TO AMEND THE FEDERAL ADVISORY COMMITTEE ACT—P.L. 92-463

HEARINGS

BEFORE THE

SUBCOMMITTEE ON REPORTS, ACCOUNTING, AND MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

S. 2947

TO AMEND THE FEDERAL ADVISORY COMMITTEE ACT AND FOR OTHER PURPOSES

S. 3013

TO AMEND THE FEDERAL ADVISORY COMMITTEE ACT

March 8, 9, and 10, 1976

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TO AMEND THE FEDERAL ADVISORY COMMITTEE ACT—P.L. 92–463

MONDAY, MARCH 8, 1976

U.S. SENATE,
SUBCOMMITTEE ON REPORTS, ACCOUNTING AND MANAGEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met at 10:08 a.m., pursuant to call, in room 3302, Dirksen Senate Office Building, Hon. Lee Metcalf (chairman of the subcommittee) presiding.

Present: Senators Metcalf, Percy, and Brock.

Also present: E. Winslow Turner, chief counsel; Gerald Sturges, professional staff member; Jeanne A. McNaughton, chief clerk; John B. Childers, minority counsel, Committee on Government Operations; and Lyle Ryter, minority counsel.

Senator METCALF. The subcommittee will be in order.

I am going to apologize for a rather long preliminary statement, but it does set the pattern for the next 3 days of hearings, for today's and the next 2 days of hearings.

OPENING STATEMENT OF SENATOR METCALF

Today the Subcommittee on Reports, Accounting, and Management begins 3 days of hearings on two bills to amend the Federal Advisory Committee Act. They are S. 2947, introduced by Senator Hatfield and me, and S. 3013, introduced by my distinguished colleague on my right, Senator Percy.

The Federal Advisory Committee Act (Public Law 92–463) went into effect on January 5, 1973. It set standards and prescribed uniform procedures to govern the establishment, operation, administration, and duration of the committees, boards, commissions, councils, task forces, and other citizen panels which advise the President or agencies or officers of the Federal Government.

It also stipulated that each advisory committee meeting be open to the public unless it is concerned with matters which the Freedom of Information Act exempts from mandatory public disclosure.

I think the Federal Advisory Committee Act has gotten off to a better start in its first 3 years than the Freedom of Information Act did, for two reasons:

1. The Advisory Committee Act directed that the Office of Management and Budget establish and maintain a committee management secretariat to be responsible for all matters relating to advisory committees, whereas the Freedom of Information Act was expected to be more or less self-executing.

2. The Advisory Committee Act required the President to make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees, whereas the Freedom of Information Act made no provision for an annual report.

Over the past 3 years, the administration of advisory committees has improved substantially under the guidance of OMB, and Congress has been kept informed of advisory committee activities through the President's annual reports.

For all the improvement, there are problems and questions, some of them summarized by the graphic displays in use here today.

For example, from the end of December 1972, when the first inventory of advisory committees was taken, to May 1, 1975, a span of 28 months, the number of advisory committees fell from 1,439 to 1,250, a net decrease of 189.

Since 525 advisory committees were newly created or belatedly discovered during this period, the act in the first 28 months actually caused termination or merger of more than 700 advisory committees.

However, the advisory committee tide began to turn late last spring, and the number of advisory committees rose from 1,250 on the 1st of May to 1,341 on the 1st of October.

How and why this happened is a matter of congressional concern, although I understand that the Director of OMB, James Lynn, will testify this morning that the number of advisory committees dropped back to below 1,300 by the end of 1975.

Another chart here gives the breakdown of advisory committees, by type, for the years 1972 through 1974. The breakdown shows a percentage increase in the number of advisory committees directed by statute. It also shows that most committees, by far, are established at the discretion of Federal agencies. That is, the committees are authorized—but not directed—by statute, or are established by agencies purely on their own initiative.

However, let me make a parenthetical statement here. When I appeared before the Rules Committee and was talking with the Rules Committee to get the appropriation for our subcommittee, Senator Percy, we were talking about advisory committees, and I suggested that over in the Legislative Counsel's Office there is boilerplate language, and any time any of us send over some suggestions for legislation, they always grind in an advisory committee.

Some day some of us are going to have to stand up and say, "Gentlemen, What is the special need for the advisory committee in this agency?"

So while I have suggested here that most of the committees are authorized by executive order, the Senate of the United States and the Congress of the United States are not without criticism or censure.

Another graphic aid we have here points out that in 1974, there were 196 persons serving on anywhere from 4 to 15 advisory committees. Apart from Federal officials who serve ex officio on several committees, these figures raise questions about the advisory committee membership selection process.

Finally, another chart portrays the reluctance of advisory committees to open their meetings to the public in 1974.

Only 55 percent of the more than 3,600 advisory committee meetings held that year were fully open. Twenty percent were wholly closed to the public, and the remaining 25 percent were partially closed. And sometimes "partially closed" means closed all but 15 minutes of an 8-hour meeting.

The bills being considered at these hearings today, tomorrow, and Wednesday address themselves to these problems. These bills would:

Extend the coverage of the Federal Advisory Committee Act to additional units of government;

Open the advisory committee membership selection process to public scrutiny;

Delete exemption No. 5 of the Freedom of Information Act—dealing with interagency or intra-agency memorandums or letters—as grounds for closing an advisory committee meeting;

Provide for administrative review and court challenge of a decision to hold a closed advisory committee meeting; and,

Tighten up advisory committee recordkeeping and reporting requirements.

The subcommittee looks forward to receiving a wide range of comment and suggestions on these and related issues bearing on amendment of the Federal Advisory Committee Act.

Senator Percy?

OPENING STATEMENT OF SENATOR PERCY

Senator PERCY. Thank you, Mr. Chairman. I am very pleased to participate in these hearings, and particularly to have the Director of Management and Budget, James Lynn, to be our leadoff witness today.

We have a tremendous problem of proliferation of Government activities. I don't know if we have found a formula for when something gets started to stop it. After its usefulness has long been served, where is the self-destruct button that ends it?

That really goes for the Congress just as much, if not more so, than for the executive branch. We continue to proliferate commit-

tees up here until there are far more than we need. That is probably why the staff runs the Congress up here.

The House members sometimes overrule the Senate members, because they know more about the issues. Knowledge is powerful. We are spread too thin. The whole Government is spread too thin. The President of the United States is spread too thin. There is far too much proliferation.

We are starting hearings tomorrow with Henry Kissinger on proliferation of nuclear power around the world. I tell you we will fall by our own weight unless we find a way to cut down this proliferation of committees.

I certainly commend Senator Metcalf and the Subcommittee on Reports, Accounting and Management for the way it has gone about taking grip of this one activity, advisory committees.

Our original estimate of the cost was something like $75 million. We have eliminated and cut down a few of them. We are down to $42,200,000, I understand.

But there were some committees, such as the Committee on Developing the Use of Spruce in Wooden Propellors, which only a few years ago went out of business. We hadn't used spruce in propellors for a long time. Even then there was some objection to reducing it from Oregon, or not for using spruce. That was the only one there was around, I guess.

We have had a tremendous problem. I think generally speaking we probably ought to work toward having a self-destruct button at the end of a certain period.

Unless there is a need for it, it now goes out of business unless it is reaffirmed and reinstituted. So I think that the nature of our hearing this morning is very broad and it goes perhaps beyond the relatively narrow scope of just Federal advisory committees, important as they are.

If this is to work, responsibility for oversight of the act, I think, must be exerted not only by the various departments and agencies in the executive branch, including OMB, but also the stading committees of the Senate and House in the legislative branch.

I am very pleased, Mr. Chairman, that we will have by this afternoon a report of the Government Operations Committee on its own oversight initiative under this act.

This project involved the evaluation and investigation of some 82 Federal advisory committees falling under the specific legislative jurisdiction of this particular committee. This report we hope can be commended to various standing committees of the Senate and House interested in conducting comprehensive oversight of advisory committees under their own substantive jurisdiction.

The methodology developed by our committee in the course of this project and the analysis of our results, though not perfect and certainly subject to being improved upon, at least are a good starting point and possibly will help other committees in knowing how they should go about fulfilling their oversight responsibilities under the Federal Advisory Committee Act.

From the oversight experience we did undergo, I am offering two amendments for criticism, improvement, rejection, or incorporation, both intended to facilitate the job of the congressional overseer by making available convenient and important information for judging the quality and accomplishments of advisory committees.

The first has to do with funding. I was somewhat surprised to find there is a certain amount of private funding of advisory committees. We are all interested in reducing Federal expenditures. But I think some times we find that it may not pay for us to depend upon private outside funding if, accepting that funding, we really have a conflict of interest.

It is a little difficult to serve two masters sometimes. Someone who provides the funds has something to say about how those funds are spent, where they are spent, and so forth. I think the problem is serious enough that we at least ought to have all private source funding reported in a public place so that it is not done other than right out in the open.

If private funds are available, we ought to know that. We ought to be on notice that there may be a vested interest being served by those private funds being provided.

Maybe it is entirely in the national interest that they be provided. Maybe they are provided from the goodness of someone's heart. But I am not sure that the chief executive officer of the company can have that kind of a heart. His interest has to be towards his stockholders, generally speaking; to his own special industry interests.

I think, therefore, these funds should be surfaced and exposed and made apparent and public, just like the ownership of securities, I suppose, by a Senator, someone sitting on the Banking Committee. I was shocked to find how many members of the Banking Committee own stock in savings and loan associations or are directors and officers of banks.

It is a little hard. Maybe they can be objective. Nevertheless, their private interests pertain to their judgment I think it is going to be much more salutary if it is exposed to the light of day, and it is known to the public they have such an interest.

I would think for that reason I would ask that private industry not to do anything we wouldn't want to do.

The second amendment really was intended to find some basis for evaluating what the track record has been of the committee—a

very high-sounding committee, maybe doing good. I think you find some of them haven't met for 4 or 5 years. You can't tell me it really needed is that it shouldn't be liquidated; or, if they have met, maybe it is a lovely social gathering. They may even invite some people to Washington, sit down, counsel, and advise, but what do they do? Do they make a recommendation? If they do make recommendations, what happens to them?

I found GAO on one appropriation, legal assistance, has made five major reports and no one has done a single thing with those reports. It must be very discouraging to the Comptroller to make these reports in a vacuum and not have anything done with them.

For that reason I think we ought to have a scorecard of some sort. It is not going to be bogged down with a lot of paperwark.

But how can we make certain by a report card of recommendations, and what has happened to the recommendations? Have they been followed up on? Can we see that a commitee has been effective?

That is the purpose, I presume, of a committee, to give advice and counsel and then have it accepted or rejected and know the basis for it.

So these two amendments are designed not to confuse the issue but to kind of focus on what these committees are doing. Whether this is the right way or not, I don't know. I simply look for comments and suggestions.

But I certainly welcome our witnesses today. I once again commend the subcommittee under your chairmanship, Senator Metcalf, for exercising this oversight over a piece of legislation.

Too many times we pass something and forget about it. We had better look back and see what is done about it. If it is a good piece of legislation, fine, amen. If not, undo the thing and practice what we preach.

Thank you.

Senator METCALF. Thank you, Senator Percy. Certainly no one has been more interested or concerned in checking the growth and the proliferation, as you suggest, of commissions and Government as Senator Percy. He is as much responsible for the creation of this subcommittee and the Advisory Committee Act as anyone in the Congress.

The bills S. 2947 and S. 3013, along with the charts that I mentioned will be incorporated in the record at this point.

[The information referred to follows:]

94TH CONGRESS
2D SESSION

S. 2947

IN THE SENATE OF THE UNITED STATES

FEBRUARY 6, 1976

Mr. METCALF (for himself and Mr. HATFIELD) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To amend the Federal Advisory Committee Act and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Advisory Committee Act Amendments of 1976".

SEC. 2. Paragraph (2) of section 3 of the Federal Advisory Committee Act is amended—

(1) by inserting after "thereof" the following: ", or any ad hoc group, including any group which has any responsibilities of an administrative, executive, or operational nature within an agency other than providing advice and information,";

(2) by inserting after "Federal Government," the following: "and, without regard to the means of establishment, which provides advice or information to or is utilized by the United States Postal Service, the General Accounting Office, the Library of Congress, the Office of Technology Assessment, the Government Printing Office, the Congressional Budget Office, the Architect of the Capitol, or the National Railroad Passenger Corporation, or any other entity which provides information to or advises the Congress,"; and

(3) by striking out ", (ii) the Commission on Government Procurement, and (iii)" and inserting in lieu thereof "and (ii)".

SEC. 3. Section 4(b) of the Federal Advisory Committee Act is amended by striking out all after "by" and inserting in lieu thereof "by the Central Intelligence Agency.".

SEC. 4. Section 5(b) of the Federal Advisory Committee Act is amended—

(1) in paragraph (2)—

(A) by inserting after "to be" the first place it appears therein the following: "publicly solicited and"; and

(B) by inserting before the semicolon the following: "and require at least one-third of the membership to be drawn from citizens in private life who

shall represent the interests of the public with respect to the subject matter before the advisory committee";

(2) in paragraph (4) by striking out "; and" and inserting in lieu thereof a semicolon;

(3) by striking out the period at the end thereof and inserting "; and"; and

(4) by adding at the end thereof the following new paragraph:

"(6) require that the names and business affiliations of advisory committee members be publicly announced at the time they are appointed.".

SEC. 5. Section 6 of the Federal Advisory Committee Act is amended—

(1) in subsection (b)—

(A) by striking out "public" both places it appears; and

(B) by adding at the end thereof the following new sentence: "Subsequently, at least once every year, the President shall report to the Congress on the status of actions taken or proposed to be taken to carry out accepted recommendations. A final report shall be submitted when all such recommendations have been carried out to the extent practicable within the President's authority."; and

(2) by adding at the end thereof the following new subsections:

"(d) The President shall maintain in the Committee Management Secretariat in the Office of Management and Budget a comprehensive and complete and current list of the names of all members, past and present, of all advisory committees together with such indices as will contain cross references by the name, business affiliation, occupation, and membership on an advisory committee of such members. The list of all current members together with all indices of such members shall be published in the annual report required under subsection (c).

"(e) At the same time the report required under subsection (c) is transmitted to the Congress the President shall transmit to the Congress a report covering the same period as the report required under subsection (c) and containing the names and affiliations of all persons employed as consultants or experts under section 3109 of title 5, United States Code, or under any other provision of law other than experts employed for the purpose of providing testimony on behalf of the Government in cases before the courts of the United States or agencies.".

SEC. 6. (a) Section 7(b) of the Federal Advisory Committee Act is amended—

(1) in clause (4) by striking out "is" and inserting in lieu thereof "it";

(2) in the fourth sentence by inserting before the period a comma and the following: "and shall include therein a comprehensive review of every advisory committee the duration of which is less than one year"; and

(3) by inserting between the fourth and fifth sentences the following: "Such an annual review shall include a determination as to whether an advisory committee has any responsibilities of an administrative, executive, or operational nature, other than providing advice or information, and shall list all such advisory committees and state whether each such advisory committee has filed a charter as required by section 9(c).".

(b) Section 7 of such Act is amended by adding at the end thereof the following new subsection:

"(f) At the time an advisory committee is established, but before any members are appointed and before an advisory committee charter is filed as required by section 9(c), the Director shall determine whether any such advisory committee has any responsibilities of an administrative, executive, or operational nature other than providing advice or information. Such a determination shall be published in the Federal Register not later than ten days before any member is appointed.".

SEC. 8. Section 9(c) of the Federal Advisory Committee Act is amended—

(1) by striking out "with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency" and inserting in lieu thereof the following: "with the Congress by transmitting a copy of such charter to the President pro tempore of the Senate and the Speaker of the House of Representatives";

(2) in clause (I) by striking out "and" after the semicolon;

(3) in clause (J) by striking out the period and inserting in lieu thereof "; and"; and

(4) by adding the following new clause: "(K) the number of members to be appointed, the method of selection and appointment of any such members, and the qualifications to be sought.".

SEC. 9. Section 10 of the Federal Advisory Committee Act is amended—

(1) in subsection (c) by inserting "(1)" after "(c)" and by adding at the end thereof the following new paragraph:

"(2) A complete audio or audio and visual recording shall be made of every advisory committee meeting which is closed. Every such recording shall be deposited with the Librarian of Congress not later than twenty-four hours after the closed meeting has been completed. At the request of

any member of any advisory committee which has met in a closed session the recording of the closed session may be reduced to typescript which shall be deposited with the Librarian of Congress.";

(2) in subsection (d)—

(A) by inserting "(1)" after "(d)";

(B) by striking out "section 552 (b)" the first time it occurs therein and inserting in lieu thereof the following: "paragraphs (1) through (4) or (6) through (9) of section 552 (b)"; and

(C) by striking out the second and third sentences thereof and adding at the end thereof the following:

"(2) Any such determination shall be in writing, shall contain the reasons for such determination, and shall be published in the Federal Register at least thirty days before the proposed date of any such advisory committee meeting.

"(3) Any such determination made by a delegate of the President or a delegate of the agency head shall be reviewed by the President or the agency head, as the case may be, upon application of any person, not later than forty-eight hours after such application is received. If any such application for review is received later than forty-eight hours before any such meeting, such meeting shall be delayed to permit the review and determination by the President or the

agency head and notification of the person applying for such review. The President or the agency head shall advise the person applying for review in writing of his determination to require that any such meeting be held in open session or to sustain or modify the determination made by the delegate. The President or the agency head may direct that any such meeting be held in open session.

"(4) If a determination is made to close any portion or all of any meeting of an advisory committee such advisory committee shall file a report of its activities including setting forth a summary of its activities, a detailed list of its meetings, and such related matters, including a detailed agenda for each meeting as would be informative to the public consistent with the policy of this section no later than the last day of the quarter immediately following any quarter during which a meeting of any such advisory committee is closed and in each of the next three succeeding quarters.

"(5) On complaint the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the advisory committee routinely holds its meetings or may hold its meetings, or in the District of Columbia, has jurisdiction to enjoin the closing of the meeting of any advisory committee. In such a case the court shall determine the matter de novo, and may conduct an inquiry in camera to determine whether

any meeting of any advisory committee should be closed under any of the provisions of this subsection and the burden is on the agency to sustain its action.

"(6) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within ten days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(7) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(8) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

"(9) Whenever the court orders any advisory committee meeting to be held open and assesses against the United States reasonable attorney's and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the closing of any such meeting raise questions whether agency personnel or advisory committee

members have acted arbitrarily or capriciously with respect to the closing, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee or member who is primarily responsible for the closing. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned, and shall send copies of the findings and recommendations to the officer, employee, or member or his representative. The administrative authority shall take the corrective action that the Commission recommends with respect to officers or employees and shall refer the matter to the Department of Justice for appropriate dispostion if any member of the advisory committee with respect to whom corrective action appears necessary is not an employee or officer of the Federal Government.

"(10) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee or member and in the case of a uniformed service, the responsible member.

"(11) The Attorney General shall submit an annual report on or before March 1, of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the matters in-

volved in each case, the disposition of such case, and the cost, fees, and penalties assessed thereunder. Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.".

94TH CONGRESS
2D SESSION

S. 3013

IN THE SENATE OF THE UNITED STATES

FEBRUARY 23, 1976

Mr. PERCY introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To amend the Federal Advisory Committee Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Federal Advisory Committee Act is amended by adding at the end thereof the following:

"(5) The term 'committee recommendation' means a communication, presented by or on behalf of an advisory committee after consultation with and approval by a minority of a quorum of such advisory committee, for the purpose of encouraging an agency to adopt a general or specific policy or program or to adopt or pursue a specific course of conduct.".

SEC. 2. Section 6 of the Federal Advisory Committee Act is amended—

(1) in the second sentence of subsection (c), by inserting after "members," the following: "the receipt and disposition of any nonappropriated funds or any thing of value for the support, operation, or maintenance of any advisory committee and the source and amount of any such nonappropriated funds or any thing of value received,"; and

(2) by adding at the end thereof the following new subsection:

"(d) The President shall include in the annual report required by subsection (c) from records maintained by the advisory committee management officer under section 8 (b) (4) of each agency which has an advisory committee and from such other similar records as may exist, for each advisory committee which makes any committee recommendations to any agency or to the President—

"(1) the number of committee recommendations presented;

"(2) the number of committee recommendations adopted;

"(3) the number of committee recommendations rejected; and

"(4) the number of committee recommendations

pending or not acted upon and the length of time each committee recommendation was pending or not acted upon.".

SEC. 3. Section 7 of the Federal Advisory Committee Act is amended by adding at the end thereof the following new subsection:

"(f) The Director shall compile and publish in the Federal Register and transmit to the Speaker of the House of Representatives and the President pro tempore of the Senate an annual list specifically identifying all advisory committees which have reported or should have reported the receipt of nonappropriated funds or any thing of value required to be reported under subsection 12 (b) together with the source and amounts of such nonappropriated funds received or thing of value furnished and the disposition thereof.".

SEC. 4. Section 8 of the Federal Advisory Committee Act is amended—

(1) in subsection (a)—

(A) by striking out "and operations" and inserting in lieu thereof "operations, and committee recommendations";

(B) by adding at the end thereof the following new sentence: "Each agency head shall maintain a complete and current file of all committee rec-

ommendations of every advisory committee which reports to such agency. Such systematic information and the contents of such file shall be made publicly available for inspection and copying subject to the provisions of section 552 of title 5, United States Code."; and

(2) in subsection (b)—

(A) by striking out "and" at the end of clause (2);

(B) by striking out the period at the end thereof and inserting in lieu thereof "and"; and

(C) by adding at the end thereof the following new clause:

"(4) collect and maintain all records of committee recommendations necessary to supply such information as the President may require for purposes of section 6 (d).".

SEC. 5. Section 12 of the Federal Advisory Committee Act is amended—

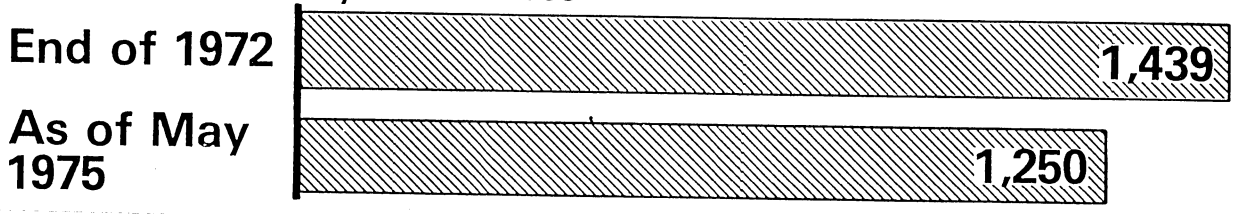
(1) by redesignating subsection (b) as subsection (c); and

(2) by inserting after subsection (a) the following new subsection:

"(b) Records required to be kept by subsection (a) shall clearly, completely, and conspicuously disclose the

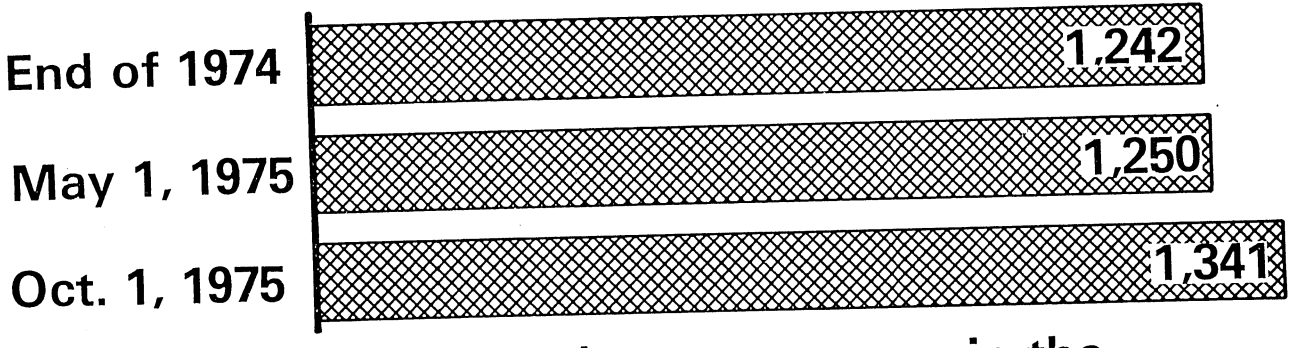
receipt and disposition of any nonappropriated funds or any thing of value received for the support, operation, or maintenance of any advisory committee and the source and amount of any such nonappropriated funds or any thing of value received.".

The Effectiveness of the Federal Advisory Committee Act



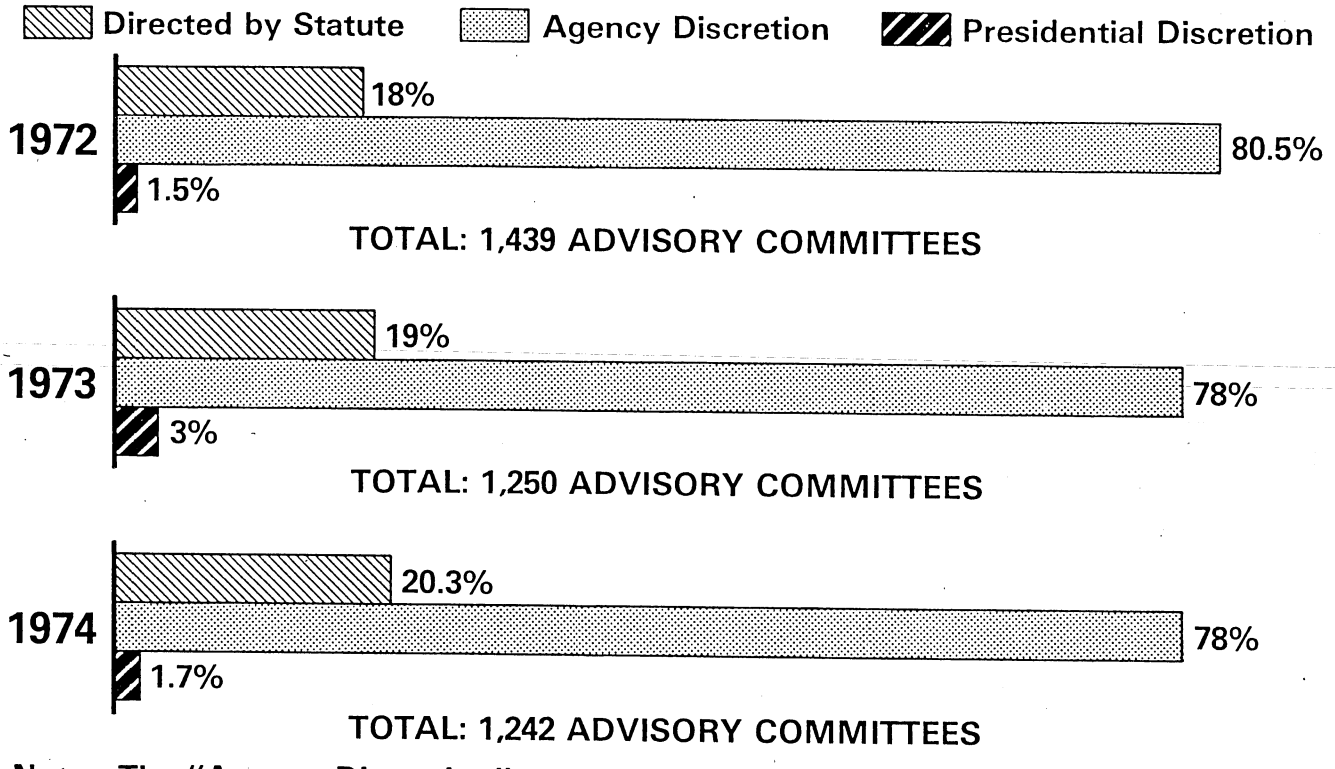
Actually, the Federal Advisory Committee Act was a far more effective weapon during the period from December 31, 1972 to May 1, 1975 than the net decrease would indicate. Since 525 or more advisory committees were newly created or belatedly recognized during 1973 and 1974, the act really forced termination or merger of more than 700 advisory committees during that 28-month period.

The Rising Tide of Advisory Committees in 1975



Due to a late spring and summer surge in the establishment of new committees and renewal of existing committees, there was a net increase of 99 advisory committees during the first nine months of 1975.

Advisory Committees, By Type, 1972-74



Note: The "Agency Discretion" category includes Advisory Committees authorized by Statute and Committees established by Agencies on their own initiative.

