J. 2228, 2228 (1981) (noting that National Governors' Association first convened in response to request from Theodore Roosevelt). The National Governors' Association participates in a presidential advisory committee, the National Education Goals Panel. Joint Statement, *supra* note 15; *see also infra* notes 121-57 and accompanying text (discussing ABA Standing Committee on the Federal Judiciary); *infra* note 79 and accompanying text (discussing Business Advisory Council and Advisory Council on Federal Reports).

21. *See generally* WOLANIN, *supra* note 16, at 115-28; David S. Brown, *The Management of Advisory Committees: An Assignment for the '70's*, 32 PUB. ADMIN. REV. 334 (1972).

22. *See* Manes Specter, *Involving Clients and the Public in Federal Administration Through Advisory Committees*, in *FEDERAL CONTRIBUTIONS TO MANAGEMENT* 16, 29 (David S. Brown ed., 1971); Nicholas A. Ashford, *Advisory Committees in OSHA and EPA: Their Use in Regulatory Decisionmaking*, SCI. TECH. & HUM. VALUES, Winter 1984, at 72, 73; *see also* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1554-55 (1992).

23. E. PENDLETON HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* 349 (1936); *see* RICHARD A. WEGMAN, *THE UTILIZATION AND MANAGEMENT OF FEDERAL ADVISORY COMMITTEES* 31 (1983); W.F. WILLOUGHBY, *PRINCIPLES OF PUBLIC ADMINISTRATION* 171-72 (1927).

24. *See* FRANK POPPER, TWENTIETH CENTURY FUND, *THE PRESIDENT'S COMMISSIONS* 13 (1970); Specter, *supra* note 22, at 28; *see also* MARCY, *supra* note 16, at 39-40 (describing National Commission on Law Observance and Enforcement (Wickersham Commission) as "unmitigated failure" in part because of perception of presidential tampering); Thomas E. Cronin & Norman C. Thomas, *Federal Advisory Processes: Advice and Discontent*, SCIENCE, Feb. 26, 1971, at 771, 771-72; Jason DeParle, *Advise and Forget*, WASH. MONTHLY, May 1983, at 41, 41 (quoting unnamed staffer) ("Most of the members [of a particular advisory committee] would have recommended higher funding than the president wanted, and when the president appoints you, you don't want to turn around and kick him in the butt.").

25. *See* HERRING, *supra* note 23, at 356; MARCY, *supra* note 16, at 25 ("[Commissions] will not achieve a reputation as fact-finders if the President requests 'an impartial report in favor of' his pet projects."); WILLOUGHBY, *supra* note 23, at 174.

Commentators have suggested that some advisory committees are, in effect, "captured" by the body or person appointing them. "When 'experts' are employed they are likely consciously or unconsciously to reflect to some extent the position of their employer so far as that position is known." MARCY, *supra* note 16, at 82; *see also* T.B. Priest et al., *Corporate Advice: Large Corporations and Federal Advisory*

Government basically wants from advisory committees is not 'expert' advice, although occasionally this is a factor, but support."²⁶ Conversely, the decision will not be viable unless the agency can show the support of the key parties that will be affected; participation is an effective means of securing key party support, and may also dampen criticism from those within the sector represented on the committee.²⁷ In addition, government decisionmakers may feel the need to report to the public on a particular matter, but are unwilling or unable to commit the agency resources to an investigation.²⁸ Any action that the advisory committee might call for would not be immediate, and would possibly involve seeking legislation or other authority.

Finally, presidential advisory committees may serve purely political ends, as vehicles for communicating with Congress and the people, building support for proposals, or masking the government's unwillingness to act. The appointment of an advisory committee may help the government convey dangerous or unpopular views to the public.²⁹ The advisory committee educates and talks to the public, not only providing advice to the government, but also deflecting any criticism from the government.³⁰ The responsibility for making a decision is transferred to the advisory committee, and the committee's advice is then adopted wholesale by the President or by Congress.³¹ The creation of a committee, like hearings held before Congress, may also help the government give the public the impression that something is being done, while it avoids having to take action. Thus, the appointment of a committee buys the decisionmaker time and defuses a politically troublesome matter by deferring it until it fades from the public's memory or more immediate concerns subsume it.³²

In both their informational and political uses, advisory committees perform many of the same functions as congressional committees.³³ They serve as "special sources of information" that "amplify in their field of study the regular supply of information to the President, which comes to him in his combined

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Committees, SOC. SCI. Q., Mar. 1984, at 100, 101.

On advisory committee dynamics, see generally SOCIOLOGY AND PUBLIC POLICY THE CASE OF PRESIDENTIAL COMMISSIONS (Mirra Komarovsky ed., 1975) (describing and evaluating case studies of four presidential commissions).

26. HAROLD SEIDMAN, *POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION* 239 (1970); see also Lyman Bryson, *Notes on a Theory of Advice*, 66 POL. SCI. Q. 321, 323 (1951)

27. Cf. Raymond Streat, *Government Consultation with Industry*, 37 PUB. ADMIN. 1, 1 (1959)

28. See DAVID FLITNER, JR., *THE POLITICS OF PRESIDENTIAL COMMISSIONS* 23-28 (1986); WOLANIN, *supra* note 16, at 15-20 (referring to function of these committees as "window dressing").

29. See POPPER, *supra* note 24, at 10-11; Specter, *supra* note 22, at 28.

30. See Mark P. Petracca, *Federal Advisory Committees, Interest Groups, and the Administrative State*, 13 CONGRESS & PRES. 83, 84-85 (1986); see also Nancy K. Smith, *Presidential Task Force Operation During the Johnson Administration*, 15 PRES. STUD. Q. 320, 320-21 (1985).

31. See Natalie Hanlon, *Military Base Closings: A Study of Government By Commission*, 62 U. COLO. L. REV. 331, 331 (1991).

32. MARCY, *supra* note 16, at 43-44; WOLANIN, *supra* note 16, at 23-24, see also DeParle, *supra* note 24, at 43 (citing examples from Truman and Johnson Administrations)

33. CONG. GLOBE, 27th Cong., 2d Sess. app. at 370 (1842) (statement of Rep. Wise)

roles as Chief Executive, Commander-in-Chief[,] . . . constitutional participant in the legislative process, leader of his party, and prominent public leader."³⁴

B. *A History of Regulation of Presidential Advisory Committees*

Advisory committees are not a uniquely twentieth-century³⁵ or American phenomenon.³⁶ Theodore Roosevelt, who advocated the use of commissions as "the marriage of the new scientific principles of management and conservation,"³⁷ is generally considered to be the father of the modern presidential advisory commission.³⁸ Herbert Hoover extolled commissions as a means of "mak[ing] the fullest use of the best brains and the best judgment and the best leadership in our country,"³⁹ and both Woodrow Wilson and

34. OFFICE OF MANAGEMENT AND BUDGET, TEMPORARY PRESIDENTIAL ADVISORY COMMISSIONS 3 (1952) [hereinafter TEMPORARY PRESIDENTIAL ADVISORY COMMISSIONS].

35. The first use of a presidential advisory committee appears to be the commission sent by President Washington to negotiate peace with the leaders of the Whiskey Rebellion. *See, e.g.,* FLITNER, *supra* note 28, at 7-8; CONG. GLOBE, 27th Cong., 2d Sess. 482 (1842) (statement of Rep. Cushing). *But see* WOLANIN, *supra* note 16, at 5 (arguing that group sent to end Whiskey Rebellion "bears only a slight resemblance to presidential advisory commissions appointed to analyze broad questions of public policy"). On August 7, 1794, Washington sent Attorney General William Bradford, U.S. Senator James Ross, and Pennsylvania Supreme Court Justice Jasper Yeates to negotiate with the insurgents. "The commissioners were empowered to grant an amnesty for all past criminal behavior in return for assurances that 'the laws be no longer obstructed in their execution . . .'" THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 196 (1986). The peace commission reported to a committee of Pennsylvanians that it had the power to promise that the President would not pursue charges of treason, would issue a general pardon, and would allow state courts to handle suits based on the revenue laws. As to the last condition, "it is to be understood, that of this [the President] must be the judge, and that he does not mean by this determination to impair any power vested in the Executive of the United States." H.M. BRACKENRIDGE, *HISTORY OF THE WESTERN INSURRECTION* 203 (Pittsburgh, W.S. Haven 1859). The commissioners submitted a report to the President on September 24, 1794, suggesting that military force would be necessary. 6 THE DIARIES OF GEORGE WASHINGTON 175-76 (Donald Jackson & Dorothy Twohig eds., 1976). After the Whiskey Rebellion, Congress moved quickly to ratify expenditures for the negotiations, for which no appropriations had been made. Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, LAW & CONTEMP. PROBS., Spring 1976, at 12, 16.

36. *See* Streat, *supra* note 27, at 1 (commenting on extensive British experience with advisory commissions); *see also* John A. Fairlie, *Advisory Committees in British Administration*, 20 AM. POL. SCI. REV. 812 (1926); Fritz M. Marx, *Commissions of Inquiry in Germany*, 30 AM. POL. SCI. REV. 1134 (1936); W. Harrison Moore, *Executive Commissions of Inquiry*, 13 COLUM. L. REV. 500 (1913).

37. Mark Greenberg & Rachel Flick, *The New Bipartisan Commissions*, J. CONTEMP. STUD., Fall 1983, at 3, 7. In 1923, the President of the American Political Science Association spoke glowingly of advisory commissions as a "neglected . . . opportunit[y] . . . the possibilities of which have not been clearly perceived." Harry A. Garfield, *Recent Political Developments: Progress or Change?*, 18 AM. POL. SCI. REV. 1, 2 (1924).

38. WOLANIN, *supra* note 16, at 5. The term "presidential advisory committee," as I will use it, includes advisory committees that either report to the President or report to a close presidential adviser on a matter of immediate concern to the President. The term thus encompasses advisory committees established or authorized by Congress and those created or recognized by the President under his own authority. *See supra* notes 16-20 and accompanying text. I mainly focus on those created under the President's own authority, although I will discuss the constitutional status of those advisory committees that Congress establishes directly or authorizes the President to establish in order to advise him. *See infra* notes 248-59 and accompanying text. While this latter group may include advisory committees that report to the President, the initiative for their creation or use by the President lies with Congress. *See also* TEMPORARY PRESIDENTIAL ADVISORY COMMISSIONS, *supra* note 34, at 1-2.

39. President's Address to the Gridiron Club, 1929 PUB. PAPERS 472 (Dec. 14, 1929).

Franklin Roosevelt made extensive wartime use of industry advisory committees as a corporate-government partnership.⁴⁰ Many of Roosevelt's committees survived the end of World War II, and their continued existence led, quite directly, to the passage of FACA.

In the post-World War II period, presidents increasingly have consulted advisory committees on everything from dam construction, to education policy, to health care, to airline industry reform, to sports policy. Presidents have charged advisory committees with conducting investigations, making recommendations in anticipation of future legislation, and advising on the discharge of specific responsibilities.

1. *The Act of 1842 and Early Appointments of Presidential Advisory Committees*

Cataloguing presidential advisory committees is almost impossible. No systematic study of early presidential advisory committees has been conducted. Henry Clay declared in 1842 that presidential advisory committees had clearly "grown into use long since in the Executive Department" and "no doubt in this instance mere precedent had been followed."⁴¹ It was not until 1842 that Congress attempted to control the practice.

In 1841 President John Tyler appointed three private citizens to investigate allegations of corruption at the customhouse in New York. The Secretary of the Treasury advised the commissioners:

The President considers it his duty, under and by virtue of the provision of the Constitution which requires him to see that the laws be faithfully executed, to inquire into and ascertain the best means within his power of correcting the evils which have been found to exist in this branch of the Executive administration . . . .

For this purpose he has appointed you a commission of examination and inquiry . . . .⁴²

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40. See Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (1942) (mandating government consultation with industry advisory committees); Army Appropriation Act, Pub. L. No. 64-242, 39 Stat. 649 (1916) (creating Council of National Defense and its advisory commission); Curtice N. Hitchcock, *The War Industries Board: Its Development, Organization, and Functions*, 26 J. POL. ECON. 545, 548-49 (1918).

The National Industrial Recovery Act, Pub. L. No. 73-67, §§ 2-3, 48 Stat. 195, 195-96 (1933), authorized the President to approve industry codes of competition. The petroleum and poultry industries established industry advisory committees to recommend codes to the President. The Supreme Court struck down those provisions in *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

41. CONG. GLOBE, 27th Cong., 2d Sess. 231 (1842).

42. *Id.* at 475 (quoting Letter from T. Ewing, Secretary of Treasury, to George Poindexter and Alfred Kelley (May 10, 1841)). For background on the general corruption at the customhouse, see LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861*, at 424-30 (1954).

On February 7, 1842, the House of Representatives adopted a resolution requesting that the President explain "under what authority" he had created the commission, how much money the commission received, and "out of what fund" the commission would be paid.⁴³ The President answered the question about authority, but avoided the more difficult question of funding:

I have to state that the authority for instituting the commission . . . is the authority vested in the President of the United States "to take care that the laws be faithfully executed; and to give to Congress from time to time information on the state of the Union; and to recommend to their consideration such measures as he shall judge necessary and expedient."⁴⁴

The Representatives' views of presidential authority are noteworthy. Under one view, the President had to receive an affirmative grant of power from Congress in order to make the appointments; the "Take Care" Clause operated on express legislative enactments.⁴⁵ On the other hand, Representative Cushing argued that the President's "Take Care" power was an independent grant of authority and implied the power necessary to its execution:

The clause requiring the President to see to the execution of the laws, and to give information to Congress of the state of the Union, was imperative on the President, and constituted an obligation, by the omission of which he violated the Constitution and his oath of office, and was liable for impeachment; and if the Constitution or laws did not set forth the manner in which a duty was to be performed, it was for the President to decide upon it.⁴⁶

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43. CONG. GLOBE, 27th Cong., 2d Sess. 214 (1842). Although the House questioned the President's appointment power and his authority to pay the expenses of the commission out of funds appropriated for other purposes, its underlying concern was that the commission's report on corruption at the customhouse would implicate prominent New Englanders and fuel the antiprotection tariff movement, to the benefit of the Southern states. *See, e.g., id.* at 482 (statement of Rep. Cushing); *id.* (statement of Rep. Underwood). Congress evidently knew of the commission at the time of its creation, but did not object. *Id.* at 476 (statement of Rep. Proffit). One of the House's concerns was the cost of printing the report, which by one account was 400 pages long. *Id.* at 456 (statement of Rep. Cushing); *id.* at 460-61 (statement of Rep. Adams); *id.* at 477 (statement of Rep. Stanly); *id.* app. at 371 (statement of Rep. Wise); *see also* H.R. REP. NO. 669, 27th Cong., 2d Sess. (1842) (reprinting report of George Poindexter); H.R. DOC. NO. 212, 27th Cong., 2d Sess. (1842) (reprinting report of Alfred Kelley and William Steuart); H.R. DOC. NO. 213, 27th Cong., 2d Sess. (1842); H.R. DOC. NO. 230, 27th Cong., 2d Sess. (1842).

44. CONG. GLOBE, 27th Cong., 2d Sess. 229 (1842) (quoting Letter from President John Tyler to House of Representatives (Feb. 9, 1842) (quoting U.S. CONST. art. II, § 3)).

45. *See, e.g.,* CONG. GLOBE, 27th Cong., 2d Sess. 477 (statement of Rep. Stanly); *id.* at 483 (statement of Rep. Everett).

46. *Id.* at 482 (statement of Rep. Cushing); *see also id.* app. at 370 (statement of Rep. Wise) (defending practice as necessary to President's power to recommend legislation); *id.* at 475, 481-82 (statements of Reps. Johnson, Cushing, and Adams) (reciting examples of arguably unauthorized appointments of presidential agents during terms of Washington, Jefferson, Madison, Monroe, Jackson, Van Buren, and Harrison).

Congress ultimately responded only to the matter of the President's authority to pay the commission. In August 1842 Congress forbade the President to "pay any account or charge whatever, growing out of, or in any way connected with, any commission or inquiry, except courts-martial or courts of inquiry in the military or naval service" unless Congress had made "special appropriations . . . by law to pay such accounts and charges."⁴⁷

The Attorney General concluded that the Act of August 26, 1842, could not constrain the President's power to appoint investigatory commissioners since that power "result[ed] from the obligation of the executive department of the government 'to take care that the laws be faithfully executed.'"⁴⁸ Congress had, however, "indirectly limit[ed] the exercise of this power by refusing appropriations to sustain it . . . thus paralyz[ing] a function which it is not competent to destroy."⁴⁹ There was no formal resolution of the debate.

2. *The Tawney Amendment and the Coming of Age of Presidential Advisory Committees*

On January 19, 1909, President Roosevelt created a Council of Fine Arts by executive order, and directed that future plans for federal buildings, grounds, and statuary "be submitted to the Council . . . and [that] their advice [be] followed."⁵⁰ At the same time, Roosevelt wrote to a representative of the American Institute of Architects recommending that the Institute "secure the enactment of a law giving permanent effect to what I am directing to be done. The course you advocate, and which I approve, should not be permissive with the executive; it should be made mandatory upon him by act of Congress."⁵¹

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47. Act of August 26, 1842, ch. 202, § 25, 5 Stat. 533.

Congress may also have had in mind an incident occurring in 1839. In that year the Postmaster General sent George Plitt to Europe as a special agent of the Post Office to collect information on mail arrangements. OFFICES CREATED WITHOUT AUTHORITY OF LAW, H.R. REP. NO. 487, 27th Cong., 2d Sess. 5 (1842). His report was printed by the Senate in 1841. S. DOC. NO. 156, 26th Cong., 2d Sess. (1841). The following year the House of Representatives adopted a resolution requesting the Postmaster "to inform the Committee on Public Expenditures by what authority George Plitt was sent to Europe . . . what was the amount paid to said Plitt, and out of what fund the payment was made." OFFICES CREATED WITHOUT AUTHORITY OF LAW, *supra*, at 1. The Postmaster responded that he presumed that his predecessor had appointed Plitt under the general authority of the laws creating the Post Office. *Id.* The committee reported that it remained "at a loss to perceive . . . any authority conferred on the Postmaster General . . . If [he] has the power to send *one* agent to travel through Europe, he may send twenty or fifty." *Id.* at 4-5. The Committee concluded, "if abuses of this character are suffered to pass uncorrected, that thousands of dollars must be wasted, and the power of Executive officers fearfully increased." *Id.* at 5.

48. 4 Op. Att'y Gen. 248 (1843). The Attorney General advised departments that they could designate agents or commissioners, but any compensation would have to come from Congress. *See* 4 Op. Att'y Gen. 106, 106-07 (1842). In a subsequent opinion, the Attorney General evidently changed his views, he advised the Secretary of the Interior that the Act worked an implied repeal of the Secretary's statutory power to appoint such agents. 5 Op. Att'y Gen. 378 (1851).

49. 4 Op. Att'y Gen. 248 (1843).

50. Exec. Order No. 1010 (Jan. 19, 1909), *reprinted in* PRESIDENTIAL EXECUTIVE ORDERS, JUNE 26, 1845-JUNE 26, 1936 (1980).

51. 43 CONG. REC. 2918 (1909) (quoting Letter from President Theodore Roosevelt to Glenn Brown (Jan. 19, 1909)).

Congress reacted swiftly, but not as Roosevelt had suggested. Instead, the House introduced an amendment to the Sundry Civil Appropriations Bill that would have prohibited appropriations to "members of the so-called Council of Fine Arts," because "such a body should be created by the legislative body and not by the executive."⁵² On February 25, Representative Tawney, Chairman of the House Appropriations Committee, introduced a much broader amendment forbidding the use of appropriated funds for the "compensation or expenses of any commission, council, or board" unless Congress had authorized its creation.⁵³ Tawney referred to the "great number of commissions . . . working under authority for the executive department alone."⁵⁴ When Representative Parsons pointed out that council members served without pay and argued that the government ought to take advantage of their voluntary services,⁵⁵ Tawney reminded him that the law already prohibited government officials from "the acceptance of voluntary service,"⁵⁶ and that the real effect of the amendment was to prohibit the use of government employees in support of voluntary committees:

The voluntary commissions gather a lot of general data all over the United States which is absolutely valueless in the form in which it is obtained, and then it is dumped into the department, and the time of the employees is used for the purpose of working out in detail and tabulating and classifying the information and data that is thus

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52. *Id.* at 2918–19 (statement of Rep. Fitzgerald). Representative Tawney questioned whether the real objection to the Council was that it served in more than an advisory capacity. *Id.* at 2919–20 (statement of Rep. Tawney). No one picked up on Tawney's point.

53. *Id.* at 3119; see also REPORT OF THE COUNTRY LIFE COMMISSION, S. DOC. NO. 705, 60th Cong., 2d Sess. 7 (1909); COMMISSION ON COUNTRY LIFE, S. DOC. NO. 734, 60th Cong., 2d Sess. 1–2 (1909) (discussing President's request for \$25,000 appropriation). Congress refused to appropriate the money, and the report was published by the Spokane, Washington, Chamber of Commerce. THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 430–32 (1913).

54. 43 CONG. REC. 3119 (1909). The Tawney Amendment may have been motivated by the creation of the Keep Commission, see Harvey C. Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, in THE INSTITUTIONALIZED PRESIDENCY 35, 61–63 (Norman C. Thomas & Hans W. Baade eds., 1972), the Country Life Commission, see FLITNER, *supra* note 28, at 13, and the Council on Fine Arts, see Norman N. Gill, *Permanent Advisory Committees in the Federal Government*, 2 J. POL. 411, 417 n.9 (1940). In subsequent debates in the Senate, Senator Aldrich attributed the Tawney Amendment to commissions, such as the Inland Waterways Commission, which were made up in whole or in part of non-executive branch personnel. 45 CONG. REC. 2493 (1910).

55. 43 CONG. REC. 3119–20 (1909). Roosevelt also created, *inter alia*, the Inland Waterways Commission, the National Conservation Commission, the Country Life Commission, and the Commission on Public Lands. Service on these commissions was voluntary, "but much of their personnel was made up of regular government employees." MARCY, *supra* note 16, at 18. Roosevelt requested \$25,000 for compensation of nongovernmental personnel working on the Keep Commission, but ultimately received only \$5000. The Commission's principals were salaried government employees, although they performed their work on their own time, without additional compensation. *Id.* at 19, 79; Oscar Kraines, *The President Versus Congress: The Keep Commission, 1905–1909, First Comprehensive Presidential Inquiry into Administration*, 23 W. POL. Q. 5, 51 (1970). See generally Harold T. Pinkett, *The Keep Commission, 1905–1909: A Rooseveltian Effort for Administrative Reform*, 52 J. AM. HIST. 297 (1965).

56. 43 CONG. REC. 3120 (1909). Tawney was referring to the Anti-Deficiency Act, ch. 1484, 33 Stat. 1214, 1257 (1905) (current version at 31 U.S.C. §§ 1341–42 (1988)); see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1370–73 (1988).

obtained, and imposes upon the department and upon the clerks an extra burden.⁵⁷

The "Tawney Amendment" was enacted with the Sundry Civil Appropriations Act on the last day of Roosevelt's term.⁵⁸ Roosevelt signed the bill, but in his own mind the provision was unenforceable: "Congress cannot prevent the President from seeking advice. Any future President can do as I have done, and ask disinterested men who desire to serve the people to give this service free to the people through these commissions."⁵⁹ In the view of the Attorney General, the Tawney Amendment affected only "commissions or boards constituted without authority of law,"⁶⁰ but the Attorney General did not comment on the question raised during the Tyler Administration: Is a commission or board appointed under the President's own constitutional authority "constituted by authority of law"?

President William Howard Taft succeeded Roosevelt in 1910 and, against the background of the Tawney Amendment, secured funding for what would become the Taft Commission on Economy and Efficiency, to propose changes in the administration of the executive branch.⁶¹ Once again, the question of the President's authority to appoint and finance such commissions arose. On the question of appointment, the Senate was divided as to whether the President possessed authority under the Recommendation Clause⁶² or the Opinions Clause⁶³ to appoint a commission on government efficiency, even

57. 43 CONG. REC. 3120 (1909).

58. Act of March 4, 1909, ch. 299, § 9, 5 Stat. 1027 (current version at 31 U.S.C. § 1346 (1988)). It provides, in part:

Public money and appropriations are not available to pay—(A) the pay or expenses of a commission, council, board, or similar group . . . ; (B) expenses related to the work or the results of work or action of that group; or (C) for the detail or cost of personal services of an officer or employee from an executive agency in connection with that group

31 U.S.C. § 1346(a)(1) (1988). This section does not apply, however, to "commissions, councils, boards, or similar groups authorized by law." *Id.* § 1346(c)(1). The Office of Legal Counsel has cited a related provision, 31 U.S.C. § 1347, as evidence that the President has limited authority to create executive agencies. See *Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation*, 9 Op. Off. Legal Counsel 76, 78 n.1 (1985) [hereinafter *Limitations on Presidential Power*].

59. ROOSEVELT, *supra* note 53, at 431 (quoting portion of his memorandum to Congress)

60. 27 Op. Att'y Gen. 300 (1909); see 27 Op. Att'y Gen. 406, 407 (1909). The Attorney General subsequently concluded that the Tawney Amendment did not reach advisory panels appointed to advise the Secretary of Agriculture in the enforcement of the Food and Drugs Act, interagency committees, or boards previously authorized. See 27 Op. Att'y Gen. 300 (1909); 27 Op. Att'y Gen. 308 (1909); 27 Op. Att'y Gen. 406 (1909). The "binding effect" of the Tawney Amendment "was largely avoided by the sensible ruling that the authorization need not be explicit." Arthur W. Macmahon, *Responsibility and Representativeness in Advisory Relations*, in *PUBLIC ADMINISTRATION AND DEMOCRACY* 185, 203 (Roscoe C. Martin ed., 1965).

