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OPEN ADVISORY COMMITTEES AND THE POLITICAL PROCESS: THE FEDERAL ADVISORY COMMITTEE ACT AFTER TWO YEARS

HENRY H. PERRITT, JR.* AND JAMES A. WILKINSON**

This article addresses the question whether opening the proceedings of federal advisory committees to the public can impede the effectiveness of the governmental process. This issue is but a narrow version of the conflict between the evolving democratic tradition of open government and the practical realities that sometimes militate against public exposure of political processes. In response to recommendations that operations of the executive branch be opened to public scrutiny, Congress has enacted the Administrative Procedure Act,¹ the Freedom of Information Act,² and, most recently, the Federal Advisory Committee Act (FACA).³ These statutes have progressively increased the public's access to executive branch activities and documents.

Congress intended the FACA to apply to fewer governmental activities than are affected by the Freedom of Information Act, which applies to all federal agency activities,⁴ yet, the FACA's impact could be

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The views expressed are solely those of the authors and do not necessarily reflect the views of any government agency.

1. 5 U.S.C. §§ 551, 553-59, 701-06, 3105, 3344, 4301, 5335, 5362, 7521 (1970).

2. *Id.* at § 552.

3. 5 U.S.C. App. I (Supp. III, 1973).

4. § 1, 5 U.S.C. § 552 (1970). Agencies perform two basic functions, a quasi-legislative function—rulemaking—and a quasi-judicial function—adjudication. The Administrative Procedure Act defines the former as agency promulgation or amendment of a statement of future effect designed to implement, interpret, or prescribe law or policy. 5 U.S.C. §§ 551(4)-(5) (1970). Adjudication is defined residually as the formulation of a final disposition in a matter other than rulemaking. *Id.* §§ 551(6)-(7). While the distinction is not always clear, rulemaking is generally understood to involve the establishment of general principles of future effect, while adjudication is generally understood to involve the application of general principles to particular cases.

Because broad policy considerations rather than individuals' rights are the focus of rulemaking, agencies, when making rules, may rely on a broader range of

greater, since advisory committees have come to play a major role in the resolution of important and sensitive issues of government regulation. Achievement of the proper balance between public access to advisory committee activities and the most effective use of such committees, which occasionally requires freedom from public scrutiny, necessitates serious policy judgments. This article examines the role of advisory committees in the governmental process, the genesis of the FACA, the conflict between public access to deliberations and the occasional need for secrecy, the judicial application of the FACA's openness requirements, and alternative approaches to the achievement of balance between public access and effective process.

SOURCES OF AGENCY EXPERTISE AND INFORMATION:
ROLE AND ADVANTAGES OF ADVISORY COMMITTEES

Reliance on agency expertise is the conceptual core of administrative law, and information is the lifeblood of expertise.⁵ The acquisition of information from a variety of sources and through a variety of channels and methods⁶ and free-ranging inquiry must precede the formulation of a rule.⁷ If they are to utilize their expertise and obtain information broader than that supplied by the parties involved, administrative agencies must be allowed to look beyond a particular hearing record to information in their own files and within their knowledge.⁸ The per-

information than they may rely on in adjudicatory proceedings and may follow procedures less circumscribed than the procedures mandated for adjudicatory proceedings. See *American Airlines, Inc. v. CAB*, 359 F.2d 624, 628-30 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966).

This article primarily treats the rulemaking process. Advisory committees usually assist an agency in the formulation of general policies rather than in the application of policy to individual cases, although committees sometimes do perform adjudicatory functions. For example, tripartite advisory committees apply agency-developed wage stabilization guidelines to individual collective bargaining contracts.

5. Professor Jaffe has spoken of an administrative agency as a reservoir into which data flows and out of which information may be drawn when needed. L. JAFFE, *ADMINISTRATIVE LAW* 111 (1954).

6. See Fuchs, *Procedure in Administrative Rulemaking*, 52 HARV. L. REV. 259, 273-77 (1938) (discussing four types of rulemaking procedures: investigatory, consultative, auditive, and adversary). The Supreme Court, acknowledging the legislative nature of an agency's rulemaking function, has approved an agency's discretionary determination of what information is pertinent and sufficient in its deliberations. See *United States v. Berwind-White Coal Mining Co. (The Assigned Car Cases)*, 274 U.S. 564, 583 (1927) (a commission setting rules may reason from the particular to the general; evidence about every affected party need not be heard).

7. An agency reaches a critical threshold in the rulemaking process when it believes that its knowledge and experience have given it an understanding of the impact its proposed rule will have. See generally Fuchs, *Agency Development of Policy Through Rulemaking*, 59 NW. U.L. REV. 789, 791 (1966).

8. See *Pacific Coast European Conf. v. United States*, 350 F.2d 197, 205 (9th Cir.), cert. denied, 389 U.S. 844 (1967).

missible extra-record sources of information include nongovernment experts who communicate with the agency informally,⁹ the agency's staff, the public, consultants, and advisory committees. The information collected from these sources can be objective or biased,¹⁰ given in writing or orally, and delivered in person or through a third party.¹¹

Although most of the thousands of decisions an agency makes are based almost solely on the advice of staff, other sources of information also serve important functions. For example, the participation of the general public greatly broadens the political and substantive base of the decision. The traditional channels for participation in agency rulemaking, the public comment process and public participation in hearings, have inherent limitations, however. The public comment process may be a democratic and efficient way to develop regulations that affect more than a limited number of parties,¹² but the process is inherently static and does not permit the mutual exchange of ideas that facilitates the exploration of broad policy alternatives. Public hearings, though used more rarely in rulemaking proceedings than in adjudicatory proceedings, also add an important dimension to rulemaking where the rule may affect important interests.¹³ The formality and public nature of hearings, however, can inhibit witnesses. Consultants, another source of information, strengthen agency expertise by making available to the agency their highly specialized knowledge and skills for brief periods of time.

9. See Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233, 239 (1962) (when an agency is acting in legislative capacity, it may receive ex parte communications just as a legislator may receive such communications).

10. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* 232-45 (3d ed. 1972). According to Professor Davis, bias, in the sense of a crystallized view about issues of policy, is deemed no ground for disqualification. *Id.* at 245. However, staff members are subject to certain conflict of interest restrictions. See *id.*

11. See generally L. JAFFE, *supra* note 5, at 111 (description of thorough informal investigation). Apparently, few limitations other than those imposed by the Federal Advisory Committee Act (FACA) have been placed on the forms or channels of advice given to agencies. The FACA requires advisory committee advice to be given in public unless one of the Freedom of Information Act exceptions to public availability applies. 5 U.S.C. App. I §§ 10(a)(i), (3)(d) (Supp. III, 1973); see 5 U.S.C. § 552(b) (1970). Under certain circumstances, agencies must make the advice received part of a record. See *Morgan v. United States*, 304 U.S. 1, 14-15, 20-22 (1938) (where proceedings are, in reality, quasi-judicial). However, advice other than that given by advisory committees may be given in public or private and in any forum or form. A decision maker should be able to utilize all the relevant information he can obtain, and the potential sources can be as varied as a chance conversation, a scholarly article, a formal hearing, or a television special. See generally P. DRUCKER, *PRACTICE OF MANAGEMENT* (1954).

12. See K. DAVIS, *supra* note 10, at 142; Perritt & Dresser, *Policy Planning*, in *HISTORICAL WORKING PAPERS ON THE ECONOMIC STABILIZATION PROGRAM* 3, 76 (1974) (public comments helpful in developing Phase IV regulations).

13. *Id.* at 166.