Individuals Serving on Four or More Federal Advisory Committees in 1974

Research by the Subcommittee on Reports, Accounting, and Management discloses that:

-107 persons serve on 4 advisory committees

-47 persons serve on 5 advisory committees

-21 persons serve on 6 advisory committees

-21 persons serve on 7 or more advisory committees

In all, 196 persons serve on anywhere from 4 to 15 advisory committees.

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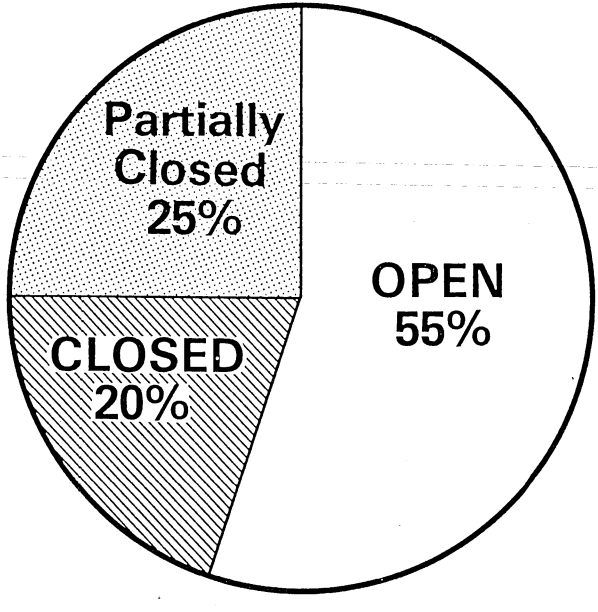
Open and Closed Advisory Committee Meetings in 1974



There were 3,626 meetings - counting a meeting held on two or more consecutive days as one meeting - during the year, of these:

-1,994 were open to the public

-719 were closed to the public

-913 were partially closed

Senator METCALF. Our first witness this morning is our very distinguished colleague from Wisconsin, Senator Gaylord Nelson, who is going to tell us a little bit about his experience with small business and the representation of small business on some of the advisory committees.

We are delighted to have you here, Senator Nelson. You have a prepared statement, so go right ahead.

TESTIMONY OF HON. GAYLORD NELSON, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator NELSON. Mr. Chairman, I would ask that my full statement, which isn't very long, be printed at the end of my remarks. I will only need about 3 minutes of the committee's time.

S. 3085 would amend the Federal Advisory Committee Act of 1972 and the Federal Reports Act of 1942 to direct that small business be fairly represented on Federal advisory committees, boards, commissions, panels, and task forces.

We don't try to—maybe we should have—but we don't try to set forth a formula for what "fairly represented" means. But, certainly, on many of these committees in those areas where the business community is affected and small business is affected, there should be a substantial ratio or percentage of small business members on any of these committees, in our judgment.

The objective of this bill is to give the small business community a greater voice in formulating actions of the Federal departments and agencies which affect the economy.

In a study that was sponsored by the Office of Management and Budget entitled "Small Business Reporting Burden," the Peat, Marwick, Mitchell & Co. accounting firm stated in one part of that report, and I quote:

> Small business has very limited representation on the Council (Business Advisory Council on Federal Reports). In practice the panels, too, have tended to be dominated by representation from large business—a natural consequence of the difficulty experienced by small business in giving the time and absorbing the expense involved in sitting on (such) panels.

Indeed, the statement about the very limited small business representation is, I think, a substantial understatement. There are 13 corporations represented on BACFR. One is a small business corporation having $1 million in sales and 45 employees. The remaining 12 corporations have an average of $5.5 billion in sales and 167,000 employees. Of the 10 associations represented, only one could be characterized as a small business organization.

Obviously, according to the standard in the bill we have introduced, this one company with $1 million in sales would not constitute "fair representation," at least in my judgment.

It is the intent of this proposal to require all such agencies that are advisory in the business area to have fair representation for small enterprise on them.

In fact, in the Internal Revenue Service just last year, a small business advisory committee to the Commissioner was established—that was 1975—by Commissioner Alexander. That committee has

gotten very high marks from its participants despite the inevitable growing pains. This happens to be a small business advisory committee to the IRS itself.

So the proposal is quite simple. I think the merit of it is clear. One of the problems in this area would be to assure that the small business representatives receive expense payments for their participation. As a matter of fact, in many of these cases it will have to be a representative from one of the small business organizations. since a small businessman running a small business can't commit a lot of time away from the business to participate in any of these lengthy proceedings such as from time to time occur.

Furthermore, I think the Small Business Administration should be a participant in these various advisory councils.

I would ask that some material I have appended to my statement, Mr. Chairman, also be printed in full in the record.[1]

That completes my testimony.

Senator METCALF. Thank you very much, Senator Nelson. Your statement in its entirety and the material you have submitted will be printed in the record at the conclusion of your testimony.

We will also incorporate your bill, S. 3085, which you are introducing along with Senator Nunn and Senator Brock, both of whom have worked very hard on this committee, and Senator Weicker who is now a member of our subcommittee.

You mentioned Business Advisory Council on Federal Reports, with the acronym of BACFR. This is the committee that advises the OMB on Federal forms.

It has been the complaint of many of the Members of the Congress over the years that this committee stops essential questionnaires because of business objection and, at the same time, BACFR has no representation from small business.

When Senator Nunn and I conducted a paperwork burden hearing last year, I discussed this matter with Mr. Oaxaca who is here today. He told us about the Peat, Marwick, and Mitchell study that you mentioned on reporting and it pointed out the very things that you have suggested and that we suspected, that big business was dominating the BACFR organization.

For $85,000 we received confirmation that big business was stopping questionnaires and big business was the only one that was represented.

As I understand it, BACFR is self-appointed. OMB does not decide the membership.

My question is, after this preliminary, Senator, couldn't we solve this by making a more balanced representation and having it appointed by or having it at least monitored by OMB rather than BACFR being a self-executing sort of an organization?

Senator NELSON. I didn't realize they were self-appointed. Is that correct?

Mr. LYNN. Yes. That is correct, Mr. Chairman. We can make suggestions, but under their charter, they make the actual appointments. And they do take our suggestions, as I understand it, from time to time.

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[1] See p. 33.

Senator METCALF. Hurray!

But here is sort of a special organization composed, at the present time, according to the Peat-Marwick study that you have mentioned, of just big business people, who are self-perpetuating by continuing to appoint big business; and the small business people you are talking about, Senator Nelson, have not been represented and have no voice in that council.

Senator NELSON. I agree with you. I assumed they were appointed from outside of that committee.

The small business representation, as I pointed out, is very minor. Quite obviously, if they were voting on a one-man-one-vote basis, small business would be outvoted 12-to-1 on any issue that was raised.

Furthermore, a corporation with $5.5 billion in sales, which is the average, can afford to engage the finest expertise there is, and have them participate full time, if necessary, because the matter of forms and what is reported and what is not reported is very important. But the small business can't afford that.

That is why it seems to me that when you talk about fair representation on forms—the small businesses have to make out all of the forms, too—so at least half of them ought to be small business.

Two: It seems to me you should have representation of the Small Business Administration somehow involved in this directly. If they need some funding for expertise in that area, we ought to do it.

I think that the small business organizations representing small business ought to have an input into it. This is about the only way you can create an infrastructure within small business that would be adequate to at least evaluate the impact of these various forms and regulations upon smaller and new businesses.

Obviously, when you create a form, there are lots of provisions asking all kinds of questions of big business and little business that are totally unnecessary. I would guess in my own mind looking at them about 80 percent of the information government asks, or 90 percent, from businesses and individuals is duplicative or unnecessary. But in any event, a large business is equipped to handle that.

Senator METCALF. Stick around until we pass the lobbying act and see how many forms there are.

Senator NELSON. In any event, large businesses have all the technical expertise and computers that at least can handle a whole lot more unnecessary forms than a small business can handle. Thank you, Mr. Chairman.

Senator METCALF. Thank you very much, Senator Nelson.

Senator Percy?

Senator PERCY. I have just two questions, Mr. Chairman. Senator Nelson, I agree that fair representation for small business is in accord with the central theme of the Advisory Committee Act.

What do you, first of all, see as the cause? Why do you believe there is an underrepresentation of small business on the Nation's Federal advisory committees?

Senator NELSON. I don't know that I can answer what the cause is. I have begun to look at that question in the past year since I

became chairman. I have been by no means an expert on these advisory committees or the impact of their advice upon small business.

But I would guess that a good part of it is for the same reason that the voice of small business isn't heard very well in the Congress; because who is their voice except individual members? That is in contrast with the large corporations who have full-time offices and the finest lawyers in the United States.

I conducted the pension hearings on the Pension Reform Act in the Finance Committee. We heard—and very good testimony; I don't quarrel with it at all—we heard from the representatives of every major association and corporation in America, pointing out technical problems with the pension plan, and some of them substantive, arguing about them. It was very compelling testimony by first-rate witnesses who are this country's pension experts.

But on all of these little things that affect the little fellow we didn't hear very much because, No. 1, he isn't any expert himself. No. 2, he has problems in hiring and paying the expert to represent him.

Now, we conscientiously looked at the questions of impact on small business. We made some exemptions in the Pension Act for small business. But nevertheless, the voices that were heard the strongest, because they are the best prepared and had the most resources, are the voices of large business.

It is the same, I think, in any agency representation, whether it is the Food and Drug Administration or any regulatory body that we have: just by virtue of the fact that the little fellow can't afford to be here and, if he comes, doesn't have the expertise.

Senator PERCY. Maybe it pays not to have representation, then, because my own impression from here in the Senate is that there is really gross discrimination in favor of small business.

We have just increased the income tax exemption so as to lower rates applying to small business—the first $50,000 instead of the first $25,000, or reduced 20 to 22 percent; where a large business pays 48 percent.

Certainly the President's action the other day in enunciating the $155,000 exemption from the action of our estate taxes is a strong, favorable thing for small business. I support it. I have supported the exemption for every piece of legislation that has come along requiring reporting and accountability by larger business.

On the floor of the Senate just the end of last year we had one amendment, which I strongly supported, which exempted all small business from the application to the Consumer Protection Agency, or Agency for Consumer Advocacy. It wiped out 90 percent of all business from coverage. That Agency has no jurisdiction or cognizance over it whatsoever. But it does apply to big business.

So I don't think we have discriminated against small business particularly. I think because the Small Business Committee, which I am not member of, has been very active, I think they have a very strong voice.

I want to see small business represented in these advisory committees, but I don't think we have been really ruling against them.

If anything, it seems to be going the other way—beat the big guy because he is big and he has been successful and exempt the small fellow.

If we make a special provision for small business, then how about the environmentalists? Will they want to require a certain number of seats on every advisory committee? How about consumer groups that come in and say they want representation? How about specialized business groups? Will we start to get into a quota system?

How do we say that small business is peculiar and particularly should be protected, but these other groups—environmentalists, specialized business groups, consumer groups—should not then have a quota on every advisory committee? How could we protect ourselves against this?

Senator NELSON. This proposal only applies to advisory committees that are giving advice in areas that affect the economy. So if it does not affect the economy and small business, then the provisions that would require representation of small business are not involved.

So, all we are saying is that the advisory committees created for purposes of making recommendations that affect the economy are going to have business representation on them. That is what they are made up of. We are saying they must be made up of a fair proportion of small business and not just big business.

Senator PERCY. Wouldn't the environmentalists and consumers have the same argument and say: "If it affects the economy, that is us?"

We have consumers certainly who would want to have something to say about it. Shouldn't they have representation?

I am just a little worried about our structuring these things by statute, because then every group is going to come in and exert pressure to get their specific rights embodied in the statute rather than urging and encouraging a broad enough representation to make committees really representative.

Senator NELSON. It may be that you have to take a hard look. The problem now is that the only representation for all practical purposes is big business. The bill focuses on committees created for purposes of giving advice on some aspect of the economy.

All we are saying is that if you are going to have a business advisory committee, let's have fair representation of small business as well as large business.

Senator METCALF. I think that during our discussion, Senator Percy, with Mr. Lynn and tomorrow with Professor Steck, we will have a development on this matter of balance. It is a very difficult matter to talk about.

You have discussed it in your full statement, Senator Nelson. I don't know whether you can just say quota system. But I would certainly resist such a quota system that we would have one member of organized labor, and one member of some environmental organization, and one member of a consumer group, and so forth, on every advisory committee, because some of them are very specialized, such as this Business Advisory Council on Federal Reports.

So we have to talk very generally about balance, and then we have to inquire as to whether or not the committees are actually balanced.

It would seem to me, however, that this small business representation on this so-called BACFR committee would be better achieved by the regular appointment process, rather than having a self-perpetuating organization, such as big business people, continuing to make recommendations for appointment, even though OMB has made contributions on the other side.

Senator NELSON. Thank you.

Senator METCALF. Thank you very much for coming. Thank you for your help.

[The prepared statement of Senator Nelson, with additional material submitted for the record, follows:]

PREPARED STATEMENT OF HON. GAYLORD NELSON, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Mr. Chairman, members of the Subcommittee, I appreciate the opportunity to testify on proposals to improve access of small business and citizens to the governmental process through advisory councils, and particularly on those proposals embodied in S. 3085 introduced last week by Senators Nunn, Javits, Brock, Weicker, Culver and myself.

S. 3085 would amend the Federal Advisory Committee Act of 1972 and the Federal Reports Act of 1942 to direct that small business be fairly represented on Federal advisory committees, boards, commissions, panels, and task forces. The objective of this bill is to give the small business community a greater voice in formulating actions of federal departments and agencies which affect the economy. As Senator Metcalf noted in the opening statement of his October 10 hearings, these actions affect their ability to survive.

Smaller and medium-sized independent business are important to the economy and to our democractic society. About 97% of the 13 million U.S. businesses are small by the definitions formulated by the Small Business Administration or by any other definition. This 97% accounts for 43% of the business output, one-third of the Gross National Product, and over half of all significant industrial innovation.

In fact, there are only about 6,000 U.S. corporations large enough to have their stock nationally traded, to reach national capital and credit markets, and to be able to afford national advertising.

Yet, the viewpoints of smaller and independent business are chronically overlooked when federal departments and agencies make their decisions on policy, regulations, and reporting forms.

STUDY OF SMALL BUSINESS PARTICIPATION IN THE REPORTS CLEARANCE PROCEDURE

For example, in March of 1975, there was a study of the small business participation in the advisory bodies utilized by the President's Office of Management and Budget. As you know, the responsibility under the Federal Reports Act of clearing any questionnaire or form which is intended to be sent to more than 10 businesses or citizens was conferred on OMB by the Federal Reports Act of 1942.

To assist OMB in this clearance procedure, there is a Business Advisory Council on Federal Reports (BACFR), which considers general issues, and smaller advisory panels which are convened to consider particular proposed report forms.

In its report entitled, "Small Business Reporting Burden," the Peat, Marwick, Mitchell & Co. accounting firm stated:[1]

[1] "Small Business Reporting Burden," prepared for Executive Office of the President's Office of Management and Budget, by Peat, Marwick, Mitchell & Co., March 1975, p. A.65.

"Small business has very limited representation on the Council.

* * * * * * *

"In practice the panels, too, have tended to be dominated by representation from large business—a natural consequence of the difficulty experienced by small businesses in giving the time and absorbing the expense involved in sitting on (such) panels."

Indeed, the statement about "very limited" small business representation may be a classic understatement. There are 13 corporations represented on the BACFR. One is a smaller business corporation having $1 million sales and 45 employees. The remaining 12 corporations have an *average* of $5-½ billion in sales and 167,000 employees. Of the 10 associations represented, only one could be characterized as a small business organization.[2]

The OMB report noted also that the Small Business Administration does not participate in the deliberations of panels reviewing forms, and there is no policy encouraging them to do so.

These are the conclusions of OMB's own report.

The lack of access by smaller businessmen to executive branch decisions was confirmed again and again in the 63 days of hearings held during the past year by the Senate Select Committee on Small Business in such areas as pension reporting forms, occupational health and safety regulations, and energy programs. My remarks to the Senate accompanying the introduction of S. 3085, on March 4, give details of several of these situations. I would like to include this material as an exhibit to my testimony.

CHANGING THE OMB ADVISORY BODIES

Insofar as existing mechanisms for obtaining outside opinions—the advisory committees and panels under the Federal Reports Act of 1942 need to be modified so that the views of smaller and independent business are more likely to be heard.

As this subcommittee is aware, a long series of hearings by the Select Committee on Small Business beginning in 1972 has documented that OMB has not adequately discharged its responsibilities under the 1942 Act. Clearance of forms adding to the mountain of federal paperwork is rarely if ever denied. To the committee's knowledge, there has never been a hearing by OMB, as contemplated by that Act for the purpose of avoiding duplication among federal forms. The primary impact of this non-performance has fallen upon small business.

By way of improvement, the 1975 OMB report suggests: "* * * that much more can be done to make it easier for small business to participate. Reimbursement under the Federal Advisory Committee Act is one possibility."

This matter of funding of the OMB committees and panels is highly important. Funding of any decision-making or advisory body by those affected by their decisions is, in my view, very questionable. Senator Percy, in introducing proposed amendments to the Advisory Committee Act on February 23, called attention to some 17 committees advising the federal government which are entirely supported by non-federal funds.[3] I would hope this Subcommittee could obtain the records and discover if the funds supporting BACFR, for instance, and other advisory bodies are provided disproportionately by big business.

Several observers who have examined this situation thus feel that small business and their spokesmen should be serving on OMB bodies which affect the business community in proportion to the importance of small enterprise to the economy—approximately 50 percent of the membership. To make this possible, I would recommend that participants be reimbursed as the OMB study recommends. In any case, the funding of these bodies should be consistent with

[2] "Efforts to Reduce Federal Paperwork," Hearing before the Subcommittee on Oversight Procedures and Subcommittee on Reports, Accounting and Management, Government Operations Committee, U.S. Senate, Oct. 10, 1975, p. 71–2.

[3] Introduction of S. 3013, remarks of Sen. Percy, *Daily Congressional Record,* Feb. 23, 1976, page S2104.

all other advisory committees. Our bill, S. 3085, offers a basis for such consistent treatment.

DEPARTMENTAL ADVISORY COMMITTEES

As to departmental and agency advisory bodies, there is a need to strike a balance between the formal requirements of the Advisory Committee Act on one side, and the ability of these groups to function effectively in providing timely advice.

The Advisory Committee Act was enacted in 1972, as a result of outstanding efforts of the Senator from Montana (Mr. Metcalf). It recognizes the benefits of advisory committees as "frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the federal government."

I agree with the Chairman and members of the Subcommittee that this is an appropriate time, after three years of experience, to review the operations of this Act, and to modify it as circumstances indicate.

We have received numerous complaints from business people that a desire of some executive agencies to comply with the Act may be inhibiting the contacts of businessmen and other citizens with government officials. I think the Committee could make clear that the Advisory Committee Act was not meant to prevent meetings of concerned citizens with the personnel of the executive branch in Washington, especially when these meetings are "one shot" meetings, such as are initiated by an outside group visiting the nation's capital. If the meetings are regular or periodic the act should clearly apply. In between, there should be discretion.

The publication of forms for pension reporting, during 1975 provided a laboratory where the existing advisory committee mechanism was tested. It should be noted first that even as to the EBS-1 form, which was publically acknowledged to be a "monster," there was OMB clearance without any objection.

The Pension Reform Act of 1974 established an advisory council on ERISA in the Department of Labor. However, this Committee does not have any small business members and it did not prevent the massive small business problems with the major ERISA reports.

A small business advisory committee to the Commissioner of the Internal Revenue Service was established in 1974 by Commissioner Alexander. This latter committee has gotten high marks from its participants despite the inevitable growing pains.

The idea of departmental or agency advisory committees along the lines of the IRS committee, which can assist in the development of report forms, among other matters, drew favorable comment in both the OMB report and the recent General Accounting Office recommendations on information collection proposal, published in the *Federal Register* on March 5.[4]

Advisory committees on this level have the advantage of contributing ideas at a stage where the forms or regulations are still in formulation, and they can, it appears, be very effective. We would envision that fair representation for small business in the decisional process could be assisted through the use of panels like the IRS Committee.

There are certainly problems in allowing such bodies, even those selected according to principles of fair representation, access to agency forms and regulations in a preliminary state.

I think that this Committee can assist the cause of small business by providing for the utmost flexibility by those departments and agencies seeking the advice of advisory groups and concerned citizens in carrying forward the governmental process. In doing so, the Committee will have to address the role of members of the public who are not appointed to these groups, but nevertheless wish to participate and even publish their results, including portions of proposed forms.

In my view, it would be most helpful if the committee could deal with such matters in its report rather than in legislation at this time, to provide maxi-

[4] Vol. 41, *Federal Register*, No. 45, p. 9570, "Clearance of Information Collection Proposals."

mum latitude for working out the difficult problems of balances which are involved.

SMALL BUSINESS CONTACTS AT EXECUTIVE DEPARTMENTS AND AGENCIES

There is also before the Government Operations Committee S. J. Res. 177 which I introduced with the same cosponsors last week.[5] This proposal is, in a sense, complementary to S. 3085. It would designate at least one person in each agency concerned with economic and business matters to become knowledgeable in small business problems. This person would be contact point for small business groups and could be a spokesman in the decision-making process where the small business community is affected.

The Small Business Administration cannot possibly be knowledgeable in the day-to-day operations of any federal agency, let alone all federal agencies. Its staff devoted to advocacy and agency representation totals 5 professionals and 3 clerical personnel. For example, this Subcommittee has been interested in energy advisory committees. The Energy Research and Development Administration is presently administering $9½ billion in research and development contracts. In drawing up the national solar energy plan, it obtained the participation of 14 other agencies, but did not even invite SBA, despite a provision of its authorizing statute specifically encouraging such consultation. A small business expert is urgently needed at ERDA, and similarly in other Federal departments and agencies.

I thank the Subcommittee for this opportunity to present these views stemming from the work of the Senate Small Business Committee.

[From the Congressional Record—Senate, (S2811) March 4, 1976]

BY MR. NELSON (FOR HIMSELF, MR. NUNN, MR. BROCK, AND MR. WEICKER)

S. 3085. A bill to insure fair and equitable representation for smaller and medium-sized businesses on Federal advisory committees. Referred to the Committee on Government Operations.

FAIR REPRESENTATION FOR SMALL BUSINESS ACT

MR. NELSON. Mr. President, I introduce for appropriate reference the Fair Representation for Small Business Act, a bill to provide for equitable representation for small businesses on the advisory bodies which are utilized by the Federal Government.

The bill would amend the Federal Advisory Committee Act of 1972 and the Federal Reports Act of 1942 to provide an explicit direction that small business—which accounts for 97 percent of the number of U.S. businesses; 43 percent of the business output; a third of the gross national product; and over half of the significant industrial innovation in the U.S. economy—be fairly represented on Federal advisory committees, panels, and task forces. The objective of this bill is to give the small business community a voice corresponding to its importance in formulating the actions of the Federal Government.

NEEDS OF SMALLER FIRMS IGNORED IN ISSUING FORMS

To my knowledge, there is no authoritative study of the small business representative on advisory committees which serve all of the various departments and agencies under the Advisory Committee Act. However, in March of 1975, there was a study of the small business participation in the advisory bodies utilized by the President's Office of Management and Budget. OMB has the responsibility under the Federal Reports Act of clearing any questionnaire or form which is intended to be sent to more than 10 businesses or members of the public. To assist this clearance procedure, there is a Business Advisory Council on Federal Reports—BACFR—which considers general issues, and smaller advisory panels which are occasionally convened to consider particular proposed report forms.

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[5] The Resolution and accompanying introductory remarks are also attached as a second exhibit to this statement.

The Peat, Marwick, Mitchell & Co. accounting firm, in its report to OMB entitled the "Small Business Reporting Burden," Stated:[1]

* * * * * * *

"In practice the panels, too, have tended to be dominated by representation from large business—a natural consequence of the difficulty experienced by small businesses in giving the time and absorbing the expense involved in sitting on (such) panels."

Indeed, the statement about "very limited" small business representation may be a classic understatement. There are 13 corporations represented on the BACFR. One is a small business corporation having $1 million sales and 45 employees. The remaining 12 corporations have an average of $5½ billion in sales and 167,000 employees.

The OMB report also notes that the Small Business Administration does not participate in the deliberations of panels reviewing forms, and there is no policy encouraging them to do so.

Is it any wonder that the interests of small business have been at the bottom of the list when decisions about Federal reports are made by the Office of Management and Budget and the White House?

PENSION REPORTS A GLARING EXAMPLE

A recent instance of this neglect is the issuance of pension reporting forms by the Department of Labor pursuant to the Pension Reform Act. In April 1975, the Department published a basic description form—EBS–1, which was between 16 and 20 pages long, depending upon the number of required schedules and appendices. Each of the 685,000 small and medium-sized employee benefit plans was expected to fill out this EBS–1.

The Senate Small Business Committee, after hearing testimony about this and other pension reporting forms on February 2 and 3, concluded that this form would have cost the small business community a minimum of two-thirds of a billion dollars in additional accounting, legal, and other professional fees, not counting the time required by management.

Fortunately, under a hail of public critisim, this form was withdrawn and after extensive revision, a substitute six-page form was republished in the Federal Register on October 10, 1975.

On the basis of almost 2,000 public comments on the second version of the EBS–1, and the companion annual report—Form 5500, both forms were again reconsidered and reduced in size. Final versions are expected to be distributed in a short time.

Curbing the excess of these reports will thus result in the saving of substantial money. But, why was a form which the Labor Department admits is a "monster," and has resulted in the expenditure of untold time and effort by the small business community in opposing it, published in the first place?

Section 512 of the Employee Reporting Income Security Act—ERISA—sets up an advisory council for employee welfare and pension plans consisting of 15 members from various groups, including employee organizations, members of the general public, and recipients of pension plans and financial funds. There is no requirement that anyone representing the 680,000 small businesses having employee plans—or the thousands of smaller accountants, actuaries, or pension administrators—be represented on this advisory council. Until recently, the smaller businesses were not in fact represented on this body.

Now, one of the public members is suppose to function as a "representative of small business," although small businesses constitute the overwhelming majority of the numbers possessing plans and administering them.

I think that if we are going to preserve the character of our society and avoid seeing giant bureaucracies take over every area of our national life, that kind of thinking must be changed.

Beyond the area of reporting forms, small business also lacks adequate input to the regulatory and policy decisions of Federal departments and agencies.

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[1] "Small Business Reporting Burden," prepared for Executive Office of the President's Office of Management and Budget, by Peat, Marwick, Mitchell & Co., March 1975, p. A65.

INSENSITIVITY TO SMALL BUSINESS IN FORMULATING REGULATIONS

While most legislative enactments are taken only after public hearings, a printed record, and a lapse of time during which spokesmen can make themselves heard, formulation of regulations and policy decisions in the executive agencies do not generally follow this pattern.

On the regulatory level, for example, the Occupational Safety and Health Administration published a 330-page book of regulations with which the small businessman was expected to comply under pain of substantial fines. I doubt whether many, or any, small business persons were consulted in the preparation of that kind of burdensome package.

LACK OF CONSULTATION ON POLICY MATTERS

An extreme example on the policy level is the exclusion of the Small Business Administration from the formation of the National Plan for Solar Energy Heating and Cooling.

When the Energy Research and Development Act was being considered 2 years ago, an amendment was inserted to encourage the Energy Research and Development Administration—ERDA—which presently administers $9½ billion in contracts, suggesting consultation with the Small Business Administration so that the resourcefulness of the small business community could be brought to bear in solving the Nation's energy problems. Small business generally accounts for more than half of all industrial innovation, and enjoys particular advantages in the solar energy field where little capital is necessary for entry or development. Yet, even in the face of the consultation amendment, ERDA ignored the SBA when it conferred with 14 other agencies to draw up the national solar energy plan.

ADDITIONAL STEPS REQUIRED TO OBTAIN SMALL BUSINESS ADVICE

It therefore appears that additional congressional action is needed to assist the small business community of this country in making its views known to Federal officials at all levels of the formulation of executive policy and administration of the laws.

The Advisory Committee Act was enacted in 1972, as a result of outstanding efforts of the Senator from Montana (Mr. METCALF). It recognizes the benefits of advisory committees as "frequently a useful beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government."

During the last 3 years there have been several developments in the advisory committee field, including the establishment of the Department of Labor's ERISA Advisory Council, the Small Business Advisory Committee to the Commissioner of the Internal Revenue Service, and the Commission on Federal Paperwork. The IRS Committee was mentioned favorably in the Peat, Marwick, Mitchell report, and has by all accounts been an excellent vehicle for gaining helpful advice on the paperwork and reporting problems of small businessmen in the tax and pension areas.