61. See Act of June 25, 1910, ch. 384, 36 Stat. 703; see also Kraines, *supra* note 55, at 43; Mansfield, *supra* note 54, at 49–52.

62. U.S. CONST. art. II, § 3, cl. 1 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .").

63. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their

a commission composed entirely of executive branch employees.⁶⁴ But the senators agreed that even if the President had the power to appoint commissions without express authorization, he lacked the authority to pay for such commissions.⁶⁵

By contrast, the House was not concerned with the President's appointment power (a matter of special concern to the Senate), but rather with the President's authority to fund a commission in the absence of appropriations, a matter over which it had original jurisdiction. Members of the House went so far as to reject an argument of necessity, contending that without proper appropriations, the President could not even carry out his duties as Commander in Chief.⁶⁶

Congress ultimately appropriated \$100,000 "[t]o enable the President, by the employment of accountants and experts from official and private life" to "inquire into the methods of transacting the public business of the

respective Office . . .").

64. See 45 CONG. REC. 2161-63 (1910) (statements of Sens. Money, Beveridge, and Newlands); *id.* at 2492 (statement of Sen. Root).

65. As Senator Newlands noted:

Some may think that Mr. Roosevelt was a little too active in appointing commissions for the purpose of inquiring into various matters relating to economics and sociology, but undoubtedly he had the power to do it. The only power that he lacked was to pay for such services out of the National Treasury. That power he could not exercise without the sanction of Congress.

Id. at 2491; see also *id.* at 2493 (statements of Sens. Newlands and Aldrich).

In 1930 the House passed a joint resolution providing for a commission to study U.S. policies in Haiti. The Senate Committee on Foreign Relations was in favor of such a commission, but reported the resolution out of committee with a recommendation to strike the language authorizing appointment of the commission:

MR. BORAH. The committee was unanimously of the opinion that the President had authority to appoint the commission without the authority coming from the Congress. We therefore concluded to authorize the appropriation necessary to cover the expenses of the commission.

MR. McKELLAR. . . . [I]s it the opinion of the committee that the President has a right to appoint any commission he sees fit to appoint, just so the money is authorized? Has he the unlimited right to appoint commissions without the Constitution giving him the power to do so?

MR. BORAH. I think he has a right to appoint a commission or an agent to make any investigation he desires to have made . . . . That has been the practice.

MR. McKELLAR. It has been done, but I doubt both the wisdom and the right to do it.

MR. BORAH. The wisdom is one thing, but I have no doubt about the President's right or authority to appoint agents to gather information or assist him in the study of conditions.

MR. McKELLAR. What is the use of Congress establishing executive offices, then? Why should we take the trouble to legislate to establish executive offices, if the President has the right to constitute as many officials as he desires, and in such form, either commission form or any other form, as he desires?

. . . .

MR. BLAINE. . . . I have no doubt but that the President can appoint a commission. He can appoint an agent to make any investigation he desires to have made. The thing that brings into power, into action, that commission or that agent is the wherewithal with which to operate. Of course, the President can appoint an agent, who may navigate the globe at the expense of the President or at the expense of his agent. Congress cannot object. But it does not follow that Congress should make an appropriation every time the President wants to appoint an agent or a commission to tell him what he ought to do.

72 CONG. REC. 2137-38 (1930); see also 69 CONG. REC. 1769-82 (1928) (discussing extensively the President's authority to appoint and fund commission on sinking of submarine S-4).

66. See 45 CONG. REC. 6752 (1910) (statement of Rep. Fitzgerald).

Government" for the purpose of "recommend[ing] to Congress what changes in law may be necessary."⁶⁷ Conspicuously absent was any reference to a commission or to the President's authority to appoint persons from "official and private life." In effect, Congress ceded to the President the authority to appoint the members of a presidential commission. The pattern was set.⁶⁸ When Franklin Roosevelt appointed his Committee on Administrative Management in 1936, he informed Congress by means of a letter to the Vice President and the Speaker of the House. Congress appropriated funds without imposing any other conditions, except to demand a copy of the report.⁶⁹

3. *The Russell Amendment and the Financing of Presidential Advisory Committees*

In 1944 Congress added yet another spending restriction. President Roosevelt, largely as part of the war effort, had created a number of agencies by executive order.⁷⁰ As part of the Independent Offices Appropriation Act,⁷¹ Congress adopted the "Russell Amendment," which provided that "no part of any appropriation or fund . . . shall be allotted or made available to, or used to pay the expenses of, any agency or instrumentality including those established by Executive order" beyond one year after its creation.⁷² The provision's author, Senator Russell, argued that the provision was necessary "to retain in the Congress the power of legislating and creating bureaus and departments of the Government."⁷³ At the time, Congress, in consultation with the Comptroller General, confessed that it did not know how far the Russell Amendment extended, and although the listing did not include advisory

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67. Act of June 25, 1910, ch. 384, 36 Stat. 703.

68. Succeeding presidents invoked similar defenses for the use of commissions as necessary to the execution of other constitutional powers. As Calvin Coolidge put it:

The use of fact-finding commissions is again being criticized . . . Some people are born with a complete set of ready-made opinions. Facts do not affect them. But no executive, from first selectman to President, can know everything necessary to discharge his office or be able to learn it from official sources. He must call on some body which can gather the information. Public duty requires it.

Quoted in FLITNER, *supra* note 28, at 9 (citations omitted).

Hoover justified his appointments because "[b]y the Constitution [the President] must recommend to Congress such measures as he shall deem necessary and expedient, and he is required to finally pass upon every act of Congress." This required, he said, the "fullest use of the best brains and best judgment and the best leadership in our country . . . [in] cooperation with voluntary organizations." President's Address to the Gridiron Club, *supra* note 39, at 472 (Dec. 14, 1929); see also Galloway, *supra* note 10, at 356 (noting that Hoover used commissions because he was reluctant to "inform Congress on the state of the Union without careful prior study of the pertinent facts").

69. Act of June 22, 1936, ch. 689, 49 Stat. 1600.

70. See 90 CONG. REC. 5184-85 (1944) (listing agencies), see also WOLANS, *supra* note 16, at 66.

71. Independent Offices Appropriation Act of 1945, ch. 286, 58 Stat. 361 (1944) (current version at 31 U.S.C. § 1347 (1988)).

72. *Id.* at 387.

73. 90 CONG. REC. 3059 (1944); see also *id.* at 3060-61, 3063. The legislation was aimed at the Fair Employment Practice Committee.

committees, the amendment was certainly broad enough to cover presidential advisory committees.⁷⁴

The Russell Amendment, like the Tawney Amendment and the Act of 1842, was a spending restriction. Once again Congress did not challenge directly the President's authority to *appoint* nonstatutory commissions, only to *finance* such commissions once appointed. The Russell Amendment, like the other acts, remains a part of the U.S. Code, but none of its provisions has ever been judicially invoked.⁷⁵ Whether or not Theodore Roosevelt surmised correctly that such provisions were unenforceable, the fact remains that they have never been enforced.

Even so, there is reason to believe that these restrictions have forced presidents funding advisory committees created on their own initiative to go through Congress, to use their own discretionary funds,⁷⁶ or to seek outside funding.⁷⁷ Since the passage of these acts, Congress has generally been

74. *Id.* at 5184-85 (reprinting Letter from Comptroller General Lindsay C. Warren to Rep. James M. Fitzpatrick (May 31, 1944)); *see also id.* at 3059 (remarks of Sen. Russell). Senator Russell was apparently concerned that nonstatutory commissions such as the Committee on Fair Employment Practice had operational functions—that is, the “power to issue orders affecting the lives and business of the American people.” *Id.*

75. *See* Advisory Committees—Application of the Russell Amendment, 3 Op. Off. Legal Counsel 263 (1979).

76. The principal sources available to the President are the Emergency Fund and the Special Projects Fund, 3 U.S.C. § 108(a) (1988), which have proven useful when Congress was reluctant to fund the President's advisory committees. *See* TEMPORARY PRESIDENTIAL ADVISORY COMMISSIONS, *supra* note 34, at 18; WOLANIN, *supra* note 16, at 67-68 & nn.54, 55; Alan L. Dean, *Ad Hoc Commissions for Policy Formation?*, in *THE PRESIDENTIAL ADVISORY SYSTEM* 101, 108-09 (Thomas E. Cronin & Sanford D. Greenberg eds., 1969).

President Roosevelt, for instance, funded the Roberts Commission investigation into the attack on Pearl Harbor from the Emergency Fund for the President. “Had this money not been available, it is conceivable that the President might have had to designate the investigation as a ‘relief project,’ rely upon a court of inquiry, stretch the words of some other appropriation act[,] . . . ask Congress for a special authorization, or give up the idea of a presidential investigation.” MARCY, *supra* note 16, at 92 (footnote omitted).

77. There is a lengthy executive practice of establishing advisory committees and then funding them partially or entirely through private funding. *See* MARCY, *supra* note 16, at 18; TEMPORARY PRESIDENTIAL ADVISORY COMMISSIONS, *supra* note 34, at 16; Dean, *supra* note 76, at 108. For example, of the 20 committees created by President Hoover, 13 cost the government nothing or “virtually nothing.” The expenses of three commissions—the White House Conference on Child Health and Protection, the White House Conference on Home Building and Ownership, and the Advisory Committee on Illiteracy—were paid by private contributors. White House Statement on Committees and Commissions, 1932-1933 PUB. PAPERS 173-78 (Apr. 24, 1932); *see also* MARCY, *supra* note 16, at 75-76; Galloway, *supra* note 10, at 359. President Truman's Hoover Commission was at least partially supported by private funds. The Commission's far-reaching recommendations on reorganization of the executive branch were well received, and a “Citizens' Committee” was formed, using private funds, to promote those recommendations. Dean, *supra* note 76, at 108; Mansfield, *supra* note 54, at 55-56. Of the Commission's 277 proposals, “the Citizens' Committee was able to count over 100 of these targets, little ones and big ones together, as battle trophies.” *Id.* at 56.

Postwar presidents have also looked to private funding. President Eisenhower's National Commission on Goals, established in 1960, was apparently funded entirely from foundation grants. WOLANIN, *supra* note 16, at 70 & n.69. The National Advisory Commission on Civil Disorders (the Kerner Commission) and the National Commission on the Causes and Prevention of Violence, both established during the Johnson Administration, were partially supported by private funds. *Id.* at 267 n.70. Finally, President Reagan's Private Sector Survey on Cost Control was funded by the Department of Commerce, but its staff had to be paid from private funding. Exec. Order No. 12,369, § 3(e), 3 C.F.R. 190 (Comp. 1983); *see also*

inclined to fund presidential commissions. But even when Congress has not been so disposed, "a determined chief executive can usually find the means of supporting any commission that he feels to be needed."⁷⁸ Additionally, presidents have encouraged private entities to establish and fund private advisory bodies as a means of avoiding congressional scrutiny.⁷⁹ Although information on advisory committees established outside the government is difficult to find, and incomplete and anecdotal even when found, the executive branch has used a number of nongovernmental advisory committees and has even encouraged their creation.⁸⁰

National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir.), *amended*, 566 F. Supp. 1515 (D.D.C. 1983).

78. Dean, *supra* note 76, at 109. But see WOLANIN, *supra* note 16, at 68 (noting that President Truman created no advisory committees during 1948 or 1949, when Congress had cut his emergency funds).

79. Particularly noteworthy among these are the Business Advisory Council (BAC) and the Advisory Council on Federal Reports (ACFR). The influential BAC was established in 1933 in cooperation with the Department of Commerce. See ANTITRUST SUBCOMM. OF THE COMM. ON THE JUDICIARY, 84TH CONG., 1ST SESS., REPORT ON THE BUSINESS ADVISORY COUNCIL 7, 11, 27-33 (Comm. Print 1955) [hereinafter ANTITRUST SUBCOMM.]; Kim McQuaid, *The Business Advisory Council of the Department of Commerce, 1933-1961: A Study in Corporate/Government Relations*, 1 RES. ECON. HIST. 171 (1976); Hobart Rowen, *America's Most Private Club*, HARPER'S, Sept. 1960, reprinted in *U.S. Gov't Information Policies and Practices—Public Access to Information From Executive Branch Advisory Groups* (Pt. 9). *Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 2d Sess. 3729, 3744 (1972) [hereinafter *U.S. Gov't Information Policies Hearings*]. The BAC was terminated on December 4, 1972, shortly after passage of FACA. See ENCYCLOPEDIA OF GOVERNMENTAL ADVISORY ORGANIZATIONS 37 (Linda E. Sullivan & Anthony T. Kruzas eds., 1975). It severed its official ties with the Department of Commerce in 1961 in order to avoid Executive Order No. 11,007, 3 C.F.R. 182 (Supp. 1962). See *Advisory Committees: Oversight Hearings Before the Subcomm. on Budgeting, Management, and Expenditures of the Senate Comm. on Gov't Operations*, 93d Cong., 1st Sess. 83 (1974) [hereinafter *Advisory Committees Hearings on Budgeting*] (statement of William H. Rodgers, Jr.).

Similarly, the ACFR was organized in 1942 at the request of the Bureau of the Budget to advise it on simplifying government reporting and statistical programs. Private business organizations and trade associations organized, financed, and appointed members to the Council. *Advisory Committees Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 91st Cong., 2d Sess., pt. 1, at 36-47 (1970) (Letter from Advisory Council Chairman Charles Stewart to Sen. Edmund Muskie (Oct. 22, 1970)) [hereinafter *Advisory Committees Hearings Before Intergovernmental Relations*]; THE ESTABLISHMENT OF A NATIONAL INDUSTRIAL WASTES INVENTORY, H.R. REP. NO. 1717, 91st Cong., 2d Sess. 19-20 (1970); see also E. Winslow Turner, *Advisory Committees: The Fifth Branch of Government*, 1 BUREAUCRAT 142, 146 (1972); Robert W. Dietsch, *The Invisible Bureaucracy*, NEW REPUBLIC, Feb. 20, 1971, at 19, 20.

80. Examples of nongovernmental advisory committees include the American Industries Health Council, see Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1, 23-26 (1981), the Government Borrowing Committee of the American Bankers Association and the Government Fiscal Policy Committee of the Securities Industry Association, see Petracca, *supra* note 30, at 108 n.3 (advising Department of Treasury), the Illuminating Engineering Society, see *Advisory Committees: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 1st Sess. 24 (1971) (statement of Sen. Metcalf) (advising government agencies on lighting standards for new buildings), the National Alliance of Businessmen, see *Presidential Advisory Committees Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2d Sess. 71 (1970) [hereinafter *Presidential Advisory Committees*] (nonprofit organization announced by President), the National Committee on Uniform Traffic Control Devices, see Brian C. Murphy, *Implementation of the Federal Advisory Committee Act: An Overview*, 9 GOV'T PUBLICATIONS REV. 3, 7 (1982), the National Petroleum Council, see *Metcalf v. National Petroleum Council*, 553 F.2d 176, 177 & n.13 (D.C. Cir. 1977) (although privately funded, Department of Interior considered it an advisory committee), the President's Advisory Committee on Political Refugees, see MARCY, *supra* note 16, at 75-76 (created informally by invitation of President Roosevelt to major religious groups in order to act as liaison between government and private organizations).

4. *Executive Order No. 11,007 and Postwar Presidential Advisory Committees*

The advent of World War II and the Korean conflict, and the urgency of the war mobilization effort, brought about new cooperation between government and industry. With the Emergency Price Control Act of 1942,⁸¹ Congress mandated government consultation with industry advisory committees to encourage cooperation in stabilizing prices.

The consultations spawned concerns that the government was actually fostering conditions conducive to antitrust violations.⁸² In the Defense Production Act of 1950,⁸³ for example, Congress authorized the President "to consult with representatives of industry, business, financing, agriculture, labor, and other interests, with a view to encouraging the making by such persons with the approval of the President of voluntary agreements and programs" in furtherance of the war effort.⁸⁴ Additionally, the Act provided that acts or omissions "requested by the President pursuant to a voluntary agreement or program approved" under the Act would not constitute violations of the antitrust laws or the Federal Trade Commission Act.⁸⁵

In response to these acts, "[t]housands of industry advisory committee meetings [were] held by the various defense agencies,"⁸⁶ thus making it "inevitable" that antitrust concerns would be raised.⁸⁷ The Department of Justice (DOJ) issued a series of letters advising Cabinet members and the administrators of various agencies of the DOJ's concerns over the industry advisory committees.⁸⁸ The DOJ recommended that, "in order to minimize the

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dealing with German refugees), the Social Science Research Council, *see WOC's and Government Advisory Groups: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 1st Sess., pt. 3, at 482 (1955) [hereinafter *WOC's*] (voluntarily prepared reports for Bureau of the Census), and the U.S. Food Administration, *see* FEDERAL COMMISSIONS, COMMITTEES AND BOARDS, S. DOC. NO. 174, 71st Cong., 2d Sess. 65 (1930) (first organized on voluntary basis and later authorized by statute and established by executive order).

81. Pub. L. No. 77-421, 56 Stat. 23.

82. Richard O. Levine, *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217, 220 (1973); Macmahon, *supra* note 60, at 193-94; *see also* Hitchcock, *supra* note 40, at 553 (discussing industry advisory boards created during World War I, suggesting that "the spirit of the Sherman Law was shattered time after time in the interest of efficiency").

83. Pub. L. No. 81-774, 64 Stat. 798 (1950) (current version at 50 U.S.C. §§ 2061-2169 (1988)).

84. *Id.* § 708(a), 64 Stat. at 818.

85. *Id.* § 708(b), 64 Stat. at 818. The Defense Production Act now provides that, subject to certain conditions, the Act does not "convey to any person any immunity from civil or criminal liability, or . . . create defenses to actions, under the antitrust laws." 50 U.S.C. § 2158(a) (1988).

86. SUBCOMMITTEE ON STUDY OF MONOPOLY POWER OF THE COMM. ON THE JUDICIARY: THE MOBILIZATION PROGRAM, H.R. REP. NO. 1217, 82d Cong., 1st Sess. 93 (1951) [hereinafter *MOBILIZATION PROGRAM*].

87. *Id.* at 6. Representative Fountain subsequently alleged that individual members of certain advisory committees had been indicted for conspiracy to fix prices. 103 CONG. REC. 11,259 (1957).

88. This was not the first time the DOJ offered such advice. In 1941 Attorney General Robert Jackson had advised the Office of Production Management and the Office of Price Administration and Civilian Supply that some acts being taken under the aegis of those offices, if done by private parties, would probably violate antitrust laws. He concluded that if the committees were formed at the request of those

possibility of violation of the antitrust laws," the departments and agencies should observe the following rules: (1) obtain statutory authorization for creating an advisory committee; (2) require that a full-time government official formulate an agenda; (3) have meetings called, held, and chaired by a government official; (4) keep records of the full minutes of each advisory committee meeting; and (5) function purely in an advisory capacity.⁸⁹

The Eighty-fourth Congress held extensive hearings on the antitrust implications of advisory committees and the general use of "without compensation" (or "WOC") employees in the federal government.⁹⁰ Congress discussed the DOJ's informal "guidelines" for industry advisory committees and the possibility of President Eisenhower issuing an executive order governing the use of industry advisory committees.⁹¹ In 1957 the House reported a bill "to provide standards for the establishment and utilization of advisory committees," thus ensuring "minimum basic administrative control."⁹² The bill contained the same guidelines informally promulgated by the DOJ letters of the early 1950's.⁹³ Unlike the DOJ efforts, however, the bill extended the guidelines from "industry advisory committees to all advisory

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offices and confined themselves to a purely advisory capacity, the DOJ would not view the actions as violating the antitrust laws. Department of Justice Press Release (Apr. 29, 1941) (releasing copies of letters sent from Attorney General Jackson to John Lord O'Brian and Leon Henderson), *reprinted in WOC's*, *supra* note 80, at 584-85.

Attorney General Francis Biddle issued quite a different statement in 1944. He stated that the DOJ had no objection to the formation of an advisory committee to the State Department and the Petroleum Administration for War, and indeed claimed that "[t]he Department of Justice has never taken the position that consultation by any industry committee with the government violates the antitrust laws." He concluded that "[a]dvisory committees representing private interests are one valuable source of information and advice, but provision should be made so that any group which feels that its interests are being neglected may present its grievances or suggestions to the Government." Department of Justice Press Release (Apr. 26, 1944), *reprinted in WOC's*, *supra* note 80, at 585-86; *see also WOC's*, *supra*, at 2222-23 (discussing advice given by Attorney General on formation of National Petroleum Council in 1946).

89. Letter from Deputy Attorney General Peyton Ford to various secretaries and agency administrators (Oct. 19, 1950), *reprinted in WOC's*, *supra* note 80, at 586-87, *see also WOC's*, *supra*, at 2222-23, *id.* at 587-92, 596-97, 599 (reprinting various letters from Justice Department officials repeating these guidelines); MOBILIZATION PROGRAM, *supra* note 86, at 171-90 (statement of Assistant Attorney General H.G. Morison).

90. *See, e.g., WOC's*, *supra* note 80.

91. *See id.* at 543-613, 2213-36 (statements of Assistant Attorney General Stanley N. Barnes), *id.* at 944-1035 (statement and questioning of Walter White, Executive Director of BAC and Department of Commerce); *id.* at 2165 (statement of Assistant Attorney General Stanley N. Barnes, indicating that Antitrust Division was working on draft executive order on advisory groups).

92. H.R. REP. NO. 576, 85th Cong., 1st Sess. I (1957) (report accompanying H.R. 7390), *see also Amendment to the Administrative Expense Act of 1946: Hearings Before a Subcomm. of the House Comm. on Gov't Operations on H.R. 3378*, 85th Cong., 1st Sess. (1957) [hereinafter *Amendment to the Administrative Expense Act*]; Levine, *supra* note 82, at 221; Henry H. Peritt, Jr. & James A. Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725, 731 (1975).

93. *See supra* text accompanying notes 88-89; H.R. 7390, 85th Cong., 1st Sess. (1957), H.R. REP. NO. 576, *supra* note 92, at 5-7. A prior bill, H.R. 3378, 85th Cong., 1st Sess. (1957), contained the DOJ requirements almost verbatim.

committees . . . of every kind and complexion."⁹⁴ This provision occasioned a minority report deeming the bill a

straightjacket regulation of the free exchange of ideas between government executives and their advisers from the public at large which would not only make the discharge of executive responsibilities much more difficult, but would dry up one of the most important aspects of the citizens' rights to confer with their Government.⁹⁵

The Eisenhower Administration opposed the bill. The DOJ concluded that the advisory process depended on the "integrity and good judgment" of the executive branch and that any legislation would "straitjacket" the executive.⁹⁶ The Bureau of the Budget protested that the bill failed to "permit any differentiation between various types of advisory groups," and might be so burdensome as "to inhibit effective use of advisory groups."⁹⁷ Meanwhile, representatives questioned the executive's power to appoint advisory committees on its own authority, and continued to link Congress' own authority with the appropriations process. Members of the House suggested that the reforms were necessary because the Tawney Amendment had become ineffectual.⁹⁸

The bill never passed the Senate. Instead, the Senate Government Operations Committee requested that the Bureau of the Budget review the advisory committee system and report back to the Committee. In February 1959 the Bureau issued a directive incorporating many of the requirements of the bill, which in turn Congress had taken from the DOJ guidelines.⁹⁹

In 1962 President Kennedy issued Executive Order No. 11,007, formally applying the DOJ guidelines to all federal agency and department advisory

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94. H.R. REP. NO. 576, *supra* note 92, at 13.

95. *Id.* at 14 (minority report) (quoting ANTITRUST SUBCOMM., *supra* note 79, at 34-35). According to the minority, "the report . . . does violence to the right of government to consult and advise with citizens and citizen groups in private . . . . If a Government official asks a private citizen to submit a recommendation or to render advice, that fact does not make the private citizen into a Government employee . . . ." ANTITRUST SUBCOMM., *supra* note 79, at 37.

96. *Amendment to the Administrative Expense Act*, *supra* note 92, at 30 (Letter from Deputy Attorney General William P. Rogers to Rep. William L. Dawson (Mar. 27, 1957)).

97. *Id.* at 31 (Letter from Budget Director Percival F. Brundage to Rep. William L. Dawson (Mar. 27, 1957)).

In a letter to the House Government Operations Committee, the Secretary of Commerce noted that H.R. 3378 went far beyond the DOJ guidelines by applying those guidelines to nonindustry advisory committees, where there was little or no risk of antitrust violations. *Id.* at 95-98 (Letter from Secretary Sinclair Weeks to Rep. William L. Dawson (Apr. 29, 1957)).

98. *Id.* at 18; *see also id.* at 18-21 (discussing need for statutory authority to create advisory committees); H.R. REP. NO. 576, *supra* note 92, at 5-6 (suggesting that agencies might rely on "implied authority" to create advisory committees); *Amendment to the Administrative Expense Act*, *supra* note 92, at 20.

99. *See Presidential Advisory Committees*, *supra* note 80, at 29 (statement of Rep. Dante B. Fascell); *id.* at 41 (statement of Comptroller General Elmer Staats); *see also* Levine, *supra* note 82, at 221; Peritt & Wilkinson, *supra* note 92, at 731.

committees.¹⁰⁰ The executive order provided “uniform standards for the departments and agencies of the government to follow in forming and using advisory committees in order that such committees shall function at all times in consonance with the antitrust and conflict of interest laws.”¹⁰¹ It also covered advisory committees “formed” by the government and any similar group “that is not formed by a department or agency, but only during any period when it is being utilized by a department or agency in the same manner as a government-formed advisory committee.”¹⁰² Significantly, however, Executive Order No. 11,007 did not apply to committees advising the President; rather, the order was to provide uniform standards only for “the departments and agencies.”¹⁰³

C. *Passage of the Federal Advisory Committee Act*

In the late 1960's, amid widespread claims that the executive branch had failed to enforce Executive Order No. 11,007,¹⁰⁴ Congress showed renewed interest in advisory committees. But in contrast to the concerns of the 1950's—antitrust and conflict of interest—these hearings focused on the non-representative nature of the advisory committees, and the need to open their proceedings and reports to the public.¹⁰⁵ Congress also felt an institutional threat from the sheer number and pervasive influence of advisory committees. The Senate noted:

[A] system of advisory committees . . . has grown up over the years . . . as a fifth arm of the Government, existing alongside the executive, legislative, judicial and regulatory arms. There is a growing

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100. Exec. Order No. 11,007, 3 C.F.R. 182 (Supp. 1962).