Advisory committees, another source of information, constitute an avenue of advice uniquely beneficial to the Government in many ways. These committees supplement staff expertise because they provide an agency with regular access to recognized experts who may not work for the government in either a staff or consultant capacity. Advisory committees can be effective political tools enabling agencies to enlist the support of well known persons in the development or implementation of a new program, to focus public attention on a problem, and to enhance political support.¹⁴ Advisory committees can defuse opposition to a program; when an agency has devised a program with the advice and consent of the regulated, they feel an obligation to support the program.¹⁵ Participation on a committee allows the members to form personal attachments, exchange information, and abandon publicly held positions in the interest of advising the Government and developing mutually beneficial solutions to common problems.¹⁶

Advisory committees also can be beneficial to the public and to the regulated. Committees provide the regulated with an opportunity to have an impact on the government's decisions and diminish the aura of governmental superiority that often characterizes relationships between the Government and the private sector.¹⁷ Advisory committees provide parties having diverse interests and points of view with a forum in which they can educate the public, the agency, and each other about the potential impact of governmental actions.¹⁸ By channeling public pressure for governmental action and allowing laymen to comment on and challenge the work of experts, the committees act as a medium for the injection of new ideas into the federal bureaucracy and as sounding boards for the informal exploration of the practical limits of proposed actions.¹⁹ Finally, the committees improve administrative procedure by developing criteria to guide the decisionmaking process and thus to ensure that cases are not treated in an arbitrary manner.²⁰

Since advisory committees are defined functionally, no stereotype exists. The Warren Commission,²¹ the White House Conference on

14. See Brown, *The Public Advisory Board as an Instrument of Government*, 15 PUB. AD. REV. 196, 198, (1955).

15. The development of a sense of obligation to support a program is especially important when a program's implementation depends on voluntary compliance. See *id.* at 198-99.

16. *Id.*

17. See A. LEISERSON, *ADMINISTRATIVE REGULATION* 161-62 (1942).

18. Brown, *supra* note 14, at 197.

19. Brown, *The Management of Advisory Committees: An Assignment for the '70's*, 32 PUB. AD. REV. 334, 339, 341 (1972).

20. Interview with John T. Dunlop, Director, Cost of Living Council, in Washington, D.C., June 7, 1974.

21. See Exec. Order No. 11,130, 3 C.F.R. 795 (1963) (appointment of commission to report on assassination of President Kennedy).

Aging,²² the National Industrial Pollution Control Council,²³ and the Ad Hoc Committee on Long-Term Care²⁴ all are classified as advisory committees. The diverse structures of these committees and others are a function of their sizes, the attributes of the people appointed, and the functions performed.²⁵

Because many diverse groups are considered advisory committees, congressional limitations of the use of such committees have a broad impact. Indeed, one district court accepted an argument that the scope of the term "advisory committee" is broad enough to encompass any meeting between an agency official and representatives of regulated interests.²⁶

LEGISLATIVE BALANCING—THE CONCERN

Congressional concern that the proliferation, duplication, and power of advisory committees effectively had made them "a fifth arm of government" prompted Congress to consider methods of preventing advisory committee abuses.²⁷ Proponents of open meetings as the method of preventing abuse assumed that the public has a right and need to know what advice the Government is receiving.²⁸ While proponents conceded that the right to know is not absolute and sometimes must yield to the need to protect national security or an individual's privacy,

22. See Announcement by President Nixon, April 23, 1971, reprinted in 7 W'KLX COMPILATION OF PRES. DOC. 674 (designation of Arthur S. Fleming as chairman and statement of purpose of Conference).

23. See Exec. Order No. 11,523, 3 C.F.R. 915 (1970) (Council established).

24. See Cost of Living Council Press Release, Aug. 5, 1973, on file at Treasury Office of Economic Stabilization.

25. Dr. David S. Brown of George Washington University has developed a classification of advisory committee structures, the primary division of which is between committees that meet only once and those that have a continuing function. See Brown, *supra* notes 6, 19. See generally Wilkinson & Atkinson, *Advisory Committees*, in HISTORICAL WORKING PAPERS ON THE ECONOMIC STABILIZATION PROGRAM 989-1044 (1974).

26. See *Aviation Consumer Action Project v. Yohe*, Civil No. 707-73 (D.D.C., June 21, 1974). The plaintiff alleged that a single ad hoc meeting between a Civil Aeronautics Board official and some industry representatives was an advisory committee meeting. Defendant's Brief for Judgment on the Pleadings at 2. The court granted summary judgment for the plaintiff and wrote no opinion. Order of June 21, 1973.

27. See H.R. REP. No. 1731, 91st Cong., 2d Sess. 4-5 (1970); *Hearings on H.R. 4383 Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 16 (1971) (remarks of Representative Metcalf).

28. See *Hearings on S. 3067 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 91st Cong., 2d Sess., pt. 1, at 11, 19 (1970). See generally H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953). Informed opinion is an essential element of good decisionmaking, and the public must have access to the information and opinions being given an agency if the public is to support or contest effectively the recommendations an agency receives. *Id.* at xiii.

they argued that exceptions to a rule requiring meetings to be open must be narrow.²⁹

Closed meetings may lead to biased recommendations or antitrust violations.³⁰ Further, when meetings are closed, committee members obtain knowledge of proposed government actions that nonparticipants cannot share.³¹ Permitting committee members to obtain such knowledge and to participate in the decisionmaking process may harm the interests of nonparticipants in two ways: it may give business or financial interests represented on the committee a competitive advantage over others, and it may force nonparticipants into the position of having to attempt to convince the agency to change a decision, often within a short time.³² Where they do have to attempt to secure a change within a short time, nonparticipants may have to construct arguments without knowledge of what information or considerations led to the decision challenged; an agency cannot supply written recommendations or minutes in response to a Freedom of Information Act request until the material is prepared, and preparation of materials may occur days or weeks after a decision is made, especially if the decision maker attended the meeting and does not have to wait for a document summarizing the views.³³

Finally, the closing of advisory committee meetings may preclude the consideration of some valuable advice. No one contends that any advisory committee contains all of the experts in a given field. Various factors limit the size of committees and cause the exclusion of knowledgeable individuals.³⁴ If the committee meetings are closed, the advice of the excluded individuals is not heard, a result that may be contrary to the public interest. The potential harm to the public interest is exacerbated where the members of the committee are biased. Although an agency should not be forced to accept advisory committee members it does not want, an agency acting in the public interest should allow individuals to witness committee meetings so they can

29. See *Oversight Hearings on Pub. L. 92-463 Before the Subcomm. on Budgeting, Management, and Expenditures of the Senate Comm. on Government Operations*, 93d Cong., 1st & 2d Sess. 13, 20 (1973-1974).

30. See *Hearings on Presidential Advisory Committees Before a Subcomm. of the House Comm. on Government Operations*, 91st Cong., 2d Sess., pt. 1, at 24-31 (1970); *Hearings on H.R. 3378 Before a Subcomm. of the House Comm. on Government Operations*, 85th Cong., 1st Sess. 4 (1957). No one has documented the occurrence of any violation of law as a result of a closed advisory committee meeting, but proponents argue that a violation could occur. Interview with Ronald L. Plessner, staff attorney, Center for Study of Responsive Law, in Washington, D.C., August 13, 1974.