In any event, it is an appropriate time to review the advisory committee mechanism. Senator METCALF himself has introduced a series of amendments to the act. We understand that the Senate Government Operations Committee expects to hold hearings on these matters beginning next week, which would be an occasion for more amendments to be considered.

I expect to testify at these hearings to advocate as strongly as possible the necessity for greater and fairer representation for the small business community on existing and future advisory councils.

Mr. President, I ask unanimously consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

94TH CONGRESS
2D SESSION

S. 3085

IN THE SENATE OF THE UNITED STATES

MARCH 4, 1976

Mr. NELSON (for himself, Mr. BROCK, Mr. NUNN, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To insure fair and equitable representation for smaller and medium-sized businesses on Federal advisory committees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Representation for Small Business Act".

SEC. 2. (a) The Congress finds that small and independent businesses are an important part of the United States economy and that their needs and concerns should be fairly represented on policymaking levels in the Federal Government.

(b) The Congress further finds and declares that—

(1) economic, governmental, and other pressures

on all businesses, and particularly small business, are mounting as reflected by steep increases in the number and size of bankruptcies;

(2) executive departments and agencies, particularly those having economic policy and regulatory functions, should take into account the impact on smaller and medium-sized businesses of such policies, regulations, and forms, and the ultimate effects upon industrial structure, competition, and the free enterprise system; and

(3) equitable and fair representation of the private, small business sector of the economy on Federal Advisory Committee within Federal executive agencies whose policy decisions and regulations affect smaller and medium-sized businesses is thus essential to the health and well-being of the Nation's economy.

SEC. 3. (a) Section 4 (b) of the Federal Advisory Committee Act is amended to read as follows:

"(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by the Central Intelligence Agency.".

(b) Section 9 of the Federal Advisory Committee Act is amended by adding at the end thereof the following:

"(d) Each advisory committee which is established by the President or by an agency head as provided in this Act,

and which is concerned with matters affecting the economy or business community shall contain fair and equitable representation of the small business sector of the economy, including individuals who, by reason of experience or training have expertise and familiarity with the unique concerns and needs of small and medium-sized businesses, particularly with respect to such establishing authority's responsibilities and Federal form and paperwork requirements.".

SEC. 4. (a) Chapter 35 of title 44, United States Code, is amended by adding at the end thereof the following new section:

"§ 3513. Advisory committees; small business representation

"Each advisory committee which is established by the President or by an agency head as provided in the Federal Advisory Committee Act and which is concerned with matters affecting the economy or business community shall contain fair and equitable representation of the small business sector of the economy, including individuals who, by reason of experience or training, have expertise and familiarity with the unique concerns and needs of small and medium-sized businesses, particularly with respect to such establishing authority's responsibilities and Federal form and paperwork requirements.".

(b) The table of sections of such chapter is amended by adding at the end thereof the following:

"3512. Information for independent regulatory agencies.
"3513. Advisory committees; small business representation.".

[From the Congressional Record—Senate, (S2816) March 4, 1976]

By Mr. NELSON (for himself, Mr. NUNN, Mr. BROCK, and Mr. WEICKER):

Senate Joint Resolution 177. A joint resolution requiring each executive department and agency to designate a small business specialist. Referred to the Committee on Government Operations.

A RESOLUTION TO CREATE SMALL BUSINESS EXPERTS IN FEDERAL AGENCIES WHICH REGULATE SMALL BUSINESSES

Mr. NELSON. Mr. President, I introduce for appropriate reference a joint resolution that aims at increasing awareness by Federal Government officials in the problems and potential of small and independent business elements of the U.S. economy. This community accounts for about 52 percent of all private employment, 43 percent of business output, and approximately one-third of the gross national product.

Moreover, every serious study of the past decade confirms that more than half of all innovations, including major industrial inventions, processes, and services, are originated by individual inventors and small businessmen.

Social scientists have documented that smaller, locally owned businesses are strong supporters of local charities and social and educational institutions such as churches, hospitals, and libraries.

Despite these marvelous resources, and the benefits they can bring to our economy and society, small business has been at the bottom of the priority lists of nearly everyone in Washington for a generation.

WHAT THIS PROPOSAL WOULD DO

This resolution seeks to reverse this neglect by designating at least one person in each of the Federal departments and agencies to become an expert in the problems of the small business community.

WHY IT IS NEEDED

There are only about 6,000 corporations, out of a total of 13.8 million U.S. businesses, which are large enough to have their stock nationally traded. These businesses tend to be generously supplied with specialists of all kinds and are able to organize rapidly and well to present their views to Government or to take advantage of any Government program. In contrast, the owner of a small business must do everything himself, and faces an almost impossible task in attempting to organize an effective response to a particular Government action on the part of millions of small firms.

The Small Business Administration, which could help in some representative situations, has a puny budget of less than $10 for each small business in the country. It cannot assign any more than a handful of employees to the representative or advocacy function, and even in areas where the agency's participation would be of the greatest use, they are often completely and pointedly ignored.

Among the many examples of neglect of small business problems which could be cited are the estate and gift tax exemptions which have been limited to $60,000 and $30,000, respectively, since 1942. Farm spokesmen have told us repeatedly that these obsolete limitations are forcing the sale of many family farms. Small business representatives have complained that the present system makes mergers with conglomerates the only practical alternative for business owners nearing the end of their careers. Yet, these laws have been unrevised and largly unexamined in 34 years, while inflation has raised the price of business and farm assets over 289.3 percent.

Another instance in the tax field. The corporate income tax remained largely as it was structured in 1950, until it was changed in 1975 for a temporary period of a year and a half only. During the last 3 years alone, our Canadian neighbors have increased their "small business deduction" from $30,000 to $100,000 and enacted several other tax provisions making operating a small business in Canada more profitable and more attractive than in the United States.

Because of this nonexisting priority of small business in the tax-writing institutions of our country, I introduced on November 20, 1975, Senate Resolution 306, which would designate a person in the Treasury Department and another on the congressional staff of the Joint Tax Committee, to study long-range tax simplification and reform for 97 percent of the U.S. businesses which are classified as "small businesses."

But lack of attention to small business problems has been a characteristic of most departments and agencies of the Federal Government.

SMALL BUSINESS IGNORED IN SOLVING ENERGY PROBLEMS

For example, energy development is certainly of primary importance to both industry and consumers. In this field, small business has had the door slammed in its face. When the Energy Reorganization Act was considered 2 years ago, several members of the Small Business Committee inserted an amendment that the Administrator of the new Energy Research and Development Administration should "consult with the Small Business Administration" so that the resourcefulness of the small business community might be brought to bear on the country's energy problems.

Several days of public hearings by the Select Committee on Small Business during 1975 made clear the special potential of small business in the field of solar energy where large amounts of capital are not required for entry into the field.

What happened? When the Energy Research and Development Administration, which is presently administering about $9½ billion of contracts, came to draw up the national plan for solar heating and cooling, the Small Business Administration was never consulted although 14 other agencies did participate in developing this plan.

In another field, that of occupational safety and health, a mammoth, 330-page volume of regulations was issued to every small business owner, who was expected to read, understand, and comply with the applicable solutions under penalty of substantial fines.

In the pension area, 1975 was an incredible year during which the Labor Department issued 20-page forms to the 680,000 small pension plans. Consequently, these forms were withdrawn because of their length, complexity and poorly designed structure.

These are but a few examples of Federal actions on policy, regulation, and forms which too often have taken an unreasonable toll of the time, energy, funds, and patience of the small, independent segment of our private enterprise economy.

In my view, the widespread nature of this problem cries out for a greater sensitivity to the problems of the businesses which make up the majority of our economy, and which do not possess the legions of technical and managerial experts with which our large corporations are generously supplied.

This resolution would take a small step in the direction of institutionalizing such increased awareness. It would designate at least one appropriate person in each department and agency to become familiar with the problems of smaller businesses. This person would serve as a point of contact when a regulation, form, or deadline has a serious impact on a significant number of small firms. Thus, the proposal could increase the possibility that there would be in Washington at least one official in each department or agency who could quickly become knowledgeable about the small business implications of proposed policies and regulations and impart them in the policy councils where decisions are made.

Unquestionably, designating such small business experts would not solve all of the problems of small business. But, it certainly will contribute to more systematic reasoning on the part of the Federal Government agencies which have a daily impact on small business. In my view, a compelling case has been demonstrated for this kind of action, and I urge that the resolution be speedily considered and passed.

Mr. President, I ask unanimous consent that the text of the joint resolution be printed at this point in the RECORD.

There being no objection, the joint resolution was ordered to be printed in the RECORD, as follows:

94TH CONGRESS
2D SESSION

S. J. RES. 177

IN THE SENATE OF THE UNITED STATES

MARCH 4, 1976

Mr. NELSON (for himself, Mr. BROCK, Mr. NUNN, and Mr. WEICKER) introduced the following joint resolution; which was read twice and referred to the Committee on Government Operations

JOINT RESOLUTION

Requiring each executive department and agency to designate a small business specialist.

Whereas small and independent business is an important part of the United States economy, accounting for 52 per centum of private employment, 43 per centum of all business output, 33 per centum of the gross national product, and nearly 13 million of the 13.3 million businesses in the United States;

Whereas small businesses and individual inventors have accounted for more than half of all innovations, including a majority of major industrial inventions;

Whereas there is an acute shortage of equity capital for smaller firms and especially for new ventures, as indicated by the fact there have been only eleven stock issues sold by medium-sized businesses in the twenty-three months ending November 1975;

Whereas smaller businesses are at a marked disadvantage in obtaining loans and other forms of credit, especially in periods of restrictive monetary policy;

Whereas regressive business income tax rates inhibit small and medium-sized businesses from raising capital through retained earnings; and the estate tax structure, which has not been overhauled since 1942, promotes the demise of locally owned businesses and family farms;

Whereas regulation and paperwork by an increasing number of Federal departments and agencies have added substantial burdens in time and costs for smaller firms; and

Whereas total pressures on all business, and particularly small business, are increasing, as reflected by a dramatic increase in the number and size of bankruptcies in the year ending June 30, 1975: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to institutionalize the resources for long-range preservation of small business and maximize its contribution to the free private enterprise system and the overall economy of the Nation, the head of each executive department and executive agency shall designate at least one employee of that agency whose assigned responsibilities shall include—

(1) acting as a liaison with the small and independent business community in matters of policy relating to small business; and

(2) conducting an analysis of the differential effects of department or agency policies on new, small, and medium-sized independent businesses, as well as their particular needs under the free private enterprise system.

Senator METCALF. Now, Mr. Lynn, I am very pleased that you are here with members of your staff who are working on this.

As I said in my opening statement, I compliment you on the activity, the interest, and the concern that you have shown in trying to enforce this act.

We don't have you up here for criticism so much as for advice and guidance and counseling, so that you can help us make it more effective and get rid of some of these useless committees and make this other advisory committee procedure more useful to the Government and get more money for the dollar spent.

Senator Percy, do you have any comments?

Senator PERCY. Does Mr. Lynn have a statement?

Senator METCALF. Yes, he has a statement.

Senator PERCY. No further comments.

Senator METCALF. Go right ahead.

TESTIMONY OF JAMES T. LYNN, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY DAVID CAYWOOD, STATISTICAL POLICY DIVISION; WILLIAM BONSTEEL, CHIEF, COMMITTEE MANAGEMENT SECRETARIAT; CLIFFORD GRAVES, DEPUTY ASSOCIATE DIRECTOR FOR EVALUATION AND PROGRAM IMPLEMENTATION; AND ROBERT BEDELL, ASSISTANT GENERAL COUNSEL

Mr. LYNN. Mr. Chairman, I will, of course, abide by the committee's wishes as to whether they wish me to read my statement in full. Frankly, what I would prefer to do, knowing it will receive careful consideration by the committee, is ask to have the full statement incorporated in the record so as to save the time of this committee and allow maximum time for questions. Let me just state a few words, some of which are in my statement and some of which are not, by way of an introduction to the subject from our point of view.

Senator METCALF. Thank you very much. Unless there is an objection, then we will have the statement incorporated in the record, as if read, at the conclusion of your testimony.

It is a brief statement. But I would prefer to have you summarize and add some other comments that may have occurred to you this morning after the discussion with Senator Nelson and our own opening statements.

Would you identify your colleagues at the desk?

Mr. LYNN. Yes, I will. I have with me today—I think you know him—Mr. Clifford Graves who is our Deputy Associate Director for Evaluation and Program Implementation. I also have Mr. Robert Bedell, who is an Assistant General Counsel; and Mr. William Bonsteel who is well known to the committee. He is the Chief of our Committee Management Secretariat.

As you mentioned, we also have Mr. Oaxaca, who takes a back seat for no man, figuratively, but literally, I guess, decided to lurk in the background.

Senator METCALF. He has been a witness before this committee, and a very valued witness. So we are delighted to have you all

here at this budget-making process on the Hill. We are honored you have taken the time out to appear at this hearing.

Mr. LYNN. Thank you, Mr. Chairman. It is a pleasure to appear. I look upon this as important business.

I would like, as a little aside, on BACFR, or whatever the pronunciation is, to just mention, if I might, a couple of facts with respect to BACFR that may be of interest.

The Chairman of BACFR is a gentleman by the name of Carl Beck, who runs a company with less than 50 employees. There are six sponsoring organizations, and there are three people appointed from each one. That means 18 out of the 26 total members.

One of those sponsoring organizations is the National Small Business Association, which is a contributing member. Also, the National Association of Manufacturers is another.

It has 13,000 members. Twenty percent of them have less than 20 employees. Fifty-five percent of them have less than 100 employees. And 88 percent of them have less than 500 employees.

I believe the Chamber of Commerce is another also sponsoring member, and the Chamber, of course, has a wide variety of sizes of firms among its membership.

I think this year at least, where all of the meetings are on paperwork, that body is being supportive of what we are trying to do in OMB and what the Paperwork Commission that was established by Congress is trying to do.

As I understand it, there has been complete unanimity that, although it is true that the larger business can surely cope with it easier than the smaller one can, paperwork is considered to be a terrific problem for both large and small business.

I should add that as I occasionally get out across the country, I find the big business groups equally vocal to the small ones in saying, "Isn't there some way we can cut down on the paperwork?"

Senator METCALF. I want to especially thank you for that summary and analysis of the composition of this Business Advisory Council.

Mr. LYNN. Thank you, sir.

As I say, I will put my statement in the record. Let me just give you a couple of random thoughts, if I might, some of which are in the statement and some of which are not.

Some of this goes back to my days at HUD and my days in Commerce. I am not a strong advocate of advisory committees in general.

I found as a manager of a department that rarely was the problem that I was facing encompassed exactly by the membership of any advisory committee. Any particular advisory committee, given a particular problem or set of problems, had a nucleus of people on it that would be useful to consult on that problem, but it would have other people who really didn't have much interest or much expertise.

Conversely, in each one of those problems or groups of problems there were people who were not on the advisory committee whose expert advice you wanted.

So during the period that I was there, if I recall correctly, I think we disposed of one or two or three.

I must say as a practical matter it is very difficult, I found, to dispose of advisory committees because it is looked upon as a signal that you don't care, that you don't love somebody.

After all, if a given advisory committee has been there for 4 years, and you try to dispose of it, does this mean you are now downplaying the importance of the advice from a given sector?

You get into almost actual pleading by people—"Please, our position in the world is being degraded if you don't have an advisory committee in our area of endeavor."

My reply always was, "Not at all."

What I would prefer to do is consult one-on-one with people whose advice I admire. If there is a need for advice on a broader basis, go to public hearings.

I found in HUD that the hearing approach was an approach that was very, very useful. I started with public hearings on lead-based paint poisoning—which everyone told me I remember—they told me, "You can't hold hearings on this. It is too sensitive an issue. The world will collapse."

The truth of the matter is the hearings were welcome by all of the various groups interested in the subject. I think the hearings were handled fairly; and they helped both us in HUD and the public generally to better understand that the problem was one that needed solution but that there weren't any easy solutions. Also some options were identified at the hearings that we considered carefully, and we adopted one or two.

I would say that I will consider my accomplishments great during the period of time that I am in OMB if I can get department heads and agency heads to think automatically about holding hearings with regard to important issues before they make policy or programmatic decisions.

Whether it is an issue facing an agency head or an options paper going to the President, I believe that executive hearings, by allowing all interested parties to be heard, can make an important contribution to the decisionmaking process. As you pointed out, Mr. Chairman, we should have balance; executive hearings are a good way to achieve this objective.

The hearing provides the best forum, it seems to me, to get that kind of balance. So I must admit I have no love affair with advisory committees generally.

Does that mean I think they all should be abolished? Of course not. I am just saying I think an agency or department should be put to the proof as to whether an advisory committee is the best way to approach a given matter.

Having said that, I also believe that when we identify problems in the management of advisory committees, that we should not amend the statutes without first experimenting with different approaches to solving those problems.

It is in that spirit that in a number of instances we respectfully disagree with the need or desirability for legislation in some of the areas that are covered by various bills that have been presented.

But by the same taken, I would hope that we in OMB, working with the Subcommittee, could identify areas where we should take

action on changes in the guidelines or changes in approach to see whether that will do the job.

Doing it that way has a large advantage. One, it is very difficult to anticipate in advance the exact way an overall prescription or requirement will apply to every one of a 1,000-plus committees.

On the other hand, if we do some of these things by administrative guidelines, you have the flexibility as you work along in time to make needed modifications, without requiring legislative change; and you also can treat it more or less as a test tube to see what works and what dosn't work.

Then, having begun that challenge, if problems still persist, I think you have to lower the boom and seek a legislative solution.

Let me say that some of the amendments we have here have a very direct relationship, of course, to "government in the sunshine."

Certainly what happens in a closed meeting of an advisory committee relates to that overall topic.

I have to say to you my general view is that to open up the processes of government is a very good thing. That is why I like the executive hearings that I have talked about earlier, because I think it gives an opportunity, whether it is for small business, big business, environmentalists, consumer groups, professors or just interested citizens, to come forward, to speak.

On the other hand, I really have become a little concerned lately as to some of the kinds of things that Senator Percy was talking about, but a different aspect of it.

I don't want to see us become so rigid in our rules with respect to open and closed meetings that we cut off a phenomenon that I have seen happen in some advisory groups that I have had advise me, or the Secretary in Commerce and in HUD—the phenomenon that occasionally some member of an advisory group will have the courage to break from the pack, so to speak.

In a public meeting, members will not usually break with the group, break from the traditional views of that particular group. In a closed meeting or in a private discussion, however, some person will come up to us and say, "This is what the group is saying, but I am telling you that is a lot of bunk, and there really isn't a technological barrier in our performing thus or so."

I really don't know the answer to that question. I do know one thing, that if we go too far toward open meetings, dissenting views may not be voiced.

On the other hand, I would guess we could still get the views because you get an awful lot of unsolicited advice, whether you are at a place where you are giving a speech and people come up to you afterward or on a social occasion. I think the chairman and Senator Percy have had this experience in common with me.

They will say, "Look here, on such and such a matter you fellows don't know what you are doing," or, on the other hand, "We really herald what you are doing in that regard."

So we ought to realize that whatever we do in the formal areas, there is still that large informal area out there which has its bad side but also has a good side—of people, in one-on-one situations, telling us what they really think rather than what they are willing

to have appear in the public press where they will be sometimes ridiculed by their peer group.

There is a balance in there, and I have to say to you frankly, I don't know where it is. But I think that is a set of issues we have to keep in mind as we go along.

With that background, I think, Mr. Chairman, I would be happy to answer your questions. I think that is the way I can be most helpful.

Let me add one other thing. You praised our efforts at OMB to some extent. There is room for criticism, as we well know. Where the praise lies is really with my staff. It is very nice as a head of an agency to take credit for good things. But I think we have had staff in OMB that by prodding us at the top of the agency, has made real progress.

Senator METCALF. Thank you very much, Mr. Director.

I think Senator Percy suggested in his amendment the attitude of all of us on the committee in introducing legislation. The reason we have hearings is to have your comment on such legislation and perhaps, when we see corrections that we feel should be made, discuss directives, or Executive orders, or some other remedies as well as amendments.

That, of course, is what we are looking to achieve in the next couple of days in this discussion.

I am trying to grope to find out just where the problem is and where we can answer the problem that you have suggested. People continue to come in and say, "These people on the advisory commissions will be inhibited if they are in an open session."

That is what they said about opening up committees of the Congress or executive sessions of the Congress. We have opened up more than 90 percent of them in the last couple of years. I have not noticed any inhibition except for the first 2 or 3 days of the hearings. And, of course, people who are of the stature of advising the President or the members of the Cabinet are men and women who are not inhibited by public appearances and so forth. In fact, I think some of them are most uninhibited.

But I appreciate your suggestion about getting rid of some of these advisory committees and having hearings and getting people in and experts testifying on the specific problem that is involved rather than just having people who are general experts.

I hope that your staff, which is excellent, will meet with ours and maybe we can work something out in that area. During the next couple of days I know that we are going to have some suggestions. I just can't ask you some questions today.

I think that you have directed, and you may give credit to your staff, if you will—and I will give them credit, too—but I think that you have set up a staff that has tried to carry out the spirit of our act. So we are going to try to inquire in the next couple of days as to how we get rid of some of these committees, how we prevent 107 people from serving on 4 different advisory committees in a country as large as this, how 47 persons serve on 5, 21 on 6. Why do we have to have that limited sort of representation?

It seems to me that in a few cases, just as with ex-Members of Congress, in a few cases some people make a career of serving on advisory committees. As I say, ex-Members of Congress are making a career of running for President. And it seems to me we could find some way to have more representation than that.

Mr. LYNN. If I might speak to that.

Senator METCALF. Please do.

Mr. LYNN. I think it is one worth looking into. I think it is one that should be looked at as to what may be in it for the bad, but what also may be in it for the good.

Let me give you an example. I find great pressure sometimes—and sometimes through my own generation—from people saying, "Jim, I think you should be on this and that committee within the executive branch, and the reason being that OMB has a contribution to make in that particular committee."

As I say, many times I am not fighting it, and many times I am fighting to get on it, because the work of the committee can have some kind of a budgetary implication to it.

But there may very well be cases there, and I would suspect it would be true, that the person is there because of the fact that it is useful to have someone who has the experience from one set of activities—including other advisory committee experience—on this advisory committee.

Am I saying that when you go through this you are going to find such a neat package? Of course you aren't.

But there may well be good reasons to have people on more than one advisory committee.

Senator METCALF. The second thing that you have suggested is that it is very difficult to get rid of these advisory committees because people say, "This is a very unfriendly thing to do to us. We have been advising you for 4 years, and we would like to continue."

I think Senator Percy and I agree that we should have that button that he calls a self-destruct. Maybe we should put an end to them automatically every 4 years, or so, and make them come in and justify.

Then Congress with its relatively larger constituency could just say, "Well, we don't see any use for these any more."

Again I am groping to see how we can turn that chart back and get rid of some more of these people that it seems to me are proliferating government.

Mr. LYNN. Mr. Chairman, on that point, you touched on a very important issue. A number of times, in the Congressional Record and here again today, you said, I think, that of almost 50 percent of the committees that we have, only 20 percent are mandated by Congress, but another 29 percent, roughly, I think, are authorized by Congress.

Of course, I can say as a practicing manager in the government, the minute a committee is authorized, the pressures from every place—sometimes including the Congress itself, I might add, or staff—to appoint are very great.

I think one of the things that would help hold down the committees substantially would be not just the kinds of things you gentlemen have been discussing about not having automatic clauses for advisory committees in legislation, but, also, as each authorizing committee holds oversight on particular issues, to have that authorizing committee get into the particular advisory committees for that department or agency and put their feet to the fire relative to whether or not particular advisory committees are really necessary—whether or not they are still needed.

Now we are going one step at a time. You said we were a traffic manager more than a policeman. I believe that was the quotation. I admire it. It was a pretty good one, and not too far from hitting the mark; although I think I have detected our being more policeman over the last month than before.

We are going to be revising our guidelines, based on the experience we have had this past year. As I said, we look forward to working with the committee closely.

But I really do believe that if the authorizing committees in the Congress—and the Appropriations Subcommittees for that matter—would take as one of their agenda items when they get to the particular area where they know an advisory committee still exists, call in the advisory committee perhaps and ask them about what they have been doing or ask the Secretary or Under Secretary or Assistant Secretary, "What advice did you get?" or "How useful has this advisory committee been?"

I have a hunch the good work this subcommittee is trying to do and the work we are trying to do in OMB could be enhanced tremendously if the authorizing committees would do that.

We are going to continue our efforts. We will continually move to put agencies and departments more to the proof. But I think that would be useful.

Senator METCALF. For a long, long time Senator Ellender took it upon himself to inquire into the appropriations of every committee and subcommittee of the Congress.

When the Rules Committee came and made the legislative appropriation, Senator Ellender always asked some of these significant questions. I suppose maybe some member of the Senate should assume some of those duties, too, and say to every advisory committee, or inform the Appropriations Committee, or somebody of that sort, "Well, what is the usefulness?" And as you say, "What advice did they get?"

If they got a broad spectrum of advice from a committee that was useful, of course, it should be continued. Otherwise maybe your idea of just executive hearings on specialized needs is a lot better than the creation of a committee.

Mr. LYNN. I think there is room for both. I really do believe that there are areas where advisory committees make sense. But I think we have had a lot more of them than is necessary.

Let me say one thing, if I might, a little further. Senator Percy mentioned keeping a scorecard. As you know, our report form to the agencies and departments has questions that are aimed at a scorecard approach in the sense of, "Tell us what value you think

this committee has given you in the course of the last year; have you taken any of their recommendations," and so on.

I believe, Cliff, isn't that in the form we use?

Mr. GRAVES. Yes.

Mr. LYNN. I will tell you what is worrisome to me—I am a neophyte at this by some measure, but I guess I am also an old man after 7 years in Government—if we start doing it on a scorecard basis.

A committee will make seven recommendations. I will be absurd about it, but it will get the idea across. One will be to change the format on the letterhead. The next one may be to change a person's title. The third one may be something else that is inconsequential. The fourth one is the big one.

Now on the report at the end of the year, it notes that 3 out of 4 recommendations of the committee were accepted. That tells you nothing as to whether the committee was good or not.

I would also say that perhaps in 3 years they didn't come up with one idea that was acceptable. But if that committee in the fourth year comes up with a really good idea that helps the people we are all trying to serve in this country, solves a problem or gives the glimmer of hope for solution, then that committee was worthwhile.

So I think it is very hard to have a scorecard as such.

Senator METCALF. I am not talking about a scorecard. I know Senator Percy is not talking about a scorecard when he said well, they should come up and justify themselves periodically. Four years has been suggested. Maybe that is too short a time.

But I agree that one justified and valued piece of advice that would save paperwork, save money, create efficiency, or something of that sort—rather than as you say just change the format of the letterhead—would justify the continuance of a committee.

But there are more than 1,000 of them. Some of them can't justify their wants. Would 4 years be, in your opinion, a legitimate time to automatically make them come back and justify their existence?

Mr. LYNN. I think, Mr. Chairman, we are trying to do it every year. So far we have been more traffic manager than policeman.

But the forms are intended, in our current organization and the way we have been moving in the organization, to allow us to inquire more on an annual basis.

However, I am always disturbed about automatic review dates. As you know, the number of advisory committees came down from the high point in October and we ended up the year with 1,267. There were 272 formed that year, so we had a net loss. By that I mean a loss from the way I view this picture. We have 25 more committees, I think it was, than we had at the beginning of the year.

Among those 1,267 are some that ought probably to be reviewed every year. There are some that you would look at once and 6 years later you would find they are still justified and will continue to be justified as long as a certain set of laws are on the books.

Since I am constantly aware of how much paperwork we already have in the Government, I worry about automatic provisions that

would apply across the board to 1,267 advisory committees—hopefully less than that next year. Automatic reviews cause extra paperwork and take time of personnel, where it may not be necessary.

Senator METCALF. Senator Percy, this is a matter you and I both had concern about. Do you want to get into this for a minute?

Mr. LYNN. I would say, though, that we ought to take a look in the same way—and there are some relevant bills currently pending in the Senate—at overall programs and the need to review them. Some of these bills talk about zero-based budgets—that every year you should make every department justify every program that it has. There are others that say each program shall terminate at the end of 4 years. I believe the Senator has that kind of bill before the Senate.

I say this: I welcome the spirit of all of this because it does mean that the Congress, as well as we in the executive branch, are paying more attention to getting rid of programs that don't work to make room for those that do and terminating programs that have just outlived their time.

I think that basic approach is very useful.

Senator PERCY. I would be most interested in having Mr. Lynn pursue the thought that he started out with, that at HUD he had a lot of advisory committees he had to deal with that weren't really helpful to him, weren't really serving the national interest, and yet he wasn't able to get rid of them.