101. *Id.*

102. *Id.* § 2(a). The order excluded from its coverage advisory committees composed entirely of representatives of State and local agencies or certain nonprofit organizations. *Id.* § 9(b) The executive order also specially defined the term “industry advisory committee,” making various distinctions in applying the DOJ guidelines to different groups. For example, industry advisory committees were required to keep a verbatim transcript of their proceedings while other advisory committees merely had to maintain minutes. *Id.* § 6(c), (d). Industry advisory committees were also required to be “reasonably representative” of the industry, geographical area, or product(s) the committee purported to represent. *Id.* § 5

In 1964 the Bureau of the Budget issued a directive implementing Executive Order No. 11,007 Bureau of the Budget Circular No. A-63 (Mar. 2, 1964), reprinted in CONGRESSIONAL RESEARCH SERVICE, 95TH CONG., 2D SESS., FEDERAL ADVISORY COMMITTEE ACT: SOURCE BOOK. LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, PREPARED FOR THE SUBCOMM. ON ENERGY, NUCLEAR PROLIFERATION, AND FEDERAL SERVICES OF THE COMM. ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE 111-15 (1978) [hereinafter SOURCE BOOK].

103. Exec. Order No. 11,007, para. 3; see *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 458 (1989).

104. See COMMITTEE ON GOV'T OPERATIONS, THE ROLE AND EFFECTIVENESS OF FEDERAL ADVISORY COMMITTEES, H.R. REP. NO. 1731, 91st Cong., 2d Sess. 8-10 (1970).

105. See *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations on S. 1637, S. 1964, and S. 2064*, 92d Cong., 1st Sess., pt. 1, at 1-2 (1971) [hereinafter *Advisory Committees on S. 1637*] (opening statement of Sen. Metcalf)

awareness that an invitation to advise can by subtle steps confer the power to regulate and legislate.

. . . Any delegation of [the power to make governmental decisions] to persons or committees not invested with executive authority is a derogation of our constitutional system.¹⁰⁶

Both the House and the Senate held extensive hearings on advisory committees, albeit concerning different problems.¹⁰⁷ The House Special Studies Subcommittee focused on the number of advisory committees duplicative of committee functions and expenditures—concerns related to federal spending for unnecessary advice. Shortly after the release of the House Committee's report, Representative Monagan sponsored H.R. 4383, which ultimately became the Federal Advisory Committee Act.¹⁰⁸ The bill generally tracked Executive Order No. 11,007 and the DOJ antitrust guidelines, with one exception: It explicitly placed presidential advisory committees within the legislation's purview.¹⁰⁹ The House Report on H.R. 4383 explained:

The words "any committee . . . established by the President, or established by one or more agencies" are meant to include those committees which may have been organized before their advice was sought by the President or any agency, but which are used by the President or any agency in the same way as an advisory committee formed by the President himself or the agency itself. It would be contrary to the purpose and intent of this bill if a committee, such as the Advisory Council on Federal Reports . . . were to be exempted from the provisions of this bill.

. . . . A Presidential advisory committee need not be created by the President. . . . If an advisory committee, however created, does render advice to the President, the President must take the steps prescribed . . . to assure that the advice is properly evaluated.¹¹⁰

On the Senate side, the Subcommittee on Intergovernmental Relations had conducted hearings on the imbalance in the viewpoints of the members of the Advisory Council on Federal Reports.¹¹¹ A compromise bill, S. 3529, was

106. S. REP. NO. 1098, 92d Cong., 2d Sess. 13-14 (1972) (quoting Rep. Monagan).

107. *Advisory Committees on S. 1637*, *supra* note 105, pts. 1-3; *Advisory Committees: Hearings Before Intergovernmental Relations*, *supra* note 79, pts. 1-3; *Presidential Advisory Committees*, *supra* note 80, pts. 1-2; H.R. REP. NO. 1731, *supra* note 104.

108. H.R. 4383, 92d Cong., 1st Sess. § 3(2), (3) (1971), *reprinted in* SOURCE BOOK, *supra* note 102, at 261.

109. *Id.*

110. H.R. REP. NO. 1017, 92d Cong., 2d Sess. 4, 5 (1972). The reference to the Advisory Council on Federal Reports was significant because that Council was neither appointed by the President nor funded by Congress. See *supra* note 79 and accompanying text. The Report itself explained that the Advisory Council on Federal Reports was "organized by several national business organizations at the request of the Office of Management and Budget." H.R. REP. NO. 1017, *supra*, at 6 (footnote omitted).

111. *Advisory Committees: Hearings Before Intergovernmental Relations*, *supra* note 79.

unanimously reported by the Government Operations Committee. Like H.R. 4383, it tracked Executive Order No. 11,007 and included within its scope any advisory or presidential advisory committee or similar group "established or organized under any statute or by the President."¹¹² The report accompanying S. 3529 emphasized that the Senate intended to reach advisory committees, even if they were not established or funded by the government.¹¹³ In the floor debates, the bill's sponsor, Senator Metcalf, faulted executive branch attempts to regulate advisory committees for "not provid[ing] for coverage of Presidential committees or committees not appointed by the President but which advise him . . . ."¹¹⁴

The Administration attempted to derail the legislation. The Office of Management and Budget (OMB) had taken the position that the legislation was unnecessary, and that the executive branch was addressing the criticisms of its self-enforcement efforts. The OMB repeatedly promised that it would issue a new directive.¹¹⁵ Finally, following passage by the House of H.R. 4383 and introduction of S. 3529, President Nixon issued Executive Order No. 11,671, revoking Executive Order No. 11,007 and promulgating new rules for the regulation of advisory committees.¹¹⁶ The order maintained the distinction between "advisory committees" and "industry advisory committees," but also covered "presidential advisory committees." Like S. 3529 and Executive Order No. 11,007, Executive Order No. 11,671 covered advisory committees established by departments and agency officers, as well as committees "not established by a department or agency, but only for such period when it is being utilized by a department or agency in the same manner as a government-established advisory committee."¹¹⁷

Senator Metcalf criticized the new executive order as no substitute for "comprehensive legislation" and took the order as evidence "that as a matter

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112. S. 3529, 92d Cong., 2d Sess. § 3(1) (1972), *reprinted in* SOURCE BOOK, *supra* note 102, at 173

113. The report stated:

What kind of committees would this bring into coverage under the legislation? The intention is to interpret the words "established" and "organized" in their most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill. Examples of such groups are the Advisory Council on Federal Reports, the National Industrial Pollution Control Council, the National Petroleum Council, advisory councils to the National Institutes of Health, and committees of the national academies where they are utilized and officially recognized as advisory to the President, to an agency, or to a Governmental official.

S. REP. NO. 1098, *supra* note 106, at 8.

114. 118 CONG. REC. 30,278 (1972).

115. See H.R. REP. NO. 1017, *supra* note 110, at 7-8.

116. Exec. Order No. 11,671, 3 C.F.R. 388 (1973).

117. *Id.* § 1(6)(B). The executive order made other minor changes while "retain[ing] the anti-trust provisions of the earlier order." Levine, *supra* note 82, at 224; see *U.S. Gov't Information Policies Hearings*, *supra* note 79, at 3432-33 (statement of OMB Associate Director Frank Carlucci). The Administration continued to oppose the legislation because it would "unnecessarily restrict[] the President's flexibility in what is basically a management area." *Id.* at 3440.

of basic policy and orderly government, a congressional mandate is required with respect to Federal advisory committees."¹¹⁸ The House and Senate quickly agreed to compromise legislation, and in October 1972, President Nixon signed FACA and promptly revoked Executive Order No. 11,671.¹¹⁹

Unlike Congresses before it, the Congress that enacted FACA did not question its own constitutional authority to regulate presidential advisory committees. Indeed, FACA went far beyond any prior proposals. Rather than restricting the President's *spending* on advisory committees, a restriction that, history showed, a President could circumvent, Congress pulled within its control all advisory committees, of whatever origin or funding. Repeated references to the privately appointed, privately funded Advisory Council on Federal Reports showed that Congress intended to press its authority to the limit.¹²⁰ Inevitably, for the President to maintain control over his own advisory committees, the Court would have to mediate the conflict with Congress.

III. THE SUPREME COURT AND PRESIDENTIAL ADVISORY COMMITTEES: *PUBLIC CITIZEN V. UNITED STATES DEPARTMENT OF JUSTICE*

A. FACA and the ABA's Standing Committee on the Federal Judiciary

In 1946 the American Bar Association created a Standing Committee on the Federal Judiciary in order "to exert a *direct* influence on the selection of specific persons as federal judges."¹²¹ The Standing Committee was to serve an "evaluative function," offering the Bar's view of the qualifications of persons under consideration for the U.S. Supreme Court, courts of appeals, district courts, and the Court of International Trade.¹²² Senate Republicans saw the ABA's Standing Committee as a response to Democratic control of the judiciary, "the perfect instrument through which [they] could attempt inroads on the nominations."¹²³ Unable to block outright a nomination, "Senate

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118. 118 CONG. REC. 30,278-79 (1972); *see also id.* at 30,280 (statement of Sen. Roth) (praising executive order as "an important step" but claiming need for "general mandate for reform from Congress" and regulation of presidential advisory committees); WEGMAN, *supra* note 23, at 147-50.

119. Exec. Order No. 11,686, 3 C.F.R. 394 (Comp. 1971-1975).

120. One issue Congress did not expressly address was whether, by enacting FACA, Congress intended to authorize the President to create advisory committees. Section 9(a) provides that "[n]o advisory committee shall be established unless such establishment is—(1) specifically authorized by statute *or by the President.*" Federal Advisory Committee Act § 9(a) (emphasis added). This section might suggest that Congress recognized the President's inherent authority to appoint advisory committees. The question of appointment authority was, of course, a focal point of the earlier debates. *See supra* notes 41-69 and accompanying text.

121. Joel B. Grossman, *The Role of the American Bar Association in the Selection of Federal Judges: Episodic Involvement to Institutionalized Power*, 17 VAND. L. REV. 785, 796 (1964).

122. AMERICAN BAR ASS'N, *THE ABA STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS* 1 (1991).

123. Grossman, *supra* note 121, at 799.

Republicans could use the adverse recommendations of the ABA and local bar groups either to justify occasional rejections of confirmation or to persuade the President to nominate 'more acceptable' persons."¹²⁴ The DOJ formalized the process in 1952 by "inaugurat[ing] a system of consultation with the Committee on the Federal Judiciary to obtain its views before a final decision on any nomination was made."¹²⁵ Thus, the Standing Committee became an integral part of the nomination process.

Shortly after passage of FACA, the DOJ considered whether it "utilized" the Standing Committee as an advisory committee. In February 1974 Attorney General William Saxbe advised the Chairman of the ABA's Standing Committee on the Federal Judiciary, John Sutro, that it was the DOJ's view that FACA applied to the Standing Committee, and he offered the DOJ's assistance in chartering the Committee. He suggested that if the ABA objected to abiding by FACA, it might approach Congress about an exemption.¹²⁶ In May 1974 a Deputy Assistant Attorney General for the Office of Legal Counsel (OLC), Mary Lawton, advised a public forum that objection to FACA's open-meeting requirement was a problem:

[T]here is resistance in interesting quarters. The Act applies to advisory committees both created and utilized by the government. One committee utilized by the Department of Justice is the American Bar Association's Committee on Judicial Selection and Qualification, you know where they rate the judges. The good American Bar Association was not happy to be informed that they're covered by the Advisory Committee Act. In fact, they're still screaming as far as I know. But that's the way we read the Act.¹²⁷

By October 1974 the DOJ had backed down. In a second letter to the Chairman of the Standing Committee, the Attorney General acknowledged that the ABA considered FACA "such an infringement upon the independence and prerogatives of the Committee that you would find it necessary to terminate ABA participation in the process of advising the President on judicial

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124. *Id.*

125. *Id.* at 804.

126. Letter from William B. Saxbe, Attorney General, to John A. Sutro, Chairman of Standing Committee on the Federal Judiciary (Feb. 25, 1974) (on file with author); *see also* Memorandum from Office of Legal Counsel, Application of the Federal Advisory Committee Act to the American Bar Association Standing Committee on the Federal Judiciary (May 23, 1973) (on file with author); Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Summary Statement of View that the Federal Advisory Committee Act Applies to the ABA Standing Committee on Federal Judiciary (Feb. 25, 1974) (on file with author); Memorandum from Leon Ulman, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan C. Rose, Associate Deputy Attorney General (June 21, 1974) (on file with author).

127. *To Amend the Federal Advisory Committee Act—P.L. 92-463: Hearings Before the Subcomm. on Reports, Accounting, and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 152 (1976) [hereinafter *To Amend FACA Hearings*] (citation omitted).

appointments.”¹²⁸ The Attorney General wrote that “in light of [the ABA’s] position . . . [t]he prospect of depriving the President of the valuable advice of your organization with respect to the exercise of his appointive power” forced the DOJ “to consider a legal point we had hoped it would be unnecessary to reach—the possible unconstitutionality of the legislation as applied to this particular Presidential function.”¹²⁹ The Attorney General opined that Congress could not “significantly limit or restrict the manner in which and conditions under which the President may seek and receive advice with respect to [judicial nominations].”¹³⁰ The DOJ had found the constitutionality of FACA “so questionable” that the legislation “should be interpreted to avoid serious constitutional doubt.”¹³¹ He advised the ABA that the DOJ would proceed on the assumption that FACA did not apply to the Standing Committee.

Later that same year, the OLC, under the signature of Assistant Attorney General Antonin Scalia, issued a memorandum questioning FACA’s constitutionality. The OLC conceded that Congress probably had power under the Necessary and Proper Clause to regulate advisory committees created or funded by Congress. But there was no justification for congressional regulation of “private committees utilized by the Government for advice without any form of compensation . . . (e.g., the ABA Committee on the Federal Judiciary) . . . on matters entrusted solely to [the President].”¹³² The OLC believed there existed an “implied power to seek and obtain advice from whomever the President deemed necessary in order to faithfully execute the laws.”¹³³ Thus, “whether it be a Presidential Advisor, not subject to congressional confirmation, a private individual like David Rockefeller, or a private committee of persons like David Rockefeller, the President must have the freedom to seek out whom he wishes for advice,”¹³⁴ lest FACA’s requirements cause the would-be adviser to “decline to become involved in an advisory capacity with the President, thus limiting the President’s ability to inform himself.”¹³⁵ Although the Scalia memorandum did not reverse the

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128. Letter from William B. Saxbe, Attorney General, to William R. Smith, Jr., Chairman of Standing Committee on Federal Judiciary 1 (Oct. 9, 1974) (on file with author).

129. *Id.*

130. *Id.* at 2.

131. *Id.* at 1.

132. Memorandum from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Constitutionality of the Federal Advisory Committee Act 3–4 (Dec. 1, 1974) (on file with author); see also Laurence H. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092, 1093–94 (1991) (discussing circumstances surrounding request for OLC opinion).

133. Scalia, *supra* note 132, at 6.

134. *Id.* at 7.

135. *Id.* at 5. In 1977 Congress did list a “Committee on Selection of Federal Judicial Officers,” created by Executive Order No. 11,992, 3 C.F.R. 124 (Comp. 1978), as an advisory committee to the DOJ, although it did not list a similar committee, the United States Circuit Judge Nominating Commission, created by Executive Order No. 11,972, 3 C.F.R. 96 (Comp. 1978). SUBCOMMITTEE ON REPORTS, ACCOUNTING AND MANAGEMENT OF THE COMM. ON GOV’T AFFAIRS, 95TH CONG., 1ST SESS., THE PRESIDENT’S ADVISORY COMMITTEE REDUCTION PROGRAM 12 (Comm. Print 1977) [hereinafter

OLC's prior view that FACA applied to the Standing Committee, subsequent opinions made clear that that was its import.¹³⁶

In 1986 the Washington Legal Foundation (WLF) filed suit against the American Bar Association and its Standing Committee on the Federal Judiciary.¹³⁷ The WLF alleged that the ABA Standing Committee had failed to comply with FACA because the Standing Committee's membership was not balanced (section 5(b)); it had not filed a charter (section 9(c)); and the Committee had not provided public notice of its meetings (section 10(a)), opened its meetings to the public (section 10(a)), made its records available to the public (section 10(b)), kept detailed minutes (section 10(c)), or designated a federal official to call and attend its Committee meetings (section 10(e)).¹³⁸

The district court, terming the question of FACA's constitutionality "serious"¹³⁹ if it applied to the Standing Committee, held that the suit could only be brought against the government agency utilizing the advisory committee. The court characterized FACA as not regulating advisory committees per se, but regulating government use of the advisory committee, and reported that it could find no case in which a court had permitted suit against a "private, pre-existing group that has not been established, appointed, and financed by the government."¹⁴⁰ The court concluded that "[i]f the Act regulates the Government's *use* of the advisory committee and not the committee itself, it follows that the proper defendant in a suit brought to enforce the Act is the Government, not the advisory committee 'utilized' by the Government."¹⁴¹ Accordingly, the appropriate remedy for violation of FACA would be to "requir[e] the *government* either to cease its undertakings with the advisory committee or to ensure that the advisory committee is brought into compliance with the Act."¹⁴² The court reasoned, "FACA [otherwise] would effectively become a vehicle for forcing private organizations to turn over files or open meetings to other private parties."¹⁴³

PRESIDENT'S ADVISORY COMM. REDUCTION PROGRAM]. President Reagan abolished both committees in 1981. Exec. Order No. 12,305, 3 C.F.R. 150 (1982).

136. See History of Appointments to the Supreme Court, 48 Op. Off. Legal Counsel 457, 473 n.54 (1980). In a 1988 memorandum the OLC simply repeated the government's position in the ongoing litigation that "the American Bar Association Standing Committee on Federal Judiciary is not 'utilized' by the President and therefore not subject to FACA." Disclosure of Advisory Committee Deliberative Materials, 12 Op. Off. Legal Counsel 87 n.1 (1988). The Solicitor General in *Public Citizen* took the position that "FACA [did] not apply to the President's reliance on private organizations for advice." Brief for Federal Appellee at 18, *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) (Nos. 88-429, 88-494).

137. *Washington Legal Found. v. American Bar Ass'n Standing Comm. on the Fed. Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986).

138. *Id.* at 1355-56.

139. *Id.* at 1356.

140. *Id.* at 1361.

141. *Id.* at 1359.

142. *Id.* at 1360.

143. *Id.*

The WLF filed a second suit against the DOJ, requesting that, to the extent the DOJ continued to seek the judicial ratings of the ABA Standing Committee, the DOJ ensure the Committee's compliance with FACA.¹⁴⁴ This time the district court held that Congress intended FACA to have broad application and that the ABA Standing Committee "fit[] squarely within [the General Service Administration's (GSA)] definition" of a "utilized committee."¹⁴⁵ Considering whether FACA's application to the ABA Standing Committee would violate the separation of powers, the court concluded that FACA would intrude on the President's "freedom to investigate, to be informed, to evaluate, and to consult during the nomination process," and the court entered judgment for the DOJ.¹⁴⁶

On appeal, the Supreme Court affirmed the district court's judgment but on very different grounds.¹⁴⁷ Deeming the term "utilized" to be ambiguous, the Court held that the ABA Standing Committee was not an advisory committee "utilized" by the President within the meaning of section 3(2) of FACA. Turning to the legislative history, the Court concluded that Congress intended to reach advisory committees established by the government and those "closely tied to[] the Federal Government, and thus enjoying quasi-public status."¹⁴⁸ Since Congress "did not indicate any desire to bring all private advisory committees within FACA's terms,"¹⁴⁹ and Executive Order No. 11,007 evidently did not cover the Standing Committee, Congress "probably" did not intend FACA to apply to the Standing Committee.¹⁵⁰ Finding it a "close question," the Court deferred to the rule that, where possible, it should construe statutes to avoid constitutional problems. Applying FACA to the

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144. *Washington Legal Found. v. United States Dep't of Justice*, 691 F. Supp. 483 (D.D.C. 1988), *aff'd sub nom. Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989). Public Citizen intervened on the side of the plaintiffs. In their suit against the DOJ, the plaintiffs abandoned their complaint about the lack of balance in the composition of the Standing Committee. 691 F. Supp. at 485 n.5. The district court commented that while § 5(b)-(c) requires balanced viewpoints for advisory committees established by Congress, the President, and federal agencies, it is silent on the composition of utilized committees. *Id.*

145. *Id.* at 488. The Administrator of the GSA is charged with "prescrib[ing] administrative guidelines and management controls applicable to advisory committees" and with "provid[ing] advice, assistance, and guidance to advisory committees to improve their performance." Federal Advisory Committee Act § 7(c).

The Administrator provided:

Utilized . . . means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

41 C.F.R. § 101-6.1003 (1993).

146. 691 F. Supp. at 493, 496.

147. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989).

148. *Id.* at 461.

149. *Id.*

150. *Id.* at 467.

Standing Committee's activities would "undeniabl[y]" raise "formidable constitutional difficulties."¹⁵¹

Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, concurred in the judgment. Justice Kennedy would have affirmed the district court on the ground that FACA did apply to the Standing Committee, but as applied, violated the separation of powers.¹⁵² Justice Kennedy pointed out that although FACA might be unconstitutional as applied to the Standing Committee, this did not "render a straightforward application of the language absurd, so as to allow us to conclude that the statute does not apply."¹⁵³ He then discussed why FACA encroached on the President's power to nominate judges. Justice Kennedy found that when the Court dealt with powers within the general "grant to the President of the 'Executive [p]ower,'" the Court employed "something of a balancing approach, asking whether the statute at issue prevents the President 'from accomplishing [his] constitutionally assigned functions.'"¹⁵⁴ But when the Court dealt with encroachment on powers that "explicit text commits" to the President, the Court "refused to tolerate *any* intrusion."¹⁵⁵ Here, the balance between the President and Congress was "struck by the Constitution itself."¹⁵⁶ The concurring Justices concluded: "The mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act."¹⁵⁷

B. *Confounding Plain Text: "Woolly" Verbs*

The Court began by acknowledging that the President and the DOJ undoubtedly "utilized" the ABA Standing Committee "in one common sense of the term."¹⁵⁸ But the Court thought "utilize" was "a woolly verb, its contours left undefined by the statute itself."¹⁵⁹ Read literally, FACA would apply to "any group of two or more persons, or at least any formal organization, from which the President or an executive agency seeks advice."¹⁶⁰ The Court pointed out that a literal reading might subject the

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151. *Id.* at 465–66.

152. *See id.* at 469 (Kennedy, J., concurring). Justice Scalia did not participate, probably because of the opinion he had issued as Assistant Attorney General for the Office of Legal Counsel. *See* Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281, 294 n.83 (1990).

153. *Public Citizen*, 491 U.S. at 472 (Kennedy, J., concurring).

154. *Id.* at 484 (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988)) (citation omitted).

155. *Id.* at 485.

156. *Id.* at 486.

157. *Id.* at 488–89.

158. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 452 (1989).

159. *Id.*

160. *Id.*; *see* *Natural Resources Defense Council v. Herrington*, 637 F. Supp. 116, 118–19 (D.D.C. 1986) (stating that if applied literally, FACA would cover "virtually any convocation of two or more persons"); *Nader v. Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975) (stating that FACA is so vague that

NAACP to FACA's purview if the President solicited its views on appointments to the Equal Employment Opportunity Commission (EEOC); or the American Legion, if the President sought its views on military policy; or even the President's own political party, when the President consulted with it in selecting the Cabinet. From this, the Court reasoned that resort to the plain language of the statute was insufficient because the literal application would "compel an odd result."¹⁶¹

Although the Act's definitions are "broad [and] imprecise" and FACA is "not a model of draftsmanship,"¹⁶² the Court failed to use the linguistic, structural, and historical tools available to it. In its definition of "advisory committee," Congress obviously intended to reach every permutation of the idea of a group.¹⁶³ While this definition is broad, it is not without some limits, since individual members of a committee may be polled as individuals and not as a committee.¹⁶⁴

Congress intended to regulate two different kinds of committees: committees established by Congress or the President and those utilized by the President. The bulk are those "established" by Congress or the President. The second class of committees presents the tough question: what are "utilized" committees? By including both "established" and "utilized" committees, Congress indicated that "utilized" committees meant something other than those established by the federal government. The point is significant. Committees are established by the federal government for the purpose of advising the executive. By law, custom, and definition, advisory committees cannot exercise operational functions of the government;¹⁶⁵ to the extent that a federally established entity does anything other than advise, it is something other than an advisory committee.¹⁶⁶ In other words, the sole purpose of

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it would include a "less formal conference of two or more non-government persons who advise the President"), *vacated as moot*, No. 75-1969 (D.C. Cir. Jan. 10, 1977).

161. 491 U.S. at 454 (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)).

162. *Nader*, 396 F. Supp. at 1232; *see also* *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

163. *See* Federal Advisory Committee Act § 3(2). Reference to the executive branch "establishing and utilizing" advisory committees appeared as early as 1957. *See Amendment to the Administrative Expense Act*, *supra* note 92, at 22 (regarding scope of authority granted in statute to use advisory committees, "establishing and utilizing . . . would cover the whole field"). The phrase was prominent, of course, in Executive Order No. 11,007.