31. See *Hearings on H.R. 4383*, *supra* note 27, at 16-18.

32. See *Oversight Hearings on Pub. L. 92-463*, *supra* note 29, at 32.

33. See *id.* at 19, 82.

34. Brown, *supra* note 14, at 202.

offer advice, in a different forum if necessary, based on the information available to the committee members.³⁵

STATUTORY SOLUTION

The FACA evolved during 15 years of intermittent congressional concern over the ways in which advisory bodies were utilized. In the mid-1950's, the Executive and Legislative Reorganization Subcommittee of the House Committee on Government Operations held hearings on a bill that not only would have set certain management requirements for committees, but also would have required advisory bodies to keep complete minutes of all meetings.³⁶ The Committee eventually reported House bill 7390,³⁷ which, in part, would have amended the Administrative Expenses Act of 1946 to require advisory committees to keep minutes of each meeting.³⁸ The minutes would have been available to the public under the Freedom of Information Act.³⁹

In response to House Bill 7390, the Bureau of Budget in 1962 issued guidelines.⁴⁰ Executive Order 11,007, which followed, effectively dealt with the congressional concerns reflected in the bill.⁴¹ The Executive Order, defining advisory committees in an expansive fashion, added several classifications not found in the House bill.⁴² It treated

35. Commentators have questioned the quality of advice drawn from too narrow a group. See H. LASKI, A GRAMMAR OF POLITICS 311-18 (1925); Laski, *The Limitations of the Expert*, HARPERS, Dec. 1930, at 101. Laski argues that because an expert "sacrifices the insight of common sense to the intensity of his experience," the public must be involved in reviewing and passing judgment on the expert's recommendations. As stated by Laski, "Intensity of vision destroys the sense of proportion. There is no illusion quite so fatal to good government as that of the man who makes his expert insight the measure of social need. We do not get progress in naval disarmament when admirals confer. We do not get legal progress from meetings of bar associations." *Id.* at 106, 108.

36. See *Hearings on H.R. 3378*, *supra* note 30.

37. H.R. 7390, 85th Cong., 1st Sess. (1957); see H.R. REP. NO. 576, 85th Cong., 1st Sess. (1957).

38. Ch. 774, 60 Stat. 806 (codified in scattered sections of 5, 19, 28, 41, 44 U.S.C.). The bill required the committees to include in the minutes a list of participants, a summary of matters discussed, and conclusions reached. H.R. 7390, 85th Cong., 1st Sess. § 15A(b)(3) (1957), reprinted in *Hearings on Presidential Advisory Committees*, *supra* note 30, at 20. The House approved the bill, but the Senate never had an opportunity to consider it. See 103 CONG. REC. 11247-49 (1957) (debate on the floor of the House). As passed by the House, the bill contained several requirements: an agency had to notify Congress prior to the establishment of any new committee; the agency had to approve an agenda before each meeting of a committee; committee activities had to be purely advisory; minutes of each meeting had to be recorded; and each agency had to submit to Congress an annual report listing each committee and its functions. See H.R. 7390, 85th Cong., 1st Sess. § 15A (1957).

39. 5 U.S.C. § 552 (1970).

40. Bureau of the Budget Circular A-63, Feb. 2, 1959, reissued and reprinted in *Hearings on Presidential Advisory Committees*, *supra* note 30, pt. 1, at 6-10.

41. Exec. Order No. 11,007, 3 C.F.R. 573 (1962).

42. See *id.* § 2(a).

advisory committees composed primarily of representatives of a single industry or group of related industries as a special type of committee⁴³ and required a verbatim transcript to be made of such "industry advisory committee" proceedings unless the agency made a determination that the making of a transcript would interfere with the functioning of the committee or would not be in the "public interest."⁴⁴ Minutes had to be kept in all cases.⁴⁵ The Executive Order also required an industry advisory committee to be "reasonably representative" of the group of industries to which it related.⁴⁶ The Bureau of the Budget issued a circular to implement the Order,⁴⁷ but it was not vigorously enforced.⁴⁸

In December 1970 the Special Studies Subcommittee of the House Committee on Government Operations issued a report containing 20 specific recommendations designed to cure the deficiencies in the regulation of advisory committees.⁴⁹ The recommendations were reflected in House bill 4383.⁵⁰ Although none of the recommendations expressly advised the opening of advisory committee meetings, the bill implicitly dealt with openness in three ways: it continued the requirement that the committees keep minutes of all meetings;⁵¹ it applied the Freedom of Information Act to all records prepared by or made available to committees;⁵² and it required committees to give public notice of the time and place of all meetings.⁵³

43. *Id.* § 2(b).

44. *Id.* § 6(d).

45. *Id.* § 6(c).

46. *Id.* § 5.

47. Bureau of the Budget Circular No. A-63, Mar. 2, 1964, reprinted in *Hearings on Presidential Advisory Committees*, *supra* note 30, pt. 1, at 6-10.

48. See H.R. REP. No. 1731, *supra* note 27, at 9-10; *Hearings on Presidential Advisory Committees*, *supra* note 30, pt. 1, at 68.

49. See H.R. REP. No. 1731, *supra* note 27, at 20-24. The Subcommittee's major recommendations were the following: (1) that Congress publicly delineate the law, policy, and administrative criteria for using advisory committees; (2) that Congress use existing committees where possible, provide funds to assure that reports are published, and give new committees specific guidance; (3) that the executive branch update its policies, secure authorization for committees over two years old, and report to Congress on the activities and composition of all committees; (4) that the Office of Management and Budget strengthen its management supervision of other agencies' use of committees; and (5) that committees be free of conflict of interest problems and balanced in representation, with a greater number of nonexperts.

50. H.R. 4383, 92d Cong., 1st Sess. (1971) (introduced by Representative Monagan); *Hearings on H.R. 4383*, *supra* note 27, at 3-12; see *id.* at 2.

51. H.R. 4383, 92d Cong., 1st Sess. § 10(b) (1971).

52. *Id.*; see 5 U.S.C. § 552 (1970). This provision applied to presidential committee records, which previously had been almost impossible to obtain. See H.R. REP. No. 1731, *supra* note 27, at 22.

53. H.R. 4383, 92d Cong., 1st Sess. § 10(c) (1971) (public notice requirement inapplicable where national defense or foreign policy endangered). The provisions were designed to "assure public access to deliberations of advisory committees." H.R. REP. No. 1017, 92d Cong., 2d Sess. 10 (1972).

The provisions of House bill 4383 contributed to the development of the FACA in two ways. First, they proposed to tie committee records to the Freedom of Information Act in order to make them subject to public disclosure.⁵⁴ Second, although the bill required advance notice of meetings, it neither required the meetings to be open nor limited in any way an agency's ability to restrict attendance. During House consideration and passage of the bill, these provisions, which focused on providing the public access to records rather than to deliberations, were not challenged or explicated.

Senate interest in the operation of advisory committees surface almost simultaneously with the commencement of the House hearings, but the Senate of the 91st Congress concentrated on the relationship between the Office of Management and Budget and the Advisory Committee on Federal Reports.⁵⁵ The 92d Congress considered three Senate bills that addressed the issue of openness and dealt generally with the management of advisory committees. One bill, introduced by Senator Metcalf, excluded from its coverage committees that provided advice solely on national security or intelligence matters and required that one-third of the members of other committees represent the interests of the public, that the meetings of other committees be open, and that verbatim transcripts of other committee meetings be compiled.⁵⁶ The Senate bill also would have invested citizens adversely affected by any action that was improper under it with standing to sue to compel compliance.⁵⁷ The Senate introduced two other bills, both of which resembled House bill 4383.⁵⁸

The Senate Committee on Government Operations worked out a compromise on the openness provisions that was reflected in a new bill, reported by the Committee on September 7, 1972.⁵⁹ The bill provided that each advisory committee meeting would be open to the public and that interested persons could appear before or file statements with the committee, that advance notice of each meeting would be given, that transcripts or minutes would be taken of each open meeting, and that any meeting concerned with matters listed in the nine exemptions to the Freedom of Information Act could be closed, although verbatim transcripts of closed proceedings would have to be

54. This provision was considered necessary because it eliminated any doubt that records were subject to disclosure. See 118 CONG. REC. 16295 (1972) (remarks of Representative Thone).