Let's just assume now that there would be a desire——

Mr. LYNN. I am not sure. I would have been better prepared if I had done my homework on them. I would be embarrassed if I went back and found out they were gone.

I am advised by Cliff I did a very good job. But I was just saying it wasn't easy, Senator.

Senator PERCY. Could you take one example, just out of the air, of an advisory committee and tell us how it was structured, what you found when you had it, how useful or useless it was.

Mr. LYNN. My recollection was that I had a General Advisory Committee, I think, for HUD.

Senator PERCY. You had what?

Mr. LYNN. A General Advisory Committee to HUD. It had a wide range of people on it. But my problems at HUD were with such matters as: Should I be selling all of these defaulted properties I was acquiring "as is," which means don't fix them up and just sell them in the market; or should I spend an average of $15,000 per house, fix them up, put in a refrigerator, a new stove, and so on, and take—with Government procurement requirements being what they are—anywhere from 8 months to 14 months to do it where that house stays blighted in the community, hurting the neighborhood it is in, and sell it rehabilitated.

Now, in that kind of an issue it is just a heck of a lot easier to do one of two things: establish an ad hoc committee of people or do, frankly, what I did.

When I was speaking to the mayors or Governors, I would ask mayors whose judgment I admire, one-on-one, what they thought of this, or a Governor what he thought of it, or if there was a builder whose judgment I respected, get his judgment.

It was a terrific tug of war among a number of competing interests.

Senator PERCY. How many advisory committees did you have at HUD?

Mr. LYNN. It used to be six. We now have two I understand in HUD.

Senator PERCY. That is all in HUD?

Mr. LYNN. That is all HUD has.

Senator PERCY. Committees on such things as housing and mass transit?

Mr. LYNN. Mass transit isn't in HUD. But in HUD you have, for example, disaster programs. I don't mean that humorously. At one point someone said all the programs were disasters. But I mean natural disaster programs.

You have a wide range of community development programs, old ones like urban renewal and model cities, and so on and the new community development bloc grants. You have a diversity of housing programs. You have programs such as section 8 housing for lower income families. You have the tandem plan, that is not directed at lower income families, but at helping middle-income families acquire credit in a time of a credit crunch.

I could go on and on. There is a diversity of issues before the Secretary and Under Secretary and Assistant Secretaries at all times that require different approaches.

Let me give you an example of an executive board hearing process: Carla Hills, the HUD Secretary, held a set of hearings on condominium conversions. That is a very complex, very difficult issue—particularly as it affects elderly people being driven out of apartment houses as they are converted to condominiums.

On the other hand, one must balance the question of what a person may do with his own property. This again was a situation where there had been comment within HUD that, "You really shouldn't hold hearings on that. That is a dynamite kind of issue."

After the public hearing, however, I heard from people at HUD that those were extremely valuable hearings. HUD officials learned things in those hearings they hadn't heard before, things which will undoubtedly affect their judgment on the matter.

Let me raise another approach and question. When is an advisory committee an advisory committee? There is now a group called The New Coalition. It consists of Governors, county officials, and mayors. We met with them and their staffs in OMB constantly during the budget process this year to get their views on health programs, on education programs, and so on.

These officials come to town regularly and on their visits to the city they will come to see us. Their staff will sit down with us almost weekly. Are they an advisory committee?

The Governors Conference frequently has a group of people come in and meet with us on a given issue. It is a group of Governors chosen from their larger group. They advise us usually in a question and answer period—just give and take—without formal recommendations. Is this an advisory committee?

Yet the truth of the matter is, that is exactly the kind of advice I want to get at OMB.

Senator PERCY. I have a couple of specific questions on the legislation before us. On S. 2947, this legislation expands coverage of the act to include advisory committees serving agencies of the legislative branch of government, such as the Congressional Budget Office and General Accounting Office and others. This would give OMB management authority over these agencies.

Is there a precedent for this kind of an arrangement where the executive branch has a management authority over the legislative branch, and do you see any constitutional problems involved on that and the separation of powers?

Mr. LYNN. I am not aware, Senator, of a good precedent for this. Secondly, I must admit that I have some fear and trepidation about giving that kind of authority to the executive branch.

We ran into, as the Chairman knows, the question in connection with the formation of the Commission on Paperwork. There the problem was solved by the Commission itself agreeing to follow the act in substance, but without acknowledgement or desire on our part for OMB to have the responsibility with respect to it.

I do think that is an issue to be addressed. There are some never-never lands as the Commission on Paperwork shows very well. For example, there the Commission reports to the President. It also reports to the Congress.

Now, does the act apply or not? There could well be constitutional questions, but it has been 7 years since I practiced law and I had better not try to speculate.

Senator METCALF. If the Senator will yield, a recent decision on the Federal Election Commission has opened up grave problems in this whole area of appointment of commissions that have some relation to the Executive and, at the same time, have congressional duties. So none of us know right now just what this is.

Mr. LYNN. I think that is right, Mr. Chairman. As you know, there are some functions in GAO and elsewhere in the legislative branch that are operational. They are more or less of an executive branch nature. I think the recent Supreme Court decision will require all of us to take a look as to whether those are proper or not.

I have no opinion at this point, but I think, in light of that decision, there has to be a review of a number of things.

Senator METCALF. I filed a brief in that case, an amicus brief, and read that very lengthy decision. But it seems to me that it has much more far-reaching implications than just on the Federal Election Commission.

It is going to involve every one of our agencies that we said, well, it will be appointed with the advice of the Speaker of the House of Representatives, or some of those things.

I think, Senator, you have raised a very serious question for all of us. The Supreme Court hasn't completely resolved it. It is sort of an ambiguous decision.

Mr. LYNN. I think that is right.

Senator PERCY. My only other question on S. 2947 is raised simply because in your own testimony you questioned the need for the requirement in that bill to report a list of the names and affiliations

of persons employed as experts and consultants by the executive branch. The testimony is that there are some 15,000 such people.

Here is a rather hefty report called the *Index to the Membership of Federal Advisory Committees.* If I want to find out who is on the Tobacco Advisory Committee I can quickly determine who the readers are and what their interests are and so forth.

We don't want to proliferate reports. However, I suppose, as Senator Metcalf is thinking, we cannot get a handle on these things unless we know who the people are.

If anyone wants to know which of these we should eliminate, I would hate to be Earl Butz. I hadn't read this when I was with him Saturday. I don't know how he could, anyway. He has an advisory committee for every aspect of every single agricultural crop we have. I don't know how he could follow that advice, much less listen to all of it.

Mr. LYNN. I think on that, Senator, we might take a look at the statutes at the same time to see how many of them are at least contemplated by the legislation that has come out of the agriculture committees. My guess would be it is a fair number of them.

Senator PERCY. It may well be required right in the statute. But do you have any idea how much it would cost to compile the information on these so-called estimated 15,000 people? That was the question you raised in your testimony as to whether it was really worthwhile.

Maybe you could supply that for the record.

Mr. LYNN. Let us supply that, sir.

Senator PERCY. Give us a chance to evaluate it.

Mr. LYNN. And against the benefit of it. That is the only thing we ask on each one of these—what are the kinds of pay dirt that may come out of them. That is all we ask.

[The information follows:]

ESTIMATED COST OF REPORT ON EXPERTS AND CONSULTANTS EMPLOYED BY THE EXECUTIVE BRANCH

The Civil Service Commission estimates the costs for meeting the data requirement of S. 2947 pertaining to experts and consultants employed by the Federal Government as follows:

Estimated number of individuals	12,000
Estimated Commission costs for compiling and printing the data	$6,000
Responding agency cost—approximately $3 per consultant	36,000
Total governmentwide cost per survey	42,000

This estimate of costs is based on providing, in addition to the number of experts and consultants, their names, employing agency, and business affiliation. Since the business affiliation is not one of the data elements in the Commission's Central Personnel Data File, a survey would be necessary to capture this information each time the data is required.

Senator PERCY. If I read your statement correctly, we seem to be basically in agreement on the policies underlying S. 3013, that information on nonappropriated funding of Federal advisory committees should be reported in a public manner and some better measure of workload and product of each advisory committee is

necessary if we are to operate oversight of these bodies. Are we in general agreement in principle?

Mr. LYNN. As to the principle, we certainly have no objection, and certainly on the second one we are very, very affirmatively disposed toward having a better job done.

Senator PERCY. Again we get into cost effectiveness.

Mr. LYNN. Exactly. And also rules that apply across the board to a thousand committees where they may require a lot more customizing as to what we do.

Let me say on the conflict of interest, I really am a little puzzled by that because again, as a manager of a department, I always knew when I was getting advice from a business person or an environmentalist or whoever else it might be, where that information was coming from. And whether or not that business group pays for its own secretariat or not, you take advice from a business group that is advising you as advice from the business sector.

You would hope that over a period of time you get to know the people who will tell you where the warts are with respect to their arrangements and the ones that are just giving you completely a brief for their position.

But there is a conflict of interest in every case of advice in this sense: They have a responsibility to the organization that they work for. We have a different responsibility—we that are receiving that advice—you gentlemen up there—and a person sitting and running an executive department.

You would hope that the advice you are getting is as much consonant with the public interest as possible. But I don't think one should ever assume that the person is going to put as much emphasis on the side of the argument that may represent a different aspect of the public interest, as the side of the argument that is totally wrapped up in his own business.

So, whether or not they pay for the secretariat, I don't think you eliminate the conflict of interest, in the broad sense, by the funding.

Now whether or not there should be disclosure as to which ones are providing dues or fees, I would think, frankly, that could be handled by administrative action, if that is thought important.

But what worried us about the statute, for example, is the question of the value of a person's time where a company allows a person to spend appreciable amounts of time on the advisory committee? That is a thing of value.

Or suppose there is a waiver of certain kinds of fees and they serve without a fee. Do you deduct that?

I think, broadly stated, we could find ourselves counting the number of angels on the head of a pin. If there is a dues mechanism or the like, that wouldn't be hard to accomplish. But I would ask, what do we have when we know that?

Senator PERCY. Yes. And what are you going to do with it?

Mr. LYNN. Yes.

Senator PERCY. I think your cost effective test is a very good one. Is it possible that for the record you could estimate what you

would project the possible cost involved would be; what it may cost in staff time, in dollars?

Mr. LYNN. By this information you mean using the example used, whereby an assessment basis or a charge basis or a contribution by a foundation, there is money paid that way affirmatively—cash——

Senator PERCY. Right.

Mr. LYNN [continuing]. To defray the expense of the operation?

Senator PERCY. I don't think you would have to take time into account.

Mr. LYNN. We can certainly try to do that. It would be very small. There are very few, at least that we are aware of, that are committees of that nature.

[The information to be furnished follows:]

ESTIMATED COST OF REPORT ON USE OF NONAPPROPRIATED FUNDS BY FEDERAL ADVISORY COMMITTEES

It is estimated that the cost to OMB and the departments and agencies of a one-time report on the names and number of Federal advisory committees receiving nonappropriated funds, and the amounts, would be less than $1,000, including 80 hours of professional and clerical staff time. We would be glad to discuss with committee staff the feasibility of such a report.

Sentor PERCY. Finally, the feasibility has been questioned of having an agency keep count of recommendations they have received because some are, as you have said, informal and loosely structured; are they recommendations or not?

In S. 3031 we have tried to define committee recommendations to deal with this problem. Is that an adequate definition from your standpoint or could you offer any suggestions for improving the definition?

Mr. LYNN. I must start, as a threshold answer, to say I am concerned about this idea of a report every year as to where each recommendation cumulatively stands.

Again, I see a massive amount of paperwork. I really do believe that the effort should be customized more than that.

On the definitional point, let me turn to Mr. Graves.

Mr. GRAVES. Senator, the definitions are still quite broad. But it does clarify the existing situation.

To pick up on Mr. Lynn's point, I don't see it as a problem for the agencies to maintain this information. Any agency having a significant number of committees should be doing this anyway.

I think the concern that we have is the mechanical problem of aggregating all of that information, compiling it into a report and regularly submitting it. But probably a more customized approach would be to require that agencies maintain these records and make them available to the Congress, to OMB, or to anyone else who would have a right to it.

Senator PERCY. Mr. Chairman, I was intrigued by the comments made by Mr. Lynn as to how many of these committees are directly under jurisdiction of the executive branch itself and how many are required by statute.

I think it would be very helpful to us if we are to scale down this operation and get it down to size if we know to whom they are responsible.

No one is going to do anything between now and November to eliminate anything. But maybe we could take a mutual bipartisan pledge that after November when you have clear sailing for a couple of years that we could really move and do something.

If we are to eliminate from the statute a requirement of a lot of things; laws are enacted and we throw in a couple of advisory committees here and there. Are they really serving their purpose? Isn't this a way to clutter up the Government rather than efficiently and effectively run it?

I would like to work with OMB to see where we could put the responsibility or take it ourselves, if we see we can.

I talked to Ed Banfield a number of years ago. He was serving on two advisory committees. He jets into Washington. His transportation is paid for. He always has other things he is doing. He says, "The only reason I am staying on is to see whether I can't eliminate them." He says, "So far as I am concerned, they don't do a thing."

I just looked through the "Index" and I found, 5 years later, that he is off of both of them. I will have to go back and ask him whether he gave up in exhaustion and they are still going or whether he actually did get rid of them. I doubt the latter.

Mr. LYNN. Just two comments in response, Senator. One, I would much rather see the automatic provision going in with appropriate blanks as to how often it should be done with respect to evaluation of the programs.

Senator Brock has introduced bills to do this. I don't know that we agree totally with that approach, but it is certainly in the right spirit.

The other thing the chairman has done, I read carefully your remarks on the floor, Mr. Chairman, pointing out to your colleagues the number of bills that were introduced in this session alone that called for advisory committees, or at least bills which would authorize advisory committees. What was it? Seven hundred, I think.

I think that is useful. We both have a job to do. Let me tell you, I frankly take every occasion—at Cabinet meetings—in my one-on-one meetings with the Secretaries—to just keep pursuing it.

I really do believe as a manager that there are many instances, by no means all because there are advisory committees that are useful and good, where a Cabinet officer or an agency head would be well advised not to have an advisory committee because the advisory committee never fits the particular problem you get.

Now if they get a problem, a task to be done, and you want to appoint a group of people for a period of time and have meetings with them, fine; and the act should be applicable and is applicable to that. If you have that kind of an ad hoc committee, as I understand it, the act is to be followed in those cases.

But to have permanent advisory committees, a committee for all seasons, so to speak, the problems in the department very often don't fit that arrangement.

Senator METCALF. Maybe we should have an advisory committee to advise us whether or not not we should continue to have advisory committees.

Senator Brock?

Senator BROCK. No questions.

Senator METCALF. Senator Brock, as you know, has some legislation and has had a continued interest in this area, too.

Mr. Lynn, I agree that Congress just automatically creates a whole lot of these advisory committees, or authorizes them. You say we authorize it and immediately a whole lot of people come in and say, "We want to be on that advisory committee."

We don't have to create advisory committees, do we?

Mr. LYNN. No, sir.

Senator METCALF. If you want to have an advisory committee to carry out some of the provisions of the act, for instance, Mr. Butz wanted an advisory committee on a policy of setting the prices of wheat or beef prices or something, he could create that, couldn't he, without special statutory authority?

Mr. LYNN. I can't think of any case where that wouldn't be true, Mr. Chairman. There may be some, but I sure can't think of them.

Senator METCALF. I don't know, maybe we should adopt a policy of just not having any of that boilerplate language to create advisory committees. Let you create the ad hoc ones downtown. Then one could come up and say, "Look, explain why those committees were created," rather than saying, "Congress authorized them and all we did was follow through."

Mr. LYNN. As I say, I think there are some that, as standing basis, do make some sense. I will say that I detected among the Cabinet members, at least as I talked to them on this issue—and I have checked about six things that I usually raise whenever I am with one of them on a one-on-one situation in a conference or airplane, and this is one of the things—I detect they are becoming more sensitive to this, if only because they know now every year they have to report to us.

They look at the justifications as they are stated. After all, it has only been 2 years that we have really had this in effect. I have seen sometimes that they go back to their groups and say, "Look, I will sign it this year, but over the course of the next 3 to 4 months I want to know the reason why it is going to continue."

As I say, I think we are going to see some improvement—even beyond what we have had. We have made some progress and I give this committee a lot of credit for that. But I think we are going to see more.

Senator METCALF. Thank you very much for your appearance. I know that I don't have to emphasize that your staff, your excellent staff, will continue to work with ours in trying to at least do a little bit in this area of eliminating some of the proliferation of people and paperwork in Government.

Mr. LYNN. Thank you very much, Mr. Chairman. It has been a pleasure to be here.

[The prepared statement of Mr. Lynn follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FOR RELEASE ON DELIVERY
Expected at 10:00 a.m.
Monday, March 8, 1976

STATEMENT OF JAMES T. LYNN
DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE SUBCOMMITTEE ON REPORTS, ACCOUNTING, AND MANAGEMENT
OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to offer testimony on the Federal Advisory Committee Act Amendments of 1976 (S.2947). While the amendments reflect areas of mutual concern in the management of advisory committees, I believe the spirit in which they were offered, and the hearings begun today, will point the way to the most effective resolution of those concerns: mutual discussion, agreement on means and objectives, and cooperative efforts to accomplish those objectives.

A great deal has been accomplished since OMB last testified before this subcommittee on the subject of advisory committees. Your subcommittee, and its staff, have been very helpful at all stages in improving the effectiveness of the implementation of the Act. Within OMB, we have increased the staff of the Committee Management Secretariat (CMS) from one professional position, to five; and procedures have been established and are being utilized so that each agency proposal to establish or renew an advisory committee, and the annual reviews of committees, are reviewed by both CMS and the program and budget

divisions. Administrative guidelines and procedures have been issued to the agencies and departments, and seminars held with agency Committee Management Officers and staff. We -- as well as this subcommittee -- have monitored the compliance with such requirements as those for publishing timely notice of meetings in the Federal Register (and the percent of notices in violation of such requirements has fallen from 47% in July 1974 to 3% in December 1975). The Annual Report of the President on Federal Advisory Committees, prepared by the General Services Administration, has been made more complete and accurate, and the back-up data has been made more widely available to the public and other interested persons at a reasonable cost, on microfilm. And the more than 60 departments and agencies which are the major users of advisory committes have become more aware of, and responsive to, the requirements and intent of the Advisory Committee Act.

I am not satisfied, however. As you may know, I am personally concerned about the number of advisory committees: I am not convinced that advisory committees are always the most effective means of obtaining expert advice, ideas, and diverse opinions for the Federal Government; and I am not convinced that we really need 1,267* committees. The automatic response to every problem should not be "let's form a committee." Other alternatives should be considered, such as greater use of "in-house" capability, public hearings, solicitation of comments from the public, use of contracts and experts and consultants.

*Data from President's Annual Report, to be released March 31, 1976.

We believe our reviews, and those of the agencies, have helped hold down the total number of committees. The fact that more than 500 committees have been merged, terminated, or allowed to expire in the last two years indicates that committees are being evaluated and terminated when no longer necessary.

While the Act is having a substantial impact, committees were created faster than they were terminated during 1975. As you have pointed out, Mr. Chairman, that is a problem of both the executive and legislative branches. Your listing of 750 bills affecting advisory committees introduced before the last August recess is one measure of the problem. If we are to substantially reduce the number of committees, the agencies, OMB, and the Congress must all work at it.

I would like to indicate where we plan to go from here. Now that OMB and the departments and agencies have passed through a period of education on the requirements of the Act, and have developed procedures for meeting those requirements, we can turn to a more systematic review of advisory committee management activities. For example, the annual reviews of advisory committees, now being conducted by the agencies for submission to OMB by April 1, will provide qualitiative assessments and recommendations for further terminations of unnecessary and marginal committees. We are also planning -- based on the experience gained under the Act, and on discussions such as this hearing -- to revise and update the guidelines and directives for advisory committee management. We believe that these actions can have a substantial impact on the concerns we all share.

I think it fair to say, Mr. Chairman, that we are in general agreement on the intent of the Advisory Committee Act, and understand the concerns that are reflected in the proposed amendments. However, I am not convinced that it is necessary to amend the Act now in order to address many of those concerns, for a number of reasons. Most importantly, I believe that there is sufficient authority in the Act, and its assignment of responsibilities, to deal with many of the problems through new or revised guidelines, and through improved oversight. Practically, I think we should be very aware of the difficulties of imposing provisions aimed at a limited number of committees, but which must be applied -- inflexibly -- to all of the more than 1,200 committees with widely differing compositions and substantive areas.

I also see a real possibility that the cost of the administrative burdens imposed may outweigh the anticipated benefits. Finally, we believe that to the maximum extent possible, operating responsibilities and decisionmaking should be delegated to the heads of the various agencies, mandating those agencies to carry out the policies established by the President, and using the Executive Office of the President in a policy-setting and oversight role. I am seriously concerned about the degree of centralization of authority and responsibility implicit in some of the proposed amendments.

Let me discuss the amendments in general groupings:

1. Expansion of coverage of the Federal Advisory Committee Act. It may be that the U.S. Postal Service, the Federal Reserve System, and the National Railroad Passenger Corporation should be included under the Act. However, we want to pursue the views of those organizations, as well as the views of the Committees of Congress having general oversight, before deciding on this.

We do not believe, however, that the executive branch can or should exercise responsibility over entities advisory to the legislative branch. Whether or not the Congress wishes to establish within the legislative branch additional means of oversight of such groups is, of course, a matter for the Congress to determine.

The issue of ad hoc groups has been troublesome since the inception of the Act. They are now covered, however, and I anticipate that many questions can be resolved by clearer definitions (one objective of revising the present directives) of "ad hoc," "advisory," "operational," "administrative," and "executive." The latter three functions are not advisory, and what is appropriate for advisory committee management may not be appropriate for such bodies. FACA cannot cover all fronts without diluting its central purpose.

2. Increased reporting requirements. S.2947, and S.3013 proposed by Senator Percy, would add significantly to the present reporting and paperwork requirements of the Federal Advisory Committee Act. For example, indexed lists of committee members were prepared -- through your subcommittee's efforts -- for members reported in the Annual

Reports for 1972 and 1974. The last listing and index filled more than 1,400 pages. The amendments would require that such lists be kept current with respect to all past and present members, indexed, and made a part of the annual report by the Committee Management Secretariat. The proposed requirements for constantly updated membership information and its inclusion in the Annual Report, vastly increases the workload and costs, without, in our judgement, a comparable increase in the usefulness of the data.

The amendments also call for:

-- an annual report to the Congress by the President of the names and affiliations of all experts and consultants. No such listing now exists, and it is estimated that there are more than 15,000 persons in those categories;

-- an annual report by the Attorney General on cases arising out of the proposed procedures concerning closed meetings;

-- extending the requirement for one follow-up report within a year after a Presidential advisory committee makes recommendations, to reports until all the recommendations have been carried out to the extent practicable within the President's authority;

-- including in the Annual Report the source and amount of any non-appropriated funds (which would affect perhaps two dozen committees) or "anything of value" received (which might include the value of every member of an advisory committee who is not paid or reimbursed for travel and expenses);

-- a tabulation in the Annual Report of the number of recommendations made, adopted, rejected, and pending, for each committee.

As an agency head, as the recipient of a number of specific responsibilities under the Federal Advisory Committee Act, and as a member of the Federal Paperwork Commission, I am troubled by this apparent emphasis on the gathering and reporting of quantitative information, without full consideration of whether the possible improvements in committee management sought by these amendments are outweighed by the administrative burden and costs such additional requirements impose.

3. Closed meetings of advisory committees. This is another areas in which we have more quantitative information than qualitative. For example, in 1975 nearly half of all meetings were closed or partly closed. In January, 24 agencies announced a total of 156 meetings, all open; 13 other agencies and departments announced 148 meetings of which 81 were to be closed or partly closed (23 on the basis of national defense or foreign policy). Again, this appears to be an area where specific problems can be addressed by administrative action without imposing inflexible and hard-to-administer legislative requirements across the board.

The amendments would require that if the initial decision to close a meeting was made by someone to whom that authority was delegated, that there be a procedure for an appeal to the agency head or the President, as appropriate, and a decision on that appeal within

forty-eight hours. A meeting would be delayed if a decision had not been made. We agree that the approach of having an internal appeal procedure could cut down on unnecessary litigation and result in more considered decisions. However, we believe that a change in the guidelines may be a more appropriate mechanism for establishing it. Agencies, of course, currently have the authority to establish internal appeal procedures for determinations on closed meetings. Similar procedures have been used in both the Freedom on Information Act and in the Privacy Act of 1974. We do not believe that an appeal should be required to be determined within forty-eight hours or that a meeting, possibly scheduled thirty days in advance, be postponed to accommodate an appeal on the thirtieth day.

The amendments would also eliminate use of one of the Freedom of Information Act exemptions incorporated into this Act as a basis for closing the meetings of advisory committees. Under this exemption, a meeting may be closed if it would disclose "interagency 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." We oppose the elimination of this exemption. Although this exemption may be the most troublesome of the nine used as a basis for closing advisory committee meetings, the solution, in my opinion, is not simply the deletion of the exemption. There are many examples of legitimate situations currently protected by this exemption. While at first glance it may appear that this exemption could indeed "swallow" the

purposes of the Act, such has not been the case either in its application or in the courts. The fact that eighty percent of all advisory committee meetings for calendar year 1975 were open to the public, or partially open, is ample evidence that this exemption has not swallowed the Act. Furthermore, while there are some differences of opinion in the courts as to the applicability of this exemption, we expect that these proceedings will result in a useful and understandable exemption.

4. Administrative role of the Office of Management and Budget. As I indicated earlier, and as you know Mr. Chairman, we have carried out our responsibilities under the Act in part by placing maximum responsibility on the heads of the various agencies and departments, and using OMB in a policy-making and oversight role. We continue to believe that this is the proper approach. Change in that approach is implicit in the proposed amendments.

I am strongly opposed to any major expansion of OMB's role. Most advisory committees are formed to provide advice or recommendations to agency heads or their delegates. Those officials, in most cases, are appointed by the President, and confirmed by the Senate, as are their legal counsel. I believe that primary responsibility for managing an advisory committee -- determining whether it should be established or continued, deciding on the scope of its functions, ensuring that it complies with both the letter and intent of the Federal Advisory Committee Act -- must rest with the official utilizing the committee.

In summary, significant progress has been made toward achieving the objectives of the Federal Advisory Committee Act. Working together, the Congress (especially this subcommittee) and the executive branch have established a system of advisory committee management. We can now focus on improving the administration of that system, and thereby achieving further progress within the present legislative framework. In short, we have not reached the limits of the Act. In my opinion, amending the Act now would be more disruptive, and less productive than a continued, cooperative effort to make the system work.

Mr. Chairman, as requested in your letter of invitation, I am attaching to this statement a brief discussion of the procedures used for selecting members of advisory committees utilized by OMB. I will be glad to discuss these further, if you wish.

Mr. Chairman, this concludes my prepared statement.

ATTACHMENT

MEMBERSHIP OF OMB ADVISORY COMMITTEES

March 8, 1976

The Office of Management and Budget utilizes six groups to provide advice and recommendations, on a range of subjects, to the Statistical Policy Division, Management and Operations. We are now reviewing these groups, as a part of the annual comprehensive review, to determine whether they should be continued, revised, merged, or terminated. This review should be completed by April 1, 1976. The members of the groups have been selected in two different ways, reflecting the differences in the groups (and their functions) themselves:

1. The membership of three committees (Advisory Committee on Gross National Product (GNP) Data Improvement, Advisory Committee on the Balance of Payments Statistics Presentation, and the Advisory Committee on Social Indicators) is wholly determined by OMB. After surveying the scope and objectives of a particular committee, staff identify persons with the needed expertise, and contact them to determine if they are interested in, and available to serve on, the committee. A list of the available candidates is given to the responsible Deputy Associate Director, who makes final recommendations to the Director. The Director, OMB, makes the final appointments.

2. Three committees are representative of non-Federal groups which are utilized to provide advice and recommendations to OMB (American Statistical Association (ASA) Advisory Committee on Statistical Policy, Labor Advisory Committee on Statistics, and the Business Advisory Council on Federal Reports). The Labor Advisory Committee represents organized labor, and each of the major unions designates its representative (usually the research director) on the Committee. The ASA Advisory Committee on Statistical Policy's members are selected in the following manner: the Executive Director and Board members of ASA nominate prospective members, the Deputy Associate Director for Statistical Policy reviews the nominations in consultation with the Executive Director and Board members, and makes recommendations to the Director, OMB, who makes the final appointments. Membership on the Business Advisory Council on Federal Reports is determined by its constitution and by-laws: each of the six sponsoring organizations (American Retail Federation, American Society of Association Executives, Chamber of Commerce of the U.S., Financial Executives Institute, National Association of Manufacturers, and the National Small Business Association) names three members; eight members-at-large are selected by a Membership Committee of the BACFR (which includes both sponsoring organization and at-large members); and finally,

there are three past chairmen active in BACFR, who are not considered to represent either sponsoring organization or at-large categories. OMB does not select the members of this utilized advisory group.