164. *See* 41 C.F.R. § 101-6.1004(i) (1993); *see also* *Herrington*, 637 F. Supp. at 116 (holding that group of six individuals whose views were sought was not advisory committee); Application of Federal Advisory Committee Act to Board of Department of Justice Journal, 14 Op. Off. Legal Counsel 70 (1990) (prelim. print) (ruling that board subject to FACA if its deliberative views were sought, but not if opinions of its individual members were solicited).

165. Federal Advisory Committee Act § 9(b); Exec. Order No. 11,007, § 4, 3 C.F.R. 182, 183 (Supp. 1962); *see* H.R. REP. NO. 1017, *supra* note 110, at 4.

166. *See* *Public Citizen v. Commission on the Bicentennial of the U.S. Constitution*, 622 F. Supp. 753, 758 (D.D.C. 1985) (holding that FACA did not apply to Bicentennial Commission where its duties were primarily operational); *HLI Lordship Indus., Inc. v. Committee for Purchase from the Blind & Other Severely Handicapped*, 615 F. Supp. 970, 978 (E.D. Va. 1985) (holding that FACA did not apply to

federally *established* advisory committees is to advise the President. Advisory committees *utilized* by the President, by contrast, need not have been established for the sole purpose of advising the President. They may have other functions, including operational functions outside of the government. In the best sense of the term “utilized,”¹⁶⁷ committees utilized by the federal government are committees that have or could have an existence outside of their service as advisers to the federal government.

The Act readily confirms this interpretation of “utilized.” First, in section 3, the definitions section, Congress excluded any committee composed entirely of full-time federal officers or employees. That Congress believed it was necessary to exclude committees of full-time federal employees indicates that Congress knew that without the exclusion, such committees would be subject to the Act.¹⁶⁸

Second, in section 4, the exemptions section, Congress exempted advisory committees “established or utilized” by the Central Intelligence Agency and the Federal Reserve System, as well as “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.”¹⁶⁹ Congress believed that, absent the exemption, FACA extended to such groups. Local civic groups are not groups established by the federal government, but are groups established for some other purpose. Congress could only believe it had to exempt these groups¹⁷⁰ because it viewed them as groups that might be *utilized* by the federal government. Congress did not deny that some local civic groups would provide advice to the President or federal

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committee whose primary responsibilities were operational), *rev'd on other grounds*, 791 F.2d 1136 (4th Cir. 1986); see also *Hunt v. Nuclear Regulatory Comm'n*, 468 F. Supp. 817, 822 (N.D. Okla.), *aff'd*, 611 F.2d 332 (10th Cir. 1979), *cert. denied*, 445 U.S. 906 (1980); *Wolfe v. Weinberger*, 403 F. Supp. 238, 241 (D.D.C. 1975); 57 Comp. Gen. 51 (1977) (commenting that National Commission on Observance of International Women's Year not subject to FACA because of operational functions)

167. [S]ome words at some times and others at all times can be shown to be unnecessary. *Utilize* is one of the second class. The occasions when *use* will not do are so rare to be inexistent for the workaday writer, and the bad habit of resorting to the longer word becomes incurable. If a nuance must be found to distinguish between the pair, it lies in the stronger suggestion *utilize* gives of turning an object or a material to purposes it was not meant for.

WILSON FOLLETT, *MODERN AMERICAN USAGE* 221–22 (1966)

168. S. REP. NO. 1098, *supra* note 106, at 7–8; H.R. REP. NO. 1017, *supra* note 110, at 3–4, see also Allan J. Stein, *FOIA and FACA: Freedom of Information in the “Fifth Branch”*, 27 ADMIN. L. REV. 31, 63 (1975).

169. Federal Advisory Committee Act § 4(c) (emphasis added).

170. The difference between an exclusion and an exemption is well illustrated in the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA). FOIA would not require the release of a memorandum from a close adviser to the President on a matter of national security because the White House Office is *excluded* from FOIA's coverage. *Id.* § 552(f); see *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), *National Sec. Archive v. Archivist of the United States*, 909 F.2d 541 (D.C. Cir. 1990); *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C. Cir. 1985). If the same document were transmitted to the OMB, it would be subject to disclosure unless *exempted* by FOIA, which it might well be under section 552(b)(1).

agencies, but decided that such groups should be exempted if their "primary function" is rendering a public service.¹⁷¹

The Court rejected its own "plain language" interpretation of FACA because of the possibility that FACA would apply to a President's casual contacts with the NAACP or the American Legion. But the Court's analysis lacked any historical perspective on its own parade of horrors. The lower courts had already struggled with virtually the same question and had largely, though not consistently, concluded that FACA extended to regularly constituted groups established outside the federal government,¹⁷² and to ad hoc groups consulting with federal officers, even for a single meeting.¹⁷³ Courts sometimes expressed reservations about potential separation-of-powers and

171. Section 9 of the Act also draws a clear distinction between established and utilized committees. See Stein, *supra* note 168, at 63-64; compare Federal Advisory Committee Act § 9(a) (stating that no advisory committee shall be *established* unless authorized by statute, the President, or an agency head) with *id.* § 9(b) (stating that advisory committees shall be *utilized* for advisory functions only).

172. *Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978) (holding that FACA applies to meetings of members of American Association of State Highway and Transportation Officials (AASHTO) to discuss proposed regulations). AASHTO—a nonprofit, privately incorporated organization, established in 1914—was made up of representatives of state and federal highway and transportation departments. AASHTO was financed by dues assessed to its members. The Department of Transportation paid dues of \$5319 in 1976. *Id.* at 690. Following the Court's decision in *Public Citizen*, the district court ruled that AASHTO was not subject to the Act. *Center for Auto Safety v. Federal Highway Admin.*, No. 89-1045, 1990 U.S. Dist. LEXIS 13733 (D.D.C. Oct. 12, 1990); cf. Benjamin Vandegrift & Alan Rosenblatt, *The Federal Advisory Committee Act: Its Impact on Informal Contacts with the Staffs of Administrative Agencies*, 41 BUS. LAW. 1281, 1281 (1986) (suggesting that ABA's Federal Regulation of Securities Committee is covered by FACA when it meets with Securities and Exchange Commission staff).

173. See, e.g., *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979) (concluding that FACA covers single meeting between Food and Drug Administration (FDA) officials and ad hoc group of five physicians); *Natural Resources Defense Council v. Edwards*, 2 Gov't Doc. Servs. § 82,070 (D.D.C. Sept. 8, 1981) (holding that FACA covers single meeting of Secretary of Energy with various industry representatives); *Food Chem. News, Inc. v. Davis*, 378 F. Supp. 1048 (D.D.C. 1974) (holding that FACA covers two informal meetings by Alcohol, Tobacco and Firearms officials with ad hoc committee of representatives of distilled spirits industry); *Aviation Consumer Action Project v. Yohe*, Civ. No. 707-73 (D.D.C. June 24, 1974) (holding that FACA covers single meeting between Civil Aeronautics Board officials and industry representatives), described in *Perritt & Wilkinson*, *supra* note 92, at 729 n.26. But see *Consumers Union of United States, Inc. v. Department of Health, Educ. & Welfare*, 409 F. Supp. 473 (D.D.C. 1976) (holding that FACA does not cover meetings between FDA officials and Cosmetics, Toiletry and Fragrance Associations to consider group's proposals), *aff'd mem.*, 551 F.2d 466 (D.C. Cir. 1977); *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) (holding that FACA does not cover biweekly meetings between various private sector groups and White House Office of Public Liaison because meetings were unstructured and informal), *appeal vacated as moot*, No. 75-1969 (D.C. Cir. Jan. 10, 1977); *Center for Auto Safety v. Morton*, Civ. No. 74-1566 (D.D.C. June 6, 1975) (concluding that FACA does not cover single meeting with auto industry representatives), cited and described in *SOURCE BOOK*, *supra* note 102, at 344; see also *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) (rejecting idea that FACA covers "episodic meetings") (dictum); *Natural Resources Defense Council v. Environmental Protection Agency*, 806 F. Supp. 275, 277 (D.D.C. 1992) (holding that Governor's Forum advising EPA was not an advisory committee).

First Amendment concerns.¹⁷⁴ The DOJ and the commentaries had also noted the problems.¹⁷⁵

There are considerable reasons why the NAACP and the American Legion¹⁷⁶ should be treated differently from the ABA Standing Committee. The latter has enjoyed a special, regular, and formal relationship of advice and confidence with the President for well over thirty years. As the ABA itself stated, the Standing Committee "has been consulted by every President concerning almost every judicial appointment since 1952."¹⁷⁷ Prior to the Reagan Administration, the ABA Standing Committee was "actively utilized and consulted in the pre-nomination stage."¹⁷⁸ Tentative ratings from the ABA "could be used by Justice officials in negotiations with senators and other officials of the President's party. At times they influenced the Justice officials' final selection."¹⁷⁹

174. In *Center for Auto Safety*, 580 F.2d at 694, the court stated that it saw no First Amendment problems in applying FACA's open meeting requirements to meetings between AASHTO and the Department of Transportation officials. The court, however, did not address whether the § 10 requirements that an advisory committee open its files and have agency officials approve the agenda and be present at the meetings posed any First Amendment concerns.

In *Consumers Union*, the court held that FACA did not apply to meetings between the FDA and cosmetics industry officials and that it would not reach the First Amendment claims. 409 F. Supp. at 477 n.7. The court in *Nader* found that, if FACA applied to White House officials' meetings with ad hoc groups, the Act might "impinge on the effective discharge of the President's powers," thereby "rais[ing] the most serious questions under our tripartite form of government." *Nader*, 396 F. Supp. at 1234 & n.5.

175. *To Amend FACA Hearings*, *supra* note 127, at 152 (statement of Mary Lawton, Deputy Asst. Attorney General, DOJ); WEGMAN, *supra* note 23, at 144-47; Cardozo, *supra* note 80, at 20-28; David B. Marblestone, *The Relationship Between the Government in the Sunshine Act and the Federal Advisory Committee Act*, 36 FED. B.J. 65, 72-73 (1977) [hereinafter Marblestone, *The Relationship Between the Sunshine Act and FACA*]; David B. Marblestone, *The Coverage of the Federal Advisory Committee Act*, 35 FED. B.J. 119, 129-32 (1976) [hereinafter Marblestone, *The Coverage of FACA*]; Jerry W. Markham, *The Federal Advisory Committee Act*, 35 U. PITT. L. REV. 557, 575 (1974); Murphy, *supra* note 80, at 5-7.

176. Even under the early cases, it is not clear if the NAACP and American Legion would have been considered advisory committees utilized by the President. For example, if the President sought the views of individual members of those groups rather than seeking the recommendation of the NAACP *qua* the NAACP and the American Legion *qua* the American Legion, then FACA would not have applied. *See, e.g.*, *Natural Resources Defense Council v. Herrington*, 637 F. Supp. 116 (D.D.C. 1986). There is reason to question the continuing validity of the early decisions regarding ad hoc meetings. If the President called the head of the NAACP for his thoughts on potential EEOC nominations, FACA would not cover the phone call. *See* 41 C.F.R. § 101-6.1004 (1993); Cardozo, *supra* note 80, at 26-28.

177. AMERICAN BAR ASS'N, *supra* note 122, at 2. "The ABA has lobbied more pervasively, and perhaps more persuasively, with respect to judicial nominations than any other private interest group. Not content, however, merely to influence the process from outside the government, the ABA meticulously has developed a special institutionalized relationship with the executive branch." William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 35 (1990), *see also* R. Townsend Davis, Jr., Note, *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 COLUM. L. REV. 550, 551-52 & n.18 (1989).

178. Sheldon Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 316 (1985). *See generally* Silberman, *supra* note 132. For background on the role of the Standing Committee during the Reagan and Bush years, *see* TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY* 261-65 (1992).

179. Goldman, *supra* note 178, at 315. The Reagan Administration abandoned the practice of consulting the ABA Standing Committee on various potential nominees at the prenomination stage. It instead consulted with the Standing Committee only after a nominee had been selected. *Id.*

Whatever the potential problems when the President informally consults with outside groups, the executive's relationship to the ABA is anything but informal. It would be difficult to conceive of a formally constituted committee that better described a "committee . . . utilized by the President . . . in the interest of obtaining advice or recommendations . . ."¹⁸⁰ Whether used as a source of advice, as a tool for pushing a nomination that might otherwise fail, or as a foil for avoiding a particular choice, the ABA Standing Committee fits well within the classic descriptions of advisory committees and their political uses.

C. *Revising the Past*

Having rejected the plain language of FACA as a basis for its decision, the Court resorted to the legislative history in search for a workable definition of "utilized." It identified Executive Order No. 11,007 as the probable source of the term.¹⁸¹ Without any evidence as to the actual or intended scope of the executive order, however, the Court focused on the fact that "no President or Justice Department official applied [Executive Order No. 11,007] to the ABA Committee."¹⁸² From this the Court concluded that FACA also did not cover the ABA Standing Committee.¹⁸³

This was another extraordinary leap by the Court. First, as the Court pointed out, one of the reasons for FACA was Congress' unhappiness with the lack of executive enforcement of Executive Order No. 11,007.¹⁸⁴ Even had the executive branch compiled a comprehensive listing of advisory committees covered by the executive order, the absence of the ABA Standing Committee from the list would have proven little, since agency heads could waive the order's requirements.¹⁸⁵

Second, the Court overlooked an exemption for "any advisory committee composed wholly of representatives of State or local agencies or charitable,

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180. Federal Advisory Committee Act § 3(2).

181. See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 456-57 (1989); Exec. Order No. 11,007, § 2(a), 3 C.F.R. 182, 182 (Supp. 1962) (covering advisory committees "not formed by a department or agency, but only during any period when it is being utilized . . . in the same manner as a Government-formed advisory committee").

182. 491 U.S. at 457.

183. The Court failed to note that Executive Order No. 11,671, which was issued in June 1972 and superseded Executive Order No. 11,007, would likely have covered the ABA Standing Committee. See Exec. Order No. 11,671, § 1(6), 3 C.F.R. 388 (1973). In testimony before the House in June 1972, the new executive order was praised for recognizing the need to cover the "utilized" committees, and both H.R. 4383 (which had already passed the House) and S. 3529 were criticized for omitting the term. See, e.g., *U.S. Gov't Information Policies Hearings*, *supra* note 79, at 3725-29 (statement of Peter J. Petkas, Esq.).

184. 491 U.S. at 459; see H.R. REP. NO. 1731, *supra* note 104, at 9-10; see also H.R. REP. NO. 1017, *supra* note 110, at 7.

185. See Exec. Order No. 11,007, § 6(f). Moreover, the sheer number of advisory committees—some 1800 at the time FACA became law in 1972, H.R. REP. NO. 1731, *supra* note 104, at 14-15—calls into question how seriously the lack of evidence of *presidential* intent to cover any particular committee should be taken. I am not aware of evidence of executive intent to cover any specific committee.

religious, educational, civic, social welfare, or other similar nonprofit organizations" found in Executive Order No. 11,007, but not found in FACA.¹⁸⁶ It is possible that the executive order exempted the ABA Standing Committee. While we may never know whether the issue was raised while the order was still in force, similar questions were addressed to Congress,¹⁸⁷ and have been raised in more recent litigation.¹⁸⁸

Third, even assuming that Executive Order No. 11,007 covered the ABA Standing Committee, the fact that the President had not enforced the order against the Standing Committee proved only that there were essential differences between executive orders and acts of Congress. Executive Order No. 11,007 required self-policing, while FACA was judicially enforceable. When an executive order relates to executive branch management, the President may make ad hoc exceptions to the executive order at his discretion, and may do so without explanation.¹⁸⁹

The Court then turned to the House and Senate reports. In the House report it could find no reference to the ABA Standing Committee, and "no indication" that a "purely private group," one "not formed by the Executive" and that "accept[s] no public funds," was within the terms of Executive Order No. 11,007.¹⁹⁰ Yet the House had stated that it intended to include "those

186. Exec. Order No. 11,007, § 9; see Marblestone, *The Coverage of FACA*, *supra* note 175, at 130 n.61 (noting that FACA is broader than executive order because it omitted these exemptions).

187. See *U.S. Gov't Information Policies Hearings*, *supra* note 79, at 3755-56 (discussing potential scope of similar exemption in Exec. Order No. 11,671).

188. Cf. *Association of the Bar v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (holding that Association of the Bar of the City of New York was not qualified for 501(c)(3) tax exemption because of actions rating judicial candidates, but was qualified for 501(c)(6) exemption as business league); Ross, *supra* note 177, at 78-82.

189. "Most executive orders deal with either technical administrative functions or the internal organization of the executive branch. These orders affect private parties only indirectly, if at all." John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 (1981) (footnote omitted); see also HOUSE COMM. ON GOV'T OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS (Comm. Print 1957).

190. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 460 (1989). In a lengthy footnote and response to Justice Kennedy, the Court made a similar point with respect to the General Service Administration's (GSA) construction of FACA. The Court inferred from the absence of the ABA Standing Committee in the GSA's annual report that the GSA did not consider FACA to apply to the Standing Committee; it declared that the GSA's regulations were owed "diminished deference" because they were not a "contemporaneous construction" of FACA. *Id.* at 463-65 n.12. Since the GSA depended on self-enforcement by the committees or self-policing by the agencies, it is unlikely that any group that harbored doubts about the applicability of FACA would volunteer for chartering and registration with the GSA. Further, the GSA did not have any tools available to ensure the chartering of committees that were utilized, but not established, by an agency. See Kit Gage & Samuel S. Epstein, *The Federal Advisory Committee System: An Assessment*, 7 ENVTL. L. 50,001, 50,002-03 (1977) ("Despite the Act's seemingly broad coverage, there remain numerous committees which claim exemption or are exempted by statute from the Act . . . . Sometimes groups which directly advise the government refuse to acknowledge that they are federal advisory committees until forced to do so through litigation."); see also *Association of Am Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 908 n.9 (D.C. Cir. 1993) (recounting example of advisory committee created by President Ford but not acknowledged as subject to FACA until Carter Administration).

If the Court were really interested in "contemporaneous construction," it could have looked to the DOJ and the OMB. The DOJ had not only given its opinion on the application of FACA to the ABA

committees which may have been organized before their advice was sought by the President or any agency, but which are used by the President or any agency in the same way as an advisory committee formed by the President himself or the agency itself."¹⁹¹ Referring to the Senate report, the Court acknowledged that some privately funded groups might be covered, but the Court again found no "desire [by the Senate] to bring *all* private advisory committees within FACA's terms."¹⁹² The Court asserted that the Senate's examples of covered committees—the Advisory Council on Federal Reports, the National Industrial Pollution Control Council, the National Petroleum Council, the committees advising the National Institutes of Health, and certain committees of the national academies—were "groups organized by, or closely tied to, the Federal Government and thus enjoying quasi-public status."¹⁹³

Comparing the "quasi-public" Advisory Council on Federal Reports with the ABA Standing Committee is devastating to the Court's conclusion. The Advisory Council on Federal Reports was organized not by the federal government, but rather "by several national business organizations at the request of the Bureau of the Budget (now the OMB),"¹⁹⁴ and it was appointed and funded by industry.¹⁹⁵ Congress knew the Advisory Council was purely private in its organization, appointment, and funding, and it still expected the Advisory Council would be subject to FACA. While the Advisory Council was indisputably "closely tied" to the OMB, the ABA Standing

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Standing Committee, but together with the OMB had issued the original guidelines for implementing FACA. The guidelines provided that committees advising an official or agency, "though not established for that purpose, are covered by the Act . . . . For example, the Act would apply to an already existing organization of scholars enlisted by an agency to provide advice on a continuing basis." *Advisory Committee Management*, OMB Circular A-63, reprinted in 38 Fed. Reg. 2306, 2307 (1973). The OMB listed three nonfederal groups, including the Business Advisory Council on Federal Reports, as advisory to it. *To Amend FACA Hearings*, *supra* note 127, at 75 (statement of James T. Lynn).

191. H.R. REP. NO. 1017, *supra* note 110, at 4.

192. 491 U.S. at 461 (emphasis added). The point is insignificant because the House and Senate reports mentioned virtually no advisory committees, public or private. *Id.* at 475 (Kennedy, J., concurring); 118 CONG. REC. 31,421 (1972) (statement of Rep. Holifield) ("We had quite a bit of trouble finding out how many [advisory committees] there were, and we are not sure that 3,200 covers it altogether. . . . [FACA] will go a long way toward getting a proper inventory . . .").

193. 491 U.S. at 461 (quoting S. REP. NO. 1098, *supra* note 106, at 8). With respect to the National Industrial Pollution Control Council, see generally William H. Rodgers, Jr., *The National Industrial Pollution Control Council: Advise or Collude?*, 13 B.C. INDUS. & COM. L. REV. 719 (1972); Henry J. Steck, *Private Influence on Environmental Policy: The Case of the National Industrial Pollution Control Council*, 5 ENVTL. L. 241 (1975); Richard H.K. Vietor, *NIPCC: The Advisory Council Approach*, 8 J. CONTEMP. BUS. 57 (1979).

194. H.R. REP. NO. 1017, *supra* note 110, at 6; see Cardozo, *supra* note 80, at 20. Congress was concerned with the "lack of balanced representation of different points of view" on the Advisory Council and thought the Advisory Council's composition "would be prohibited" by what is now the Federal Advisory Committee Act § 5(b). H.R. REP. NO. 1717, *supra* note 79, at 19. The Advisory Council on Federal Reports was finally terminated by the OMB in a zero-based review of all federal advisory committees conducted in 1977. PRESIDENT'S ADVISORY COMM. REDUCTION PROGRAM, *supra* note 135, at 69.

195. H.R. REP. NO. 1717, *supra* note 79, at 19; see also S. REP. NO. 1098, *supra* note 106, at 16 ("[There is] substantial merit in opening advisory committee deliberations and documentation to the public, particularly with respect to business advisory bodies, where the potential for special interest pleading and abuse [is] more apparent.").

Committee was similarly tied to the DOJ. Nothing in the formation or funding of the Advisory Council on Federal Reports made it any more “closely tied” to the government or “amenable” to management by agency officials than the ABA Standing Committee, yet the Court obviously was not prepared to concede that the ABA Standing Committee was “quasi-public.”

The unanswered question in *Public Citizen* is why Congress added the term “utilized” in conference. What did the term add to the bill to which the House and Senate were prepared to agree, and why was it added so late in the process? The Court’s inadequate response was that there was “no indication that the modification was significant.”¹⁹⁶ The Court stated that Congress’ “initial restricted focus on advisory committees established by the Federal Government . . . was retained rather than enlarged by the Conference Committee.”¹⁹⁷ The Court was mistaken. The legislative history clearly reveals that Congress intended the addition to be significant. The term “utilized” was added in conference precisely to ensure that the Act would cover privately established and funded groups, such as the Advisory Council on Federal Reports.

In late June 1972, after the House had passed H.R. 4383, and after the President had issued Executive Order No. 11,671 (superseding Executive Order No. 11,007), but before the Senate adopted S. 3529, public interest lawyers testifying before a subcommittee of the House Government Operations Committee criticized the bills for not expressly covering utilized committees. Attorney Peter Petkas of the Corporate Accountability Research Group told the subcommittee that both H.R. 4383 (passed by the House on May 9, 1972) and S. 3529 (under consideration) contained “several problems.” First among his concerns was that

[c]ommittees utilized but not established by an agency (or the President) are not included within the definition of either type of “advisory committee” [in S. 3529]. The definitions turn on whether or not the committee was “established . . . by the President or any officer of the Government.” The administration has already acquiesced in the need for this broader definition by including the utilization concept in its new Executive order [No. 11,671]. It has dealt with the problem of over-inclusiveness by limiting the applicability of the requirements of the order to “utilized-but-not-established” committees to the period of utilization. *It is important in this context to recall that the advisory committees of the OMB, those organized under the aegis of the Business Advisory Council on Federal Reports, are “utilized” but not established by OMB.*¹⁹⁸

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196. 491 U.S. at 462.

197. *Id.*

198. *U.S. Gov’t Information Policies Hearings*, *supra* note 79, at 3725 (emphasis added), *see also id.* at 3727 (recommending that Executive Order No. 11,671 define “utilized”). Other sources gave similar testimony. *Id.* at 3681–83 (statement of David Calfee).

This was apparently the last hearing held on FACA-related matters before the Senate acted in September 1972. June would already have been too late for the House to revise its own bill, and with presidential and congressional elections ahead, the House had little opportunity to suggest changes to the Senate until the conference. The "utilized" change was held over for the conference, which "adopt[ed] the House definition of 'advisory committee' with modification."¹⁹⁹

Ignoring this legislative history, the Court concluded that Congress added the term "utilized" to ensure that the term "established" was applied in a "generous sense" so as to encompass advisory committees established by the quasi-public National Academy of Sciences "for" federal agencies.²⁰⁰ As evidence, the Court quoted the conference report's explanation of section 4: "'The Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies.'"²⁰¹ The passage quoted by the Court was undoubtedly a pivotal paragraph in the conference report. Unfortunately, standing alone, it obscured far more than the term "utilized," which it purported to illuminate.

At first glance, the passage did seem to support the proposition that FACA does not apply to (1) organizations with federal contracts, and (2) advisory committees not established immediately by or for an agency. Both propositions would have been novel; the former because the Act says nothing about groups with contracts, and the latter because this would have taken away from the bill everything the term "utilized" would have added. If the Court was correct, then why did Congress even bother to add the term "utilized"? More simply, why didn't Congress simply define "advisory committee" to mean committees established "by or for" an agency, since such language might have picked up the Advisory Council on Federal Reports without bringing into question some other groups?

The answer appears in *Lombardo v. Handler*,²⁰² an early FACA decision involving the National Academy of Sciences. In *Lombardo*, the plaintiff claimed that the Academy and its Committee on Motor Vehicle Emissions were advisory to the Environmental Protection Agency (EPA), in violation of FACA. The district court held that the Academy was not an "agency" subject to FACA, and that its committee was not established or utilized by the EPA. The Academy, which the Supreme Court characterized as "quasi-public" in

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199. EXECUTIVE BRANCH ADVISORY COMMITTEES, H.R. CONF. REP. NO. 1403, 92d Cong., 2d Sess. 9 (1972); see 118 CONG. REC. 31,420-21 (1972) (statement of Rep. Monagan).