55. See *Hearings on S. 3067*, *supra* note 28.

56. S. 1637, 92d Cong., 1st Sess. §§ 4(1), 5(2), 8(a) (1971).

57. *Id.* § 11(a).

58. See S. 2064, 92d Cong., 1st Sess. (1971) (introduced by Senator Percy); S. 1964, 92d Cong., 1st Sess. (1971) (introduced by Senator Roth).

59. S. 3529, 92d Cong., 2d Sess. (1972); see S. REP. NO. 1098, 92d Cong., 2d Sess. 4 (1972).

prepared.⁶⁰ In its report the Committee stressed that it had chosen the Freedom of Information Act as the basis for exemptions both because that Act resulted from comprehensive congressional scrutiny and balancing of the need for public disclosure and the need to protect certain information and because the use of the Act's exemptions met most of the objections to openness raised during the hearings.⁶¹

During floor consideration of the bill, Senator Metcalf introduced an amendment that precluded the application of the bill's requirements to the Central Intelligence Agency⁶² and then accepted an amendment offered by Senator Javits that also shielded the Federal Reserve Board.⁶³ The Senate passed the bill as amended,⁶⁴ and the House and Senate conferees began to redraft the FACA in the final days of the 92d Congress. The conferees essentially retained the provisions of the Senate bill, although they deleted the requirement that a verbatim transcript of any closed meeting be prepared.⁶⁵

The Administration had opposed the legislative imposition of both the committee management and the openness provisions on the ground that the executive branch already had the authority to control advisory committees.⁶⁶ In a last minute effort to discourage legislation, the President issued a new executive order on advisory committees,⁶⁷ but the order did not deter the Senate sponsors of the legislation because it failed to go far enough in either the development of management controls or the assurance of openness.⁶⁸

60. S. 3529, 92d Cong., 2d Sess., § 10 (1972).

61. See S. REP. NO. 1098, *supra* note 59, at 16-17.

62. 118 CONG. REC. 30272 (1972).

63. *Id.* at 30273. In his letter requesting exclusion for the Federal Reserve Board, Board Chairman Arthur Burns argued that the Federal Reserve Advisory Committee discussions cover a number of sensitive subjects, such as monetary policy, the international payments system, and liquidity conditions in the banking system. He stated that premature publication of views candidly expressed at the advisory committee meetings could prove harmful and asserted that full and frank discussion at these meetings could be inhibited seriously if the meetings were open to the public, or even if minutes of the meetings were published. *Id.* It is difficult to understand why the rationale for shielding the Central Intelligence Agency and Federal Reserve Board from public scrutiny does not apply to other advisory committees.

64. *Id.* at 30280.

65. See HOUSE CONF. REP. NO. 1403, 92d Cong., 2d Sess. (1972); 118 CONG. REC. S 15286 (daily ed. Sept. 19, 1972) (remarks of Senator Percy). Neither the conference report nor the subsequent floor debate on the conference bill revealed why the requirement for a verbatim transcript was deleted or elucidated other aspects of the conferees' compromise. See HOUSE CONF. REP. NO. 1403, *supra* at 6-7, 11; 118 CONG. REC. S 15285-86 (daily ed. Sept. 19, 1972).

66. See HEARINGS ON H.R. 4383, *supra* note 27, at 99-100 (letter from Arnold R. Weber, Assistant Director of the Office of Management and Budget).

67. Exec. Order No. 11,671, 37 Fed. Reg. 11307 (June 5, 1972), *reprinted in* 118 CONG. REC. 30279-80 (1972).

68. See 118 CONG. REC. 30274, 30278 (1972) (remarks of Senators Percy and Metcalf).

The open meeting provision, as enacted, represents a sharp break with the past. Agencies previously had retained discretion to close or open advisory committee meetings.⁶⁹ The Act eliminates most of the agencies' discretion and mandates open meetings unless narrow, statutory standards are met. In effect, an agency must open its meetings, no matter how compelling or significant the reasons for closing them, unless a person authorized to do so determines that a meeting is concerned with matters exempted by the Freedom of Information Act from public disclosure.⁷⁰ If a meeting is to be closed on the basis of one of the exemptions, the reasons for closing it must be stated in written form, and the advisory committee must summarize its activities in a written report at least once a year.⁷¹ National security is the only exception to the requirement that advisory committees provide advance notice of all meetings.⁷²

If an agency wishes to close a meeting, it must determine several weeks in advance that the meeting will be concerned with matters listed in an exemption of the Freedom of Information Act. An agency can make this advance determination rather easily where the committee will deal with matters exempted under any of the eight exemptions dealing with specific subject areas.⁷³ Exemption five, which exempts certain interagency and intra-agency memoranda,⁷⁴ poses a problem, however. Only with difficulty can an agency determine in advance the applicability of this nebulous exemption.

The draft regulations issued by the Office of Management and Budget in January 1972 reflected recognition of the vagueness of exemption five.⁷⁵ The draft established one standard for the use of all exemptions but five and a tougher standard for the use of exemption five.⁷⁶ If a meeting is to be closed on the basis of exemption five, the agency head must determine that the meeting or a portion thereof, will consist of an exchange of opinions that, if written, would be exempt under exemption five, and that closing the meeting is essential "to protect the free exchange of internal views and to avoid undue interference with agency or committee operation."⁷⁷ When an exemption

69. Cf. Exec. Order No. 11,007, *supra* note 41, § 6; Bureau of the Budget Circular A-63, Mar. 2, 1964, reprinted in *Hearings on Presidential Advisory Committee*, *supra* note 30, at 6.

70. 5 U.S.C. App. 1 §§ 10(a)(1), (3), (d) (Supp. III, 1973); see § 1, 5 U.S.C. § 552(b) (1970) (Freedom of Information Act exemptions).

71. 5 U.S.C. App. I § 10(d) (Supp. III, 1973).

72. *Id.* § 10(a)(2).

73. See 5 U.S.C. §§ 552(b)(1)-(4), (6)-(9) (1970).

74. *Id.* § 552(b)(5) (exempting inter or intra-agency written communications that would not be available to a party other than an agency in litigation with the agency).

75. See 38 Fed. Reg. 2306-11 (Jan. 23, 1973).

76. See *id.* at 2310, § 10a(3)(c)(iii)(A).

77. *Id.* § 10a(3)(c)(iii)(C).

other than five is utilized to protect opinions or discussions, the guidelines require only that the specific purpose of a meeting be the discussion of a matter falling within one of the other exemptions.⁷⁸

OPENNESS, THE MAJOR ISSUE

The legislative history reveals that Congress intended the FACA to address a major issue: whether deliberations of advisory committees used by the federal government should be open to the public. The issue of openness does not arise only in discussions about advisory committees; a strong theme of openness runs through the political traditions of Anglo-American democracy and pervades the analysis and critiques of many social and political institutions.