We believe that the membership of OMB's advisory committees meets the requirements of the Federal Advisory Committee Act. However, this is a factor that is being considered in the annual comprehensive review, and if our current review indicates that changes are indicated, we will take appropriate action.

Senator METCALF. We are honored to have as our next witness the Honorable Mary C. Lawton, Deputy Assistant Attorney General of the Office of Legal Counsel of the Department of Justice.

We are glad to have you before the committee again. We enjoyed your testimony in the past. We are glad to have you with us.

TESTIMONY OF MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY DAVID MARBLESTONE, ATTORNEY, OFFICE OF LEGAL COUNSEL; AND JOHN FITCH, ATTORNEY, OFFICE OF LEGISLATIVE AFFAIRS

Ms. LAWTON. Thank you, Senator.

Mr. Chairman and members of the committee, given the hour and the highly technical nature of our testimony, I would propose not to go through all of the details, but to submit the statement for the record.

Senator METCALF. Fine. The complete statement will be incorporated in the record at the conclusion of your testimony.

You have commented on special bills that are before this committee as far as the Department of Justice is concerned. So I appreciate that you are going to highlight your statement.

Ms. LAWTON. Thank you, Senator. As the committee requested, a description of the methods of selection of Department of Justice advisory committees is attached to my prepared statement.

May I first introduce David Marblestone of our staff who has worked with this committee for some time; and John Fitch of the Office of Legislative Affairs.

One of the points made in the testimony, Senator, is one that was alluded to earlier here today, and that is the problem of separation of powers when committees advising the Congress and advising the legislative branch entities are incorporated into the present structure of the Federal Advisory Committee Act.

The problem arises primarily because of the oversight functions which the act places in OMB and the new provision that would put disciplinary responsibility in the Civil Service Commission.

We think it raises serious separation of powers problems if the Civil Service Commission is to exercise disciplinary responsibility over individuals who are advising the Congress or advising entities of the Congress.

Indeed, we question whether the scope of Civil Service Commission jurisdiction would reach such individuals since, by definition in the Advisory Committee Act, they are not Government employees.

Those are two of the problems we have with the amendments in their present form. It seems to us that if entities advising the legislative branch are to be incorporated into the concept of the Advisory Committee Act, it might best be done by a parallel piece of legislation that would resolve these separation of powers problems; picking up the concept of openness and the concept of reporting, but nevertheless not encompassing executive branch oversight of legislative branch business.

Senator METCALF. Let me comment on that. I know you make some lists. You say well, these are the problems, and send them

over to the legislative counsel. A bill comes back and it is introduced and we have hearings. The whole purpose of the hearings is to probe that legislation.

I think you have raised a question that disturbs me. I think that it is disturbing enough that it would seem there would be no point in jeopardizing some of the provisions of the legislation by including that.

I would just suggest that we have a mutual agreement right now that that issue would not be taken up, because I think there are much more important things involved in some of the legislation than that.

Ms. LAWTON. We noticed, Senator, that at the outset when introducing this bill you referred to it as a discussion draft. It was in response to that really that we addressed so many of the technical points.

We have no policy problem with the concept of the Advisory Committee Act or with your identification of some of the ways that the bill addresses them. But obviously you do as well. So we hope to be of some help in suggesting alternative ways to reach the same end.

Senator METCALF. There is some talk about sanctions and so forth and discipline. I think the problems of open meetings and standing to sue and things are much more deep-seated than these problems that do relate to separation of powers.

I am glad you pointed them out. I just think that we will just have an agreement that we will eliminate that from the legislation.

Ms. LAWTON. One of the other problem areas, as you note, in the legislation is this whole question of the appropriate exemptions for closing portions of advisory committee meetings.

I think perhaps the problem stems in part from the use of the cross-reference device to describe the standards for closing the meetings rather than addressing the underlying issues that are appropriate with regard to advisory committees, as distinguished from Federal agencies acting under the Freedom of Information Act.

One of our suggestions is that perhaps the committee might wish to consider recasting the exemptions in the Advisory Committee Act in a form tailor-made to advisory committees—that is, specifying the areas that ought not to be addressed in closed meetings and those which should be properly closed, and laying those out in the act itself rather than attempting to incorporate by reference——

Senator METCALF. In the Freedom of Information Act.

Ms. LAWTON [continuing]. In the Freedom of Information Act.

That presents problems because these are difficult issues, of course. There is a body of case law under the Freedom of Information Act that might be lost in the process. Still, it seems to us that a legislative examination of each and every one of those grounds for exemption might be helpful at this time because advisory committees are different from Federal agencies.

Senator METCALF. We thought about that. The subcommittee discussed that very problem. The subcommittee came to the conclusion that the Freedom of Information Act, which did have some case law, as you suggested, and did have some precedents, would be better to be incorporated by reference.

We have a few cases that have arisen under the Advisory Committee Act that perhaps we should relook at, because as you say, advisory committees are different from some of the other Federal agencies.

But don't you think it is a grave question that more than half of the advisory committees have been closed here, when we are able to legislate with only one executive session of the Senate in the whole 2 years, and more than 90 percent of our committee meetings, both markup and hearings, are open?

Ms. LAWTON. The statistics definitely do not look good. I don't have sufficient familiarity with the wealth of advisory committees to make any individual judgments. We don't have very many in the Department of Justice. We don't have very many closed meetings.

It is hard for me to assess what some of these other committees in other agencies, with which I am not familiar, might use as a basis for justification.

But I would agree with you that the figures on their face raise a question as to whether closing was necessary in all of those instances.

Senator METCALF. So nearly half, 48 percent were closed and 52 percent were open. I just think that the business of government involves so many things that it is very questionable to me whether or not the statute that permits closure of that many of the committees should not be amended or should be enforced in some different direction.

Ms. LAWTON. Yes. I agree that we have an obvious problem on the surface of those statistics. I can think of types of committees where it might be entirely appropriate to have a high percentage of closed meetings because they were perhaps valuating grant applications by individuals who provide a curriculum vitae that may raise privacy implications.

But there are some other instances where I would have some questions. The only committee that I have direct familiarity with serving our Department, to my knowledge, has never closed a meeting. When the question has been raised, the response of the Federal representative has been: "Technically we might close the action, but why should we? What harm does it do to leave it open?

It seems to me that that ought to be the question that all advisory committees ask themselves: What harm is there in staying open?

I don't propose to go into any more of the specific provisions, Senator.

Senator METCALF. I want to talk with you a little bit about standing to sue. Some of the case law that has been developed has been developed because a consumer agency, or environmental group, or labor union, or somebody such as that has gone into court and said: "Well, we want to attend a meeting. It is closed. We don't think there is justification for closure."

They have standing to do that, go into court. It seems to me that has to be contained. We don't just want to have somebody coming off the street and say: "I am going to file a lawsuit against a committee."

But we have to have broader standing to sue, I think, than the Department of Justice recommends. Would you tell us just where you think we should draw the line on the ability of an organization or a group of people, whether we should just say Ralph Nader and Common Cause have a standing to sue, or who can bring these questions up?

Ms. LAWTON. Two of the suggestions in our testimony, Senator, attempt to address that. One is the concept that the Administrative Procedure Act now uses of party aggrieved, which is admittedly not a precise concept. The other suggestion that we make deals with the question of an individual who has first, if you will, exhausted administrative remedies—that is, a person who has requested participation, questioned the closing of a meeting, and has been denied, and who then would have standing to sue.

Senator METCALF. I tried to get involved in a suit because I was interested in oil policy, and I am over there on the Interior Committee and working with energy, and on the Special Committee on Energy, and so forth, and tried to go in and challenge the composition of the National Petroleum Council.

At least preliminarily they say: "The United States Senator hasn't any standing to sue."

How can I get my legislative standing for a Member of Congress who is concerned and who is interested and who is working in that area? Do we have to amend the statute?

Ms. LAWTON. You have, of course, filed an appeal, Senator. I propose we wait to see what the court of appeals says.

Senator METCALF. I think we are going to appeal.

Ms. LAWTON. You have me in an awkward position. It is a pending suit. We are both involved.

On pages 11 and 12 of our testimony, we discuss the question of standing. As I said, we suggest the two alternatives that standing be limited to a person who had filed a complaint about the closing of a meeting and was turned down and then has standing to sue, or that there be use of the Administrative Procedure Act concept of party aggrieved.

We have no objection to the inclusion of a judicial review provision as such in the legislation. Given the amount of litigation without one, I could argue that perhaps it is not necessary at this stage.

But still I think it would clarify the existing law. And those are two proposals we make on the question of standing.

One of our concerns, not just with this legislation but with many proposals, is the combination of standing and venue throughout the United States. We worry about constant suits in different districts challenging a single action, because venue is very broad now under the general Federal statute and the possibility of conflicting decisions concerning, perhaps, in this context, the same meeting.

What do we do if one district court says it is fine to go ahead with the closed meeting and the other one says no, it is not fine to go ahead. This could result when different plaintiffs in different districts have filed suits concerning the same meeting.

Senator METCALF. It happens to us all the time.

Ms. LAWTON. Of course it does. But we would rather not encourage it.

Senator METCALF. I am not going to get involved with you today in another proposition that I felt was so important out in the State, such as the State of Montana, that we should have a right to go into our own district court rather than having to come back here and fight our suits in the busiest court, the District of Columbia court. We should be able to go down to the ninth circuit rather than the district court of appeals.

But there is some merit in the contention. There should be one special science for filing such a claim since they are national in scope and somebody from San Francisco could file one kind of a suit and that district could would give a decision that would be different than the one in Alabama, for instance.

Ms. LAWTON. There are, of course, mechanisms in the Federal Rules for deferral and so forth.

Senator METCALF. Sure there are.

Ms. LAWTON. The problem is where the suits are filed seeking a temporary restraining order, and it may be handled by a U.S. attorney here and another one there. Because such suits move so rapidly, the court order may be out before we have any information on it or the fact there are three or four suits relating to the same issue.

It is not something that can be eliminated entirely, of course. Concepts such as standing help to some extent in reducing the problem.

Senator METCALF. Senator Brock?

Senator BROCK. No, I just was sitting here musing, Mr. Chairman. I would like to resolve this thing because I am so tired of the paranoia in this country. I think it is time we open the process and let the people in this country know things are not so bad.

I am not going to argue the question of standing. That is for you lawyers. I don't have any expertise on that.

Senator METCALF. The question of standing has come up, and I think Miss Lawton would agree, some of the most useful explanations of the act have arisen because people or organizations that feel their rights have been infringed upon have come in, and we have had some good definitions of what some of the broad language means. That is how in our legal process we do process a whole system of laws that we just can't run into statutes.

Senator BROCK. I think if we can open up committees, and I think you and I both would like to do that, or advisory groups, we would solve a whole lot of these problems before we even had to go to court. That is the way to do it.

I am tired of people suing each other. I am tired of some businessmen looking under every bed for an environmentalist and vice versa.

Senator METCALF. It depends upon the environmentalist who is in the bedroom. I am in complete accord. I think that the most serious proposition here is that half of these meetings are closed.

It seems to me we have two things. If we have broad representation and we have open meetings, our other problems are just automatically taken care of. If a whole lot of these people that are on advisory committees are inhibited in participating in open meetings, maybe that is one way to get rid of some of these advisory committees.

It would seem to me that we in the Congress would welcome assistance of the Department of Justice in opening up the meetings and insuring that the very general language that we have to make about broad representation is enforced.

Ms. LAWTON. Of course, it is likewise to our advantage, as you noted, Senator, because if advisory committees don't close meetings, we don't have litigation problems.

Senator METCALF. That is right.

Ms. LAWTON. So it is definitely to our advantage.

Senator METCALF. Of course, the best answer Senator Brock and I could give is to not have any advisory committees at all. Then they don't have to have any meetings.

Senator BROCK. That is the ultimate dream, Mr. Chairman.

Senator METCALF. Of course, they are useful. They have grown so much because there was a great use for advisory committees. They were created, and then all at once, as I said, we just automatically write them into every statute we create, and every new Cabinet officer says, "Well, I will get myself a couple of advisory committees around," and all at once we have them proliferating all over the place.

Ms. LAWTON. Fortunately for the Department of Justice, most of our legislation does not call for advisory committees. There are a few in the LEAA statutes. Otherwise we don't have statutory committees. We haven't created very many on our own.

One that is currently operating is on false identification. It is a single study project. I would not assume that it would stay in existence beyond the completion of the study. So, we as an agency don't have a proliferation of these.

As the attorneys for agencies who do, we of course are very much aware of the problem.

Senator BROCK. I do not want to extend the hearing with further discussion over the proliferation of committees. Regretable though it may be, politicians have a predisposition to establish any committees to appoint their contributors to. That is part of the problem, too.

Senator METCALF. Just like the postmasters, you know. They have 10 applicants and 1 ingrate and 9 enemies.

Thank you very much for coming up. Thank you for the technical and special suggestions. As you understand, and it has been said before here today, this is only exploratory legislation. Perhaps much of the material can be developed by discussion and executive directives and so forth. Any legislation has to have the probing that you have given us.

Ms. LAWTON. We will be heppy to work with the committee. Thank you.

[The prepared statement of Ms. Lawton follows:]

[Prepared Statement of Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel]

Mr. Chairman and Members of the Subcommittee:

I am pleased to present the views of the Department of Justice regarding amendment of the Federal Advisory Committee Act.

Mr. Chairman, when you introduced S. 2947 on February 6, you stated that it was offered "in the spirit of a discussion draft." In our view, the present bill addresses most of the main problems raised by the Federal Advisory Committee Act. However, we are unable to support many of the bill's key provisions. I will discuss the reasons for our opposition and, in addition, will suggest alternative approaches. A number of the provisions of S. 2947 and of Senator Percy's bill, S. 3013, prescribe reporting or other requirements which would entail substantial administrative burdens. In general, problems of that type will not be dealt with in my statement, because, with regard to them, we defer to OMB and other agencies more directly involved.

A. The Act's Coverage

S. 2947 would amend the Act's provisions regarding coverage in several significant ways.

1. At present, the Act applies to groups which provide "advice or recommendations" to the President or

executive or independent agencies.[1/] Section 2 of the bill would extend the Act's coverage to any group, not composed wholly of full-time officers or employees of the Federal Government, which:

> provides advice or information to or is utilized by the United States Postal Service, the General Accounting Office, the Library of Congress, the Office of Technology Assessment, the Government Printing Office, the Congressional Budget Office, the Architect of the Capitol, or the National Railroad Passenger Corporation.

It would also cover any other such group which "provides information to or advises the Congress."

One difference between the above provisions and the present definition of "advisory committee," § 3(2) of the Act, is that the latter does not encompass groups whose sole function is to provide information.

Our main difficulty with the proposed extension of coverage is the separation-of-powers problems which would result from covering advisory committees of Congress and arms of Congress, such as the Congressional

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1/ We have interpreted the Act as applying to committees which advise both Congress and the President.

Budget Office and the GAO. The Act assigns various regulatory functions to the President or to OMB. In our view, it would not be appropriate to make legislative branch advisory committees subject to regulation by the executive. If there is a need to regulate the creation and operation of legislative branch advisory committees, we suggest that it be accomplished by means other than amending the Federal Advisory Committee Act, for example, by enactment of a separate statute.

2. S. 2947 would also bring under the Act advisory committees of the Postal Service, the Federal Reserve System and the National Railroad Passenger Corporation. With regard to the desirability of such coverage, we defer to the affected agencies.

3. Section 2 of the bill would add to the definition of "advisory committee" an express reference to "any ad hoc groups." We have interpreted the existing Act as applying to ad hoc, as well as continuing, advisory committees. See § 6(c) of the Act.

The question here is the meaning of "ad hoc group." One possible interpretation, though not the one we have followed, is that the term includes a one-time, informal meeting between a Federal official and a group composed of private persons. If this is the intent of the amendment, we object to it.

Such informal meetings do not involve a "committee or similar group" in the ordinary sense of those words. It is not uncommon for a Federal agency to convene, on a one-time basis, an informal meeting for the purpose of obtaining the individual views of knowledgeable persons. To make that kind of meeting subject to the Act's requirements of chartering and so forth would probably make them unfeasible. Due to the ephemeral nature of such groups, bringing them under the Act would serve little purpose.

4. In this regard, it might be beneficial for agencies and the public if, through amendment of the Act or legislative history, the meaning of "committee" were clarified. We have continued to follow standards similar to those set forth in the original OMB-Justice guidelines.[2/] Another matter which might be darified is the

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2/ Under our interpretation of the Act, in general, for a group to come within the coverage of the Act, it must have all or most of the following characteristics:

(1) fixed membership (including at least one person who is not a full-time Federal officer or employee),

(2) a defined purpose of providing advice to a Federal official or agency regarding a particular subject or subjects,

(3) regular or periodic meetings,

(4) an organizational structure (e.g., officers) and a staff.

meaning of "utilized." On June 29, 1973, then Assistant Attorney General Robert G. Dixon sent you copies of various letters and memorandums, prepared in our office, regarding the Act, including a memorandum setting forth our views on the coverage of "utilized" advisory committees.

5. One element of the Act's definition of "advisory committee" is a list of types of groups ("committee, board, commission . . . [etc.]"). Section 2 of S. 2947 would add to this list the following:

> . . . any group which has any responsibilities of an administrative, executive, or operational nature within an agency other than providing advice and information.

The purpose of this amendment is not clear. Would it mean, for example, that any operational group (whose membership includes at least one person who is not a full-time Federal employee) which provides any advice to a Federal agency would be subject to the Act? If so, would all of the group's activities be covered or only its advisory activities?

On the basis of the Act's legislative history and § 9(b), we have taken the position that, generally speaking, operational bodies (bodies which make or implement decisions) are not subject to the Act. Under our inter-

pretation, where a group provides some advice to an agency, but the advisory function is incidental to and inseparable from non-advisory functions, the Act does not apply. If the amendment is intended to change the Act in this respect, we suggest that the matter be dealt with more clearly. Moreover, we question the desirability of such an extension.

The phrase "responsibilities of an administrative, executive or operational nature" appears in section 6 of the bill; that provision also seems unclear.

B. Closing Advisory Committee Meetings

1. One of the most difficult issues presented by the Act is the use of Exemption (5) of the Freedom of Information Act, 5 U.S.C. 552(b)(5), the exemption for "inter-agency and intra-agency memorandums or letters . . .," as the basis for closing a meeting of an advisory committee. This matter has resulted in several lawsuits and one of them, Aviation Consumer Action Project v. Washburn, is now before the U.S. Court of Appeals for the District of Columbia Circuit.

Section 9 of S. 2947, which amends section 10(d) of the Act, would eliminate Exemption (5) as a possible basis for closing an advisory committee meeting. We oppose this amendment.

From the outset, we have rejected the view that Exemption (5) could be used to close virtually any advisory committee meeting. On the other hand, given the language of section 10(d) of the Act and pertinent decisions of courts of appeals, we have not accepted, as a proper general rule, the view that Exemption (5) can never be used as the basis for closing a meeting. Our basic position has been that that exemption can be used, but only in carefully limited circumstances.

Of course, the present issue is whether section 10(d) should be amended by eliminating Exemption (5). Our opposition to this amendment rests upon the fact that there are circumstances in which there are compelling reasons for closing all or part of an advisory committee meeting, but in which the only applicable exemption is Exemption (5). Examples are as follows:

(a) a meeting or portion consisting of an exchange of opinions concerning positions which may or should be taken by the Government with respect to negotiations with other countries;

(b) a meeting or portion consisting of evaluation of the qualifications or competence of persons or institutions applying for Federal grants;

(c) a meeting or portion regarding possible regulatory action where premature disclosure could have substantial effects upon a particular company or industry, or upon the effectiveness of whatever regulatory action may be taken;

(d) a meeting or portion devoted to final preparation of a report which (when written) will be exempt from disclosure.

We suggest that alternatives to total elimination of Exemption (5) be considered. One possibility would be to set forth in the statute special restrictions upon the use of Exemption (5). Another approach would be complete revision of section 10(d). That is, instead of relying upon the exemptions of the Freedom of Information Act, the Advisory Committee Act might set forth the types of subjects which would warrant closing all or part of a meeting.

Let me point out that eliminating Exemption (5) as the basis for closing meetings would have effects upon implementation of the Freedom of Information Act. Courts have held that certain documents prepared by advisory committees come within Exemption (5). E.g., Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C.Cir., 1974), cert. denied, 421 U.S. 964 (1975). Exemption of a document would have little meaning if the public had a right to attend the meeting at which the document was prepared

2. Section 9 of the bill would add a requirement that a recording be made of every closed meeting of an advisory committee and that such recordings be deposited with the Library of Congress.

If such requirements are to be imposed, the bill should set forth limits on access to recordings that are held by the Library of Congress. Otherwise, substantial legal issues, including separation-of-powers issues, would be raised. It should be remembered that a closed meeting may be an integral part of the decision-making process of the executive branch.

Also, the requirement that recordings be made would result in substantial cost. Regarding the question whether such cost can be justified, we defer to the views of OMB and other agencies.

3. Section 9 of the bill would add a requirement that any determination to close a meeting be published in the Federal Register, at least 30 days before the meeting. The current OMB circular regarding advisory committees provides that an advisory committee which seeks to have a meeting closed must provide written notice to the agency head at least 30 days in advance. However, there is no requirement that the agency head's determination to close a meeting be made 30 days in advance or that the determination as such be published in the Federal Register.

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It might be desirable for the bill to provide that, in appropriate cases, e.g., in emergency situations, the requirement of 30-days advance publication may be modified.

C. Review of Closed Meetings

1. Section 9 of S. 2947 would add the following provision to section 10(d) of the Act:

> (3) Any such determination [to close a meeting] made by a delegate of the President or a delegate of the agency head shall be reviewed by the President or the agency head as the case may be, upon application of any person, not later than forty-eight hours after such application is received. If any such application for review is received later than forty-eight hours before any such meeting, such meeting shall be delayed to permit the review and determination by the President or the agency head and notification of the person applying for such review. * * *

We assume that this provision does not mandate review by the agency head or the President himself. Presumably, the review function could be delegated, so long as the delegate is a superior of the official who made the closed-meeting determination.

As it now stands, this provision of the bill would be unworkable. A blanket requirement that review be accomplished within 48 hours is not realistic; merely obtaining necessary information could require more time than that.

We see no justification for a requirement that a meeting be delayed whenever a request for review is received within 48 hours of the date of the meeting. This would work unnecessary hardship upon agency personnel and advisory committee members. If notice of the determination to close a meeting is published in the Federal Register 30 days in advance, requests for review should be filed as promptly as possible after that notice. The question of delaying a meeting should be within the discretion of the agency head, subject to possible judicial review.

2. The matter of judicial review of determinations to close meetings is also dealt with in § 9 of the bill.

Despite the fact that the Act contains no provision authorizing judicial review and that such a provision was deleted in 1972 by the conference committee, the district courts have exercised jurisdiction over cases challenging the closing of advisory committee meetings. We do not object to adding to the Act an appropriate provision authorizing such review. However, the judicial-review

provisions of the present bill are deficient in several respects.

First, the matter of standing is not addressed. Standing should be limited to persons who had filed an administrative complaint or at least to persons aggrieved by the determination in question.

Second, under the bill, the Government would have ten days in which to file its answer, unless the court granted an extension "for good cause." Ordinarily, the Government has 60 days in which to respond to a complaint; even under the Freedom of Information Act, the time is 30 days (subject to extension for good cause). The ten-day limit would, in most cases, put an unreasonable burden upon the Department of Justice and defendant agencies and would also burden the courts with requests for extensions.

Under Rule 65 of the Federal Rules of Civil Procedure, a party who makes a proper showing may obtain a temporary restraining order or a preliminary injunction. If judicial review of determinations to close advisory committee meetings is to be authorized, these provisions for extraordinary relief would be available. Of course, the various prerequisites, e.g., a showing of irreparable injury, would have to be met. My point is that the problem of pre-meeting relief can be dealt with on the basis of existing procedures, procedures which do not depend

upon the filing of the Government's response to the complaint.

Third, the bill sets forth provisions concerning attorney fees, disciplining agency employees and contempt of court that are similar or identical to provisions of the Freedom of Information Act as amended in 1974. We question the need or the appropriateness for many of these provisions.

For example, the Federal courts have inherent authority to punish contumacious conduct. There is no need for the statute to deal with this matter.

In our view, the fact that the Freedom of Information Act now contains provisions concerning possible disciplinary action is not a reason to add such language to the Advisory Committee Act. We are not aware of facts which show the need for inclusion here. In particular, it would not seem appropriate to have the Civil Service Commission investigate the conduct of advisory committee members who are not Federal employees or, indeed, who are members of advisory committees serving only the legislative branch. Nor does there appear to be a basis for the Department of Justice's taking "corrective action" against such persons.

3. We have no objection to requiring the Attorney General to submit an annual report concerning litigation under section 10 of the Act. However, there should not be a requirement that the reports describe "efforts . . . by the Department of Justice to encourage agency compliance with this section." The Act assigns to OMB, not to the Department of Justice, responsibility for overseeing compliance.

D. Selection of Advisory Committee Members

1. Section 4 of the bill would amend section 5(b) of the Act by requiring that legislation establishing or authorizing the establishment of any advisory committee include requirements that the membership of the committee be "publicly solicited" and that at least one-third of the members "be drawn from citizens in private life who shall represent the interests of the public . . . ." It should be noted that section 5(c) of the Act states that the requirements of section 5(b) shall, to the extent that they are applicable, "be followed by the President, agency heads, or other Federal officials in creating an advisory committee."

Presumably, the bill's provisions concerning advisory committee membership are intended to apply not only to committees established by statute, but also to those created by the executive branch. If so, we question the

appropriateness of that result. There may be situations in which, due to the sensitive nature of an advisory committee's work or due to the need for prompt commencement of its activities, public solicitation of members would not be feasible.

As you know, in 1972, the Senate committee decided against including a public-interest membership requirement.[3/] We believe that effective enforcement of the existing and more general "balanced membership" requirement should suffice.

One aspect of the Act which might be clarified is the applicability of section 5(b)'s balanced-membership requirement to advisory committees created by the executive branch, before the Act took effect. As noted previously, section 5(c) refers only to executive action creating advisory committees, not to selection of members for pre-existing committees.

2. Mr. Chairman, you requested information on procedures used for selecting members of Department of Justice advisory committees. Our Department has a small number of advisory committees. There is no uniform selection method. I have prepared a memorandum describing the methods used and will be happy to offer it for inclusion in the record.

3/ See S. Rep. 92-1098, p. 16.

E. Other Matters

1. Section 14 of the Act deals with termination of advisory committees. Clarification of the provisions concerning termination of advisory committees established by statute would be desirable. Our interpretation of this section is discussed in a memorandum which Mr. Dixon submitted to the subcommittee on June 29, 1973.

2. The Act appears in an appendix to Title 5 of the United States Code. We suggest that the amendments provide for inclusion of the Act in Title 5 itself.

3. Section 5 of the bill would require annual reports on Government use of consultants and experts. This subject has little relation to the Advisory Committee Act. It seems doubtful that the expense of preparing such a report could be justified.

Mr. Chairman, that concludes my statement. I will be pleased to answer any questions you may have.

Selection of Members for Department of Justice Advisory Committees

1. According to our information, as of March 5, 1976, the Department of Justice had membership-selection responsibility with regard to six advisory committees. Four of the committees were within the jurisdiction of the Law Enforcement Assistance Administration; the Criminal Division and the FBI each had responsibility with regard to one committee.

The methods of selecting members vary from committee to committee. There follows information furnished by the three components of the Department regarding their respective selection procedures.