200. *Public Citizen*, 491 U.S. at 462.

201. *Id.* at 462 (quoting H.R. CONF. REP. NO. 1403, *supra* note 199, at 10).

202. 397 F. Supp. 792 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

Public Citizen,²⁰³ bore little resemblance to a public body. It had contracts with the federal government, but also had contracts with nonfederal entities, did not receive federal appropriations, and was not subject to the civil service laws or similar restrictions.²⁰⁴

The district court in *Lombardo* pointed out that there had been some initial confusion between the House and the Senate over whether institutions with federal contracts would be considered advisory committees. The legislative history of the original bill in the House had provided that “[t]he term advisory committee does not include any contractor or consultant.”²⁰⁵ The Senate history had provided, however, that the bill covered “a group [organized] by formal or informal means, by contract or other arrangement . . . . Examples of such groups are the . . . committees of the national academies . . . .”²⁰⁶ The district court concluded that this apparent conflict was resolved in conference. Yet, in context, the inartful statement in the conference report made it clear that FACA applied neither to entities with federal contracts—specifically the National Academy of Sciences—nor to advisory committees not directly established for an agency by an entity having a contract. The statement did not affect the scope of FACA except with respect to entities advising the government under a contract. An exchange on the floor of the House shortly after the conference confirmed this understanding:

MR. HORTON. Am I correct in the understanding that this bill does not apply to such organizations as the National Academy of Sciences and its various committees which make studies and submit reports to Federal agencies on request?

MR. HOLIFIELD. The gentleman is quite correct. If he will refer to the joint explanatory statement of the committee of conference at page 10, the first full paragraph, it states as follows:

The Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies.

As the gentleman knows, the National Academy of Sciences was founded by Congress and, therefore, it comes under that category.

MR. HORTON. So, it would be excluded?

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203. 491 U.S. at 462. Ironically, the House characterized the National Academy of Sciences as “semi-private.” H.R. REP. NO. 1731, *supra* note 104, at 15. The Academy was incorporated by Act of Congress in 1863. An Act to Incorporate the National Academy of Sciences, ch. 111, 12 Stat. 806 (1863). It is insignificant that Congress chartered the Academy because, prior to 1870, Congress exercised exclusive control over all acts of incorporation in the District of Columbia. See Act to Provide for the Creation of Corporations in the District of Columbia, ch. 80, § 3, 16 Stat. 98, 101 (1870); *Lombardo*, 397 F. Supp. at 794.

204. 397 F. Supp. at 794–95 & n.10.

205. H.R. REP. NO. 1017, *supra* note 110, at 4.

206. S. REP. NO. 1098, *supra* note 106, at 8.

MR. HOLIFIELD. That is correct.²⁰⁷

In sum, the Court in *Public Citizen* confused what for the conference were two separate questions: First, how could Congress ensure that FACA would cover utilized groups such as the Advisory Council on Federal Reports? Second, how could Congress avoid covering groups with federal contracts, such as the groups formed by the National Academy of Sciences? The conference addressed the first question directly by adding the term "utilized" in section 3. It addressed the second question obliquely by including language in the conference report to the effect that section 4 would exempt the National Academy of Sciences. Disregarding the legislative history on these points, the Supreme Court concluded that FACA applies to "groups formed indirectly by quasi-public organizations such as the National Academy of Sciences"²⁰⁸ and that FACA does not cover "private groups," which would include the Advisory Council on Federal Reports.²⁰⁹ The Court's conclusions concerning Congress' intentions are almost 180 degrees off.

D. *Concluding Thoughts on Public Citizen*

In the last analysis, the Court told us that the driving force behind *Public Citizen* is neither the need to protect the ABA Standing Committee from federal regulation, nor the need to safeguard the executive's constitutional

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207. 118 CONG. REC. 31,421 (1972). The counsel to the Senate Committee on Government Operations, E. Winslow Turner, explained at a FACA oversight hearing:

On that particular point, as to the Academy, because I happened to be around when some of that legislative history was taking place it was generally accepted as legislative intent at the Conference on the Advisory Committee Act that the National Academy of Sciences, when it meets as a group down the street to discuss things within itself and to develop whatever reports come to it, is in no different a category than the National Association of Manufacturers or the U.S. Chambers of Commerce. It is a private organization talking to itself. But when the National Academy of Sciences, by a contractual [sic] relationship, advises the Federal Government, it is in the capacity of a consultant, and subject to appropriate laws, not the Federal Advisory Committee Act.

If it advises the Federal Government directly in any other way, it is covered under the Federal Advisory Committee Act. It is clear in legislative history . . .

Advisory Committees: Hearings on Budgeting, *supra* note 79, at 89; *see also* Gage & Epstein, *supra* note 190, at 50,003-04 (quoting Letter from Robert E. Dixon, Jr., Assistant Attorney General, Department of Justice, to Peter B. Hutt, Assistant General Counsel, Department of Health, Education & Welfare (Nov. 23, 1973)) (suggesting that FACA excluded National Academy of Sciences as general matter).

In a post-passage meeting "the Staff Director of the House Government Operations Committee stated that one reason for putting in the Conference Report . . . the language that the 'Act does not apply to . . . advisory committees not directly established by or for such [federal] agencies' was to exclude the ABA Committee from the Act's coverage." The OLC rejected the statement as "not sufficient to overcome the language of the statute." Office of Legal Counsel, Application of the Federal Advisory Committee Act to the American Bar Association Standing Committee on the Federal Judiciary 6 n.5 (May 23, 1973) (on file with author).

208. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 462 (1989). Of course, the Academy or an advisory committee created by the Academy would not be subject to FACA when acting in a private capacity.

209. *Id.* at 462.

prerogatives, but simply the need to preserve a rule of construction: The Court will construe a statute to avoid constitutional problems unless such a construction is contrary to Congress' interest.²¹⁰ This rule, the Court reassured us, recognizes Congress as a coequal branch, bound by and sworn to uphold the Constitution. According to the Court, respect for Congress and Congress' constitutional judgment required the Court to search the legislative history for a much-reduced role for the "woolly verb," utilized. Out of respect for Congress, the Court treated a well-considered administrative construction as undeserving of consideration on its own merits, relegating it to a single footnote. For its efforts at divining Congress' intent from the legislative history, the Court demonstrated that it indeed possessed nothing more than a "nodding acquaintance with FACA's purposes."²¹¹ In the end, the Court made a shambles of the Act, quite unnecessarily.

The Court's stated rationale was to avoid construing FACA in such a way as to subject it to constitutional challenge, a policy rooted in the separation of powers and the respect the Court owes Congress. Nominally, the majority's solution protected presidential turf from congressional encroachment, while respecting Congress' knowledge of constitutional contours. In the end, the Court served neither the executive nor Congress. The executive was fully shielded from Congress by the Constitution. If FACA was constitutional, then intervention by the Court was unnecessary; if FACA's application encroached on ground reserved to the executive, then the Constitution demanded the Court's assistance. But the executive did not need the Court's heavy-handed construction to save it from congressional encroachment. In the process of saving the executive from Congress, the Court trampled the deference that it ordinarily gives executive agencies construing congressional acts. The net result is that the executive ceded territory, not to Congress, but to the Court.

Congress suffered at the hands of the Court's feigned deference. What the Court did has left Congress less sure of what it must say in order to have the Court take it seriously. After *Public Citizen*, Congress will be less confident in its ability to use ordinary terms and to have its acts enforced, and it will be even less sure of the usefulness of its legislative reports. Moreover, the Court took from Congress the initiative to amend FACA. In 1989 Congress was well aware of the problems in FACA; knowing the Court would decide *Public Citizen*, Congress was prepared to move forward on clarifying amendments.²¹² Congress is entitled to press its authority to the outermost

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210. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

211. *Id.* at 452-53.

212. See, e.g., *Federal Advisory Committee Act Amendments of 1989: Hearing Before the Senate Comm. on Gov't Affairs*, 101st Cong., 1st Sess. (1989); *Federal Advisory Committee Act and the President's AIDS Commission: Hearing Before the Senate Comm. on Gov't Affairs*, 100th Cong., 1st Sess. (1987); see also Mary K. Palladino, *Ensuring Coverage, Balance, Openness and Ethical Conduct for Advisory Committee Members Under the Federal Advisory Committee Act*, 5 ADMIN. L.J. 231 (1991).

reaches of the Constitution, and it is entitled to know precisely where those boundaries are. Congress has demonstrated its willingness to experiment with novel and aggressive government reforms. Sometimes it has been successful,²¹³ and sometimes its efforts have pushed the extent of its constitutional powers too far.²¹⁴ But Congress is more informed as a result of these cases. Given the development of constitutional law since FACA's passage in 1972, and particularly given the resurgence of formalism in the Court's decisions, it could not have been clear to Congress that FACA's application to the ABA Standing Committee was "absurd."

In FACA Congress had pressed its power over presidential advisory committees far beyond anything any prior Congress had suggested. Congress invited conflict with the executive, and the Court simply refused to arbitrate. The Court's contrived construction of FACA did nothing to define the boundaries for Congress. As Justice Kennedy pointed out, an unconstitutional application does not make the application absurd.²¹⁵ As did the executive, Congress suffered in *Public Citizen*, but the costs imposed on it did not originate with the executive, but with the Court. Ultimately, the Court revealed itself to be an inept participant in what has been a constitutionally sophisticated debate between the President and Congress.

E. *Public Citizen Redux: Association of American Physicians & Surgeons, Inc. v. Clinton*

These concerns resurface in the D.C. Circuit's opinion in *Association of American Physicians & Surgeons, Inc. v. Clinton*.²¹⁶ The case arose when the President appointed a Task Force on National Health Care Reform (Task Force) chaired by the First Lady, and charged it with conducting public hearings and submitting draft legislation to the President within one hundred days.²¹⁷

Various associations, claiming that the First Lady was not a federal employee, and that the Task Force was therefore a federal advisory committee, sought access to the Task Force's meetings. When the White House declined, the associations filed suit. The district court found that the First Lady was not

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(arguing in favor of proposed amendments); Michelle Nuskiewicz, Note, *Twenty Years of the Federal Advisory Committee Act: It's Time for Some Changes*, 65 S. CAL. L. REV. 957 (1992).

213. E.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding constitutionality of federal sentencing guidelines); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding constitutionality of Ethics in Government Act of 1978 (independent counsel law)).

214. E.g., *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976).

215. 491 U.S. at 472 (Kennedy, J., concurring).

216. 997 F.2d 898 (D.C. Cir. 1993).

217. The Task Force comprised six Cabinet members, the Director of the OMB, the Chairman of the Council of Economic Advisers, three White House officials, and the First Lady. *Id.* at 900-01.

a federal employee, and concluded that FACA violated the President's power to recommend to Congress "such Measures as he shall judge necessary and expedient."²¹⁸

The D.C. Circuit reversed, solely on the question of whether the First Lady's presence brought the Task Force within FACA. Acknowledging that "the question whether Mrs. Clinton's membership on the Task Force triggers FACA is not an easy one," the court commented that *Public Citizen* constituted "an extremely strained construction of the word 'utilized' in order to avoid the constitutional question."²¹⁹ The court stated that it too would be guided by "whether the government's constitutional argument in this case is a powerful one."²²⁰ The court considered potential interference with the President's express power to recommend legislation and his implied power to "discuss matters confidentially,"²²¹ and concluded that "interfering with a President's ability to seek advice directly from private citizens as a group, intermixed, or not, with government officials . . . raise[d] Article II concerns" such that the court would treat the First Lady as a full-time officer or employee of the government under FACA.²²²

Association of American Physicians perpetuates and compounds the manifest errors of *Public Citizen*. As in *Public Citizen*, the D.C. Circuit formulated its statutory construction on the basis of whether a particular construction brought about the right constitutional result. In the process, the court did not avoid the constitutional question, but, finding FACA constitutionally infirm, reasoned backward to alter its view of what FACA meant, thereby making its constitutional discussion dicta. The court renders its interpretive powers irrelevant when it makes construction of terms such as

218. U.S. CONST. art. II, § 3; see *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 813 F. Supp. 82, 86–88, 90–93 (D.D.C.), *rev'd*, 997 F.2d 898 (D.C. Cir. 1993).

219. 997 F.2d at 906.

220. *Id.*; see 813 F. Supp. at 86 ("[T]he court believes there was little ambiguity in the word 'utilize' prior to the Supreme Court's holding in *Public Citizen* . . .")

Commenting on both *Public Citizen* and *Association of American Physicians*, a district court observed that the Court avoided the constitutional questions "by adroit semantics and near-clairvoyant discernment of legislative intent." The majorities "incurred stern approbation from concurring brethren who were less squeamish." *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1014 (D.D.C. 1994).

221. 997 F.2d at 909.

222. *Id.* at 910–11; see *Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee"*, 1 Op. Off. Legal Counsel 20, 22–23 (1977) (suggesting that, although First Lady was not special government employee merely because she regularly discussed governmental matters with President, her chairing meetings of government employees might be "engaging in a governmental function" for conflict-of-interest purposes).

In Judge Buckley's view, the position urged by the government and adopted by the majority began with "an assumption that *Public Citizen*'s result could not have been reached through genuine interpretation . . . and [ed] with the conclusion that *Public Citizen* authorizes courts to avoid constitutional issues by ascribing implausible meanings to the most unambiguous language." 997 F.2d at 917 (Buckley, J., concurring). Judge Buckley would have found that the First Lady was not a full-time government employee, that the Task Force was subject to FACA, but that applying FACA to the Task Force would violate presidential privilege. *Id.* at 920–25.

"full-time officers or employees" turn on debates over unrelated terms in Article II, the removal power, or presidential privilege.

Whether or not Congress in 1972 understood how far its constitutional powers extended, it surely thought it knew how far it had cast FACA.²²³ As *Association of American Physicians* demonstrates, Congress should have no such confidence today.

IV. BEYOND *PUBLIC CITIZEN*: PRESIDENTIAL ADVISORY COMMITTEES AND THE SEPARATION OF POWERS

In his enduring concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,²²⁴ Justice Jackson describes a Constitution that "contemplates that practice will integrate the dispersed powers into a workable government," a government in which "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."²²⁵ In his oversimplified scheme, when the President and Congress act consonantly, the only question under the Constitution is one of power in the government itself. But in the absence of a congressional grant or denial of authority, there exists a "zone of twilight" in which the distribution of power is uncertain and the President acts solely on his own constitutional authority. Finally, when the President acts contrary to the will of Congress, his power is at its "lowest ebb," and the President relies on his own authority less whatever claim Congress has to concurrent or exclusive control of the matter.²²⁶

Presidential control of advisory committees has operated largely in the zone of twilight in which presidential power is confirmed more often by congressional inattention or resignation than by congressional approval. The passage of FACA, by which Congress asserted control of both congressionally created advisory committees and presidentially created advisory committees, shifted the historical relationship between the President and Congress from one of congressional inattention or resignation to one of clear assertion of congressional power. Presidential control of advisory committees no longer operates in the zone of twilight. The President's power is now at its lowest ebb; he must rely solely on his own constitutional authority.²²⁷

The jockeying for control of the advisory committee whip handle does not rival the raw exercise of power apparent in the seizure of Youngstown's steel mills. Though the drama may be missing, the matter of control of advisory

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223. Congress was prepared to remedy any deficiencies in FACA through legislation. See 813 F. Supp. at 89-90 n.12 (discussing remedial legislation that would have defined President's spouse as full-time employee for purposes of FACA).

224. 343 U.S. 579 (1952).

225. *Id.* at 635 (Jackson, J., concurring).

226. *Id.* at 635-38.

227. See *id.*

committees has proven sufficiently enduring to merit inquiry into the nature and relationship of the President's and Congress' respective claims to control of presidential advisory committees. Advisory relationships bespeak an intimate inquiry into the constitutional working of presidential decisionmaking; unlike assertions of presidential power over the domestic and external affairs of the United States, presidential claims of control of advisory committees focus exclusively on the internal workings of the executive branch. Since the President remains accountable for any decision based on advice, and Congress has the means to discover for itself the substance of the advice, the argument between Congress and the President is one over control of the process by which advisory committees advise the President.

In this Part I discuss the textual bases for the President's and Congress' claims to control of presidential advisory committees. I begin with a discussion of the President's claim to the right to appoint and consult with advisory committees free from interference, a claim he must win in the absence of congressional authorization. I then discuss sources of Congress' power to enact restrictions such as FACA. Questioning Congress' power is not a mere academic exercise. It is a means of testing Congress' claims against the President's claim to exclusivity or primacy in the control of his own advisory committees.

A. *Presidential Authority over Presidential Advisory Committees*

In February 1842 the House of Representatives asked the President to explain "under what authority" he had established the commission investigating the New York Customhouse.²²⁸ It is a question that has been repeated upon the appointment of numerous other presidential advisory committees. No careful explanation has been forthcoming, and Congress has never pressed for a formal response. The question, in Justice Jackson's scheme, must be divided into two parts: First, does the President have the power, in the absence of congressional authorization, to appoint his own advisory committees? Second, is the nature of the power such that the President has the right, in the face of congressional objection, to unfettered consultation with his advisory committees?

The answer to the first question is relatively straightforward. Following the inquiry from the House of Representatives during the customhouse investigation, President Tyler answered that his power derived from the Take Care Clause, the State of the Union Clause, and the Recommendation Clause. The response apparently silenced Congress, or at least prompted it to retreat

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228. CONG. GLOBE, 27th Cong., 2d Sess. 214 (1842); *see supra* notes 43–49 and accompanying text

to the question of funding, where Congress undoubtedly stood on more secure ground.²²⁹

The more difficult question, whether the President has the right to consult with advisory committees free from congressional interference, has never been considered independently of the question of the President's power to appoint. It is fair to state that until the passage of FACA it was the practice, and the assumption by both Congress and the President, that if the President appointed an advisory committee, it was his privilege to consult with the committee free from congressional interference. The privilege was always subject, of course, to Congress' control of the purse and its own powers of inquiry. In light of the issues raised by FACA, the question merits a closer examination of the President's powers as they relate to his advisory committees.

1. *The Vesting and Take Care Clauses*

The Constitution vests the powers of the government of the United States in three bodies: Congress, comprising the Senate and the House of Representatives; the President; and the federal courts, comprising the Supreme Court and such inferior courts as Congress decides to establish. Unlike Congress and the courts, which are collegial bodies, the President alone exercises the executive power.²³⁰ The Founders considered and rejected the proposal for a Council of Revision that would have divided the power of the executive among more than one person.²³¹ Indeed, at least one express power, the Opinions Clause,²³² reinforces the notion that the executive power

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229. See *supra* text accompanying notes 44–46.

230. Madison pointed out that by dividing the legislative power but concentrating the executive power, the Constitution aspired to give, as nearly as possible, to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches . . . As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require . . . that it should be fortified.

THE FEDERALIST No. 51, at 322–23 (James Madison) (Clinton Rossiter ed., 1961).

The term "separation of powers" does not appear in the Constitution but is "implicit in the clauses that 'vest' the legislative, executive, and judicial powers of the federal government in Congress, the President, and the federal courts, respectively." John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1212 (1993).

231. THE FEDERALIST No. 70, at 424–25 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see 1 FARRAND, *supra* note 12, at 94, 96–98, 138–40; 2 FARRAND, *supra* note 12, at 73–80, 367, 537–43. Nothing in the Constitution commits any part of the executive power to the President's subordinates, except in two cases: when Congress vests the appointment of inferior officers in the heads of departments, U.S. CONST. art. II, § 2, cl. 2; see *Morrison v. Olson*, 487 U.S. 654 (1988), and when "the Vice President and a majority of . . . the principal officers of the executive departments" certify that "the President is unable to discharge the powers and duties of his office," U.S. CONST. amend. XXV, § 4, cl. 1.

232. "The President . . . may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices . . . ." *Id.* art. II, § 2, cl. 1.

belongs to the President alone,²³³ and an implied power, the removal authority, gives the President a powerful tool for enforcing his judgments.²³⁴

It is not immediately clear whether the Vesting Clause is itself a substantive grant of authority or whether it merely identifies the recipient of other enumerated powers found in Sections 2 and 3 of Article II.²³⁵ If the Vesting Clause serves an identifying function only, then what follows in Sections 2 and 3 are for the President what the powers enumerated in Article I, Section 8 are for Congress. Under this view, the Take Care Clause serves as the general grant of power to the President to execute the laws.

If, however, the Vesting Clause is a substantive grant of power, then we must explain the clauses following in Sections 2 and 3, particularly the Take Care Clause. One explanation is that Sections 2 and 3 contain powers in addition to the power to execute the laws, vested in the President in Section 1. The argument against this is that it seems to make the Take Care Clause redundant.²³⁶ One response might be that the Take Care Clause in Section

233. Although Hamilton thought the clause a "redundancy," *THE FEDERALIST* No. 74, at 447 (Clinton Rossiter ed., 1961), and Justice Jackson thought it "inherent in the Executive if anything is," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 n.9 (1952) (Jackson, J., concurring), the Framers, [h]aving empowered a single individual . . . had to ensure that his power would not be mooted by those below him who might effectively frustrate any meaningful exercise of his power by refusing to communicate with him.

The agreed solution to both these problems was the adoption of the Opinion Clause, which was designed to serve the purposes of a presidential council while allaying fears that such an advisory group could shield the President from direct responsibility for executive branch actions. Susan M. Davies, Comment, *Congressional Encroachment on Executive Branch Communications*, 57 U. CHI. L. REV. 1297, 1301-02 (1990) (footnotes omitted); see Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1004-07 (1993). As Professor Harvey Mansfield pointed out,

the purpose in assuring the President the written opinions of department heads on request was not only to provide him with informed advice and to make them answerable to him for past actions. It would also enable him to establish clear responsibility before he acted on a pending matter himself or directed the department chief how to act on it—a protection of the principle of hierarchy. . . . A President who can direct the exercise of any powers committed to a subordinate can afford to take a relaxed view of the formal structure of the establishment of which he is the pinnacle.

Mansfield, *supra* note 54, at 37.

234. *Myers v. United States*, 272 U.S. 52 (1926). But see Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 777-81 (1987) (suggesting, as practical matter, that removal power is "modest").

235. See Joseph P. Verdon, Note, *The Vesting Clauses, The Nixon Test, and the Pharaoh's Dreams*, 78 VA. L. REV. 1253 (1992); Michael L. Yoder, Note, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173 (1990). Compare *Myers*, 272 U.S. at 117 (Vesting Clause is "essentially a grant of the power to execute the laws") and 1 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 379 (1953) (Vesting Clause is grant of authority followed by incomplete enumeration of particulars) and Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176-78, 1187 (1992) (Vesting Clause is substantive grant of authority) and Prakash, *supra* note 233, at 995-97 (Founders considered Vesting Clause to be grant of authority) with Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1132-33 (1988) (Supreme Court prior to *Myers* held Vesting Clause was not substantive grant) and Martin H. Redish & Elizabeth J. Cisar, "If Angels Were To Govern" *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 483-84 (1991) (Vesting Clause is not substantive grant of authority).

236. Redish & Cisar, *supra* note 235, at 484.

3 imposes an additional qualifier, namely that the laws be "faithfully" executed, suggesting the President may not thwart Congress by declining to execute the laws at all.²³⁷ A second explanation is that the Take Care Clause recognizes that the President cannot execute the laws unaided; his duty is to see that the law is faithfully executed by others.²³⁸ A third explanation is that all of the powers described in Sections 2 and 3 are inherent in the executive power vested in the President, and those sections are not presidential powers, but disabilities. Sections 2 and 3 describe the limits on the exercise of the executive power in the same way that Section 9 of Article I limits the exercise of Congress' enumerated powers.²³⁹ Thus, the President does not have the power to appoint officers of the United States, except if the Senate consents. The President, by virtue of the investiture of executive power, may issue pardons, but Section 2 limits the pardon power to "Offenses against the United States" and "except in Cases of Impeachment."²⁴⁰ The Take Care Clause imposes "an obligation of watchfulness,"²⁴¹ a more imposing responsibility than a simple duty to execute the laws; it is a duty on which the President may be questioned and, in an extreme case, impeached. At the very least, the President's "enumerated powers" describe and limit the executive power vested in the President.²⁴²

Whether the substantive grant of power to execute the laws appears in the Vesting Clause or in the Take Care Clause,²⁴³ neither clause gives substantive content to the law that is the President's duty to execute faithfully.²⁴⁴ The exercise of the Take Care Clause, unlike the exercise of

237. Chief Justice Taft saw the Take Care Clause as an implicit confirmation that the President would require assistance in executing the laws, and used that premise to infer the removal power in the President. *Myers*, 272 U.S. at 164. Lee Liberman takes the position that the Take Care Clause merely confirms the executive power vested in the President, but that other powers—her example is the Commander-in-Chief power, U.S. CONST. art. II, § 2, cl. 1—are enumerated. Lee S. Liberman, Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong, 38 AM. U. L. REV. 313, 316 (1989).

238. 1 Op. Att'y Gen. 624, 625 (1823); see Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757, 797 (1979).

239. See Calabresi & Rhodes, *supra* note 235, at 1196 & n.216.

240. U.S. CONST. art. II, § 2; see *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) ("A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws . . .").

241. Calabresi & Rhodes, *supra* note 235, at 1198 n.221.

242. While the vesting of the legislative power in Congress was limited to the powers enumerated in the Constitution, the executive power was "given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed . . ." *Myers v. United States*, 272 U.S. 52, 128 (1926); see also *id.* at 138–39.