THE POLITICAL TRADITION

The American tradition of public access to the process of government, an important underpinning of American democracy, grew out of the development of open government in England. The first branch of the English government to be opened to public scrutiny was the judiciary, whose records have been available to the public from the time of Edward I.⁷⁹ Public access to judicial proceedings engendered more controversy, but the principle was established rather early that the deliberations of a court should take place in the public view.⁸⁰

There was no similar early tradition of access to legislative activities.⁸¹ Early parliamentary proceedings were conducted entirely in secret, and those who revealed information about the process were subject to contempt-of-Parliament penalties.⁸² Gradually, as technological developments in journalism made the enforcement of secrecy impractical, selected members of the public were admitted as a matter

78. *Id.* § 10a(3)(c)(iii)(B).

79. See H. Cross, *supra* note 28, at 135.

80. See *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949); *Trial of John Lilburne*, 4 How. St. Tr. 1270, 1273-74 (Oyer & Terminer 1649) (plea of defendant being tried for treason for open trial apparently granted); Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 382-83 (1932). The Supreme Court reviewed this Anglo-American legal tradition in *In re Oliver* and justified openness as a restraint on abuse of power by the courts. 333 U.S. 257, 268-70 (1948). Another court, drawing on the analysis of commentators, justified the rule on the ground that if proceedings are open, important witnesses may learn of the adjudication and come forward to present their evidence. See *Tanksley v. United States*, 145 F.2d 58, 59-60 (9th Cir. 1944).

81. See TASWELL-LANGMEAD'S CONSTITUTIONAL HISTORY 657 (10th ed. T. Plunknett 1946).

82. See *id.* at 658. Originally necessary to protect members of Parliament from the retribution of the sovereign, secrecy also was a convenient veil to hide proceedings from constituents. *Id.* at 657. To avoid inaccurate accounts, Parliament officially printed votes and proceedings but printed them without reference to debates. *Id.* at 658.

of Parliamentary "grace."⁸³ This "grace" had become a right by the time of the American Revolution, a right that state legislatures and the United States Congress quickly affirmed.⁸⁴

The public's right of access to executive branch activities developed last, and slowly,⁸⁵ in part because the administrative function only gradually became distinct from the judicial and legislative functions in the English constitutional development,⁸⁶ and in part because the prerogatives of the monarch shielded the executive branch.⁸⁷ Even after the United States Constitution established three equal and separate branches of government, the common law provided neither a right to inspect public records or documents nor a right to witness executive branch proceedings.⁸⁸ Gradually, a limited right of access to executive branch records that might be needed for current litigation evolved.⁸⁹ Finally, in the original Administrative Procedure Act,⁹⁰ Congress granted to those "properly and directly concerned" with the subject matter a statutory right of access to government documents.⁹¹

The dichotomy between public access to documents and access to the decisional process merits attention. Oral deliberations usually precede the preparation of documents setting forth decisional alternatives or the decision itself. Those participating in the deliberations are likely to be less precise and less careful in their statements than those who subsequently compose the documents, but the process of deliberation is closer to the core of decisionmaking than are the documents. Thus, access to deliberations is of a higher order than access to documents. It is not surprising, therefore, that a right to inspect judicial records preceded the right to be present at judicial proceedings, or that the

83. See *id.* at 658-61; *Wason v. Walker*, L.R. 4 Q.B. 73 (1868) (reports of debate in Parliament privileged from libel suit on ground that such reports are in the public interest).

84. See J. WIGGINS, *FREEDOM OR SECRECY* 9-10 (1964).

85. See *id.* at 66-68.

86. See W. CHURCHILL, *THE BIRTH OF BRITAIN* 213 (1963) (reviewing development of administrative functions of the Exchequer and Chancery).

87. See J. WIGGINS, *supra* note 84, at 66-68.

88. See *Fayette County v. Martin*, 279 Ky. 387, 396, 130 S.W.2d 838, 843 (1939); *Shelby County v. Memphis Abstract Co.*, 140 Tenn. 74, 78, 203 S.W. 339, 340 (1918).

89. See *Norwack v. Fuller*, 243 Mich. 200, 208-09, 219 N.W. 749, 751-52 (1928) (person seeking to enforce common law must show special interest; newspaper editor has such special interest); *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893) (newspaper access to divorce proceeding denied on ground of insufficient interest); cf. *Fayette County v. Martin*, 279 Ky. 387, 396-97, 130 S.W.2d 838, 843 (1939) (city has sufficient interest in and statutory right of access to state tax records); *Shelby County v. Memphis Abstract Co.*, 140 Tenn. 74, 78, 203 S.W. 339, 340 (1918) (abstract company permitted access to land records so small landowners could be informed).

90. Ch. 324, 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 551, 553-59, 701-06, 3105, 3344, 4301, 5335, 5362, 7521 (1970).

91. *Id.* § 3(c), as amended, 5 U.S.C. § 552 (1970).

right to see legislative documentation preceded the right to attend meetings of legislative assemblies. Access to the executive branch also followed this progression. First, the Freedom of Information Act provided access to certain written administrative records and documents;⁹² then the FACA provided a right to be present at certain proceedings of advisory committees.⁹³

EXCEPTIONS TO THE TRADITION

Openness and public access have never been defended as appropriate in all circumstances. Some processes function better and serve the public interest better when carried on in private. Determining which processes should be open to public scrutiny and which should be closed is difficult, for the determination rests on a delicate balance of interests. Nevertheless, courts and Congress have identified several important exceptions to the norm of public access.

Recently, in *United States v. Nixon*⁹⁴ the Supreme Court invested the doctrine of executive privilege with clear constitutional status. Declaring that the need to protect communications between high government officials and those who advise and assist them is "too plain to require further discussion,"⁹⁵ the Court pointed out that public exposure can be detrimental to the decisionmaking process because the tendency to be concerned with appearances and personal interests can inhibit candor.⁹⁶ Effective exploration of alternatives may require privacy.

92. 5 U.S.C. § 552 (1970).

93. 5 U.S.C. App. I (Supp. III, 1973). Related, but in some ways more far-reaching, developments at the state level led to the enactment of so-called "Sunshine Laws," which typically require meetings of state instrumentalities at which official acts are to be taken to be open. See, e.g., ARK. STAT. ANN. § 12-2805 (1968); FLA. STAT. ANN. § 286.011 (Supp. 1974-1975); GA. CODE ANN. § 40-3301 to -3303 (Supp. 1973). Florida state courts have construed the requirements as applicable to every step in the decisional process and even to informal meetings. See *Canney v. Board of Pub. Instruction*, 278 So. 2d 260, 263 (Fla. 1973) (even informal meetings must be open to public); *Times Publishing Co. v. Williams*, 222 So. 2d 470, 474 (Fla. App. 1969) (school board meeting; statute meant to include acts of deliberation, discussion, and decision by governing bodies). Some question remains, however, about whether meetings of purely advisory bodies must be open. See OP. OF THE FLA. ATT. GEN. 271-380 (Dec. 3, 1971); Note, *Government in the Sunshine: Promise or Placebo*, 23 U. FLA. L. REV. 361, 365 (1971). If advisory bodies are exempt, the statutes will have the odd effect of permitting advisory bodies to deliberate in secret while requiring the actual decision makers to deliberate before the public.

94. 94 S. Ct. 3090 (1974).

95. *Id.* at 3106. See also *United States v. Morgan*, 313 U.S. 409, 422 (1940) (court cannot probe mental processes of Cabinet official).

96. 94 S. Ct. at 3106. The Court of Claims used similar reasoning when it refused to permit discovery of an intra-agency memorandum advising on program policy. See *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 944-47 (Ct. Cl. 1958).

Congress has recognized the same principle of government. When Congress wrote into the Information Act an exemption for interagency and intra-agency memoranda, it pointed out that effective deliberations cannot take place in a "fishbowl." See 5 U.S.C. § 552(b)(5) (1970); H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966).