2. Law Enforcement Assistance Administration

Presently, LEAA has four advisory committees: the National Advisory Committee for Juvenile Justice and Delinquency Prevention, the Private Security Advisory Council, the National Advisory Committee on Criminal Justice Standards and Goals, and the Advisory Committee of the National Institute of Law Enforcement and Criminal Justice.*

National Advisory Committee for Juvenile Justice and Delinquency Prevention

This advisory committee was established pursuant to Section 207 of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601 et seq., Pub. L. 93-415. The membership selection procedure of the committee is found at Section 207(c) which provides:

> The regular members of the Advisory Committee shall be appointed by the President from persons who by virtue of their training or experience have special knowledge concerning the prevention and treatment of juvenile delinquency or the administration of juvenile justice, such as juvenile or family court judges, probation, correctional or law enforcement personnel; and representatives of private voluntary organizations and community-based programs. The President shall designate the Chairman. A majority of the members of the Advisory Committee, including the Chairman, shall not be full-time employees of Federal,

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* This committee is scheduled to terminate on March 6, 1976, and indications are that it will not be renewed, at least not in its present form.

> State, or local governments. At least seven members shall not have attained twenty-six years of age on the date of their appointment.

The Office of Juvenile Justice and Delinquency Prevention of LEAA submitted recommendations to the White House. The list was composed of prominent persons with diversified experience in the juvenile area. Recommendations also came from other sources such as congressional leaders. Final membership selection is reserved to the President. This procedure applies both to the selection of the initial membership and the filling of vacancies.

Private Security Advisory Council

This advisory committee was established by LEAA pursuant to Section 517(b) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701 et seq., as amended (Pub. L. 90-351, as amended by Pub. L. 93-83 and Pub. L. 93-415). Section 517(b) provides in pertinent part that:

> The Administration is authorized to appoint, without regard to the civil service laws, technical or other advisory committees to advise the Administration with respect to the administration of this title as it deems necessary.

The charter of the Council provides that:

> Membership of the Council and its committees will be drawn from LEAA, other concerned Federal agencies, public law enforcement agencies, private security businesses, manufacturers of products used for private security, institutions and businesses concerned with private

security, and representatives of the general public who are not necessarily identified with any of the foregoing.

LEAA staff composed a recommended list of prominent persons in the private security field. This list was compiled by an informal process of contacting persons known by LEAA to have experience in the area. The list was submitted to the Administrator who made the final decision as to the membership. This procedure applies to the selection of the initial membership and the filling of vacancies.

National Advisory Committee on Criminal Justice Standards and Goals

This committee was established pursuant to the Section 517(b) authority. The membership as stated in the charter is to consist of prominent State and local officials, representatives of the private sector, and the academic community with functional expertise in the area of standards development. Regional diversification was also a concern for the membership of the committee.

In addition to in-house suggestions, LEAA staff informally solicited names to be placed on a recommended list that was submitted to the Administrator for final approval. Among those groups contacted were the National Governors' Conference, the National Conference of State Legislatures, and several State planning agencies. This

procedure applies to the selection of the initial membership and the filling of vacancies.

Advisory Committee of the National Institute of Law Enforcement and Criminal Justice

This committee was established pursuant to the Section 517(b) authority. Membership, as indicated in the charter, was to include LEAA employees, officers and employees of criminal justice agencies, representatives of the research and academic community, social scientists and others involved in the administration of all aspects of criminal justice.

An initial list of nine prospective committee members was drawn up by the Director of the National Institute of Law Enforcement and Criminal Justice and submitted to the Administrator for his final approval. The list was composed of names suggested by other offices in LEAA and the Department of Justice. This same procedure was utilized several times until the committee achieved its present composition. The Administrator on occasion did refuse to approve names that were submitted to him by the Director of the Institute. This procedure applies to the selection of the initial membership and the filling of vacancies.

3. Criminal Division

The Federal Advisory Committee on False Identification is under the auspices of the Criminal Division of the Department of Justice.

The following procedures were utilized in the selection of Committee members:

Because the false identification problem was so broad and concerned not only Federal, state, and local government officials but commercial and private interests as well, every effort was made from the inception of the Committee to provide a "balanced" Committee membership pursuant to OMB Circular A-63 Revised, Section 6. In particular, the greatest attention was given to insure the full participation of the public and public interest groups, such as privacy organizations, on the Committee.

Letters of invitation from the Department of Justice were sent, therefore, not only to Federal, state and local agencies and business groups, but to such groups as the American Civil Liberties Union, Common Cause, and Ralph Nader's group, inviting these organizations to become working partners and members on the Committee. Each organization was allowed to nominate its own participants but only one voting member was permitted per each agency.

Following the Attorney General's public announcement of the formation of the Committee in a speech in October, 1974, the announcement of the Committee's first meeting and the charter of the Committee were placed in the Federal Register as required by the Federal Advisory Committee Act to alert the public to its creation. In addition, the Committee's announcement of meetings in the Federal Register have continually carried this paragraph:

> The meeting is open to the public. The Committee welcomes a broad spectrum of ideas from the public to assist the Committee in its efforts to increase individual privacy and to aid in preventing the criminal use of false identification.

When responses from the above-cited invitation letters were received, a tentative list of five Committee Task Force Chairmen and lists of members on each Task Force were compiled by Criminal Division staff for use at the organizational meeting. Committee members were chosen solely on the basis of their expertise in the areas of Committee investigation; the need to balance membership with all levels of government and the private sector; and the expressed intention of members to work. There are no honorary members on the Committee. Members who have failed to come to meetings have been dropped. Since the first meeting of the Committee, all persons from the public requesting membership on the Committee

have been granted it; all meetings have been open to the public; and indeed, all votes taken by the Committee to date have been taken by a show of hands not just of members, but of all persons who have attended each of the public sessions of the Committee.

4. Federal Bureau of Investigation

The National Crime Information Center (NCIC) Advisory Policy Board reports to the FBI. There are 26 members on the Advisory Policy Board, 20 of whom are elected by agencies participating in the NCIC system with equal representation from each of four NCIC geographic regions of the country. There are six members from the criminal justice community appointed by the Director of the FBI. There are two each from the prosecutive, the judicial, and the corrections sectors of this community. The elected members serve two-year terms commencing on January 5, 1975. The appointed members serve indefinite terms at the pleasure of the Director of the FBI.

The Regional Chairman of each of the four NCIC Policy Board regions conducts elections in November and December of each even year for membership on the Board.

Balloting is held by permitting each state control terminal agency to nominate one state-level representative and one local-level representative to serve on the NCIC Advisory Policy Board. Nominees are top-level criminal justice administrators capable of providing substantial input to the deliberations of the Policy Board. A list of nominees is then prepared by the Regional Chairman and furnished to the state control terminal agency.

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The state control terminal agency then votes for five state and two local representatives out of which the top four state and one local representative are chosen. There is only one vote per state. The four nominees receiving the highest number of votes for the state-level openings and one receiving the highest number of votes for the local opening are elected to the Board from that region.

Any vacancy on the Board (with the exception of the six members selected by the Director of the FBI) is filled by appointment by the Regional Chairman wherein that vacancy was created utilizing the next highest vote totals from the prior election. The person appointed is of the same category (state, county, municipal) as the member vacating that position. This appointment is for the unexpired term of the member vacating that position.

Senator METCALF. The committee will be in recess until tomorrow at 10:30 in room 6202, at which time we will continue these hearings.

[Thereupon, at 12:05 p.m., the subcommittee recessed, to reconvene at 10:30 a.m. on Tuesday, March 9, 1976.]

TO AMEND THE FEDERAL ADVISORY COMMITTEE ACT—P.L. 92-463

TUESDAY, MARCH 9, 1976

U. S. SENATE,
SUBCOMMITTEE ON REPORTS, ACCOUNTING, AND MANAGEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met at 11 a.m., pursuant to recess, in room 3302, Dirksen Senate Office Building, Hon. Lee Metcalf (chairman of the subcommittee) presiding.

Present: Senator Metcalf.

Also present: Vic Reinemer, staff director; E. Winslow Turner, chief counsel; Gerald Sturges, professional staff member; Jeanne McNaughton, chief clerk; James George, minority, professional staff member.

Senator METCALF. This is the second of 3 days of hearings by the Subcommittee on Reports, Accounting, and Management, on two bills to amend the Federal Advisory Committee Act. They are S. 2947, introduced by Senator Hatfield and me, and S. 3013, introduced by Senator Percy.

Today's scheduled witnesses are Professor Henry Steck, of the department of political science, State University of New York at Cortland, and Mr. Reuben Robertson, legal director, Aviation Consumer Action Project.

The testimony Professor Steck has prepared makes a number of excellent points. I agree with his observation that, despite the Federal Advisory Committee Act, we really do not know very much about the advisory committee process.

I welcome his suggestion that the second generation task for the act is a close and critical look at the advisory process.

Professor Steck also reminds us that advisory committees are lobbying with a difference, "since membership on advisory groups is cloaked with the mantle of institutional legitimacy and public authority." He adds: "Such is the danger presented by the military- industrial complex, perhaps the preeminent example of the merger of public and private power."

This would be a suitable moment to summarize the results of a subcommittee staff study of the representation of the top 100 defense contractors[1] on Department of Defense advisory committees in 1974. In brief:

Twenty-nine of the top thirty defense contractors are represented on DOD advisory committees. Of the top 50 companies, only 13 are not represented on them.

[1] See p. 312.

Lockheed, the top defense contractor, has 11 employees on 12 DOD advisory committees. Boeing, No. 2, has 12 employees serving on 13 DOD advisory committees.

The leader is 14th ranked A.T.&T., with 19 employees serving on 21 DOD advisory committees.

What the numbers alone do not reveal is that a good many of these contractor representatives are old recycled Pentagon hands—retired generals, former high-ranking civilian officials of the Defense Department or the individual services, and former congressional staff.

The subcommittee intends to publish the study, which names the contractors, their representatives, and the advisory committees on which they serve. It will also include biographies of some of them such as Willis M. Hawkins of Lockheed, and Barry J. Shillito of Teledyne—to show the clubbiness of the Pentagon, its contractors, and its advisers.

Now we will call on Prof. Henry Steck, who has a prepared statement.

TESTIMONY OF PROF. HENRY J. STECK,[1] STATE UNIVERSITY OF NEW YORK, COLLEGE AT CORTLAND

Senator METCALF. Professor, are you a doctor?

Professor STECK. Yes.

Senator METCALF. Do you want to be called a doctor?

Professor STECK. Professor will be fine.

Senator METCALF. All right. Professor Steck, we are delighted to have you here. You have made several reports on this very question, so we recognize you as an expert to give us some advice and counsel as to where we go from here. Go right ahead.

Professor STECK. Thank you. It is a pleasure to be here.

The Federal Advisory Committee Act (FACA) is a significant addition to a series of legislative enactments designed to broaden the administrative process. Such successive measures as the Administrative Procedures Act, the Freedom of Information Act, section 102 of the National Environmental Policy Act, and the proposed Government in the Sunshine Act have all reflected a congressional determination to open the administrative process to public view, to enlarge puplic access to the arenas of administrative decisionmaking, and to instill into the administrative process the procedural and participatory rights and opportunities available in the legislature and the courts.

Even before Watergate, a strong current flowed in the direction of greater public accountability on the part of administrative agencies. Whereas reformers of a bygone era focused on the dangers of concentrated economic power, contemporary reformers are as responsive to the dangers of unregulated and exclusionary bureau-

[1] Dr. Henry J. Steck is a professor of political science at the State University of New York, College at Cortland. Professor Steck received his Ph. D. from Cornell University and has taught at Vassar College and the University of British Columbia as well as at SUNY Cortland. A former chairman of the department of political science, Professor Steck is the co-author of a book, *Our Ecological Crisis: Its Biological, Economic, and Political Dimensions* (Macmillan, 1974). He has written several papers on advisory committees, including "Private Influence on Environmental Policy: The Case of the National Industrial Pollution Control Council," in 5 *Environmental Law* 241 (Winter 1975).

cratic structures. FACA can best be appreciated against the broad sweep of the history of liberal democratic institutions toward the progressive opening of the doors of State power.

It is addressed to the manner in which government agencies conduct themselves. It demands revisions in agency procedures in the direction of greater disclosure, public participation, administrative accountability, and responsible management procedures.

FACA's significance lies squarely in its effort to control the institutional nexus between the public and private sectors. Whereas the classic textbook principles of liberal democracy enshrine a separation of State and society, the reality is that the functions of modern government are too far ranging, too penetrating, and too complex for the passive watchman State of yesteryear.

State and society are not ineluctably mixed. In its largest terms, FACA is a legislative response to this situation: it seeks to impose liberal principles on an illiberal situation. It does so in part by recognizing that administrative decisions depend upon highly specialized forms of information and expertise.

Like the Administrative Procedures Act and the Freedom of Information Act (FOIA), FACA seeks to formalize the channels of information and to compel government to disclose to the maximum extent possible the informational basis of its decisions. Like the proposed Government in the Sunshine Act it seeks open meetings so as to restrict ex parte contacts by interested parties.

The act's significance lies squarely in its efforts to control the institutional connection between the public and private sectors by regulating the manner in which agencies receive advice, information, and cooperation.

As Senator Metcalf said in opening the hearings that led to the passage of FACA, information is the "bedrock of government decisionmaking."

Advisory committees are a common but little publicized device employed by Federal agencies to tap the expertise of the private sector, to solicit the advice of private parties in formulating policies, to gain the benefit of fresh ideas, to secure the cooperation and assent of affected groups in administering programs, and to provide a measure of public participation.

Despite routine complaints about the proliferation of such committees, their utility is repeatedly acknowledged by both administrators and Congressmen.

In 1974, for example, a new committee was created roughly every 1.06 working days while the number of new committees has increased since FACA's enactment in 1972. The responsibility for this continuing growth is not, however, the sole responsibility of administrative officials.

Responsibility for establishing or authorizing the existing 1,242 committees is evenly shared by Congress and the agencies. The 93rd Congress alone enacted 53 laws establishing, authorizing, or affecting Federal advisory committees. Scarcely a day goes by when a bill is not introduced creating a new advisory committee. Overall, then, the system of advisory committees is a major longstanding institutional method for linking private interests and private expertise to the administrative process.

Despite the widespread reliance upon advisory committees by Congress, the President, and individual agencies, Congress has never felt comfortable with either the untidy growth and weak management of the advisory committee system or with the potential for improper influence inherent in the close and closed relationships characteristic of the system.

For more than 15 years, Congress and the Executive Intermittently sought to come to terms with the system. By 1970 pressure began to develop for a legislative solution to the problem of advisory committees.

In 1970, the House and Senate Government Operations Committees initiated what proved to be 2 years of extensive hearings culminating in the enactment of FACA in 1972. As the hearing record grew, Congress was told what had been plain since the first hearings in 1955.

The advisory committee system was overgrown, mismanaged, and largely invisible. The committees were ill-managed and ill-tended. Many committees, and especially such peak industry committees as the National Industrial Pollution Control Council (NIPCC), the National Petroleum Council (NPC), and the Advisory Committee on Federal Reports, not to mention their lesser cousins, were closed to the public and indifferent to the requirements of accountability that sound administrative practices require.

Finally, the committees were all too frequently the private preserve of corporate interests and thus a legitimized government—supported form of high level administrative lobbying. As constituted, the system provided no opportunity for a wider public to have input when decisions, based on committee advice, were being made and policy administered. The system came to be regarded as a shadowy fifth branch of government.

Without tracing the full legislative history of the act, suffice it to say that FACA combined two distinct sets of congressional concern. First, Congress believed that the system was another example of an ever-growing and irresponsible bureaucracy. It therefore sought to subject advisory committees to tighter, more effective, and most accountable executive management requirements and congressional oversight.

Second, there was an equally deep concern with the power of advisory committees, with the nature of representation on such committees, and with public accessibility to the advisory process. Congress thus sought to open committees to the sunshine of public view and to the healthy winds of public participation.

As it stands and as I read the act, it seems to me to consist of five different purposes.

First, the act is a committee management law designed to create an orderly set of standards and uniform procedures for regulating the establishment, operation, administration, duration, termination, cost, and recordkeeping of advisory committees. To ensure that these management requirements are met, the act establishes clear oversight and control responsibilities for Congress, the President, the Office of Management and Budget, and agency heads. It seeks to insure, inter alia, that advisory committees perform only author-

ized, well-defined, and necessary functions, to check the growth of advisory committees, to establish uniform procedures for the chartering and functioning of advisory committees, and to provide a set of administrative guidelines and management controls for advisory committees.

Second, the act is a sunshine law requiring that meetings be open and that Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees.

In this respect, the act provides for the maintenance of public records concerning the work of advisory committees, for the submission of regular reports by the President and by committees, for publicly advertised and open meetings of advisory committees, and for public participation in the work of advisory committees. By reference to the Freedom of Information Act (5 U.S.S. 552), the act contains exemptions to the openness mandate.

While it was not perhaps the best stroke of draftsmanship to incorporate the thicket of problems inherent in FOIA's exemptions, there can be no doubt that as between the competing values of disclosure and openness and of confidentiality and privilege, FACA places the greater weight on the former. The Senate report accompanying FACA stated in no uncertain terms that section 10 is one of the key sections in the legislation and is to be liberally construed.

Third, the act is a fair balance law. It requires that the membership of advisory committees be fairly balanced in terms of the point of view represented and the functions to be performed. As I argue below, this provision is central to the overall purposes of FACA.

Fourth, the act is a public participation law. It provides not only that committee be open to public observation, but to public participation as well. The public is regarded by the law not as an audience of silent spectators but as invited participants with the right to appear before, and file statements with, an advisory committee.

The act incorporates without statutory specificity elements of the public hearing and public comment processes already routine under APA. This provision seems to establish an affirmative obligation for agency officials to make such public advice part of the record upon which agency decisions are based.

Finally, the act seeks to insure that functionally advisory committees are advisory only and that their activities are controlled by responsible officials of the Federal Government.

After 3 years, what gains have been generated in the advisory committee system? Clearly, FACA has changed the rules of the game and under prodding from public interest groups, the courts, and this committee, agencies are learning the new rules. But because old habits die hard, it is probably still too early to reach a balanced accounting of FACA's full impact.

That will not be possible until the rules are routinely followed and until we have more information about the system than we have now. At this point, then, we are still confronted with the normal

sluggishness, uncertainty, and diehard habits that inevitably persist following the passage of any new reform legislation.

To the degree that FACA offends the old regime its full effects will be delayed. I believe, however, that we can conclude that we have come to the end of the initial stage of FACA's implementation. Permit me first to specify three of the positive gains that FACA has produced.

First, the committee system is being opened to the public. The days are behind us when advisory committees were closed, when secrecy shrouded the deliberations of the more important committees, and when access to committee work was blocked by a maze of obstacles and no trespassing signs.

Meetings are increasingly open to the public. In 1974, 55 percent of all meetings were open, 20 percent were closed, and 25 percent were partially closed. No doubt, these figures could be improved in light of Congress' intention that the standard of openness be liberally construed and that meetings be closed only under very specific and well-defined circumstances.

But my impression is that the bias is now running in the direction of openness and disclosure. While 45 percent may seem to be a high percentage of closed meetings, it should be emphasized that two-thirds of all reporting agencies and departments held no closed or partially closed meetings. A third of all meetings that were totally closed were concentrated in the Department of Defense while the bulk of the remaining totally or partially closed meetings were concentrated in those agencies that deal either with financial matters or with the review of grant-type proposals, for example, the National Science Foundation, National Institutes of Health, National Endowment for the Arts, and the like.

With good grace or not, agencies are accepting the congressional mandate that openness prevail over claims of confidentiality. This is not to say that problems do not exist. I shall turn to these shortly. But cases of bureaucratic evasion and subterfuge seem less common than 3 years ago.

Meetings are generally noticed within 15 days; agenda are published; the right of the public to speak and make written submissions is recognized; bureaucrats are as often as not contrite when chastened by a tart letter from the distinguished chairman of this committee.

Nothing more clearly illustrates this acceptance than the differences between OMB's first guidelines dated November 1972, and its March 1974 guidelines. Whereas the former interpreted FACA's purposes as designed to insure only that "adequate information is provided" and that "adequate opportunities for access by the public" be made available, the 1974 guidelines stress that "the emphasis should be on the free flow of information."

In sum, FACA has imposed on agencies what many of them once regarded as the unthinkable. And doing the unthinkable has not produced the chamber of horrors that bureaucratic conservatives once predicted. In general, it seems to me with good grace or not, agencies are accepting the congressional mandate that openness prevail over claims of confidentiality.

Second, FACA has resulted in more effective management of the advisory committee system. Agencies have designated advisory committee management officers and formulated FACA guidelines. OMB has simplified its guidelines in line with the spirit of the act.

The annual report and the accompanying materials permit Congress, interested groups, and scholars to take an upclose look at the dimensions and cost of the system. Above all, FACA has resulted in a stepped up rate of extinction for committees. Whereas only 187 committees were terminated in 1972, 390 and 299 committees disappeared in 1973 and 1974, respectively, including some that are familiar to this subcommittee, such as the National Industrial Pollution Control Council and the National Business Council on Consumer Affairs.

To some extent, then, FACA has reversed the natural law of the persistence of bureaucratic forms. Certainly some of the committees sank without a trace. Others may have been forced out of existence because they were not willing to play the game by the new rules. NIPCC is a case in point. In its 3-year lifetime, NIPCC was a prize example of all the evils Congress sought to prevent: its members were drawn exclusively from the corporate sector; the public was shut out of its meetings; it enjoyed a still unmeasured degree of ex parte contact with administrative decisionmakers; it became an arena for lobbying and corporate public relations at Government expense.

NIPCC responded to the openness of FACA with ill-disguised bad grace. Unwilling to open itself to the public in a meaningful manner or to broaden its membership, the NIPCC structure was allowed to wither away. The coup de grace, of course, was administered by Congress itself when it refused to appropriate funds for NIPCC. Against the background of Watergate, the administration was in no position to fight for its survival.

NIPCC passed quietly away under the provisions of section 14(a). That an advisory council designed to deal with a policy area of great importance to the business community and the Government was allowed to fade away reveals rather sharply the extent to which NIPCC was less a conduit for expert advice than an arena of influence and patronage that provided the corporate sector with access to the corridors of agency decision making. One may be permitted to speculate on how many other of the nearly 700 expired groups fell into a like category.

Finally, as FACA enters its next stage, I believe we can discern two developments that may prove significant. I shall be certainly yielding to excessive optimism, but there are two points of speculation and prediction. The first relates to the quality of advice provided by the advisory committees and to the quality of management control and the second to the forms of public involvement in the advisory process. Let me take as a text a portion of the Department of Commerce memorandum dated March 20, 1975:

> The need for prudent management is quite clear: heads of operating units must make a concerted effort to reduce the number and the costs of advisory committees. To this end, the following actions and options should be considered.

* * * * * * *

2. If a committee is not meaningfully and productively achieving its purpose, revamp it or terminate it.

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4. As a substitute for committees which are not especially active, as well as for committees which have proven to be more informative than advisory by nature, consider the medium of public symposia or conferences—which individual invitations to public sector specialists. This avoids the costs of formal chartering, of numerous reports, or periodic reviews, and of many other statutory requirements associated with advisory committees.

The same tone was struck partially yesterday in Director Lynn's comments.

But Secretary Dent last year, and Director Lynn yesterday, cast the problem of advisory committees in very constructive benefit-cost terms.

The memorandum reveals a readiness by an administrator to evaluate advisory committees in unadorned and hardnosed cost-effective terms. This approach is an oddity since administrators and Congress alike have tended to assume a priority that advisory committees are a good thing.

Casting the problem in benefit-cost terms is precisely the approach that FACA should be encouraging on the part of both administrators and Congress. Significantly, Secretary Dent also recognizes, elsewhere in the memo, that "open meetings * * * require much less paperwork than closed meetings."

Raising the question of costs and benefits also raises the corollary, namely, whether there exists in some situations a less costly alternative to advisory committees? In suggesting as much with its references to conferences and public symposia, the memorandum looks in the direction of public participation in a manner consistent with FACA's openness mandate.

It may well be that in certain kinds of policy area the advisory committee structure as such can be dismantled and other techniques of advice developed. Both developments, I would think, would be all to the good.

Let me turn now to some of the defects in the administration of the act.

Despite the undoubted if incremental advances under FACA, there is still much to be done before the purposes of Congress are met on a more or less continuing basis. Some of the persisting difficulties are commonplace, having been examined extensively in earlier hearings.

Others are emerging as second generation concerns of great import. Failure to deal with them would reduce FACA's goals to little more than an ambitious set of rituals. My review of these is necessarily impressionistic: it would be a major research undertaking to enalyze systematically the use of 1,242 committees by over 60 agencies, 22,000 advisers and $40 million.

In this context, one might note that section 7(b) of the act calls upon OMB to prepare a "comprehensive review of the activities and responsibilities of each advisory committee" with a view toward making determinations about the effectiveness, administration, and continuation of those committees.

This review is required annually and appears to call for a set of findings by OMB that would provide qualitative effectiveness

studies about committees. Unless I am mistaken, there has been no comprehensive 7(b) report of the type envisioned by the act. Consequently, oversight has necessarily fallen to the watchdogging of this committee's staff and the persistence of public groups nad private litigants.

For what they are worth, then, my own impressions persuade me that the proposed amendments to FACA are both timely and pertinent.

This ties in, of course with a number of the amendments you have proposed and it ties in with my comments about the necessity for cost-effective examination of the system.

Allow me to concentrate on what I see as three critical problem areas: first, continuing negligence if not evasion in the administration of the act; second, clear indifference and avoidance of the fair balance provision of the act and the related statutory failure to deal with the problem of advisory committee selection; third, the need for a close and extended study of advisory committees on a case-by-case or agency-by-agency basis.

First, despite the undoubted gains under FACA, even the most casual review of agency compliance reveals practices that are at variance with the spirit and letter of the act. Protestations to the contrary, old habits persist and take new form.

Although these practices are not universal in scope, they surface frequently enough to suggest the need for remedial action. FACA's regulatory scheme of openness, it must be recalled, requires the performance of a related set of duties on the part of agencies. No doubt FACA's requirements are costly, time-consuming and, one regrets to say, involve the multiplication of paperwork.

But these are lesser values. As the Calvert Cliffs court said of the more onerous agency duties under NEPA:

> **Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.**

That seems to me to be a relevant and generalized enjoinder that could well adorn FACA. What are the duties that FACA requires of an agency? They require, inter alia, that: (1) timely public notice of meetings be given; (2) informative agendas be published; (3) meetings be held in accessible locations with adequate space provided for public attendance; (4) full opportunity be given the public for written or oral presentations; (5) full and detailed determinations be written and available for the closing of meetings under exemptions provided in 5 U.S.C. 552(b)(1–9); (6) fully informative minutes be kept of meetings; (7) complete records be maintained in a publicly available manner; (8) annual records be filed.

Although these requirements are not difficult, Senator Metcalf's correspondence with agencies throughout 1975 demonstrates a sluggishness at best in the administration of the act's provisions. A review of the Federal Register for January of this year confirms that strict compliance has still not been achieved. Longtime committee watchers will share my jaded lack of astonishment at the examples of administrative inadvertence that repeatedly turn up.

On the matter of timely meeting notice, for example, one finds that although most meetings are noticed 15 days or more prior to

the meeting date, a sizable minority receive less than 15 days notice: a number of the individual State advisory committees to the Civil Rights Commission clearly gave less than 15 days notice.

More to the point, uninformative and skimpy agendas appear all too frequently. Persons wondering whether to attend the February 5 meeting of the Bicentennial Committee of the National Council on the Arts would have learned from the Federal Register only that the meeting would consist of "a discussion of general outlook on Bicentennial program and * * * a general discussion of specific programs."

The adequacy of minutes is called into question by the plainly cursory minutes of the top-level Labor Management Committee. Nor do the agencywide failures in recordkeeping inspire confidence in the quality of records throughout the Government. One wonders, to take one example, whether the fact that the FDA submitted "grossly inaccurate cost estimates" for its committees is idiosyncratic on the surface of an iceberg of bureaucratic failure.

More crucial to FACA's success, however, is the nature of compliance with FACA's openness mandate. As I have indicated, the openness rate is about 55 percent with the bulk of the closed 45 percent being located in a small number of agencies. To some extent, we must be cautious in interpreting this figure.

It may well be that sound policy reasons exist for closing many of those meetings. It may be plausible to look not at the rate of closed meetings but at the kinds of matters discussed by those closed meetings. The news may be better than the raw percentages would indicate.

But there is unquestionably bad news with respect to closed meetings. For example, some agencies appear to believe that a meeting by any other name is not a meeting. One might recall the unseemly instance of LEAA's National Advisory Committee on Criminal Justice Standards and Goals' Organized Crime Task Force being advised by a Federal employee to avoid FACA's tough requirements by meeting in unnoticed off-the-record dinner meetings.

This practice is probably more common than we think. The FEA's Consumer Affairs/Special Impacts Advisory Committee employed an informal caucus to discuss possible resolutions for the consideration of the full committee; when attendance proved slack at monthly evening caucuses breakfast meetings were proposed.