243. Although Calabresi and Rhodes and Redish and Cisar seem to disagree over the relationship between the Vesting Clause and the Take Care Clause, their analyses differ only because their ultimate concerns differ. Calabresi and Rhodes argue that the Vesting Clause of Article II more nearly resembles the Vesting Clause of Article III—rather than the Vesting Clause of Article I—and this strengthens the argument for a unitary executive. Calabresi & Rhodes, *supra* note 235, at 1175–76. Redish and Cisar worry that a substantive Vesting Clause will justify implied presidential powers. Redish & Cisar, *supra* note 235, at 483. Calabresi and Rhodes do not necessarily disagree with this concern. See Calabresi & Rhodes, *supra* note 235, at 1177 n.119.

244. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 598 & n.88 (1984) ("[The President] is vested generally with 'the

other enumerated powers, is without meaning in the absence of congressional legislation. "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."²⁴⁵ Congress determines what it is the President must faithfully execute, and it accomplishes the task in varying degrees of specificity. The power to enact substantive legislation is Congress' principal check on the President. The greater the specificity, the greater the control Congress has asserted over the President's faithful execution of the law. Whatever additional duty of "watchfulness" the Take Care Clause imposes on the President, it is fundamentally unlike the additional, enumerated presidential powers.

The Take Care Clause will not independently sustain the President's claim of authority to appoint and exclusively regulate advisory committees. Though his duties under the clause may be the occasion for the appointment of an advisory committee, the clause alone cannot supply the authority to do so. Either the power to appoint and exclusively regulate advisory committees is located in other presidential powers or it must be implied from the general vestiture of executive power.²⁴⁶ At most, the President's assertion of the Take Care Clause is valid only as a defense to the charge that the President has no power *in the absence* of congressional legislation to appoint and exclusively regulate an advisory committee.²⁴⁷

The foregoing discussion also explains the lack of objection when Congress directs the President to consult with an advisory body designated or created by Congress.²⁴⁸ Congress often instructs the President to consult with various groups prior to taking some specified action. Typical of the provisions

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executive Power,' but what that is in the domestic context does not readily appear.") (footnote omitted). By contrast, the other presidential powers specified in Article II do have substantive content. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 5 (4th ed. 1957) ("[C]ertain specifically granted 'executive' powers . . . are, when properly defined, theoretically autonomous and hence not subject to the legislative power.").

245. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (quoting *Myers*, 272 U.S. at 177 (Holmes, J., dissenting)); see also *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804).

The Take Care Clause is also unique because of all of the President's powers enumerated in Article II, the Take Care power is the only one that is routinely delegated. This fact is essential to the Court's opinion in *Myers*: The Vesting and Take Care Clauses together imply "general administrative control of those executing the laws." 272 U.S. at 164. The remaining powers, for the most part, are not delegated by the President. See 7 Op. Att'y Gen. 453, 464-65 (1855). The Attorney General's view finds support in the Appointment Clause, which conceives of a role for "Heads of Departments" in the appointing of inferior officers, suggesting that the President may not delegate his authority to appoint ambassadors, other public ministers and consuls, justices of the Supreme Court, and other officers of the United States.

246. The modern defense of the continuing practice finds support in the Vesting Clause, from which the President claims "some residuum of inherent constitutional authority to create offices or agencies." See *Limitations on Presidential Power*, *supra* note 58, at 78 n.1.

247. My analysis does not diminish whatever claim the President has to presidential privilege. See *infra* notes 292-309 and accompanying text.

248. I recognize that I have focused on the friction between Congress and the President over the use of presidential advisory committees. I briefly discuss congressionally established advisory committees here to show under what circumstances there might be friction in the one case but not in the other.

is one in the International Security and Development Cooperation Act of 1985,²⁴⁹ which first authorizes the President to "ban the importation into the United States of any good or service from any country which supports terrorism" and then insists that the "President, in every possible instance, shall consult with the Congress before exercising the authority granted by this section and shall consult regularly with the Congress so long as that authority is being exercised."²⁵⁰ Congress frequently demands that the President consult with Congress or its committees.²⁵¹ It has also directed the President to consult with particular Cabinet officers, departments, federal agencies,²⁵² foreign governments,²⁵³ states,²⁵⁴ advisory committees,²⁵⁵ and generic groups such as the public, industry, and labor.²⁵⁶ The Take Care Clause, in these instances, reaffirms that the President must consult with Congress in order to faithfully execute the laws.

249. Pub. L. No. 99-83, 99 Stat. 190 (1985) (codified in scattered sections of 22 U.S.C.).

250. 22 U.S.C. § 2349aa-9(a) to -9(b) (1988).

251. *E.g.*, 7 U.S.C. § 1738n (Supp. V 1993) (requiring President to consult with congressional committees on Enterprise for Americas Facility); 10 U.S.C. § 113 (Supp. III 1991) (requiring President to consult with Congress on appointment of Commission on Assignment of Women in Armed Forces); 19 U.S.C. §§ 2112(c), 2902(d) (1988) (requiring President to consult with Congress before entering into trade agreement); *id.* § 3108(c)-(d) (requiring President to consult with Congress prior to modifying U.S. negotiating objectives); 22 U.S.C. § 2272 (1988) (requiring President to consult with Congress on furnishing certain assistance to Central American countries); *id.* § 2364(a)(3) (requiring President to consult with committees prior to furnishing assistance under Arms Export Control Act); *id.* § 5353(b) (requiring President to consult with committees prior to discussing uniform international banking standards with foreign governments); *id.* § 5421(d)(2) (requiring President to consult with leadership of House and Senate prior to designating nonprofit organization to receive federal funds); *id.* § 5724 (requiring President to consult "appropriately" with Congress in determining status of Hong Kong); 50 U.S.C. §§ 1542, 1703 (1988) (requiring President to consult with Congress "in every possible instance" before committing U.S. forces to hostilities or employing international emergency economic powers); *id.* § 2405(f) (requiring President to consult with Congress prior to imposing or expanding export controls).

252. *E.g.*, 42 U.S.C. § 6272(c)(3) (1988) (requiring President to consult with Attorney General, Secretary of Energy, and Secretary of State on foreign policy interests related to international energy supplies); *id.* § 9651(a)(1)(G) (requiring President to consult with appropriate federal and state agencies, affected industries, and claimants prior to submitting report on hazardous waste disposal).

253. *E.g.*, 16 U.S.C. § 3173 note (1988) (requiring President to consult with Canada on Stikine River region in Alaska); 22 U.S.C. § 1928 note (Supp. IV 1992) (requiring President to consult with NATO and other nations to obtain agreement on defense cost sharing); *see also* 8 U.S.C. § 1188 note (1988) (requesting that President appoint advisory committee to consult with Mexico and advise Attorney General on alien temporary worker program).

254. *E.g.*, 16 U.S.C. § 255 (1988) (requiring President to consult with Governor of Washington prior to adding to Olympic National Park); 42 U.S.C. § 5191(b) (1988) (requiring President to consult with affected states prior to determining that emergency exists); *id.* § 12651(g)(1)(C) (Supp. IV 1992) (requiring President to consult with governor of each state prior to conferring presidential teaching awards).

255. *E.g.*, 50 U.S.C. app. § 2405(c) (1988) (requiring President to consult with advisory committees prior to imposing export controls).

256. *E.g.*, 19 U.S.C. § 2512(c)(3) (1988) (requiring President to consult with public, industry, and labor prior to making report to Congress); *id.* § 3108(b), (d) (requiring President to consult with private sector prior to entering into certain trade agreements, and with industry and labor prior to modifying negotiating objectives); 22 U.S.C. § 4703(c) (1988) (requiring President to consult with institutions of higher education on guidelines for granting scholarships to students from developing countries); 33 U.S.C. § 2711 (Supp. IV 1993) (requiring President to consult with affected trustees on actions to remove oil discharge); 50 U.S.C. app. § 2405(c) (1988) (requiring President to consult with industry prior to imposing export controls).

In these examples, Congress has not commanded that the President adhere to any advice given, including its own. Congress may legislate more carefully or quite specifically so as to constrain the President's discretion,²⁵⁷ but having enacted a law that leaves some judgment to the President, Congress may advise, but not command the President in the exercise of that judgment. For instance, Congress could not pass a law granting the President certain enforcement powers and then add that the President must consult with Congress and do as it says.²⁵⁸ The effect would be to usurp the President's duty to take care that the laws are faithfully executed.²⁵⁹

2. *The Enumerated Powers*

In his response to the House of Representatives, President Tyler defended his information-gathering activities by citing, in addition to the Take Care Clause, the Recommendation and State of the Union Clauses.²⁶⁰ Theodore Roosevelt regarded advisory committees as a means of "informing himself concerning 'the state of the nation.'"²⁶¹ President Hoover relied on the Recommendation Clause, and emphasized his need to inform himself in the exercise of his power "to finally pass upon every act of Congress"²⁶²—a

257. See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838).

258. See *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding unconstitutional Gramm-Rudman-Hollings provision binding President to recommendation of officer of Congress, Comptroller General). At the very least the act of telling the President what to do in a particular matter would be subject to the bicameralism and presentment requirements of Article I, Section 7. See *INS v. Chadha*, 462 U.S. 919 (1983), see also *Bowsher*, 478 U.S. at 737, 753–56 (Stevens, J., concurring).

259. Furthermore, some courts have suggested that Congress' command to *consult* is not judicially enforceable. See *Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 426–30 (D.C. Cir. 1989) (Silberman, J., concurring) (concluding that balanced viewpoint requirement in § 5(b)(2) of FACA is not justiciable); *Public Citizen v. Department of Health & Human Servs.*, 795 F. Supp. 1212, 1220–22 (D.D.C. 1992). Recently, a district court refused to enjoin the President from acting on advice obtained from an advisory committee even though the committee had failed to observe FACA. *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1015 (D.D.C. 1994).

Nor will the courts review the advice, even where it is allegedly "erroneous." *Employers Group of Motor Freight Carriers, Inc. v. National War Labor Bd.*, 143 F.2d 145, 151 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 735 (1944); see *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940) (holding that recommendations of Tariff Commission are not reviewable); *Crowell v. Benson*, 285 U.S. 22, 51–52 (1932) (holding that advisory nature of certain findings by masters does not interfere with Article III responsibilities of courts); *United States v. Los Angeles & Salt Lake R.R.*, 273 U.S. 299, 309–10 (1927) (holding that ICC order did not affect legal status of carrier even though Commission's report might become basis for action by Commission or by Congress); *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 577 (1919) (holding that specifications not enacted into law are not subject to constitutional challenge); see also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 n.9 (1963); *National War Labor Bd. v. United States Gypsum Co.*, 145 F.2d 97, 97–98 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 856 (1945), cf. L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 98–99 (1982) ("The advisory committee system is clearly constitutional, because final legislative action is only by statute and the role of the committee is purely advisory.").

260. See *supra* note 44 and accompanying text.

261. See CORWIN, *supra* note 244, at 71.

262. See *supra* note 68.

reference to presidential power to sign or veto legislation.²⁶³ Others defending presidential practices have relied on the Take Care Clause, the Recommendation Clause, the Opinions Clause, the foreign affairs power, and an argument of necessity.²⁶⁴

a. *The Recommendation and State of the Union Clauses*

No clause of Article II expressly grants to the President the power to acquire information, through advisory committees or by any other means. Yet the underlying theme of the President's claims, the predicate for the exercise of all of these powers, is the need for information. A President's claim to the power to acquire information or advice is partially justified by the Founders' assumption that the President would have superior access to information. Two clauses of Article II, Section 3 reflect that assumption. The first is the State of the Union Clause, which requires that the President "from time to time give to Congress Information of the State of the Union."²⁶⁵ The Clause presupposes that the President would have information regarding the state of the Union and that the information would be known only to him, or at least that Congress would not possess it.²⁶⁶

The second provision is the Recommendation Clause, which empowers the President to recommend to Congress "such Measures *as he shall judge necessary and expedient*."²⁶⁷ Under the Recommendation Clause, the President has the duty to determine the need for and wisdom of new legislation. The phrase "as he shall judge necessary" evokes Madison's conception of Congress' right to judge whether legislation "is properly an incident to an express power, and necessary to its execution."²⁶⁸ By the terms of the Recommendation Clause, Congress lacks the power either to command the President to make certain recommendations or to forbid the President from doing so.

Justice Story argued that these clauses "relative to the president's giving information and recommending measures to congress" reflected an

263. U.S. CONST. art. I, § 7, cls. 2, 3.

264. See *supra* notes 45-49, 62-65 and accompanying text; MARCY, *supra* note 16, at 10; see also 3 Op. Off. Legal Counsel 321, 322 (1979) (opining that Congress did not intend FACA to apply to advisory body created by United States and another nation).

265. U.S. CONST. art. II, § 3.

266. Raoul Berger suggests that the State of the Union Clause imposes a duty on the President such that Congress may request performance of the duty at its convenience. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 37-38 (1974); see also TEMPORARY PRESIDENTIAL ADVISORY COMMISSIONS, *supra* note 34, at 5-6. A pre-FACA House report suggested that the President had a "constitutional obligation . . . [to] report to the Congress the state of all [advisory] committees and their reports." The House Committee cited the State of the Union Clause and the Take Care Clause as the source of the President's obligation. H.R. REP. NO. 1731, *supra* note 104, at 6 & n.20.

267. U.S. CONST. art. II, § 3 (emphasis added). The President's right to recommend legislation is sustained by the power to convene Congress "on extraordinary Occasions." *Id.*

268. 3 ELLIOT'S DEBATES, *supra* note 12, at 567-68.

understanding that the President "must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to congress."²⁶⁹ The Recommendation Clause draws from the President's experience and his superior access to information relating to his other considerable powers, including his powers as Commander in Chief, as the executor of the laws, and as principal representative of the United States in foreign relations. Any restriction on the President's access to advice would impede not only his ability to recommend to Congress needed changes, but also his ability to carry out his remaining duties.

Might FACA impede the President's access to information, thus undermining his recommendation power? The question was raised in *Association of American Physicians*,²⁷⁰ where the court characterized the government's argument under the Recommendation Clause as "somewhat artificial":

Discussions on policy—whether they take place in executive branch groups or in pure FACA advisory committees—to some extent always implicate proposed legislation. Whenever an executive branch group considers policy initiatives, it discusses interchangeably new legislation, executive orders, or other administrative directives. Thus, virtually anytime an advisory group meets to discuss a problem, it will implicate the Recommendation Clause, from which all executive branch authority to recommend legislation derives. Accordingly, if the

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269. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 807 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833); see JOHN N. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 697, at 466 (New York, Hurd and Houghton 1870); see also WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 160 (Philadelphia, H.C. Carey and I. Lea 1825) ("Exercising his office during the recess of the legislature . . . [the President has] the best means of discovering the public exigencies"). C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 158–59 n.2 (reprint 1987) (2d ed. 1894) ("The Constitution does not prescribe the form in which the President shall present the measures which he may recommend; nor does it vest the Congress with the power to do it, either by an express provision or by any reasonable implication. It leaves the determination of the form, therefore, to the President himself.") (citation omitted).

The Recommendation Clause, like the State of the Union Clause, has its origin in the "royal act of communicating with Parliament." RAWLE, *supra*, at 158; see also 3 WILLIAM STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND 477–80 (Oxford, Clarendon Press 1880). This may suggest a relationship between the Recommendation Clause and the Right of Petition Clause. The Recommendation Clause empowers the President to represent the people before Congress, by recommending measures for the reform of government, for the general welfare, or for the redress of grievances. The Right of Petition Clause prevents Congress from abridging the right of the people to petition for a redress of grievances. See Norman B. Smith, "Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153 (1986); Stephen A. Higginson, Note, A Short History of the Right To Petition Government for the Redress of Grievances, 96 YALE L.J. 142 (1986). The argument that the First Amendment disables Congress, see Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW U. L. REV. 1156 (1986); Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 465 (1953), implies that the First Amendment limits Congress' power to restrict the President's recommendation power.

270. 997 F.2d 898 (D.C. Cir. 1993). The government argued that applying FACA to the Task Force would violate the Recommendation Clause, but declined to argue that FACA was unconstitutional on its face. *Id.* at 908, 912 n.12.

application of FACA to groups advising the President or anyone else in the executive branch were constitutionally problematic, insofar as those groups were advising on proposed legislation, FACA would be problematic with regard to virtually all policy advice.²⁷¹

The court of appeals' dismissal of the government's Recommendation Clause argument was too facile. The court vastly overstated the dilemma, because the Task Force was established for the declared purpose of recommending legislation to Congress. Moreover, FACA is Congress' way of saying, "Mr. President, disclose to us and the rest of the world the advice you have sought, the information on which it is based, and your forthcoming legislation." Premature disclosure, however, undermines the President's ability to *propose* legislation, a power distinct from the privilege to *support* legislation already proposed by him or by someone else. Premature disclosure exposes any proposal to death by a thousand paper cuts.

Morton Halperin tells the story of the Gaither Report prepared for President Eisenhower and the National Security Council in 1957.²⁷² Public release of the advisory committee's report, he suggests, would have bolstered the arguments of those within the administration and in Congress who favored increased defense spending. He concludes:

[While] the work of civilian *ad hoc* NSC committees is of value to Congressmen and private citizens, such groups are primarily instruments of the President and need to be evaluated in terms of their possible contribution to the Executive decision-making process . . . .

The Committee Report provided clear, well-reasoned statements of the problems of vulnerability and limited war, of the role of dispersal and hardening, and of the problems and opportunities of civil defense. It undoubtedly made a major contribution to the understanding of these problems by top officials. The panel was able to point out serious deficiencies where it found them because it was not responsible for past policy action, and the President could receive such advice because he anticipated being able to keep it private.²⁷³

Public meetings of the Task Force on Health Care Reform would have chilled the committee's willingness to advise the President, delayed the process of advising him, and illuminated early and incomplete thinking about the health care problem in a way that, in a political sense, would have prevented the President from recommending the measures to Congress that he believed necessary and expedient.

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271. *Id.* at 908.

272. Morton H. Halperin, *The Gaither Committee and the Policy Process*, in *THE PRESIDENTIAL ADVISORY SYSTEM* 185 (Thomas E. Cronin & Sanford D. Greenberg eds., 1969).

273. *Id.* at 207.

The court ultimately recognized that constitutional “difficulties arise because of the Task Force’s operational proximity to the President himself—that is, because the Task Force provides advice and recommendations directly to the President.”²⁷⁴ According to the court of appeals, the problem was not that Congress had interfered with the President’s ability to recommend appropriate legislation, but that, on balance, FACA interfered with the President’s “ability to seek advice directly from private citizens as a group, intermixed, or not, with government officials.”²⁷⁵ The court did not, however, draw a connection between these two problems; it failed to acknowledge that interfering with the President’s ability to seek advice might impede the President’s ability to recommend legislation. The Task Force provides information and recommendations—pure advice capable of having enormous impact if the President decides to accept it. In applying FACA to this example, Congress has diminished—though not assumed—the power of the President to recommend legislation and has thus violated the separation of powers.²⁷⁶

In addition, if Congress imposes a duty on the President to consult with it or some other group prior to submitting legislation,²⁷⁷ Congress has placed extra-constitutional conditions on the President’s power to recommend legislation. Congress, of course, has no duty to listen to the President,²⁷⁸ and

274. *Association of Am. Physicians*, 997 F.2d at 909.

275. *Id.* at 910.

276. The Supreme Court has vigorously enforced the separation of powers when the powers committed to one branch under the Constitution are usurped by a coequal branch. See *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Buckley v. Valeo*, 424 U.S. 1, 128–29 (1976); *Humphrey’s Executor v. United States*, 295 U.S. 602, 629–30 (1935); see also *THE FEDERALIST* No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

The Court has also recognized potential separation-of-powers violations when the powers conferred on one branch are diminished, though no other branch has assumed their exercise. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856–57 (1986) (“Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch.”). The separation of powers is violated nonetheless because the constitutional scheme has been upset; the relative balance among the three branches has been altered. If, for example, Congress were to assign to a nonprofit organization the right to appoint members to the Federal Election Commission, it would be violating the separation of powers no less than it would by assuming the task for itself, as it did in *Buckley*. In an indirect sense, Congress would have increased its power relative to the President, because the President would have less power than he possessed before. See *Schor*, 478 U.S. at 865 (Brennan, J., dissenting).

277. E.g., Trade Agreements Act of 1979, 19 U.S.C. § 2501 (1980). Congress provided.

Whenever the President determines that it is necessary or appropriate to amend, repeal, or enact a statute of the United States in order to implement any requirement of, amendment to, or recommendation under such an agreement, he shall submit to the Congress a draft of a bill to accomplish the amendment, repeal, or enactment and a statement of any administrative action proposed to implement the requirement, amendment, or recommendation. Not less than 30 days before submitting such a bill, the President shall consult with the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and each committee of the House or Senate which has jurisdiction over legislation involving subject matters which would be affected by such amendment, repeal, or enactment.

Id. § 2504(c)(1); see also *id.* § 2512(d)(2). It is doubtful that provisions such as these are justiciable.

278. See J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2120–23 (1989) [hereinafter Sidak, *The Recommendation Clause*].

may impose its own rules or constraints on such proposals once they have been made.²⁷⁹ Just as requiring the President to consult with Congress or an outside advisory committee prior to submitting legislation diminishes the President's exclusive Recommendation Clause power, imposing conditions on the President's decision to seek outside views also weakens his ability to recommend legislation.

b. *The Appointments Clause*

While no President has ever mentioned the Appointments Clause as the source of power for the exclusive control of presidential advisory committees,²⁸⁰ Presidents have relied on the Clause when Congress attempts to control an advisory committee established or utilized in support of the President's appointment power. Suppose Congress ordered the President to consult with an outside body—e.g., the ABA Standing Committee—prior to nominating federal judges. Even though the President would not be bound by the Committee's recommendation,²⁸¹ this arrangement would violate the separation of powers by encumbering, and thereby diminishing, the President's right to nominate. From the President's perspective, the additional requirement to consult with the ABA might be dilatory, merely bothersome, politically devastating, or helpful. He might have chosen to consult with the ABA anyway. No matter how the President sees it, however, the consultation requirement is an encumbrance on the President's nomination power, a requirement above and beyond obtaining the advice and consent of the Senate.²⁸²

If we substitute the Senate Judiciary Committee (or the House Agriculture Committee, for that matter) for the ABA Standing Committee, the example becomes somewhat clearer. If Congress passed a law creating new federal judgeships and required the President to consult with the Senate Judiciary Committee prior to making the nomination, a court should have little difficulty finding the law aggrandizing.²⁸³ Just as requiring the President to consult

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279. See, e.g., 19 U.S.C. § 2504(c)(2) (1988) (providing that no amendment to statute that might otherwise affect trade agreement "shall be implemented under United States law, unless" President submits legislation in particular form, sends report to Congress on need for legislation, and submits bill to Congress that "is enacted into law").

280. See CORWIN, *supra* note 244, at 70–71; MARCY, *supra* note 16, at 9.

281. My analysis does not question whatever power Congress has to define offices of the United States, and to prescribe, in great detail, the qualifications for such offices. See *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993); see also *United States v. Cooper*, 20 D.C. (9 Mackey) 104, 124–25 (1891); CORWIN, *supra* note 244, at 74–75, 362–65; Note, *Power of Appointment to Public Office Under the Federal Constitution*, 42 HARV. L. REV. 426, 429–31 (1929). Any constitutional question raised by this practice is beyond the scope of this Article.

282. See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring).

283. See John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 638–46 (1993). My example

with an advisory committee or with Congress (thereby interfering with his choice of advisers) diminishes the President's power to nominate, prohibiting or otherwise regulating the President's choice of outside advisers also diminishes the President's constitutional authority to nominate.²⁸⁴

c. Other Enumerated Powers

The case for insulated presidential rights under the other enumerated powers is not diminished by the fact that the Appointments Clause prescribes a role for the Senate. Justice Kennedy in *Public Citizen* made a powerful argument regarding the pardon power: "Congress cannot interfere in any way with the President's power to pardon. The pardon power 'flows from the Constitution alone . . . and . . . cannot be modified, abridged, or diminished by the Congress.'" ²⁸⁵ As with the Appointments Clause, Congress has no grounds for complaint if the President should seek advice outside the government in the execution of his pardon power.

The use of congressionally established advisory committees in foreign relations presents difficult questions, most of which are beyond the scope of this Article. The interplay between the President's role as the "sole organ of the Federal Government in the field of international relations," ²⁸⁶ and Congress' power to regulate foreign commerce, to declare war, and to raise armies and maintain a navy ²⁸⁷ makes this a murky constitutional area. ²⁸⁸

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finds some support in history. In May 1813 James Madison nominated Jonathan Russell to be Minister Plenipotentiary to Sweden. 13 ANNALS OF CONG. 91 (1813). The Senate adopted a resolution on June 14 referring the nomination to a committee and directing the committee to confer with the President. *Id.* at 95. Madison initially accepted the invitation, then postponed the meeting repeatedly. Finally, on July 6, he wrote to the Senate:

[T]he Executive and Senate, in the cases of appointments to office and of treaties, are to be considered as independent of and co-ordinate with each other. If they agree, the appointments or treaties are made. If the Senate disagree, they fail. If the Senate wish information previous to their final decision, the practice, keeping in view the Constitutional relation of the Senate and Executive, has been, either to request the Executive to furnish it, or to refer the subject to a committee of their body to communicate, either formally or informally, with the head of the proper department. The appointment of a committee of the Senate to confer immediately with the Executive himself, appears to lose sight of the co-ordinate relation between the Executive and the Senate, which the Constitution has established . . . .

Id. at 95-96. On July 9 the Senate determined by resolution that "it is inexpedient, at this time, to send a Minister Plenipotentiary to Sweden." *Id.* at 98; see 2 MESSAGES AND PAPERS OF THE PRESIDENTS 1817, *supra* note 2, at 151-61; CORWIN, *supra* note 244, at 361-62 n.16; see also LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 127 (1985) (discussing Senate's submission of petition to President Grant recommending appointment of Edwin Stanton to Supreme Court).