Congress has excluded the public from certain of its committee deliberations.⁹⁷ Steps taken in 1973 to increase public access to committee markup sessions resulted in a significant decrease in the percentage of committee meetings closed to the public.⁹⁸ Most committees reported that the effect of this change was slight. Some members, however, declared that the change seriously interfered with the efficient conduct of committee business because members "performed" for lobbyists by introducing a plethora of frivolous amendments.⁹⁹

The decisions of the Supreme Court are the results of perhaps the most striking example of deliberations conducted in secret.¹⁰⁰ The relative absence of controversy about this instance of secret decisionmaking has resulted in little express justification for the practice, but the need for candor and free-ranging discussion and the understandable concern about personal and political embarrassment probably mandate the continuation of the practice.

THE NEED FOR PRIVATE DELIBERATIONS

Exceptions to the general principle of openness have been justified summarily on the ground that discussion is less inhibited and, presumably, results in a better decision if the discussion takes place in private. Unfortunately, there has been little analysis of the validity of this proposition as it is applied to governmental processes. However, a model of group dynamics drawn from the labor relations field, which has been subjected to more rigorous analysis than have governmental deliberations,¹⁰¹ can be used effectively to explore the need for privacy. The authors of one behavioral model of labor negotiations, Professors Walton and McKersie, suggest that their model is applicable to social negotiations of all kinds because negotiation is a basic tool for conflict resolution.¹⁰² Their analysis divides the process of negotiation into four subprocesses—distributive bargaining, integrative bargaining, attitudinal structuring, and intra-organizational bargaining—that occur more or less simultaneously.¹⁰³

97. See 1973 CONG. Q. ALMANAC 1074.

98. See *id.* In 1971, 36 percent of the committee meetings were closed to the public, and in 1972, 40 percent were closed. In 1973, only 16 percent were closed. *Id.*

99. *Id.*

100. See J. FRANK, MARBLE PALACE 111 (1972); L. SALOMON, THE SUPREME COURT 16 (1961).

101. See J. DUNLOP & D. BOK, LABOR AND THE AMERICAN COMMUNITY (1970); J. DUNLOP & N. CHAMBERLAIN, FRONTIERS OF COLLECTIVE BARGAINING (1967); J. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS (1954); R. WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965).

102. R. WALTON & R. MCKERSIE, *supra* note 101, at 2-3.

103. *Id.* at 4, 8.

Distributive bargaining occurs when each party can gain only at the expense of the other.¹⁰⁴ When the parties are involved in this subprocess, each negotiator uses a variety of tactics to induce his opponent to retreat from his initial offer and to move toward the outcome desired by the negotiator, and each party seeks to conceal from the other the point at which he would strike, or accept a strike, rather than yield further.¹⁰⁵ In the second subprocess, integrative bargaining, a solution exists that either will improve the positions of both parties or will improve the position of one at little or no cost to the other.¹⁰⁶ Integrative bargaining requires a higher degree of cooperation and less use of aggressive tactics than distributive bargaining.¹⁰⁷ The third subprocess, attitudinal structuring, is the process of change in the ways the negotiators perceive each other and interact as individuals.¹⁰⁸ The fourth subprocess, intra-organizational bargaining, involves the recognition of each negotiator's need to maintain a consensus and to manage fragmentation and heterogeneity within his own organization so that the members of his organization will support or at least acquiesce in the outcome of the negotiations.¹⁰⁹

Public exposure would interfere with three of these four subprocesses. Such exposure would interfere most with integrative bargaining because the parties need to feel that they can "brainstorm" free of the scrutiny of their constituents.¹¹⁰ Public scrutiny also would seriously impede intra-organizational bargaining; if the negotiators' constituents were privy to the plans designed to alter their aspirations to correspond to the outcome of negotiations, the plans would not work. Finally, publicity also would interfere with distributive bargaining, in which each party must keep his own position disguised if he is to alter the other's. The glare of publicity and the attendant speculation by third

104. *Id.* at 4. For example, bargaining over wage rates is distributive bargaining. The worker can achieve a higher wage only at the expense of higher costs to the employer. *Id.* at 11.

105. *Id.* at 52-53.

106. *Id.* at 5. Labor-management discussions directed toward devising ways to improve productivity and thereby to enable a company to stay competitive or toward devising layoff procedures that maximize the interests of both parties are examples of integrative bargaining. *Id.* at 132-37.

107. *Id.* at 141-42.

108. *Id.* at 5.

109. *Id.* at 5-6. Basic tactics of intra-organizational bargaining involve the alteration of constituent aspirations to coincide more closely with possible negotiation outcomes, or the articulation of the actual outcome so that it seems to correspond more closely to constituent aspirations. *Id.* at 311.

110. *See id.* at 141-42, 159-60 (trust and "[f]reedom to behave spontaneously without fear of sanctions," aided by privacy, are essential to integrative bargaining). To eliminate all inhibitions and avoid the scrutiny of their constituents, negotiators frequently go "off the record" and adjourn to more informal sessions, even where their "on the record" discussions are private. *Id.* at 159.

parties and constituents about the real positions of the parties would undermine the process.

Advisory committee activities can resemble labor negotiations. When the views of the committee's membership are relatively homogeneous and when the advice sought engenders relatively little controversy between the membership and the agency, the resemblance between advisory committee deliberations and labor negotiations is likely to be small. When membership views are heterogeneous or when the membership's consensus and the position of the agency conflict, the resemblance is likely to be great.¹¹¹

The deliberations of the Food Industry Advisory Committee during Phase IV of the Economic Stabilization Program provide examples of the similarities between advisory committee and labor negotiation processes. The members of the committee had been chosen to reflect producer, processor-distributor, and consumer segments of the food production and consumption chain.¹¹² Considerable controversy arose between committee members about where the Government should focus its action in order to stabilize food prices.¹¹³ Spokesmen for the producers, on one side, and spokesmen for the middlemen, on another, contended that the other group had reaped the major benefits from the increases in food prices and should bear the burden of any restraint on prices.¹¹⁴ Consumer spokesmen simply argued that some stringent federal action had to be taken to control the retail price of food.¹¹⁵ The

111. For example, the proceedings of an advisory committee formed to offer technical advice to an agency are unlikely to resemble labor negotiations. The members of such a committee probably do not have a personal or emotional stake in the outcome, particularly if the issues turn on matters that are relatively settled within the engineering or scientific disciplines. The proceedings of advisory committees formed to defuse opposition to an existing or prospective governmental policy, on the other hand, are likely to resemble labor negotiations; the tension between the committee and the agency is likely to be great, even if the committee faces little internal dissension. Clearly, the deliberations of tripartite committees formed to deal with labor-management issues resemble labor negotiations. Not only are the memberships necessarily heterogeneous, but the subjects of concern to the committees also are the same subjects that confronted the labor negotiators studied by Professors Walton and McKersie.

112. See COST OF LIVING COUNCIL, ECONOMIC STABILIZATION PROGRAM QUARTERLY REPORT, JULY 1-SEPT. 30, 1973, at 59, Wilkinson & Atkinson, *supra* note 25, at 1035.

113. Food prices had risen rapidly after the June 13, 1974, freeze was lifted for fruits and vegetables. See COST OF LIVING COUNCIL, *supra* note 112, at 17.

114. See *Hearings on the Economic Stabilization Act Before the Subcom. on Production and Stabilization of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong. 2d Sess. 601 (1974) (testimony of John T. Dunlop); Summary of Phase IV Consultations, Agenda and Policy Papers, Tab I, Tab D at 2 (1973) (unpublished Cost of Living Council document, on file at the Department of the Treasury Office of Economic Stabilization).