As for the CAB, its Industry Advisory Committee on Aviation Mobilization has not met since 1968 and conducts its business through the mail. More pernicious is the technique openly used by the new-departed NIPCC. Following FACA's passage, I was told by NIPCC officials that FACA would cause no real problem because NIPCC members would simply begin using personal contacts and the phone to do business. Indeed, in 1973 NIPCC converted its increasingly rare plenary meetings into sterile and ritualized public sessions that did nothing while NIPCC members went underground.

As public NIPCC meetings dwindled to a precious few in 1973, 156 meetings were held that were informal consultations with individual members. On a priori grounds, I believe that the use of

informal meetings, sub rosa get-togethers telephone chats, and the like, represents an important and innactable question.

Unfortunately, our knowledge of such matters must remain intuitive and based upon the few cases that do surface. As a discuss shortly, I believe there is a way to make openness work and work well.

The greatest threat to FACA's openness mandate, however, has been the use and abuse of FOTA exemptions and most notably exemption b(5). The story of the last 3 years is by now familiar: whereas FOIA 552(b) was used as a point of reference for defining exceptions to 10(a), agencies began to use it, and especially (b)5, to close committee meetings indiscriminately. The prodding of this committee paralleled by a string of court cases ought by now to have reduced FOIA claims to a minimum.

Courts have successively rejected claims that committees are agencies, that committee deliberations are agency deliberations, that committee documents are agency documents, that advisory committee members are functionally equivalent to Federal employees, and the like.

Most recently, the D.C. district court ruled that (b)(5) "is inherently inapplicable to advisory committees." While the finding is less sweeping than this language suggests—documents that are "an integral part of the deliberative process" of an agency are still entitled to the protection of (b)(5)—the decided cases unequivocally hold that "Congress has expressly ordered the door be open except on the rarest occasions," and that a heavy burden, is on the Government to prove otherwise in specific terms.

One would have thought that this was the end of it and that all (b)(5) claims would be accompanied by very precise, very reasoned explanations. This is not the case. Exemption (b)(5) is alive and well in the pages of the Federal Register.

Speaking as a nonlawyer, it appears to be the case that current (b)(5) exemptions are still employed: (1) in conclusionary ways that are unsupported by reasoned explanations or references to the intergovernmental documents that trigger the (b)(5) claim; (2) in ways not consistent with FOIA, FACA, or the decided FACA cases, the latter at most having limited (b)(5) claims to a narrow set of documents; (3) in a "in numbers there is safety" theory that yokes (b)(5) to other section (b) claims in a manner that leaves the reader unable to determine the grounds of the determination—hence, unable to know from the record how to mount a legal attack; (4) in ways that assume still that committee members are functionally analogous to Federal employees such that their verbal exchanges receive (b)(5) protection.

As an example of the catchall use of (b)(5), consider that on January 16, 1976, FDA partially closed 12 meetings with the following (b)(5) formula: "This portion of the meeting will be closed to protect the free exchange of internal views" (5 U.S.C. 552(b)(5)). A more general explanation stated with respect to (b)(5):

A portion of a meeting may also be closed if the Commissioner determines: (1) That it involves interagency or intra-agency memoranda or discussion and deliberations of matters that, if in writing would constitute such memoranda,

and which would therefore, be exempt from public disclosure; and (2) that it is essential to close such portion of a meeting to protect the free exchange of internal views and to avoid undue interference with agency of (sic) committee views.

From my reading of the Gates, Nader, Washburn, and Washington research project, and Wolfe decisions, the only possible remaining legitimate use of (b)(5) exists when a given interagency or intra-agency document that has been interjected into committee deliberations remains part of the agency's decisional process.

Not being a lawyer, I hope I am not treading where I shouldn't go.

Senator METCALF. Not being a lawyer helps.

Professor STECK. Very good.

The Washburn decision suggests at the outer boundaries that (b)(5) cannot be invoked, that is, the privilege is waived, when documents are disclosed by the agency to committee members who are not full-time Federal employees. In no cases, however, can (b)(5) be used as a generalized technique for closing meetings. It can only be used, if then, in very narrow circumstances. Certainly, it cannot be used simply to protect "the free interchange of internal views."

The nondefense agencies, 552(b) (2), (4), (6) exemptions form a second line of defense. Although those proficient in the arcane mysteries of FOIA litigation may find me mistaken, I do not believe that (b) (2), (4), (6) claims are being currectly used. Consider the following explanation for the closing of the Federal Prevailing Rate Advisory Committee meeting. The notice provides that the meetings will be closed on the basis of 5 U.S.C. 552(b)(2). It then states:

The closing is necessary in order to provide the members with the opportunity to advance proposals and counterproposals in meaningful debate on issues related solely to the Federal Wage System with the view toward ultimately formulating advisory policy recommendations for the consideration of the Civil Service Commission.

These discussions relate to a general matter of public policy, that is, the compensation system for civil servants, involving the Government as a whole. It is not related, to quote (b)(2) "solely" to the "'internal personnel rules and practices of an agency"; nor is it related to the kinds of situations suggested either by the House report interpretation of (b)(2) or the more narrow Senate interpretation that has been favored by the courts. Use of (b)(2) to cover meetings of Civil Services Commission committees is one thing. But (b)(2) turns up in the strangest places. Consider this notice of the Commission of Fine Arts:

Preliminary discussions of design studies for the west end of Pennsylvania Avenue similarly require a frank and uninhibited exchange of tentative view as exempted from disclosure by Subsection 552(b)(2) of Title 5 . . . The Freedom of Information Act authorizes the exemption from disclosure of inter and intra-agency memoranda and letters where the documents are not final determinations and such exemptions are necessary to prevent the inhibition of predecisional processes (5 U.S.C. 552(b)(2). The deliberative process by which the Commission of Fine Arts arrives at independent judgments is a predecisional process which must remain uninhibited and thus undisclosed in order that the Commission may effectively perform its statutory functions.

While this particular meeting may legitimately have been closed, (b)(2) was not the way to do it.

There are other questions with respect to exemptions as well. Exemption 2 has been used in ways which seem to me not quite legitimate.

It should be noted that committees and advisory committees reviewing grant applications are tending to use an all-purpose formula composed of (b)(4), (5), and (6). Of all the questions facing FACA, the question of grant decisions and peer review is, to my mind, the most difficult. On the one hand, it is not clear that exemptions (b)(4), (5), (6) collectively work: research or artistic applications may not involve financial or commercial matters; exchanges between non-Federal employees seem not to be covered by (b)(5); and while (b)(6) may cover part of a committee's work, for example, evaluation of recommendations, it is not clear that it covers other parts, for example evaluation of a curriculum vitae.

It do not think the question of peer review is an easy one to settle. The competing values are several and, in my judgment, openness may not always outweigh the need for an honest decision on the scientific or artistic merits of a project; nor does openness seem on first glance the right cure for the deficiencies of the system; nor, on the other, are closed meetings appropriate for other aspects of the peer review process.

Since Congress has given its stamp of approval to the existing peer review system in section 110 of the National Cancer Act, hasty formulations of the relationship of FACA to peer review ought to be avoided.

Perhaps our attention ought to be properly addressed to finding a way to balance the public's right to know, the public's right to accountability, and the imperatives of an effective grant review system. On this issue I would agree with Primack and von Hippel in their chapter "Toward an Open Advisory System" in "Advice and Dissent: Scientists in the Political Arena":

> A proper respect for the privacy of the individual researcher must be balanced against society's concern that the taxpayers' money be well spent. It is difficult to decide this balance on general principles.

It may be that statutory exemptions ought to be built into FACA itself in this and other cases where FOIA exemptions work so poorly.

Senator METCALF. May I interrupt you right there.

Professor STECK. Yes.

Senator METCALF. I know that you were here yesterday. It was suggested by Ms. Lawton, from the Department of Justice, that perhaps, instead of incorporating by reference the Freedom of Information Act, we should spell out the statutory guidelines ourselves in the legislation, or let the Department of Justice or someone else to spell them out.

Would you comment on that while we are on that subject?

Professor STECK. I think that might be one approach. I have tried to read the cases. It seems to me that might be a very plausible approach to take. My impression is that when a case goes to

court, what seems to happen is that all of the Freedom of Information precedents are brought along into the litigation and one begins to find the courts and the lawyers trying to make distinctions whether it is a Freedom of Information case or an Advisory Committee case.

In the Washington research project, the court makes dicta in a footnote and you begin to wonder what is going on. In that case, one is not quite sure if the court is fully aware of the meaning of the Advisory Committee Act.

If you throw out exemption 5, there still may be cases. I think grant review is a difficult one which needs very close study.

You may want to build advisory committees exemptions into the act itself simply to avoid in the future agencies coming along whenever they feel it convenient and saying: "Well, we know exemption 5 is to be used rarely." As Judge Greene put it: "On the rarest occasion," but here is a rare occasion and then you are back into court. So it might be well to devise very, very strict guidelines covering certain categories of cases.

I hope I am not engaging in special pleading on peer review. But having served on committees which make research awards, it is a very complicated business and you are dealing with different kinds of data.

A man's credentials and abilities is one. Such matters involve, in a certain sense, a personnel or privacy decision. Second, the nature of his proposal is another aspect and that might be partially open, and then, third, the question of whether this kind of research ought to be supported at all and that becomes a fully open question.

Congress also has recognized peer review partially in section 110 of the National Cancer Act, which comes after the Advisory Committee Act. So I can well see certain problems arising in the future out of that.

It might be well to build exemptions into the act by amendment or by guidelines if your committee will have a heavy hand in writing them rather than to continue with this drafting process.

Senator METCALF. You heard me say that we initially felt that the body of case law that had been developed in the Freedom of Information Act would be useful by reference in the Advisory Committee Act, but perhaps the time has come when we should develop some case law of our own, and make some distinctions, and so forth.

Perhaps your suggestion and the Department of Justice suggestion is that this is an area where we should have an amendment.

Professor STECK. Yes. Also because the Freedom of Information act talks about documents and here you are talking about discussion, often verbal. Then they come up with a formula covering discussion, which if it is reduced to writing—but it is not—on the part of Federal employees ought to be exempt. You begin to get into a set of Chinese boxes with that question.

Mr. TURNER. Isn't there a distinction, Professor Steck, between a Government document and a group composed of non-Government people together with Government people? In other words, if the Freedom of Information Act is to obtain a document from the

Government, which is its document, and make it public and certain exemptions were attached, but over here you have a meeting going on with people who are not full-time Government officials but are from the outside, from the private sector, because there would be a distinction between a Government document and a meeting—that might justify the kinds of separate types of exemptions that you are talking about.

Professor STECK. I have thought a great deal about this because it is a very touchy problem. It seems to me that Congress has made the distinction in the act between advice and deliberation. The tug and pull now is that when an exempt document under exemption 5 is introduced into an advisory comittee, let's say on the most narrow grounds conceded—I might think in *Nader* v. *Dunlop*—you in effect pull the advisory committee into the deliberative process.

If you say that is legitimate, then you can go forward legitimately and say there are cases where you need frank and open discussion.

It seems to me that what Congress has said in the act is we don't want deliberative discussion taking place in an advisory committee. It is simply advisory discussion.

In other words, I said at the outset of my statement that the act sought to strike at the institutional connection between public and private, and exemption 5 precisely raises that general issue.

Even if you apply exemption 5 on the rarest and most prudent and legitimate occasions, you are still pulling the advisory committee into the deliberative process. It seems to me Congress wants to keep them separate. In that case, I think there is probably a very strong argument to be made for the amendment you propose.

Now, it will make things difficult. Speaking with a lawyer yesterday, I was told that: "What will result is that the agency officials will resort to one-on-one appointments and phone calls for his advice." That may be true, but Congress's judgment is that if advice that comes from the private sector, that is from the private sector organized in public advisory committees, that ought to be open to all nongovernmental persons to hear and to throw in their 2 cents worth.

So here you are saying there is a balancing. It is not an open-and-shut case, but on balance the decision is for openness. The grant review committees are very, very tough because they are used in an extremely important way.

The Government, in effect, is the major supporter of research in this country, I think some 60 percent since World War II. If they are going to use in NIH 400 committees in the grant review process, either you set up separate legislation or, in my judgment, you write that exemption and any others you might come up with into the act.

I don't even know whether the peer review committee falls under the umbrella of an operational committee. I don't feel competent to judge that.

Senator METCALF. Thank you; go ahead.

Professor STECK. Finally, a consideration of the openness provisions of FACA leads to one further conclusion. Like the National

Environmental Policy Act, FACA was apparently meant to be a self-enforcing statute. The act itself provided no enforcement means that could be utilized against a recalcitrant agency. Hence, again like NEPA, the enforcement of FACA fell to the courts, in the first instance and Senator Metcalf in the second.

Neither solution is altogether satisfactory. By the time litigation is underway the committee meeting in dispute may be over. The courts can correct continuing violations, but they cannot return the horse to the barn.

FACA's statutory scheme needs to be fleshed out, therefore, by a provision that allows for speedy resolution of contested decisions to close meetings and for a mechanism of sanctions that will discourage administrators from begcoming sloppy or playing hide-and-seek with FACA.

Second, openness is not the only issue. A consideration of FACA's effectiveness since 1973 suggests that a major defect in its scheme lies in the linked problems of selection of advisers and the ambiguous meaning of the "fairly balanced" mandate of section 5(b)(2).

Given the prescience of the committees that originated FACA and given the hardhearted skepticism of its drafters toward advisory committees, it is astonishing that the act contains no provisions for the selection of advisory committee members nor any precision in the term "fairly balanced" or the accompanying standard—or standards——of "points of view represented" and "the functions to be performed by the advisory committee." The issues of selection and balance are critical in reaching to the ultimate purpose of FACA.

This purpose in large measure is to prevent a biased single-interest between the private and public sectors. Efficiency of management, high quality advice, and openness are all important statutory values. But the achievement of these values would be for naught if the political character of the advisory system were a closed and exclusionary one in policy terms.

A key question for political analysis, of course, is who has access to decisionmakers and who has influence over them? In drafting FACA this committee in particular and Congress in general recognized that advisory committees represented one element in the increasing convergence and fusion of public authority and private power—and especially corporate power.

Advisory committees were seen to provide the means for groups representing common if not identical interests and sharing similar views about policy to acquire inordinate and one-sided influence over various arenas of policy.

The 1970-71 hearings revealed that in case after case committees such as NIPCC, the National Petroleum Council, the Defense Industrial Advisory Committee, the Advisory Committee on Federal Reports and others spoke with a common voice and filtered information to decisionmakers through a common filter.

Advisory committees are not, of course, the only vehicle for access and influence. But they are one and one that is fundamental, given the low visibility that decisionmaking has for most citizens.

The pages of the Federal Register and not the headlines of the New York Times or the urgent tones of the late night news tell the real story.

From the outside it is virtually impossible even for the well-informed citizen to understand the labyrinthine bureaucratic politics that characterize the Washington scene. The inner motives of agency decisionmaking are obscure and the niceties of the rulemaking and adjudicatory processes are impenetrable to any but those with the financial, legal, and scientific resources needed to play the game.

Through advisory committees organized groups can master the inflow of the raw data necessary for decisions touching on our lives. If some sectors of society are able to control the flow of advice and knowledge to those who make policy and if the system of expertise and advice is closed, the system cannot be regarded as neutral and therefore impersonally and impartially open and responsible.

It is lobbying with a difference since membership on advisory groups is cloaked with the mantle of institutional legitimacy and public authority. Such is the danger presented by the military-industrial complex, perhaps the preeminent example of the merger of public and private power.

Twenty years ago this year, the danger inherent in the advisory system was described by a subcommittee of the House Judiciary Committee in a report on WOC's and advisory groups that warned against "the problem of undue influence exercised by groups or individual factions from strategic vantage points within the various departments or agencies" and "the dangers of utilizing men" with economic allegiance outside the Government."

I would submit that the key to minimizing these dangers can lie only in an effective internal structuring of advisory committees such that an interested combination of groups do not prevail in some hegemonic fashion. There needs to be a structuring of men and motives such that a check on evasions of FACA's provisions comes from within the committee system itself.

The system of selection should be opened up; "fairly balanced" should be defined in terms of a diversity of qualified opinions and interests wherever possible. In this way a system of built-in checks will render attempts to circumvent FACA's openness procedures less likely on crucial issues.

There has been enough said to demonstrate beyond question that very rough politics are often played with respect to advisory committee appointments. Committee watchers with long memories will recall that 4 years ago Ralph Nader was dropped from a Department of Transportation Motor Vehicle Safety Advisory Council that seemed to tilt in industry's favor.

More recently, we have been treated to a number of reports detailing the extent to which high-level NIH committee vacancies multiplied because suggested nominees did not have political credentials acceptable to the Nixon and Ford White House. Those who suspected that the very high level advisory councils were convocations of the political faithful had some of their suspicions

confirmed, if only circumstantially, by several pertinent post-Watergate revelations.

There was, for example, some evidence that the NIPCC was closely linked to Maurice Stans' role as a fund raiser for Mr. Nixon and that membership on the Council was an incentive offered to businessmen who gave until it hurt. That is from the Government side.

From the other side of the table, the importance of membership for particular interests is well testified to by the efforts of the American Medical Association to establish an elaborate referral system designed "to channel into 315 Federal health advisory panels doctors who agree with the philosophy of the association."

I might parenthetically add that in yesterday's discussion with Director Lynn the two of you seemed at times to be downplaying the role of committees as ineffective. I think that is one hypothesis and one end.

I think groups like the AMA and others take these committees seriously.

The other hypothesis is that some committees are very, very potent, hence the need for greater study.

However defined, politics plays a part. Under these circumstances, it is doubtful that a fair balance can be readily achieved. One need only thumb through the index of advisory committees to develop a healthy suspicion that in all too many cases a fair balance has not been achieved. The attached charts[1] which do not pretend to scientific exactitude but only to a rough hand count, illustrate the point with respect to selected advisory committees dealing with energy matters.

I suspect that the results could be multiplied in many other instances as well, for example, in the case of the Department of Defense. In light of this, I believe there is a prima facie case that widespread violations of FACA's fair balance provisions do exist.

No doubt it is a difficult question. Neither section 5(b)(2) nor the legislative history adequately define "fair balance" and the questions that might be raised in litigation are numerous: does "fair balance" refer to some mathematical proportion?

Is a fair balance different from an equal balance? How many consumer representatives are needed to offset labor or industrial representatives? What would "fair balance" mean with respect to a scientific committee whose subject matter may be beyond the reach of all but a handful of highly trained scientists?

How are "points of view" to be defined and representation determined? Does "fair balance" extend to affirmative action type considerations? Furthermore, does the phase "in terms of the point of view represented and the functions to be performed by the advisory committee" constitute a one-test or two-test standard?

This provision is the bedrock on which FACA rests and answers to these questions will not come easily. I note that the OMB guidelines do stress the importance of agencies meeting their fairly balanced obligations, but I do not note a wholesale vamping of committees as a result. Finally, as a nonsmoker, let me close with a moment of special pleading and ask whether nonsmokers are

[1] See p. 139.

fairly represented on the Department of Agriculture's National Tobacco Advisory Committee?

Finally, despite FACA, I do not believe that we generally know very much about the advisory committee process. All of us who gather periodically at these most valuable hearings have bits and pieces of data and our favorite stories about this hero or that villain.

But we do not have the kind of information that would permit us to analyze the advisory committee process systematically and in depth. We know, for example, that there are various kinds of committees: scientific and technical committees, industry committees, grant making committees, general advisory committees, task force commissions, and the like.

What we do not know is whether some do a better job of providing advice to decisionmakers than others. Nor do we know what various advisory committees do well or not well. We know relatively little about the relationship between agency personnel and committees: in some cases, committees appear to be little more than a nuisance or a kind of symbolic gesture to organized interests; in other cases, advisory groups appear to have substantial formal or informal influence. The years of hearings are filled with differing and often conflicting conclusions, hypotheses, and case studies. Yet in some ways we are no farther ahead now than we were 3 years ago.

What is needed are careful studies on the functional cost effectiveness of advisory committees and on the manner in which the public interest is served by advisory committees.

We have at least two excellent examples. One is the House Government Operations Committee report on the FDA committees. I suggest to all who have doubts about the effectiveness of these committees that they study those findings very carefully. They are extremely disturbing.

We also have the study of committees in the foreign relations field. I think those types of studies are needed to a much greater degree. In fact, it might be worth having the GAO look into it.

These thoughts are suggested in part by my feeling that we have yet to receive, as I have mentioned, the kind of report that section 7(b) calls for. But it is also suggested by the research findings of a few scholars, by the recent Congressional Research Service study of the role of advisory committees in foreign policy and, above all, by the House Committee on Government Operations study of the use of advisory committees by the Food and Drug Administration. The two studies are models of the kind of analysis that we require. The latter especially is perhaps the most damning analysis ever made of the relationship between agency and advisory committees. Consider some of the findings of the subcommittee chaired by Representative Fountain: The number of FDA advisory committees has increased substantially since FACA was enacted but the evidence does not show that the extensive use of such committees has contributed to a more effective regulation of new drugs; the FDA is using advisory committees improperly for nonessential purposes; FDA advisory committee use has contributed to a lowering of drug approval standards; FDA use of advisory committees is often motivated by a desire to obtain support of the medical

profession for regulatory decisions; FDA improperly influenced advisory committees by injecting legal issues into their consideration of scientific evidence; FDA's management of advisory committees has been lax, resulting in inefficiency and waste; FDA submitted grossly inaccurate cost estimates for FDA advisory committees; FDA routinely disregards statutory requirements for open advisory committee meetings.

In light of these findings, I would repeat my suggestion that a second generation task for FACA is to look critically at the advisory process in a close manner. If the FDA situation is widely representative, then we may need a far more extensive reform of the system than FACA projects.

FACA, after all, takes the system as it exists and seeks to improve it in terms of management and openness. It does not question the existing use of advisory committees as such. As a first step, then, to such an approach, I strongly urge this committee to undertake a careful review of the system under FACA. I think a useful first step would be to commission a series of studies by the General Accounting Office of the system either by types of committees or by an agency-by-agency study.

I wish now to turn to the amendments contained in S. 2947 and to amendments that I understand may be proposed by Senator Percy. In light of what I have said thus far, I believe firmly that, on balance, the proposed amendments are timely and should strengthen FACA considerably. I shall turn first to various provisions in S. 2947.

This extremely significant amendment to the act is not without its difficulties. The requirement that public solicitation be used in the selection is commendable and I would like to see that enacted.

(1). Section 2: This section extends FACA to two sets of committees left unmentioned in the original statute: operational groups and ad hoc groups. Extending the act to cover these categories is a constructive move.

FACA is directed at committees composed of private persons partaking of the public business in an advisory capacity. The heart of the matter lies in the mixed public-private character of such committees.

From this point of view, it is quite sensible to extend FACA to cover public-private committees that functionally are operational in character or have administrative or executive responsibilities. The same considerations that led to the adoption of FACA in the first place apply to these groups with no less force.

My only query is whether additional change is needed in section 9(b) which holds that advisory committees shall be utilized solely for advisory functions. Unless we assume that operational functions of an administrative or executive character are essentially advisory in character, existing section 9(b) should be modified lest so-called operational groups be inadvertently abolished by a wave of the definitional hand. It might be added that this amendment would prevent groups from exempting themselves from the force of the act on the grounds that they are operational rather than advisory in character.

As for ad hoc groups, it is well to bring them under the act's requirements. Presumably, the intention of this amendment is, first, to guarantee that formalized short term committees (for example, the Ad Hoc Advisory Group on Reserpine and Breast Cancer) are covered and, second, to clamp a lid on the use of informal meetings between public officers and private citizens to avoid the requirements of FACA.

On the latter problem, the difficulty lies in deriving a definition of "ad hoc" that adequately draws the line between one- or two-time meetings between an official and outsiders and informal meetings that have all the characteristics of a committee (for example, purpose, stability, duration, and so forth) except a formal designation. The language as it stands may not give precise guidance to an agency official, but it does put him on notice that regularized off the record meetings with a stable group of persons cannot escape FACA's mandate.

(2). Section 4: This extremely significant amendment to the act is not without difficulties. The requirement that public solicitation be used in the selection is commendable. The expanded reporting requirements contained in section 4(B)(4) and section 8(4) of S. 2947 are very much overdue.

Without full knowledge of the character of advisory committee members and their backgrounds, interested persons and groups are at a loss to understand the configuration of interests that determine the parameters of public policy. It is simply not enough to be told that members of Interior's State multiple use advisory boards are ranchers. Enactment of these two sections will cast even more light on the workings of the system.

The difficulty of this section lies with the section 4(1)(A) requirement that at least one-third of the membership of all advisory committees be drawn from private citizens who represent the interests of the public. The spirit of the amendment is exemplary.

But the precise formulation causes several sticky problems. The quota-like formulation and the broad sweep of its critical terms creates certain reservations. I do not find it an easy matter to construe the term "represent the interest of the public with respect to the subject matter" in operational terms, yet this is the key statutory formula in this section.

Further, I seem to detect a change in direction over the existing language in section 5(b)(2) and (c). The existing language requires (a) that a committee be fairly balanced, that is, contain a good measure of diversity among somewhat comparable groupings; (b) that this balance must be among diverse points of view, that is, contrasting and alternate positions on policy; and (c) that the membership also be balanced in terms . . . of the functions to be performed, that is, in terms of qualifications. Members are to be selected on the grounds that they represented distinct views and had the qualifications to serve.

This reading is supported by the Senate report on FACA which states that: "Membership of the advisory committee shall be representative of those who have a direct interest in the purpose of the committee."

The original formulation represented sound policy and would exist if it were complied with. In this context, it might be worth considering applying it to committees in existence when the act was passed and not simply committees that will be formed from 1973 forward.

Indeed, the existing wording of section 5 (b) (2) and (c) would suffice on its own terms if firmly complied with. The fault lies not in the statute, but in its lack of implementation. The proposed amendment raises such difficulties that if enacted it might well leave matters worse off than they now are.

Although application of a one-third formula might give the appearance of solving a problem, it is far from clear that matters would be better off. Nor can we dispel the apprehensions that arise from contemplating the tangled situation that would result from the bewildering collage of interpretations that bureaucrats, public interest groups, special interests, and the legal profession would create with the concept of represent the interest of the public with respect to the subject matter before the advisory committee.

Beyond such speculative considerations, two situations might plausibly arise from this solution to the problem of breaking the policy biases of the existing system and instilling a healthy diversity of views. First, the appointment of citizens in public life to represent the public interest is an open door to a more extensive use of political patronage.

I have seen too many appointments of politically creditable or socially respectable do-gooders to public bodies to have any faith that this provision would be used as it is meant to be. We want persons on these committees who are representative of the broad array of views and competencies that have, to return to the language of the Senate report, "a direct interest in the purpose of the committee."

The amendment as proposed does not even suggest that such citizens be qualified. In the modern world, competency to deal with arcane questions of science, technology, medical judgment, and the like, is a valuable resource.

Ralph Nader is not only a public citizen; he—and all those scientists, lawyers, ecologists modeled after him—also possesses a high degree of technical competence. If the amendment is allowed to stand, the words "well qualified by reason of education or experience" should be added before the words "citizens in private life."

The second and related danger is that of tokenism. Patronage and respectability aside, administrators may well comply with the provisions by appointing persons who may represent the public but lack the qualifications to do the job well.

Although I believe I could speak for the public interest, I do not, for example, know what use I could be on the High Energy Laser Review Group of the Department of Defense, nor am I confident that I could identify and defend the public interest on these matters.

But I would trust a qualified scientist who, while sharing expertise with Pentagon scientists, might bring a different policy outlook to bear. Nor am I sure that I would necessarily want nonqualified persons passing judgment on research or artistic grant proposals: the congressional flap over the NSF's support of "Man: A Course of Study" illustrates the point.

I suppose we differ in that I do not share the Jacksonian premises that underlay this section, nor do I agree that there is a single identifiable public interest.

Perhaps, then, it would be better to devise a scheme for assuring the implementation of section 5 (b) (2) and (c) as it was originally written.

Let me suggest another scheme for assuring the implementation of section 5 (b) (2) and (c) as it was originally written.

Rather than setting up the one-third quota, perhaps we could work on the agency officials in the following fashion. When a committee is newly chartered or an existing committee rechartered, the responsible agency official should be required to publish a fair balance statement specifying the nature of his compliance with the fairly balanced requirement of section 5.

This would dovetail with the requirement of the proposed new section 5 (b) (6). This reasoned determination could thus form the basis for a challenge to the membership of the committee.