284. But see *infra* notes 311-25 and accompanying text (noting that President's privilege is subject to whatever power Congress has over the purse).

285. 491 U.S. at 485 (quoting *Schick v. Reed*, 419 U.S. 256, 266 (1974)). But see Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 334 (1991) (discussing *Public Citizen* and suggesting pardon power is unique among President's enumerated powers).

286. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320-21 (1936). The President's control over foreign affairs is generally attributed to his status as Commander in Chief, as well as his power to make treaties, appoint ambassadors, and receive ambassadors and public ministers. U.S. CONST. art. II, §§ 2-3.

287. U.S. CONST. art. I, § 8, cls. 3, 11-13.

Certainly Congress has a much stronger claim that it may require the President to consult with groups prior to taking certain statutorily authorized actions where Congress is clearly regulating foreign commerce.²⁸⁹ Requiring consultation with foreign countries as a condition precedent to taking some specified action might be another matter.²⁹⁰ In general, this is one area in which Congress has been especially tolerant of presidential use of informal advisers and committees.²⁹¹

3. *Executive Privilege*

The President's claim to executive privilege shares many of the same separation-of-powers rationales I have offered for recognizing a presidential right to consult outside advisers in private, but the privilege extends to government officers and employees engaged in both advisory and operational functions. In addition, it bears a distinct historical pedigree. While it is not my purpose to revisit the constitutional status of executive privilege, the complicated relationship among FACA, the Freedom of Information Act (FOIA), and the Sunshine Act bears on executive privilege as it relates to advisory committees.

The Court generally has recognized a qualified executive privilege to protect "the confidentiality of Presidential communications."²⁹² The privilege "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties" and is thus "inextricably rooted in the separation of powers."²⁹³ It is justified by the President's need for "complete candor and objectivity from advisers" and the public interest in "candid, objective, and

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288. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 32 (1972).

289. *E.g.*, United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, § 103, 102 Stat. 1851, 1854 (1988) (requiring President to obtain advice from appropriate advisory committees and United States International Trade Commission and consult with Senate Committee on Finance and House Ways and Means Committee).

290. See, *e.g.*, 12 U.S.C. § 635i-6(f) (Supp. V 1993) (requiring President, prior to selling, reducing, or canceling loan to foreign country, to consult with foreign country); 16 U.S.C. § 3173 (1988) (requiring President to consult with Canada prior to submitting report to Congress); Pub. L. No. 102-190, § 1046(a), (c), 105 Stat. 1290, 1466 (1991) (codified at 22 U.S.C. § 1928 note (Supp. IV 1992)) (requiring President to consult with NATO and other nations to achieve equitable defense cost sharing, and directing President to make "maximum use feasible" of Department of Defense and Ambassador-at-Large). Some provisions nominally requiring consultation are not conditions precedent, but are more precatory in nature. See, *e.g.*, Pub. L. No. 99-603, § 301(f), 100 Stat. 3360, 3411, 3416-17 (1986), *amended by* Pub. L. No. 100-525, § 2(f)(4), 102 Stat. 2609, 2612 (1988) (expressing "sense of Congress" that President should establish advisory committee to consult with Mexico and advise Attorney General on alien temporary worker program).

291. See S. MISC. DOC. NO. 109, 50th Cong., 1st Sess. 39-40, 103-05 (1888) (minority report) (arguing that President did not exceed his constitutional powers where appointment followed common practice). *But see id.* at 14-17, 35-36, 38 (majority report by Committee on Foreign Relations) (objecting to President's appointment of plenipotentiaries to negotiate fishing treaty, and objecting to President's withholding treaty negotiation documents from Senate). See generally WRISTON, *supra* note 5.

292. *United States v. Nixon*, 418 U.S. 683, 705-06 (1974).

293. *Id.* at 705, 708.

even blunt or harsh opinions in Presidential decision making.”²⁹⁴ Hamilton described the need for “secrecy[] and dispatch,” qualities that would characterize the operations of a single executive and would be lost “in proportion as the number [of executives] is increased.”²⁹⁵ From the need of a unitary executive to seek the counsel of others and direct the action of his subordinates,²⁹⁶ the Court has found in the Constitution a limited presidential power to protect the President’s communications through executive privilege and to enforce his orders through removal.

The Court twice reviewed the question of executive privilege and, though acknowledging that such a privilege exists, in both cases it denied the privilege. The confrontations between Congress and the President in *Nixon I*²⁹⁷ and *Nixon II*²⁹⁸ took place because of the unusual circumstances of Watergate. More modest confrontations between the two branches over the general disclosure of presidential communications have been largely avoided because the principal open government acts, FOIA and the Sunshine Act, do not apply to the White House.²⁹⁹ Additionally, these acts recognize some

294. *Id.* at 706, 708.

295. THE FEDERALIST No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

296. See *Myers v. United States*, 272 U.S. 52, 163–64 (1926).

297. In *United States v. Nixon*, the Court based its recognition of executive privilege on history and necessity, not on the text of the Constitution. 418 U.S. 683, 705–06 nn.15–16 (1974) (*Nixon I*). The Court rejected President Nixon’s invocation of executive privilege in a criminal context, but it went to great lengths to explain that it did not have to decide “between the President’s generalized interest in confidentiality and . . . congressional demands for information,” the threat of which was more likely to cause presidential advisers to “temper the candor of their remarks.” *Id.* at 712 & nn.19–20.

298. In *Nixon v. Administrator of General Services*, the Court upheld the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974) (current version at 44 U.S.C. § 2111 (1974)), under which the GSA would assume custody of President Nixon’s papers and tape recordings. 433 U.S. 425 (1977) (*Nixon II*). The Court again rejected a “broad, undifferentiated claim of public interest in the confidentiality” of presidential communications. *Id.* at 427 (quoting *Nixon I*, 418 U.S. at 706). The Court found no historical basis for claiming the privilege with respect to all presidential communications and thus no “expectation that the confidences of the Executive Office are absolute and unyielding.” *Nixon II*, 433 U.S. at 450. The Act was a “limited intrusion” by government archivists and respected the President’s right to assert privilege with respect to particular records. *Id.* at 452, 455.

299. FOIA applies to an “agency,” defined as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 5 U.S.C. § 552(a), (f) (1988). By specifically including the “Executive Office of the President,” which encompasses offices such as the Office of Management and Budget, the Office of Policy Development, and the Office of Science and Technology Policy—which both advise the President and have other responsibilities—Congress implicitly excluded the White House Office, which includes the President’s closest advisers and their staffs. See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); H.R. REP. NO. 1380, 93d Cong., 2d Sess. 14–15 (1974). But cf. *United States v. Claridge*, 811 F. Supp. 697 (D.D.C. 1992) (holding that Tower Commission was an “agency” for purposes of 18 U.S.C. § 1001). Compare *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993) (holding that FOIA does not reach President’s Task Force on Regulatory Relief, comprising Vice President and certain Cabinet members) and *National Sec. Archive v. Archivist of the United States*, 909 F.2d 541 (D.C. Cir. 1990) (holding that FOIA does not reach Office of Counsel to President) and *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C. Cir. 1985) (holding that FOIA does not reach CEA) and *Pacific Legal Found. v. Council on Env’tl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980) (holding that FOIA does not reach CEQ) with *Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990) (holding that Board is agency for purposes of FOIA and Sunshine Act). The Sunshine Act incorporates FOIA’s definition of “agency.” 5 U.S.C. § 552b(a)(1) (1988).

form of executive privilege.³⁰⁰ For example, exemption 5 of FOIA exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."³⁰¹ The Sunshine Act does not contain an exemption similar to FOIA's exemption 5, but does exempt meetings that, if opened to the public, would result in the premature disclosure of information "likely to significantly frustrate implementation of a proposed agency action."³⁰² On their own terms, FOIA and the Sunshine Act do not apply to advisory committee materials because advisory committees are not "agencies."³⁰³

FACA, of course, incorporates FOIA and the Sunshine Act, making advisory committee documents available for public inspection and committee meetings open to the public.³⁰⁴ But FACA incorporates FOIA and the Sunshine Act in such a way that the protections afforded the executive do not survive. While FOIA and the Sunshine Act do not cover the White House, they do cover presidential advisory committees. Intra-agency and interagency memoranda need not be disclosed under FOIA's exemption 5, but advisory committees cannot use exemption 5 because they are not "agencies."³⁰⁵ Similarly, where open meetings would result in the premature disclosure of advisory committee proposals, the advisory committee cannot avail itself of exemption 9(B) of the Sunshine Act because it is not an "agency."³⁰⁶

This gap in the insulation Congress has offered the President is evident in *Association of American Physicians*. The court concluded that the Health Care Task Force consisted exclusively of federal employees and was, therefore, exempt from FACA.³⁰⁷ While most of the individuals constituting the Task Force are also in executive departments that are subject to FOIA and the

300. See Marblestone, *The Relationship Between the Sunshine Act and FACA*, *supra* note 175, at 67.

301. 5 U.S.C. § 552(b)(5) (1988); see *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

302. 5 U.S.C. § 552b(c)(9)(B).

303. See Marblestone, *The Relationship Between the Sunshine Act and FACA*, *supra* note 175, at 69 n.29, 79–80; see also *Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994) (holding that advisory group created by Sentencing Commission is not subject to FACA where Sentencing Commission is not executive branch agency); *National Security Archive*, 909 F.2d at 541 (denying request under § 10 of FACA for records of Tower Commission on grounds that request was misdirected to Counsel to President, who is excluded from FOIA).

304. Federal Advisory Committee Act § 10(a)(1), (b), (d). FACA, as originally passed, made the exemptions of the Freedom of Information Act, 5 U.S.C. § 552(b) (1966), applicable to the open meeting requirements. It was amended in 1976 to substitute the exemptions of the Government in the Sunshine Act, 5 U.S.C. § 552(b) (1976). See H.R. REP. NO. 1441, 94th Cong., 2d Sess. 25–26 (1976).

305. *Wolfe v. Weinberger*, 403 F. Supp. 238, 241–43 (D.D.C. 1975) (holding that exemption 5 does not apply to advisory committees); *Gates v. Schlesinger*, 366 F. Supp. 797, 799–800 (D.D.C. 1973), *appeal dismissed*, No. 74-2013 (D.C. Cir. Jan. 23, 1975); see *Nader v. Dunlop*, 370 F. Supp. 177, 178 (D.D.C. 1973); H.R. REP. NO. 1441, 94th Cong., 2d Sess. 26 (1976); see also *Forsham v. Harris*, 445 U.S. 169 (1980) (holding that records held by private organization funded by federal agency do not become agency records subject to FOIA).

306. James T. O'Reilly, *Advisers and Secrets: The Role of Agency Confidentiality in the Federal Advisory Committee Act*, 13 N. KY. L. REV. 27, 34 (1986); see *Disclosure of Advisory Committee Deliberative Materials*, 12 Op. Off. Legal Counsel 87 (1988) (prelim. print).

307. *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); see Federal Advisory Committee Act § 3(2)(c)(iii).

Sunshine Act, the Task Force was also not an “agency” for purposes of FOIA or the Sunshine Act.³⁰⁸ Had the Task Force’s materials been subject to FOIA, they probably would have been exempt from disclosure as intra-agency or interagency memoranda; Task Force meetings probably could have been closed to the public to protect the premature disclosure of proposed agency action. By contrast, had the court ruled that the First Lady was not a full-time federal employee, the Task Force would have been subject to FACA, and consequently to the public disclosure provisions of FOIA and the Sunshine Act. None of the privileges in those acts, however, would have followed. No deliberative process privilege or premature disclosure privilege would have been available because the Task Force was not an agency. The Task Force would have had to open its meetings to the public, and its records would have been subject to FOIA.³⁰⁹

In this example, whether the Task Force is a working group insulated from the public disclosure laws or an advisory committee subject to the public disclosure laws turns solely on whether the body advising the President includes at least one person who is not a full-time government employee. Yet the consequences for the President’s health-care program are equally serious whether he seeks advice from members of his cabinet or from outside advisers. From the President’s perspective, it is the substance of the advice, rather than its sources, that he wishes shielded from premature disclosure.

Ironically, while FACA protects from disclosure conversations between the President and his advisers, or even among his advisers, it exposes conversations between the President and outside persons serving as advisers. This gap in the statutorily created executive privilege can be remedied easily through legislation. Until it is, however, courts will have to confront assertions of executive privilege or, more dramatically, the constitutionality of FACA.

B. *Limits on Congressional Authority over Presidential Advisory Committees*

Prior to the passage of FACA, the most important sources of congressional control over presidential advisory committees were the Spending and Appropriations Clauses. FACA, however, is not a restriction on spending,³¹⁰ and Congress must find its source of authority in some other provision. In this

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308. See *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993) (holding that President’s Task Force on Regulatory Relief, comprising Vice President and certain Cabinet members, is not an “agency” for purposes of FOIA).

309. See *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 837 F. Supp. 454, 456 (D.D.C. 1993) (inquiring whether any participant’s “status as a private citizen [on the Health Care Task Force] would . . . disqualify that group or sub-group from exempt status under [FACA]”).

310. FACA does not contain any spending restrictions per se. See Federal Advisory Committee Act § 2(b)(5) (stating that Congress and public should be kept informed of cost of advisory committees); *id.* § 7(d) (stating that Director of OMB shall establish guidelines for compensation of advisory committee members). But cf. H.R. REP. NO. 1731, *supra* note 104, at 12–13 (expressing Congress’ concerns over expenditure of funds associated with proliferation of advisory committees).

Section, I discuss the limitations of the Spending and Appropriations Clauses and then turn to the Necessary and Proper Clause as a possible source of congressional authority to control presidential advisory committees.

1. *The Spending and Appropriations Clauses*

The Spending and Appropriations Clauses provide that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States,"³¹¹ and "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."³¹² In general, "any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."³¹³ Congress must, however, provide funds for the compensation of the President and the federal judiciary.³¹⁴ Beyond that, there is some controversy as to what extent Congress must fund the executive branch.³¹⁵ Congress has recently asserted its complete control over government spending, claiming that the Appropriations Clause gives it "exclusive control of funds spent by the Government, and . . . give[s] the democratically elected representatives of the people an absolute check on Executive action requiring expenditure of funds."³¹⁶ The Office of Legal Counsel (OLC) has suggested, however, that Congress "could not deprive the President of [functions expressly authorized by the Constitution] by purporting to deny him the minimum obligational authority sufficient to carry [his] power[s] into effect."³¹⁷

311. U.S. CONST. art. I, § 8, cl. 1.

312. *Id.* § 9, cl. 7.

313. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 425 (1990); *cf.* *United States v. Lovett*, 328 U.S. 303, 313 (1946) ("Congress under the Constitution has complete control over appropriations.").

314. U.S. CONST. art. II, § 1, cl. 7; *id.* art. III, § 1; *see* *Freytag v. Commissioner*, 501 U.S. 868, 906, 907 (1991) (Scalia, J., concurring).

315. Compare Charles L. Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15-16 (1974) (asserting that Congress could reduce President's staff to one and auction White House) and Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 473-74 (1987) (noting that Congress can defund President) and Stith, *supra* note 56, at 1348, 1360-63, 1388 n.221 (asserting that President cannot finance any activity in absence of congressional authorization) with J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1184-94 (1989) [hereinafter Sidak, *The President's Power of the Purse*] and Sidak, *The Recommendation Clause*, *supra* note 278, at 2103 & n.114 (arguing that Congress cannot refuse to fund performance of certain of President's constitutional duties—referring to Recommendation and Treaty Clauses).

316. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 412 (1987).

317. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. Off. Legal Counsel 1, 5-6 (1981); *see also* 6 Op. Att'y Gen. 26, 28 (1853) (noting that President's obligation to act is "wholly independent of question whether there is, or is not, adequate

The strength of the President's claim to the purse is tied to whether the funds support his Take Care duties or his enumerated powers. Suppose Congress decided not to fund antitrust enforcement. Since Congress has the power to abolish the law creating the President's obligations in the first place, Congress can defund his enforcement activities, and defunding becomes a means of temporarily relieving the President of his constitutional obligations under the Take Care Clause.³¹⁸ If Congress can relieve the President of his duties to enforce the law by abolishing the law, Congress does not encroach upon the President's duties by refusing to fund advisory committees supporting his Take Care functions.

The same reasoning would not apply to spending controls that in effect preclude the President from exercising his enumerated powers. The President derives these obligations from the Constitution, not from Congress. It is unlikely that Congress could void the President's enumerated powers entirely by making it illegal for him to expend any money, for example, to recommend legislation to Congress or to negotiate treaties.³¹⁹ Congress can, however, defund presidential advisory committees. While the President might consider them essential, advisory committees serve no operational function; thus defunding them cannot prevent the exercise of the President's enumerated powers. Defunding the President's use of advisory committees may result in ill-informed actions by the President,³²⁰ and may diminish his ability to obtain information he thinks important for Congress, but it does not prevent the President from fulfilling his enumerated duties. Even if the committees are advising the President on matters within his enumerated powers, the President would have difficulty demonstrating that a lack of advisory committee funding prevented him from exercising his constitutionally assigned tasks. Congress' power under the Spending Clause claims primacy here.³²¹

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appropriation by Congress").

318. Cf. 6 Op. Att'y Gen. 26, 28 (1853) ("An appropriation of money by Congress is an implied authority for the President to do the thing, provided it can be done within the limits of the appropriation.") My example is only an extreme case of current constraints. The DOJ, for example, has limited funds for enforcing the nation's antitrust laws. The budget allocated to the Antitrust Division limits the number of attorneys hired. Given the limited number of staff, the Attorney General must make some hard choices as to which matters to pursue and which cases to settle.

319. See Sidak, *The Recommendation Clause*, *supra* note 278, at 2100-03, *see also* Sidak, *The President's Power of the Purse*, *supra* note 315, at 1195-97 (suggesting that any unappropriated presidential spending in furtherance of textually demonstrable duty is defensible), Suth, *supra* note 56, at 1351.

320. For example, the Russell Amendment defunded "agenc[ies] or instrumentalit[ies]" established by executive order after one year, a restriction the executive branch regarded as substantive in effect. An OMB study noted that "[t]his restriction has erected a virtual compulsion to limit the tenure of Presidential advisory commissions to no more than one year. . . . [S]uch limitation in time may badly cramp a commission's schedule and may make even longer-range inquiries for the President impossible." TEMPORARY PRESIDENTIAL ADVISORY COMMISSIONS, *supra* note 34, at 19.

321. See Sidak, *The Recommendation Clause*, *supra* note 278, at 2105.

My analysis so far has assumed that Congress uses its purse, as it did in the Act of 1842 and in the Tawney and Russell Amendments, by closing it completely to certain activities. More problematic is whether Congress may use its taxing and spending powers to purchase cooperation or even coerce

If the President relies on outside committees that do not receive federal funds, however, Congress cannot cite the Spending Clause to limit the President's power. Presidents have circumvented Congress' spending restrictions by using unrestricted funds allotted to the President, seeking outside funding, or utilizing privately funded groups as advisory committees. In the cases of the Act of 1842, the Tawney Amendment, and the Russell Amendment, Congress seems to have invited that result. Indeed, if Congress' stated concern—the wisdom of the expenditure—is the true issue, then it should have no objection to privately funded advisory committees.³²² Congress would either have to forbid the President from spending any funds for his own maintenance while dealing with privately funded advisory committees,³²³ or it would have to find other means of regulating the advisory committees directly. The former might well violate the Compensation Clause,³²⁴ which was intended to give the President some degree of independence from Congress, and the latter would raise First Amendment concerns.³²⁵ Whatever concerns Congress might have about unauthorized presidential activities, and whatever power it can assert to forbid such activities, Congress has no basis for claiming control of the process of obtaining or rendering advice so long as federal funds are not used in support of the advisory committee.

2. *The Necessary and Proper Clause*

The more difficult question is whether Congress may regulate advisory committees that do not derive financial support from the public purse. This Subsection demonstrates why the Necessary and Proper Clause (sometimes called the "Sweeping Clause") is not sufficient to enable Congress to claim exclusive control over advisory committees staffed and funded outside the government.

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compliance with congressional desires—that is, to control the President in the same way that it controls the states, *see* *South Dakota v. Dole*, 483 U.S. 203 (1987), or controls others, *see* *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *United States v. Butler*, 297 U.S. 1 (1936). *See* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 125–26 (noting that following *Dole* the Court has "effectively abrogated the notion that Congress is a government of delegated powers," and that "the constraint is illusory").

322. *See* Sidak, *The Recommendation Clause*, *supra* note 278, at 2103–06 (arguing that Congress cannot object to presidential recommendations that have zero marginal cost); *see also* Stith, *supra* note 56, at 1385 n.206 (noting that Congress has means other than Spending Clause to control private spending of private funds). *But see id.* at 1357 n.66 (noting that donated funds are subject to appropriations restrictions if spent in name of United States, even where funds do not pass through Treasury).

323. *See* Stith, *supra* note 56, at 1361–62 ("[The President] may not spend one minute to make one phone call to solicit private funds (for use of the government or directly for a third party) for an activity explicitly denied appropriated funds.").

324. U.S. CONST. art. II, § 1, cl. 7.

325. *See infra* notes 344–58 and accompanying text.

The Necessary and Proper Clause grants Congress the power to pass executory laws that are necessary and proper to its own powers, the powers of the President, the federal courts, and other officers or departments listed in the Constitution.³²⁶ Congress' power to make "laws . . . for carrying into Execution" and the President's power to execute the laws are not the same, despite the similarities in the constitutional clauses creating these powers. This is not an instance of overlapping or "blended" powers.

Since *McCulloch v. Maryland*, the Necessary and Proper Clause has been recognized as an independent source of congressional authority, although it is not a judicially enforceable limitation on Congress' power.³²⁷ The Court has looked elsewhere for constraints,³²⁸ and has identified two. First, Congress has no power under the Necessary and Proper Clause when it has been expressly disabled under another constitutional provision, as in Section 9 of Article I or in the First Amendment. For example, the Constitution flatly prohibits Congress from enacting a bill of attainder or an *ex post facto* law³²⁹ and makes any attempt by Congress to do so *ultra vires*. Second, Congress has no power when it has been implicitly disabled because the President, the federal judiciary, or the states have been expressly empowered. Congress' novel appointments provision in *Buckley v. Valeo* was outside its powers, not because the federal government lacked power to make the appointments, but because the exercise of the appointment power by Congress would have been inconsistent with its exercise by the President, to whom the Constitution committed that power.³³⁰ A question under the bill of attainder or *ex post*

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326. Congress "shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. The phrase "Powers vested by this Constitution in the Government of the United States" includes the powers vested in the President. The parallels between the terms "Execution," "Power," "vested," and "Government of the United States" in the Necessary and Proper Clause and the terms "executive," "Power," "vested" and "President of the United States" in the Vesting Clause of Article II are too obvious to allow any other conclusion.

327. 17 U.S. (4 Wheat.) 316, 419–20 (1819); see also *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681 (1896). But see Blumoff, *supra* note 235, at 1174 (arguing that Necessary and Proper Clause disables Congress from exercising power residing in other branches); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271–72 (1993) (noting that term "proper" is a "textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights"); Liberman, *supra* note 237, at 331–32 & n.124, 355–56 (suggesting that there are limitations on Congress' power under Necessary and Proper Clause); Prakash, *supra* note 233, at 1009–11 (discussing limitations on Necessary and Proper power).

328. "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (citation omitted); see also *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 498–500 (1977) (Powell, J., concurring); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-1, at 297 (2d ed. 1988).

329. U.S. CONST. art. I, § 9, cl. 3.

330. As the Court stated in *Buckley*:

Congress may undoubtedly under the Necessary and Proper Clause create "offices" in the generic sense and provide such method of appointment to those "offices" as it chooses. But Congress' power under that Clause is inevitably bounded by the express language of Art. II,

facto clauses is a matter of whether the governmental power exists, while an Appointments Clause question is a matter of the proper allocation of a power that exists within the government.

The failure of the Court to find any internal limitations on Congress' power under the Necessary and Proper Clause may be more a consequence of the context of the cases coming before the Court than a lack of doctrinal scrutiny. Madison maintained that Congress itself should be the judge of the need for and propriety of a power.³³¹ His view is reflected in *McCulloch*'s familiar formula: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."³³² But the context of Madison's remarks has been overlooked. He (like Chief Justice Marshall in *McCulloch*) was defending the use of the Necessary and Proper Clause to *expand* Congress' enumerated powers and, consequently, the powers exercised by the federal government vis-à-vis the states. Hence, "[i]ts terms purport to enlarge, not to diminish the powers vested in the government."³³³ Madison, like the Court in *McCulloch*, was concerned that Congress should have sufficient means to carry into execution its own powers, as well as those powers of the President and the federal courts. Madison and *McCulloch* did not address whether—and to what extent—Congress may employ the Necessary and Proper Clause to *restrict* powers claimed exclusively or concurrently by the President.

Congress must be the judge in the first instance of what is necessary and proper to carry into execution its own enumerated powers when it seeks to enlarge the areas under government control. Congress may also judge what is necessary and proper for the execution of the President's authority when Congress seeks to expand or facilitate the President's authority. But it is a different matter for Congress to enlarge its own power by bringing under its control an area that has traditionally belonged to the President.³³⁴ In one

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§ 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices . . . may . . . properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."

424 U.S. at 138–39.

331. 3 ELLIOT'S DEBATES, *supra* note 12, at 567–68.

332. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

333. *Id.* at 420.