115. Summary of Phase IV Consultations, *supra* note 114, Tab D, at 2; see Hinkle & Brinkley, *Communicating with the Public*, HISTORICAL WORKING PAPERS ON THE ECONOMIC STABILIZATION PROGRAM 1139, 1210-11 (1974) (public pressure for controls).

Cost of Living Council was interested in striking a compromise that would be economically sound, that would restrain inflationary price increases, and that would draw minimal criticism from the public and from members of Congress.

The conflict among the three constituent groups closely resembled the conflict present in the situation to which Professors Walton and McKersie applied their distributive bargaining subprocess model; each group believed it could gain only at the expense of the others.¹¹⁶ The government's concern resembled the type of problem dealt with through integrative bargaining; the Government believed that all parties, working together, could develop a solution that maximized all interests.¹¹⁷ The task of the Cost of Living Council was to reconcile the apparently irreconcilable differences between the three groups within the framework of the Council's need to develop a feasible Phase IV within a very short time period.¹¹⁸ For the reasons identified above as necessitating secrecy in the labor negotiation process, the Food Industry Advisory Committee needed to conduct its business outside the public view.¹¹⁹

116. See notes 104-105 *supra* and accompanying text.

117. See notes 106-107 *supra* and accompanying text.

The effectiveness of the committee was contingent on the satisfaction of two conditions precedent. First, the members of the group had to have credibility with the key producer, processor-distributor, and consumer groups. Without this credibility, the committee could not represent or resolve the larger political controversy. Second, the group as a whole had to feel some commitment to work with the Council to develop a workable policy. Without this sense of commitment, the committee members could reach no compromise, consensus, or heightened understanding of the difficulties. Each of these conditions was met to some degree. The membership apparently was perceived as fairly representative, although some consumer groups alleged that the balance was struck in favor of business groups, and certain producer groups complained that they were not specifically represented. Repeated warnings from Council officials that the President was committed to a tough, but economically sound program and that such a program would be developed and put into effect with or without the help of the committee stimulated the commitment to work with the Council; it was in the interest of the committee members to participate in the development of an approach that most satisfied their own positions and goals.

118. See *COST OF LIVING COUNCIL*, *supra* note 112, at 32; Wilkinson & Atkinson, *supra* note 25, at 1035-36.

119. The Food Industry Advisory Committee is described as an example of a committee that needed privacy, but it was by no means unique. John T. Dunlop, Director of the Cost of Living Council and a highly respected industrial relations expert, expressed special concern about the impact of public exposure on the effectiveness of three tripartite labor-management committees utilized by the Cost of Living Council. His concern resulted in a recommendation to Congress that such tripartite groups be legislatively exempted from the requirements of the FACA. The recommendation was supported by reasoning essentially the same as that propounded by Professors Walton and McKersie, buttressed by a statement that the presence of clearly conflicting interests on such committees lessened the need for the external protection of the public interest provided by the FACA. See *Hearings on the Economic Stabilization Act Before the Subcomm. on Production and Stabilization of the Senate Comm. on Banking Housing, and Urban Affairs*, 93d Cong., 2d Sess. 505-07 (1974) (testimony of John T. Dunlop).

JUDICIAL APPLICATION

Congress clearly recognized that circumstances could justify exceptions to its general rule that advisory committee deliberations should be opened to the public,¹²⁰ but Congress did not clearly explicate the circumstances that would warrant such exceptions. The FACA's incorporation of the Freedom of Information Act exemptions as the standards for the closing of advisory committee meetings has caused considerable difficulty. Most of the controversy has swirled around the use of exemption five, which protects internal memoranda from disclosure if they would not be available to a party other than an agency in a discovery proceeding.¹²¹ This rather general provision, framed to prevent disclosure of documents, is not easily applied to meetings, and the statutes do not define the oral analogue to an intra- or interagency document.¹²²

The applicability of exemption five logically should turn on whether the deliberations of an advisory committee are "internal" and therefore entitled to protection. In *Soucie v. David*¹²³ and *Wu v. National Endowment for Humanities*,¹²⁴ two federal courts of appeals held that exemption five applied to reports from experts or consultants on the ground that consultants should be able to give their judgments freely, without fear of publicity.¹²⁵ In both cases, documents setting forth recommendations of experts were treated as interagency memoranda and therefore exempt from discovery.¹²⁶ The receipt of advice from an advisory committee is barely distinguishable from the receipt of advice from consultants, yet in *Gates v. Schlesinger*¹²⁷ a district court precluded the application of exemption five to advisory committees on the ground that an advisory committee is not an agency. The court acted out of concern that exemption five could be used to justify closing virtually all advisory committee meetings to the public.¹²⁸

The *Gates* result seems unsupported by case law, congressional action, or logic. The facts in both *Wu* and *Soucie* involved agency reli-

120. See S. REP. No. 1098, *supra* note 59, at 14, 16.

121. 5 U.S.C. § 552(b)(5) (1970). In December 1973 the Attorney General identified five suits that had been based on the Federal Advisory Committee Act. Three of them involved the use of exemption five. *Oversight Hearings on Pub. L. 92-463*, *supra* note 29, at 205.

122. See *Oversight Hearings on Pub. L. 92-463*, *supra* note 29, at 13.

123. 448 F.2d 1067 (D.C. Cir. 1971).

124. 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

125. 460 F.2d at 1032; 448 F.2d at 1078 n.44.

126. 460 F.2d at 1032; 448 F.2d at 1078 n.44.

127. 366 F. Supp. 797 (D.D.C. 1973).

128. *Id.* at 799.

ance on outside advice,¹²⁹ which closely resembles the advisory committee process. Indeed, the "panel" that convened in the *Soucie* case today might be considered an advisory committee.¹³⁰ Congress's post-*Soucie* incorporation of exemption five into the FACA as a ground for excluding the public from the deliberations of advisory committees would seem to evidence a lack of congressional desire to overturn the *Soucie* result.¹³¹ Courts should not take action that effectively deletes from a statute provisions Congress properly incorporated and could itself have deleted had it so chosen. The argument that exemption five could permit closure of all meetings and thereby negate the policy embodied in the advisory committee act seems excessive.¹³² This argument has been made against the use of the exemption to protect documents from disclosure, but courts have managed to develop a body of case law that circumscribes its use.¹³³ Courts similarly could circumscribe the use of the exemption to close advisory committee meetings.

Another development in the limited case law relating to the FACA distinguishes sharply between protection of oral deliberations and protection of written documents. In *Nader v. Dunlop*¹³⁴ a district court, in granting a motion for summary judgment, held that exemption five can be invoked to exclude the public from an advisory committee meeting only to preserve the confidentiality of a specific document.¹³⁵ Al-

129. In *Soucie* the report submitted to the agency resulted from deliberations of a panel of experts that had been convened by the President's Office of Science and Technology to develop outside recommendations on the supersonic transport program. 448 F.2d at 1070.

In *Wu* the plaintiff sought access to the evaluations of this work by several expert advisers of the National Endowment, at least one of which had been given orally, and the others of which had been rendered after consultation among the evaluators. 460 F.2d at 1031.

130. See 5 U.S.C. App. I § 3(2) (Supp. III, 1973) (advisory committee defined). See also *Aviation Consumer Action Project v. Yohe*, Civil No. 707-73 (D.D.C., June 24, 1974) (summary judgment for plaintiff). The plaintiff in *Yohe* had argued that a one-time meeting between a Civil Aeronautics Board official and airline executives constituted an advisory committee meeting; the court enjoined any further meetings until the group complied with the FACA. *Id.*

131. See 5 U.S.C. App. I § 10 (Supp. III, 1973); S. REP. No. 1098, *supra* note 59, at 16. By referencing section 552(b)'s exceptions as grounds for closing advisory committees, Congress presumably intended to incorporate the case law that had developed under that section. See S. REP. No. 1098, *supra* at 16.