334. See Lawson & Granger, *supra* note 327, at 334 (arguing that, in using its Necessary and Proper power, Congress "must respect both the specific allocations of power prescribed by the Constitution . . . and any unenumerated but 'proper' principles of governmental structure"). *Myers v. United States* and *Nixon I* are examples of the Court considering a presidential claim of necessity against an assertion of congressional power. A strict view of the Necessary and Proper Clause would suggest, however, that such a determination belonged to Congress and that these cases were incorrectly decided. See Liberman, *supra* note 237, at 339–40; William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102, 112–18.

instance Congress is made the judge of the outer limits of its own authority, in the other Congress is the judge of the President's authority. *McCulloch* does not answer the question of what happens when Congress narrows rather than expands a power historically exercised by the President and claimed by him to be necessary and proper to the exercise of his other constitutional powers.³³⁵

The Necessary and Proper Clause, together with the Appointments Clause, is the source of Congress' power to create executive departments.³³⁶ The President has generally conceded that there is a need for congressional legislation authorizing additional offices,³³⁷ while continuing to assert his right to appoint informal advisers. Similarly, Congress, while maintaining its exclusive power to create offices, has largely abandoned its claim to exclusive power to create advisory committees. Even in FACA the President's power of appointment is unquestioned and, apparently, conceded. Section 9(a) provides "[n]o advisory committee shall be established unless such establishment is—(1) specifically authorized by statute *or by the President*."³³⁸ Since Congress could have authorized the President in FACA to appoint advisory committees for his own use, but did not,³³⁹ section 9(a) can only be taken as evidence of congressional acquiescence. At the same time Congress has acknowledged the President's power, it has exercised the concurrent power to appoint or designate members of advisory committees, a power that might be denied Congress under a stricter view of the Appointments Clause.³⁴⁰ Thus, Congress has occasionally claimed a role in the appointment of advisory

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335. *But see* Van Alstyne, *supra* note 334, at 118–20 (Congress has power to determine all presidential powers not expressly granted).

336. The Necessary and Proper Clause implements the Appointments Clause, which recognizes that "other Officers of the United States," whose appointments are not provided for in the Constitution, might be "established by Law." U.S. CONST. art. II, § 2, cl. 2; *see* *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976), *CORWIN, supra* note 244, at 70. Other provisions also recognize that departments or offices, not created by the Constitution, would be established. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1 (President "may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices"); *id.* amend. XXV, § 4 (referring to "the principal officers of the executive department or of such other body as Congress may by law provide") Congress might also claim authority from its enumerated powers to create departments or agencies dealing with the subject matter of those powers (for example, post offices or patent offices). *Id.* art. I, § 8, cls. 7, 8.

Congress can create offices, but whatever offices are created or authorized draw their executive authority from the President because the executive power is vested in the President, and he alone remains responsible. *See* Calabresi & Rhodes, *supra* note 235, at 1184 n.158.

337. *See, e.g.*, Limitations on Presidential Power, *supra* note 58, at 76. The OLC asserts, however, that the President has some inherent authority to create executive offices. *Id.* at 78 n.1.

338. Federal Advisory Committee Act § 9(a) (emphasis added).

339. Congress has occasionally issued an open-ended authorization to the President to appoint advisory committees for carrying out specific programs. The authorizations are sporadic and are most frequently found in the area of foreign relations. *See supra* note 18 and accompanying text.

340. *See* *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F3d 821 (DC Cir 1993) (holding unconstitutional designation of two officers of Congress as *ex officio*, but nonvoting, members of FEC). Rejecting the argument that the members were "constitutionally harmless," the court found that "their mere presence as agents of Congress conveys a tacit message to the other commissioners" that belied "a mere 'informational or advisory role.'" *Id.* at 826–27.

committees,³⁴¹ and individual members of Congress may serve on formally constituted advisory committees without violating the Incompatibility Clause.³⁴²

Beyond the questions of appointing or funding advisers, Congress has little basis for regulating the President's outside advisory committees under the Necessary and Proper Clause.³⁴³ It is doubtful that Congress has an independent basis in its own powers, other than the Spending Clause, for regulating presidential advisory committees. Nor are the President's enumerated powers a proper basis for FACA. In a broad sense, everything the President does while in office may be said to be an exercise of the powers of his office, and thus nominally subject to Congress' Necessary and Proper power. But that notion carried to its logical conclusion would have the President serving at congressional sufferance, a conclusion at odds with the idea of divided government.

3. *The Right of Petition*

Congress fares no better if it attempts to regulate advisory committees directly. The lower courts, perhaps recognizing the implications of such direct regulation, have tried to explain that FACA only reaches the President's *use* of outside advisory committees, and not the committees themselves.³⁴⁴ That explanation misreads FACA. Unlike the Administrative Procedure Act,³⁴⁵ FOIA,³⁴⁶ the Privacy Act,³⁴⁷ and the Government in the Sunshine Act,³⁴⁸ which govern the conduct of federal agencies, critical sections of FACA apply directly to advisory committees. FACA could hardly state the proposition more clearly: "The provisions of this Act or of any rule, order or regulation

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341. For example, of the National Economic Commission's twelve members, two citizens were to be appointed by the President, two senators and three citizens by the President *pro tempore* of the Senate, and two representatives and three citizens by the Speaker of the House. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 2102, 101 Stat. 1330, 1330-34.

342. U.S. CONST. art. I, § 6, cl. 2. As the House of Representatives concluded, appointment to an advisory committee is not an "office under the United States," since the "mere power to investigate some particular subject and report thereon, or to negotiate a treaty of peace, or on some commercial subject, and report without power to make binding on the government, does not constitute a person an officer." H.R. REP. NO. 2205, 55th Cong., 3d Sess. 49 (1899). The House Report concluded that members of Congress could accept positions on various commissions without relinquishing their seats. See H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1001-02 (1975). But cf. Wendy E. Ackerman, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993 (1986) (suggesting that judicial service on commissions raises separation of powers concerns).

343. See Lawson & Granger, *supra* note 327, at 274-75 & n.24.

344. See *Center for Auto Safety v. Cox*, 580 F.2d 689, 693 (D.C. Cir. 1978); *Washington Legal Found. v. American Bar Ass'n Standing Comm. on the Fed. Judiciary*, 648 F. Supp. 1353, 1359 (D.D.C. 1986).

345. 5 U.S.C. § 551 (1988).

346. *Id.* § 552.

347. *Id.* § 552a.

348. *Id.* § 552b.

promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.³⁴⁹ While some provisions of FACA are addressed to the President,³⁵⁰ the GSA,³⁵¹ or agency heads,³⁵² the open government provisions so controversial in FACA are addressed to the advisory committees themselves.³⁵³ An advisory group "utilized" by the President would ignore these regulations at its peril.³⁵⁴

Even if we assumed FACA were necessary and proper to the "carrying into execution" of the President's powers, the existence of congressional power over the President would not support regulation of private entities, at least not without raising serious questions under the Right of Petition Clause.³⁵⁵

349. Federal Advisory Committee Act § 4(a); see *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 903 (D.C. Cir. 1993) ("FACA places a number of restrictions on the advisory committees themselves.").

350. See, e.g., 5 U.S.C. app. § 5(b)-(c) (directing President to create advisory committees with balanced viewpoint); *id.* § 6 (directing President to file annual report)

351. *Id.* § 7 (directing the GSA to create Committee Management Secretariat and granting it power to promulgate pay, travel, and expense guidelines); *id.* § 13 (charging GSA with duty to file reports with Library of Congress).

352. *Id.* § 5(b)-(c) (directing agency heads to create advisory committees with balanced viewpoint), *id.* § 8 (directing agency heads to establish administrative guidelines and appoint an advisory committee management officer); *id.* § 11(b) (directing agency heads to make transcripts of agency proceedings available); *id.* § 12 (directing agency heads to maintain records of funds required for advisory committees and to provide support services for advisory committees)

353. *Id.* § 10(a)(1) ("Each advisory committee shall be open to the public"), *id.* § 10(b) (advisory committee's records "shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports"); *id.* § 10(c) (no advisory committees shall conduct any meeting in absence of designated officer or employee of federal government), *id.* § 11(a) (advisory committees must make transcripts of advisory committee meetings publicly available), *cf. id.* § 10(f) (advisory committees may not meet without approved agenda and advance approval of federal officer or employee, excluding presidential advisory committees from agenda requirement)

354. While in many cases FACA's open meeting requirement is conveniently enforced against an agency, in *Washington Legal Foundation* the plaintiffs sought, *inter alia*, the ABA Standing Committee's records. *Washington Legal Found. v. American Bar Ass'n Comm. on the Fed. Judiciary*, 648 F. Supp. 1353, 1355-56 (D.D.C. 1986). It is unlikely that the DOJ held any of the ABA's records. Had the district court ultimately held FACA applicable to the ABA Standing Committee, and the Act constitutional, the Washington Legal Foundation would have been entitled to public inspection and copying of "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Standing Committee. Federal Advisory Committee Act § 10(b). The DOJ would have had no means of enforcing the court's order. The court might have ordered the DOJ to cease using the Standing Committee in the future unless it produced its records, but the DOJ would not have had the means to compel the ABA to produce *past* records had it refused.

The district court in *Washington Legal Foundation* believed that § 8(b) placed the responsibility for maintaining the records and carrying out the disclosure provisions of § 10(b) on a designated "Advisory Committee Management Officer," who would be an agency employee. See 648 F. Supp. at 1360. That section, however, applies only to "advisory committees established by that agency." Federal Advisory Committee Act § 8(b). In the case of the ABA Standing Committee, appointment of a Management Officer would not have brought the Committee's past records under agency control.

355. U.S. CONST. amend. I; see Marblestone, *The Coverage of FACA*, *supra* note 175, at 131 n.64, Markham, *supra* note 175, at 575 & n.87; James T. O'Reilly, *Committees and Competition: Restoring Industry Input to Federal Advisory Committees*, 41 BUS. LAW. 1293, 1316 & n.151 (1986) (noting right of petition problem). Some members of Congress have expressed the same concern. See *supra* note 95 and accompanying text; see also *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 n.13 (1989) (noting potential First Amendment problems). Political scientist David Brown, speaking of White House conferences as advisory meetings, has suggested that these are "a 20th century version of the constitutional

Advisory committees do not themselves exercise any executive authority;³⁵⁶ nor is the act of rendering advice inherently governmental. While it may be an act undertaken by government officials, not all advice-giving, even when the recipient is a government official, is a governmental act. Nor is the advice itself an exercise of government power until it is acted upon by the President or by someone exercising authority delegated by the President. Once advice is acted upon, however, the full responsibility for the exercise of authority is borne by the President, not by those who have advised him.³⁵⁷ Advisory committees do not become a part of the government simply by advising it,³⁵⁸ and Congress cannot demand committee compliance with FACA as the price of obtaining access to the President because it would represent the securing of a waiver of the Right of Petition as a condition to its exercise.

C. *The President in the "Zone of Twilight": An Implied Power To Consult with Advisory Committees*

Ultimately, almost all of the historical arguments made by presidents in defense of their advisory committees have been arguments based not on text, but on necessity. The problem is, as the statements by Presidents Roosevelt, Taft, and Hoover demonstrate, and as the court in *Association of American Physicians* observed, that almost any advisory committee can be loosely

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right of petition." Brown, *supra* note 21, at 339.

356. "Where no governmental power is at issue, there is no strict constitutional impediment to a 'branchless' agency, since it is only '[a]ll legislative Powers,' Art. I, § 1, '[t]he executive Power,' Art. II, § 1, and '[t]he judicial Power,' Art. III, § 1, which the Constitution divides into three departments." *Mistretta v. United States*, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting). Justice Scalia's example of a "branchless" agency exercising no governmental powers" is "an Advisory Commission charged with reporting to all three Branches, whose members are removable only for cause and are thus subject to the control of none of the Branches." *Id.*; see also 26 ANNALS OF CONG. 753 (1814) (statement of Sen. Gore) (distinguishing official envoys appointed in 1812 by President Madison to negotiate treaty with Great Britain from Gouverneur Morris' mission to England on behalf of President Washington; Morris held "no public character . . . no letters of credence, commission, power or authority whatever, whereby he could bind the nation").

357. See *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992) (finding that President's transmission of apportionment reports to Congress—no Secretary of Commerce's report on census—was final agency action, but holding that President is not subject to APA); see also William P. Rogers, *The Right To Know Government Business from the Viewpoint of the Government Official*, 40 MARQ. L. REV. 83, 89 (1956).

Even the resolution, ultimately rejected by the Founders, that would have established a privy council comprising the President of the Senate, Speaker of the House, Chief Justice of the Supreme Court, and various cabinet secretaries provided that the council's duty "shall be to advise [the President] in matters respecting the execution of his office . . . but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." 1 ELLIOT'S DEBATES, *supra* note 12, at 257; 2 FARRAND, *supra* note 12, at 367; see also *id.* at 539. This concept is reinforced in the Appointments Clause, which makes the Senate a body advisory to the President. The Senate's check on the President is not its power to advise, but the right to withhold its consent.

358. See *Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee"*, 1 Op. Off. Legal Counsel 20 (1977) (individual who advises President regularly on informal basis is not government employee for conflict of interest purposes).

justified by the need for information or advice in support of some presidential function. It would be impossible to prove otherwise.³⁵⁹

The power of the President to seek outside advice can be implied from the structure of Article II, and it is not moderated by any Article I power of Congress. The existence of such presidential authority is not necessarily lost when Congress opposes its exercise, even though it is at this point that the powers of the executive are reduced to their minimum, their lowest ebb. The resolution of this conflict must look to the textual basis for the claim to exclusivity, the need for exclusivity, and the alternatives available to each branch.

In the exercise of his Take Care responsibilities, the President's consultations are regulated by Congress in two circumstances. First, when Congress prescribes consultations as a part of the President's Take Care responsibilities, the requirement does not infringe upon his judgment and, indeed, becomes part of the President's duty to faithfully execute the law. It is when the advice is made binding on the President that he has been relieved of his Take Care responsibilities in violation of the separation of powers.³⁶⁰ Second, when the President appoints his own advisory committees in support of his Take Care responsibilities, and Congress funds the committees, then Congress may place some restrictions on the committees. In this context, the Take Care Clause is the occasion for the exercise of the implied power, but it exists concurrently with Congress' spending power. Finally, when the President utilizes outside committees that do not receive federal funds, any command from Congress respecting the President's use of the committee is tantamount to prohibiting the consultation. Regulation of presidential consultation cannot be justified by the Spending Clause, and it is beyond the scope of the Necessary and Proper Clause because it interferes with the judgment reposed in the President by the Constitution without appreciably fulfilling Congress' own duty to facilitate the execution of the laws.

The President, in the exercise of his enumerated powers, has even greater independence. Yet, even with respect to the President's enumerated powers, Congress always retains its power over the purse and is under no obligation to fund presidential advisory committees. The advisory committee, as a repository of pure advice and no executive authority, has no claim to even minimal congressional funding. Once Congress acquiesces to funding, however, it is limited in the constraints it can place on the use of advisory

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359. See 26 ANNALS OF CONG. 755 (1814) (statement of Sen. Gore) ("Necessity always authorizes what it requires . . ."); THE FEDERALIST No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961) ("No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.").

360. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (finding unconstitutional directive to President to carry out Comptroller General's budget reduction recommendations).

committees' funds. Finally, as with the Take Care Clause, where the President seeks the advice of outside advisers who do not receive federal funds, Congress has no power to object under the Spending Clause or under the Necessary and Proper Clause because this would impinge on the President's ability to carry out his constitutional duties.³⁶¹

What are the consequences of recognizing an inherent power vested in the President to seek advice free of congressional regulation? My first observation is that the scope of any potential claim is very limited. Any claim the President can make probably does not include the hundreds of advisory committees that are agency-established. This category includes the numerous scientific and technical committees that advise, for example, the Department of Energy and the Department of Health and Human Services.³⁶² Nor, for the reasons I have explained, could the President assert such control over the bulk of congressionally created advisory committees, which are typically established to advise the President in his Take Care functions. The remaining committees, those presidential advisory committees established by the President on his own initiative that are federally funded, are relatively few,³⁶³ and the number of outside advisory committees established or utilized by the President that are not federally funded is likely to be even fewer.

Second, the claim for such an implied power pales in comparison with other presidential powers inferred from the text. For example, the power to appoint and consult advisory committees is relatively insignificant when compared with the President's power over foreign affairs.³⁶⁴ On the other hand, the power to seek outside advice free of congressional control is undoubtedly a valuable power. The vigor with which presidents have exercised and defended it, and the lengths to which they have gone to avoid Congress' spending restrictions, are testimony to the value placed upon it by the

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361. As Carl Marcy concluded nearly 50 years ago:

[A]s long as Presidential commissions confine themselves to fact-finding, advice and legislation, and engage in no affirmative executive, legislative or judicial action on their own account, cases cannot arise and the courts cannot interfere with their activities. If the commissions are voluntary, funds are supplied from outside sources, and no federal employees are used, Congress short of impeachment, can do nothing.

MARCY, *supra* note 16, at 9.

362. See, e.g., *Use of Advisory Committees by the Food and Drug Administration: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 93d Cong., 2d Sess. (1974); TWENTY-FIRST ANNUAL REPORT OF THE PRESIDENT, *supra* note 13, at 48-55; see also SENATE COMMITTEE ON GOV'T AFFAIRS, 95TH CONG., 1ST SESS., ENERGY ADVISERS: AN ANALYSIS OF FEDERAL ADVISORY COMMITTEES DEALING WITH ENERGY (Comm. Print 1977).

363. Although a 1970 House report put the number of presidential advisory committees at 198, H.R. REP. NO. 1731, *supra* note 104, at 10, that number apparently included intra-agency committees as well. The latest report prepared by the GSA listed 57 presidential advisory committees, of which Congress directly established 32. TWENTY-FIRST ANNUAL REPORT OF THE PRESIDENT, *supra* note 13, at 8; see also *id.* at 41-42.

364. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936) (holding President's degree of discretion in foreign affairs greater than that in domestic affairs); Redish & Cisar, *supra* note 235, at 483-84.

President. Restrictions such as FACA undoubtedly encumber both the President's willingness to use advisory committees and the willingness of advisory committees to serve the President. The Court recognized in *United States v. Nixon* a "valid need for protection of communications between high Government officials and those who advise and assist them" because "those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."³⁶⁵ The Court added, "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."³⁶⁶ FACA's requirements that advisory committees have a balanced viewpoint, open their records to public inspection, and open their meetings to public participation increase the cost of using advisory committees, and suggest that presidents will rely less frequently on advisory committees. Similarly, these requirements discourage privately funded committees from participating in the process of advising the President. The empirical evidence for this proposition is admittedly anecdotal, but the ABA's Standing Committee is a good example.³⁶⁷ If the Standing Committee's stated position—that it would have withdrawn its services rather than submit to FACA—is accurate, it may suggest that the cost of openness, at least from the President's perspective, is too high.

Moreover, even when the President decides to appoint or consult an advisory committee under the conditions set forth in FACA, the President may not receive the full and frank views of the committee. What the President receives is not the committee's advice, but its press release, those things that the committee is willing to tell the President in public. Or, even if the advisory committee offers its candid views to the President, the public record and sunshine requirements may skew the public debate in ways that a different process would not. As the story of the Gaither Report demonstrates, advisory committees are sometimes used to sway a divided Administration. Public disclosure affects what is, to that point, an inchoate decision and may precipitate a decision that might not have been reached through a more circumspect process. Information that might skew an internal debate frequently flows out of divided administrations as the two sides talk to each other through the press. But these political wranglings ought to be the President's to manage and resolve. FACA's open government requirements systematically interfere with the President's management of his own advisory committees. These requirements must be seen as a normative value independent of whatever value

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365. 418 U.S. 683, 705 (1974).

366. *Id.* at 708.

367. The process not only affects private groups, but bodies composed of state and local officials as well. See *supra* note 172. State and local officials have complained to Congress that FACA inhibits their meetings with federal officials. See WEGMAN, *supra* note 23, at 9.

we might assign to the substantive policy questions before the advisory committee.

The conflict I have described between Congress' interest in public disclosure of advisory committee reports and processes and the President's interest in fully informed, candid advice will often be a false one; the interests of the President in receiving the views of an advisory committee will often be fully compatible with the open government provisions in FACA. But that is an ad hoc judgment that the President is much better situated to make. At some point the President's *ipse dixit* should suffice to demonstrate the need for confidentiality.³⁶⁸

Third, recognition of an implied power over advisory committees is sufficiently limited so that it would not encroach on powers plainly belonging to Congress.³⁶⁹ As I have shown, the President has virtually no claim to resist congressional regulation of advisory committees supporting his Take Care duties. Congress controls the advisory committee process with respect to such duties by virtue of its own enumerated powers and the Necessary and Proper Clause. And Congress, irrespective of any power the President can assert over advisory committees, retains control over any federal monies that might be expended. Furthermore, Congress' stated interests in enacting FACA—control of a growing number of advisory committees, control of costs, balanced representation, open meetings—are almost completely met through FACA's jurisdiction over congressionally established advisory committees, agency-established advisory committees, and all other federally funded advisory committees.

More important, Congress has numerous tools to use as checks on the President's advisory committees. Congress can establish clear guidelines for the policy area in which the advisory committee is working. Such guidelines can serve as Congress' broadest and potentially greatest check on the President, because they go to the heart of the President's authority, the Take Care power. While institutionally difficult for Congress to establish, they remain Congress' most potent tool. Congress can also exercise control over the

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368. Presidents may choose, and have chosen, to constrain their own use of advisory committees. *See, e.g.*, Exec. Order No. 11,007, 3 C.F.R. 182 (Supp. 1962) (constraining use of agency advisory committees); Exec. Order No. 11,671, 3 C.F.R. 388 (1973) (constraining agency and presidential advisory committees). Presidential recognition of the need for advisory committee management does not justify, nor does it invite, congressional management.

369. Because of the nature of advisory relationships, asking whether "the delicate balance of power among the three branches of government will be upset" if FACA is strictly enforced places an impossible burden on the President. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 113 (1984). Unlike the case for removal authority, there is no way for the President to prove in any given case that congressional interference in his advisory relations will actually prevent him from exercising his duties. No one can know in advance whether an advisory committee will turn up anything useful or whether FACA would actually interfere with the advisory committee's work. The asserted need is presidential *ipse dixit*. But for that reason, as well as the fact that Congress would have no means of proving the contrary, resolution of the question should favor expanding the scope of information to which the President has access.

President's discretionary funding of advisory committees. This too is a powerful tool because it takes from the President the power to fund his own advisory committees; it is also one that Congress has never asserted very effectively. Powerful as it is, though, it is ultimately limited to the extent that it still leaves available to the President private funding for his appointed or privately established committees.

Congress can attempt to preempt the President by establishing advisory committees for him. It is unlikely that the President would establish a second committee in an area in which Congress had already legislated. For example, Congress objected vociferously for years to the OMB's use of the Advisory Council on Federal Reports. Had Congress simply enacted legislation creating a substitute body, it likely would have displaced the objectionable Advisory Council.³⁷⁰ Alternatively, Congress can seize the initiative from the President by codifying the creation of his independently established commission, in essence adopting it as its own.³⁷¹ These are, admittedly, cumbersome processes, but they are nevertheless avenues available to Congress.

Congress might also seek the reports prepared by the advisory committee directly from the President. Although this raises the usual concerns over separation of powers and presidential privilege, it is certainly no more onerous or intrusive than FACA. Moreover, presidents generally have been disposed to release advisory committee reports. It is typically in the President's interest to release such advice, even if it is not always in his interest to have the advisory committee's processes probed. The report becomes subject not only to substantive criticism of its advice, but also to whatever criticism there may be of the committee's procedures, composition, lack of openness, failure to secure public participation, and so forth. Any President who declines to open the advisory committee process must bear this cost. Finally, Congress holds a potent tool in its power to call members of the advisory committee to testify before Congress. Although Congress may not ask the advisers what they told the President, it may ask them for their views on the substance of the issue.³⁷²

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370. This is, in effect, what Congress did in 1974 when it created the Federal Paperwork Commission, Pub. L. No. 93-556, 88 Stat. 1789 (1974) (repealed 1977). Although the Commission did not legally preempt the Advisory Council on Federal Reports, the Advisory Council was terminated three years later, after 33 years in existence. See *Commission on Federal Paperwork: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 93d Cong., 2d Sess. 17-19 (1974) (statement of National Small Business Association) (discussing need for federal commission and cooperation between small business and Advisory Council on Federal Reports); see also *supra* note 194.

371. One example is the Defense Base Closure and Realignment Commission, which the Secretary of Defense originally chartered in 1988. In 1990 Congress codified the Commission's role. See *National Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 402-03 (D.C. Cir. 1990), *REPORT OF THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION*, H.R. DOC. NO. 111, 102d Cong., 1st Sess. 17-18 (1991).

372. *Soucie v. David*, 448 F.2d 1067, 1084-85 (D.C. Cir. 1971) (Wilkey, J. concurring).

V. CONCLUSION

As Congress had recognized for almost two centuries, the President has the inherent power to seek the views of outside advisers. It is a power grounded generally in the Vesting Clause, and more particularly in the President's enumerated duties—especially the Recommendation Clause, which assumes the President's unique need for access to superior sources of information. Although the Spending and Appropriations Clauses, together with the Necessary and Proper Clause, are a limited source of authority for Congress to regulate publicly funded advisory committees established by Congress or the President, Congress' authority over advisory committees not supported from such funds is limited. FACA violates the separation of powers to the extent that it regulates the President's use of outside advisory committees funded at their own expense. FACA both aggrandizes Congress' relative powers over the President and diminishes the absolute powers of the President.

This implied power secures a constitutional enclave within which the President may obtain outside advice free of congressional control. It is constitutional elbow room for the President to seek the advice he believes relevant, and from a source he considers competent to render it. It is advice that the President values, in John Tyler's words, "for [his] own information," and for which he reserves the right to "deem it best [when] to communicate the entire report to Congress, or otherwise make it public . . . ."³⁷³ It is an enclave to which presidents have not hesitated to retire and that, until the passage of FACA, Congress had reluctantly, but consistently, respected as ground the Constitution reserved to the President.

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373. CONG. GLOBE, 27th Cong., 2d Sess. 476 (1842) (Letter from President John Tyler to George Poindexter (Feb. 11, 1842)).