132. Congress also heard arguments that exemption five could be used to shield almost all advisory committee hearings. See *Oversight Hearings on Pub. L. 92-463*, *supra* note 29, at 9, 11.

133. *EPA v. Mink*, 410 U.S. 73, 85-94 (1973) (public's access to internal memoranda governed by flexible, commonsense approach); *National Cable Television Ass'n v. FCC*, 479 F.2d 183, 194 (D.C. Cir. 1973) (agency burdened to show need for protection of policy matters); *Ethyl Corporation v. EPA*, 478 F.2d 47, 49-50 (4th Cir. 1973) (factual material not inextricably intertwined with policymaking must be made available).

134. 370 F. Supp. 177 (D.D.C. 1973).

135. *Id.* at 180.

though its reasoning was unclear,¹³⁶ the court apparently viewed section 10 of the FACA only as a kind of savings clause to preserve the Freedom of Information Act's protection of a limited class of government records.

Manifestly, the congressional concern embodied in the FACA relates to meetings, not to documents, to deliberations themselves, not to the writings that are the focus or the result of such deliberations.¹³⁷ If the deliberations of the committee are sufficiently intertwined with the agency decisionmaking process to warrant protection, the *Dunlop* limitation to protection of documents is unnecessarily restrictive. If the deliberations are entirely outside the agency process, the protection accorded internal documents is inapplicable; disclosure of an internal memorandum to the committee would waive its privileged character under exemption five.¹³⁸

ALTERNATE APPROACHES

More satisfactory guidelines to the application of section 10 of the FACA are difficult to derive for two reasons. First, the agency must determine whether to close deliberations before they occur, before either the agency head or a court can determine precisely the content of such deliberations. Second, if a citizen has been excluded from a meeting, no court order can reconstruct the meeting to permit him to attend, even if the court determines that his exclusion was wrongful. Approaches to the FACA that resolve these difficulties must be developed.

The District of Columbia Circuit suggested a viable solution in *Schechter v. Weinberger*.¹³⁹ After denying summary reversal of the district court's denial of a temporary restraining order, the *Schechter* court established guidelines for the district court's consideration of preliminary injunctive relief. Under the guidelines a transcript of the meeting at issue was to be made.¹⁴⁰ Further, the agency was to provide

136. In its memorandum opinion, the court did not discuss limiting the exemption to the protection of documents; it concentrated on the Cost of Living Council's use of exemption five to close all meetings in a summary fashion. *Id.* at 178. Only in its order did the court limit the protection of exemption five to documents before a committee. *Id.* at 180. The order, therefore, might be one limited to the particular facts in the *Dunlop* case, an equitable remedy, not a general standard. See *Oversight Hearings on Pub. L. 92-463*, *supra* note 29, at 73 (statement of Mr. Plesser).

137. See *Oversight Hearings on Pub. L. 92-463*, *supra* note 29, at 23, 56, 153-56 (testimony of Mr. Wolff; letter from Mr. Plesser; minutes of HEW meeting).

138. See *id.* at 11 (testimony of Professor Wolf); *id.* at 20 (letter from Senator Metcalf to the Director of the Office of Management and Budget).

139. Civil No. 73-1331 (D.C. Cir., Mar. 28, 1973) (denial of motion for summary reversal of district court's denial of temporary restraining order).

140. *Id.*

the trial judge with detailed testimony or affidavits that would assist the district court in determining whether the meeting properly fell within exemption five.¹⁴¹ If the agency's testimony and affidavits did not give the district court a sufficient basis for its determination, the court could make an in camera inspection of the transcript to determine whether it should be disclosed under the Freedom of Information Act.¹⁴²

The *Schechter* approach seems a workable one. It recognizes implicitly that certain advisory committee meetings should be closed to protect the committee deliberations and provides courts with a means to review an agency's decision to close a meeting. It also preserves the content of the discussions at the meeting so the public can discover what transpired if a court subsequently determines that the meeting was wrongfully closed. Since the FACA addresses primarily the public's right to attend rather than to participate,¹⁴³ a citizen wrongfully deprived of attendance loses little if he subsequently has recourse to a verbatim transcript.

Several other suggestions for improving administration of the statute are sensible and fully within the authority of the Office of Management and Budget, as the congressionally delegated supervisor of advisory committee practices, to effectuate.¹⁴⁴ One suggestion provides for administrative appeal of a decision to close a meeting.¹⁴⁵ Provision for such appeal would be desirable because it would afford the agency an opportunity to correct an improper finding before the process of judicial review begins¹⁴⁶ and also would spare citizens the expense and inconvenience of filing lawsuits to vindicate their right to attend most advisory committee meetings.

Amendments to exclude certain committees or agencies from the coverage of the FACA also have been proposed.¹⁴⁷ Perhaps a few committees should be exempted entirely from the Act,¹⁴⁸ but grants of

141. *Id.*

142. *Id.*

143. See *Gates v. Schlesinger*, 366 F. Supp. 797, 801 (D.D.C. 1973) (memorandum opinion granting preliminary injunction).

144. The authors have serious doubts about the practicality of the proposals that deal with mandating certain kinds of representation on committees to achieve a pre-ordained balance. See S. 1637, 92d Cong., 1st Sess. (1971) (introduced by Senator Metcalf) (one-third public representation required).

145. See *Oversight Hearings on Pub. L. 92-463*, *supra* note 29, at 25 (remarks of Professor Wolf).

146. See *United States v. Illinois Cent. R.R.*, 291 U.S. 457, 463 (1934).

147. See notes 62-63, 119 *supra*; *Wilkinson & Atkinson*, *supra* note 25, at 989, 1029 (new statutory wage and price control agencies should be exempt from FACA).

148. Sharing the views of John T. Dunlop, the authors believe that the legislative exemption of tripartite labor-management committees would not impair the effectiveness of the statute. These committees are inherently balanced and their discussions relate to sensitive industrial relations matters.

blanket exemptions to entire agencies seem unwise. Although agencies may well have certain advisory committees that should be exempted from the requirements of the FACA, they also may have others that pose the potential for abuse that the Act was intended to prevent. These committees should remain within the Act's coverage.

CONCLUSION

Advisory committees are a useful adjunct to the federal government, but their proliferation and potential for abuse properly stimulated concern, which resulted in the FACA. Administration of the statute is awkward because of the use of a standard tied to government documents as the standard for deciding which oral deliberations may be closed. Courts have struggled with this difficulty and have fashioned varying interpretations of the standard. Although most of the interpretations seem not entirely satisfactory, one court has suggested a means by which the preservation of a record of oral deliberations may facilitate judicial review of an agency's decision to close a meeting and may provide a remedy to those citizens improperly denied access to such a meeting. This means fully effectuates congressional intent, which encompassed both the general rule of openness and the thesis that some meetings should be closed.

Only the complexity of administration has been criticized here; the authors have not intended to criticize the basic policy of the FACA or to suggest that congressional concern for the problems that advisory committees could create was inappropriate. But those who would go beyond Congress and assert that all advisory committee deliberations should be open to the public ignore the practical realities of the political process. Congress was justified both in its view that exceptions to the general rule of open meetings are necessary and in its decision to link those exceptions to other established exceptions to open government.