Such a challenge would be lodged first with the head of the agency—if his subordinate chartered the committee—or to the courts by a direct statutory right of action should the agency head deny his appeal. This would parallel the appeals procedures of FOIA and of section 9 of these amendments.

It would also permit a working out of the meaning of "fairly balanced" in a way that would be attentive not only to the purpose of FACA but to the everyday work of advisory committees.

You may get somebody on the committee who seems to be at first blush, for example, let us say, a large rancher but when you look more closely he may also be the president of a State Sierra Club. You would get your balance in point of view. The difficulty with the balanced provision——

Senator METCALF. That will never happen.

Professor STECK. Pardon?

Senator METCALF. You can dream though.

Professor STECK. What I am driving at is what you really want. I was thinking of some of the more arcane scientific committees. For example, the High Energy Laser Committee in the Department of Defense. You are not going to get a diversity of persons with qualifications to sit on that committee. If I were put on the committee it would be window dressing for compliance with the Act.

But what you may find in the university community is a qualified scientist in high energy laser matters, a qualified scientist who, nonetheless, takes a different point of view with respect to, say, to the sorts of policies that that committee will be called upon to judge.

As it now stands, we are talking about two things: balance in terms of points of view, which is one question, and balance in terms of functions which I read to mean in terms of qualifications.

I think the better approach might be to work with the existing language which I find very sound and try to find ways to strengthen it rather than to bring in the one-third possibility.

Let me raise one or two more questions.

Three: Section 5: With one exception, I believe this amendment is most salutary. Section (2) (B) in particular begins the work I have mentioned of providing the data so as to allow Congress, the

executive, and the public to judge whether advisory committees are in fact effective elements in the decisionmaking process.

Section (2) will simply shift to the executive the responsibility for producing the exemplary indices that this committee has produced.

My one reservation is with the new section 6(d) proposed in section 5(2) of S. 2947. I do not speak with any authority on the role of consultants in the administrative process. I do know enough, however, to appreciate the mushrooming significance of consultants and the well-established institutional role consultants play and have played in recent years.

I believe the subject is important and complex enough that it calls for a separate set of legislative hearings with an eye toward drafting separate legislation. It is not a simple topic and I do not believe that it should be approached in a piecemeal fashion.

I have had colleagues who have done consulting work. I have watched the way in which they move easily between industry, university, and government consulting.

I think that the subject is important enough and also complex enough, that I would suggest to you, sir, that it might be a better course of action not to write a provision relating to consultants into the Advisory Committee Act but instead, rather, first, to hold separate hearings on it and begin to derive separate legislation.

We don't know how many there are, where they come from, how much it costs, how they are used, what the impacts are, and so forth.

Looking back on the 2 or 3 years of hearings on advisory committees and what they turned up in the late sixties and early seventies, I think it might be worth paralleling that course with respect to consultants. Some firms, for example, the Rand Corp., we know something about.

But if you go through the advisory committee index you will find a lot of consultant firms there. It would be very interesting as a social scientist simply to know what role they are playing in government policymaking.

So in that sense, I think it might be better to approach it in along a separate avenue, rather than through the back door of the Advisory Committee Act.

Four: Section 9: This section seeks to close the chinks in the openness provisions of FACA. It strikes down exemption 552(b)(5). Considering both the misuse of exemption (b)(5) and the steady line of decided cases narrowing its applicability, this amendment puts an end to the legal thicket that has grown up around exemption (b)(5) and to its misuse.

It leaves the way open for closing advisory committee meetings for legitimate reasons, for example, elements of the peer review system. At the same time it provides a speedy system of review of determinations to close meetings, allows those appealing such determinations adequate time to make the appeal and, with the provisions for electronic recording of meetings, allows the horse to be returned to the barn.

In modeling the appeal system on that contained in FOIA, S. 2947 proposes a familiar system, for example, with the provision for in camera review of the subject matter of a committee meeting.

The amendment also shrewdly builds in a set of sanctions against both the Government and the agency official who arbitrarily and capriciously closes a meeting. This section, I think, remedies two defects in the original bill: It provides for a method of contesting agency determinations for closing meetings and it provides an external system of incentives to offset the otherwise self-enforcing character of the act.

The latter remedies may be harsh but the stakes are often very high. As James Madison writes in the Fifty-First Federalist Paper: "It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest reflection on human nature?"

Five: Senator Percy's amendments: These deal with two separate problems. The first, which provides for the disclosure of advisory committees support by private sources, is simply a step toward eliminating the conflicts of interest that are naturally inherent in the mixed nature of advisory committees.

Since there may be cases where outside private support is desirable, this amendment seems like a prudent first step in dealing with the question.

The second provides for a reporting and evaluation system of recommendations on the agency level similar to that created for the President by section 5 of S. 2947. The two complement each other and, as I have argued, begin to create the means for evaluating the advisory committee system in a comprehensive manner.

I think the discussion yesterday on looking at these things from a scorecard as versus a qualitative approach suggested a sound distinction. Some committees may not make formal written recommendations. They may sit down with a government official and work at a common problem and work through solutions or options without reducing their advice to writing.

It may be a more valuable committee than one which, as you suggested yesterday, may come up with four recommendations where three of the trivial ones are accepted and the fourth important one is not.

So I would go back to my prior suggestion; namely, that a very, very careful cost-effective qualitative study be made of committees, either on an agency-by-agency or committee-by-committee basis.

In sum, then, FACA has been and continues to be a strong element in making government more efficient, more accountable, and more accessible. The proposed amendments, if enacted, should, with some exceptions, do a great deal toward furthering its historic purposes.

I think that concludes the summary of my remarks.

Senator METCALF. Thank you very much, Professor Steck.

As I have heard you testify, I think your statement about fair balance, in making an analogy with requiring a statement on fair balance similar to the statement on closing or opening the committee, is a very important one. I don't know how to achieve balance.

I was glad to have you make the analogy with a jury. We have been able to find that we get people on a jury who are from all walks of life, none of whom have special technical ability and at the same time, by and large, they arrive at a decision which is just and enforceable.

It would seem to me that if we could just get some people who have a different point of view, so that that point of view would be heard, if they were skilled or technically trained, then it might be a catalyst for some useful activity on a committee, especially if it were open and public.

I think that we should explore this. When the committee is created, as I understand it, the appointing authority would come up and say; "We have X, Y, and Z and they are technical experts, and M, N, and O are people who are working in some of the trades, and so forth, and somebody else is representing consumers and labor unions, or John Birch Society, or Common Cause, or some other organizations, so that we had a spread." Then we can say, yes and no, we do have or we don't have balance.

I know that you are familiar with my attempt to get some balance in the Railway Act. I had required that some of them be representatives of the public, and some of the public members actually were stockbrokers who handled railroad securities and bankers who loaned money for the railroads, and so forth, none of whom really represented the public that I was thinking about.

Anyway, it seems to me that is a very interesting suggestion that we should explore. We will ask you to continue to work on it.

Yesterday I asked why have legislative authorization for these committees at all? Would you comment on that?

Professor STECK. In terms of the possible motives?

Senator METCALF. No. I just asked why create advisory committees at all by legislative authorization? Mr. Lynn suggested that he thought any Federal agency had a right to set up an advisory committee if it was deemed desirable, without legislative authorization.

He said sometimes we have to create such a committee when it is especially authorized and we don't really want it.

Why shouldn't we just say to each Cabinet officer and to each executive department, "when you create an advisory committee, come in and justify it," and not write that boilerplate legislation, that "there shall be a committee of 9 or 12 or 13 fairly balanced," and so forth.

Professor STECK. This is an interesting problem. I don't think a day goes by when a bill isn't introduced that contains an advisory committee provision.

Just reach on the shelf and pull off the Clean Air Act, the Water Pollution Act, and the like, and you can find provisions for new advisory committees.

It seems to me that the role of sound policy might be for Congress to exercise some self-restraint in the matter and leave it up to the agencies if the agencies feel a distinct need to get the advice of a certain segment of society.

It seems to me that the forces giving rise to this congressional reflexive action is probably at least threefold. I think generally there is a somewhat built-in distrust on the part of Congress towards bureaucrats in general.

Moving forward from that, I think Congress wants to make sure the public is involved. They want to give a signal to certain groups in society that their views are going to be listened to. This is a kind of "we love you" syndrome that Director Lynn referred to yesterday.

There is an uneasiness on the part of Congress that the agency may not have access to all the right kinds of hardnosed advice and generalized opinion.

I think it would be perfectly plausible to leave it up to the administrators to create their own committees, because I have been told by enough of them that they regard them as a nuisance and wish they wouldn't be imposed on them.

I think the route might be from the congressional end of simply withdrawing from this instinct. But I don't know how one could get Congress to do that.

Senator METCALF. One of the ways is for some one of us to just stand up and, every time an advisory committee is incorporated in a bill, move to strike it and require that whoever is handling the bill justify the creation of a new committee.

Professor STECK. My question would be whether it derives out of the hand of the drafter or whether these are put in by concrete representations on the part of effective groups.

Senator METCALF. If somebody could justify it, of course, it would go through. If it couldn't be justified, it would be a healthy sort of thing to eliminate it.

Yesterday Senator Percy suggested that he didn't see how Secretary Butz did any work because of all the advisory committees he had. I don't know of anybody in the Government who needs more advice than Secretary Butz, but most of those advisory committees he has are legislative in origin and have been created and are required by the Congress.

Maybe it would be useful to reduce some of those.

Professor STECK. Many of those are not to the Secretary himself, of course. They are to the middle-level and lower-level people. And that is where the difficulty is.

Senator METCALF. Of course some advisory committees are the kind the BLM has established, which are grass roots sorts of things.

Professor STECK. Some grass roots. It is the strongest, biggest trees, not the grass.

Senator METCALF. They are the beginning of grass roots. I am looking forward to the day when we have one of those big ranchers who is also President of the Sierra Club. Maybe that will be grass roots out of the BLM. Those are local committees which work at a local level, which is, I think, different than the thing we are talking about.

Professor STECK. Not exactly, Mr. Chairman. Because there the fair balance provision really has to be looked at very carefully, even—especially—at the local level.

Senator METCALF. The balance is awfully important. We have to have somebody representing the fish and wildlife interests. We have to have someone representing the interests of the Government, of course, the grazing interest, and somebody representing soil conservation as well as just the general public.

Your concept is that we are appointing a committee of 5 or 7 or 13 or whatever they are, and the following members of the committee have the following qualifications. Then anyone who looks can find out what the balance is.

Professor STECK. May I add, by way of a question, on my suggestion. I wonder if it would be plausible not simply to say to the of-

ficals, "You have to publish a statement setting forth how your proposed membership meets the balance," but whether it would also be plausible to ask the official to put it into the Federal Register and subject it to the usual notice and comment procedures, maybe 60 days.

Not simply setting a statement that you have to go to court to challenge but you can challenge through something analogous to the regular rulemaking procedures of the APA.

Senator METCALF. It has been our experience that this question of balance is one of the most difficult to meet. It is even more difficult than the openness provision. Yesterday, the Department of Justice said that it took the attitude that when people came in and said, "We would like to close the meeting," then it would ask "What harm would it do to leave it open?" If you take that attitude, then the burden of the proof changes, doesn't it?

Professor STECK. Yes.

Senator METCALF. I think that you have made a distinct contribution in making that suggestion.

Maybe just by enforcement or by continued writing of letters that my staff sends to me every day after reading the Federal Register, which is so voluminous, we will provide a nuisance or an irritant to the administration that is less costly than public hearings.

I am concerned about consultants but maybe consultants would be the answer.

I agree with you that consultants should be the subject matter of other hearings on other legislation. We should be concerned, as you suggest, about the cost-benefit ratio as we are with other things. Do we get our money's worth out of a committee? Maybe we should make the various agencies file a cost-benefit statement every year with the Appropriations Committee.

Is the advice obtained worth the amount of money that we have to expend to get it?

You have raised some very interesting questions. We will look forward to working with you to try to develop either executive orders or further legislation.

Do you have a question, Mr. Turner?

Mr. TURNER. Just a short comment. With the fair balance statement, I think there should be accompanying that a rather detailed list of the affiliations of each of the members—similar to our interlocking directorate study of our committee— of the businesses and other professional affiliations so you can get an idea of whether the individual——

Professor STECK. That is exactly what I had in mind, because if you look through the index now, you keep coming up with people who are listed just as lawyers or accountants or ranchers or professors, and you really don't know where their other interest lies. This dovetails with the consulting aspect of it since we know on certain kinds of committees you may have university scientists who are nonetheless heavy consultants for a particular pharmaceutical or food firms, and whatnot.

Senator METCALF. Thank you very much. We will continue to look to look to you for counsel and advice in working out some of these matters in continued oversight in this area.

Professor STECK. Thank you very much.

[Additional information supplied for the record by Prof. Steck follows:]

attachment 1 ENERGY RELATED ADVISORY COMMITTEES IN SELECTED AGENCIES 16

AGENCY	LABOR	INDUSTRY	R+D	PUBLIC Official-Agency	UNIVERSITY	OTHER/ Ambiguous *	BANKS	CITIZEN GROUPS	TOTAL
FEA									
- CIAC		5			4				9
CAC	6	9		3	1	1	1	2	23
CASIAC	1		1	11	2	2		11	28
EVAC		15	1	6	1	2		1	28
EFAC		2	2	2	9				15
FAC		21	2	1		2			26
LP-GIAC		24		3					27
NGTDAC		25		7		1			33
NAC		10	1	1					12
EAC		5	6	7	1	3		4	26
RDAC		22		2		1		1	26
SRAC		4	1	16	1	2			24
T-RIAC		27	1	6		3	1	2	40
WPAC		19	1	3		1			24
TOTAL	7	188	16	68	19	18	2	22	
COMM									
CTAB-PPIB		15	4		3	1			23
MPMAC		11	2	2	1	3		1	20
SACCMAGFMEMTN		10	1						11
SACEPBNETMTN		23							23
CZMAC		5		7	4				16
CTAB		7		1	5	2			15
EAB	2	4		1	2		2		11
NIECC		23		1					24
NACOA			1	1		1			3
TOTAL	2	98	8	13	15	7	2	1	

R Feldman

* This category includes a number of individuals or organizations not readily identifiable and categorized through their names. Examples of professionals in this category are, attorneys, physicians, consultants, accountants, ranchers, farmers, people involved in media, and ex-officials or executives. Also included are organizations identified by surnames, such as, Lane, Atker, Dunner, Zieas.

SOURCE U.S. Senate. Subcommittee on Reports, Accounting, and Management. Committee on Government Operations. Hearings on Energy Advisory Committees. 94th Cong., 1st Sess. August 1, 1975.

U.S. Senate. Subcommittee on Reports, Accounting, and Management. Committee on Government Operations. Federal Advisory Committees. Committee Print. 94th Cong., 1st Sess. October 1975.

Attachment 1 (cont.) ENERGY RELATED ADVISORY COMMITTEES IN SELECTED AGENCIES 17

AGENCY	LABOR	INDUSTRY	R&D	PUBLIC OFFICIAL-AGENCY	UNIVERSITY	OTHER/ * AMBIGUOUS	BANKS	CITIZEN GROUPS	TOTAL
INTERIOR									
OSEAP			1	24	1	2		2	30
OCSNMAB			2	32	1				35
RAC- MAR		1	1		1	4			7
RAC- NAR				1		2			3
RAC- RMR		3			1	4			8
RAC- EPA	12	35	1	41	12	54	6	4	165
ACCMR	2	3	1	1	1	3		1	12
EACNG		42	1		6	1			50
PETRAC-OCED		10	1	1		1			13
NPETROC	2	132	2		3	10	1	4	144
PETROSC-E		23		1					24
PETROSC-F		22		1					23
RAC-NWR		3		3		3			9
RAC-PNR		2			1	3			6
RAC-SER		1	1	2	1	4			9
RAC-SWR		1				6		1	8
RAC-WR		1				6	1	1	9
TOTAL	16	279	11	107	28	103	8	13	
FPC									
NPS- TFCFS		4		5	4				13
-TACIIEPS		7	3	11		1		1	23
- CC		4	3						7
- EAC	1	27	4	15	1	6		2	56
- TACF		11		9	1		1		22
- TACFU		12	1	13	3	6			35
- TACPS		13		10		1			24
- TACRD		9	5	7	1				22
NGS - CC		8		4					12
- CTF		4							4
- DTAC		12		3					15
- EAC	2	31		4	2	3		2	44
- STAC		13	2	5	4	1			25
- TTAC		6			1			1	8
TOTAL	3	161	18	86	17	18	1	6	

* This category includes a number of individuals or organizations not readily identifiable and categorized through their names. Examples of professionals in this category are, attorneys, physicians, consultants, accountants, ranchers, farmers, people involved in media, and ex-officials or executives. Also included are organizations identified by surnames, such as, Lane, Atlee, Dunner, Zieas. R Holloway

SOURCE U.S. Senate Subcommittee on Reports, Accounting, and Management. Committee on Government Operations. Hearings on Energy Advisory Committees. 94th Cong., 1st Sess. August 1, 1975.

U.S. Senate Subcommittee on Reports, Accounting, and Management. Committee on Government Operations. Federal Advisory Committees. Committee Print. 94th Cong., 1st Sess. October 1974.

Senator METCALF. Our next witness is Mr. Reuben B. Robertson III. He is a member of the Public Citizen Litigation Group in Washington, D.C., and the legal director of the Aviation Consumer Action Project.

TESTIMONY OF REUBEN B. ROBERTSON III, MEMBER OF THE PUBLIC CITIZEN LITIGATION GROUP IN WASHINGTON, D.C., AND LEGAL DIRECTOR OF THE AVIATION CONSUMER ACTION PROJECT

Senator METCALF. Mr. Robertson appeared as a witness before the subcommittee's hearings on advisory committees in 1971, as well as our 1974 hearings on corporate disclosure.

The Aviation Consumer Action Project has provided us with much useful and valuable information on relations between and among regulated companies and the Federal regulatory agencies, particularly in the field of aviation.

Mr. Robertson has had extensive professional experience in litigation before the Federal courts in matters of administrative law and procedure, including several important cases which have arisen under the Federal Advisory Committee Act.

He has also been a member of various advisory panels, including the Civil Aeronautics Board's Advisory Committee on Procedural Reform and its Consumer Affairs, of which he was chairman, so his firsthand experience from that perspective is also of great interest to these hearings.

Without any further comment, we welcome you back to the committee again for comment, advice, and counsel on this question.

Mr. Robertson?

Mr. ROBERTSON. Mr. Chairman and members of the subcommittee, I greatly appreciate the opportunity to participate in these hearings to consider amendments to the Federal Advisory Committee Act.

In the slightly more than 3 years since it took effect, the significance and wisdom of that act, and of its policy against secrecy in the activities of thousands of groups advising the Government, have become increasingly apparent.

That is not to say, however, that the spirit or letter of the law have been complied with throughout the Government. Although some agencies—and some advisory committees—have conscientiously sought to live up to its requirements, others have seized upon loopholes and ambiguities in the act—and the absence of any effective sanctions or enforcement process—to flout and resist the congressional mandate.

In my view, some revisions and clarifications of the act are now in order, and the proposals of Senator Percy and the Metcalf-Hatfield bill, S. 2974, are definitely on the right track.

One particular problem has arisen in the administration of the FACA to which I would urge your most immediate attention, because

it seriously undercuts the principle of openness that is at the very core of this legislation. The problem is the abuse of the fifth exemption of the Freedom of Information Act.

In reviewing my testimony last night, it seemed that I hadn't sufficiently emphasized in the prepared statement how strongly I feel that the Government's argument on this fifth exemption point is wrong and frivolous.

I don't think Congress ever intended that the fifth exemption could be used in the context of the Advisory Committee Act, because the fifth exemption applies only to internal documents in the Government. The advisory committees, by their very definition, are made up of outsiders. If their members were all inside the Government, they wouldn't constitute advisory committees.

Senator METCALF. May I interrupt?

Mr. ROBERTSON. Yes, sir.

Senator METCALF. Doesn't the very fact that we have private individuals participating in the discussion of advisory committees eliminate the use of section 5, which is, as you suggest, for internal official governmental documents where Government officials of the executive department are solely concerned?

Mr. ROBERTSON. That is absolutely right, Senator Metcalf. Every court that has decided this question so far has said that exemption 5 is inherently inapplicable to advisory committees.

Yet what happens? The Government continues to press this silly exemption claim. They simply force people to go to court if they want to have redress.

I don't think the law is unclear. In my view the law is clear, but it is being abused by the Government. That is why I think the Congress should correct this situation right away, to take the load off the courts if nothing else, and certainly to improve the administration of the Act.

This exemption was designed to protect internal Government documents which would not generally be available to a private party through discovery in civil litigation against an agency.

As the Supreme Court noted last term, Congress specifically had the Government's executive privilege in mind in adopting exemption 5, with the purpose of preventing injury to the quality of agency decisions through inhibition of frank internal discussions of legal or policy matters.[1]

Various of the agencies are now asserting, however, that the incorporation by reference of exemption 5 into section 10(d) of the Advisory Committee Act expanded executive privilege, so that it is not only available to persons within the Government, but also to outsiders who serve on advisory committees.

Ignoring entirely that exemption 5 on its face applies only to interagency and intraagency matters, it is contended that by analogy the

[1] *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975).

exemption is also available to shield the discussions and deliberations of advisory committees from public scrutiny. Otherwise, the agencies say, they might not get candid and honest advice from their advisers.

Of course the answer to that is to get advisers who will give candid and honest advice even if the public is watching.

The problem with the agencies' argument is that, if the executive privilege rationale could properly be applied to any advisory committee proceedings, it would equally apply to all of them. To close any meeting, the agency head would merely have to assert that it was considered necessary to enhance the candor and quality of discussions.

The essential function of any advisory committee, after all, is the consideration, formulation, and rendering of advice to an agency. If that function were in and of itself considered sufficient grounds for closing the proceedings, the open meeting requirement would be a nullity. The exception, in short, would swallow the rule.

Just a glance at recent Federal Register publications shows how widespread the blanket invocation of this exemption has become. In the Register for March 3, for example, the Air Force announced a closed executive session of a subgroup of its Scientific Advisory Board to evaluate the information received in earlier presentations, discuss preliminary findings and write initial draft inputs for possible inclusion in a final report, which are said to concern matters listed in exemption 5.

The Veterans Administration, on a single page of the March 2 Register, gave notice of a meeting of the Geriatric Research and Clinical Centers Advisory Committee and 22 other advisory boards engaged in evaluating research being done by VA investigators—all closed under exemption 5.

I don't think there is any good basis for this theory in the statute or its legislative history. Yet time after time the Government and its agencies are asserting it as a basis for keeping me and you and other people out of these meetings.

Perhaps the most outrageous example of the abuse of this exemption is the conduct of the Food and Drug Administration. In a case brought by my colleague Dr. Sidney Wolfe, director of the Health Research Group, the U.S. District Court for the District of Columbia ordered the release of transcripts of closed meetings of the FDA's over-the-counter drug review panel on antacid drug products.[1]

District Judge Richey firmly rejected the FDA's claim that the transcripts were exempt under exemption 5 because they reflected internal deliberations of the panel, and he explicitly held that exemption 5 is inherently inapplicable to advisory committees.

FDA chose not to appeal Judge Richey's decision, and it released the particular transcripts involved in the litigation. Nevertheless, incredibly, FDA officials then made it known that they would ignore the ruling as to future advisory committee proceedings.

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[1] *Wolfe v. Weinberger*, 403 F.Supp. 238 (D.D.C. 1975).

In correspondence with us, and finally in a notice published in the Federal Register on December 15, 1975, the agency said it intended to continue closing committee meetings, and withholding transcripts of them, under exemption 5.

I would like to submit copies of the relevant documents for the hearing record.

[The documents referred to follow:]

PUBLIC CITIZEN LITIGATION GROUP,
Washington, D.C., December 2, 1975.

Re: *Wolfe* v. *Weinberger*, Civ. No. 74–454 (D.D.C., Oct. 31, 1975).

THOMAS SCARLETT, Esq.,
Food and Drug Administration, Department of Health, Education, and Welfare, Washington, D.C.

DEAR MR. SCARLETT: This letter is to memorialize the telephone conversation which you initiated yesterday with Ms. Anita Johnson, one of the undersigned. In this way we wish to insure that there will be no misunderstanding as to our respective positions in connection with the above-entitled case. You informed Ms. Johnson that the Food and Drug Administration (FDA) has decided not to appeal Judge Richey's opinion, and that the FDA will shortly make available to us the transcripts of the OTC Antacid advisory committee meetings as directed to do by the Court. However, you also stated that the FDA intends to continue to withhold the transcripts of all other FDA advisory committees on the ground that their deliberations are protected from disclosure by 5 U.S.C. § 552(b)(5). Thus, according to the FDA, if we want access to either the transcripts or the meetings of any other advisory committees, we must initiate a new lawsuit for that purpose.

If the foregoing does not accurately reflect your statements, or if your statements do not accurately reflect the FDA's position, please inform us at once.

We wish to lodge a strong protest against the FDA's decisions to continue to claim 5 U.S.C. §552(b)(5) as a basis for withholding advisory committee transcripts and (probably more important in view of the FDA's efforts since the filing of this suit to discourage advisory committees from making transcripts) to continue to close advisory committees to the public. We find the FDA's decision neither to appeal nor to obey the rule of law proclaimed in *Wolfe* to be indefensible. We remind you of Judge Richey's explicit holding that: "This Court rejects defendant's assertion that the Federal Advisory Committee Act recognizes the applicability of 5 U.S.C. §552(b)(5) to the advisory committees and finds that the (b)(5) exemption is inherently inapplicable to advisory committees."

We hope that the FDA will reconsider its unfortunate decision.

Yours truly,

LARRY P. ELLSWORTH.
ANITA JOHNSON.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE U.S. ATTORNEY,
Washington, D.C., December 9, 1975.

Re: *Sidney Wolfe* v. *F. David Mathews*, Civil Action Number 74–454.

MS. ANITA JOHNSON,
Public Citizen Litigation Group,
Washington, D.C.

DEAR MS. JOHNSON: Please be advised that we are in receipt of a copy of your letter to Thomas Scarlett, Esquire, Food and Drug Administration, dated December 2, 1975. Although we will not now take issue with your interpretation of Judge Richey's decision as applicable to other cases, we wish to clarify that

transcripts of the OTC Antiacid panel's meetings have been available for your inspection and copying at the FDA since Monday, December 2, 1975.

Sincerely,

EARL J. SILBERT,
U.S. Attorney.
ROBERT N. FORD,
Chief, Civil Division.

[From the Federal Register, Vol. 40, No. 241—Monday, December 15, 1975]

FOOD AND DRUG ADMINISTRATION

[Docket No. 75N–0357]

OTC DRUG REVIEW PANEL ON ANTACID DRUG PRODUCTS

AVAILABILITY OF CERTAIN TRANSCRIPTS OF CLOSED SESSIONS

On March 20, 1974, Dr. Sidney Wolfe, Director of the Health Research Group, filed suit in the United States District Court for the District of Columbia to obtain copies of verbatim transcripts of closed sessions of the over-the-counter (OTC) drug review panel on antacid drug products. *Wolfe* v. *Weinberger*, No. 74–454. The suit was based on the Freedom of Information Act (5 U.S.C. 552) and the Federal Advisory Committee Act (5 U.S.C. App. I). The Food and Drug Administration had denied access to the transcripts on the ground that they reflected internal deliberations of the antacid panel, and so were exempt from disclosure under both statutes pursuant to exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)).

On October 31, 1975, the District Court (Richey, J.) ordered the transcripts to be produced. The court held that the transcripts are not exempt under 5 U.S.C. 552(b)(5). However, since all but one of the panel's meetings had occurred before January 5, 1973, the court expressly declined to reach any issue involving the Federal Advisory Committee Act, which was not effective until that date.

For this reason, and because the issue of the availability of exemption 5 to close deliberative sessions of advisory committees (and, by implication, to protect advisory committee transcripts) under the Federal Advisory Committee Act is presented in a case now pending in the United States Court of Appeals for the District of Columbia Circuit (*Aviation Consumer Action Project* v. *Washburn*, No. 75–1085), the Government has decided not to appeal the District Court's decision in *Wolfe* v. *Weinberger*. Moreover, the transcripts at issue were made available to the staff of the Subcommittee on Intergovernmental Relations and Human Resources of the House Committee on Government Operations. As a result, substantial portions of the transcripts about which some controversy had developed were introduced into the public record of hearings held before the subcommittee on May 9 and 12, 1975.

Accordingly, although no appeal of the narrow ruling in *Wolfe* will be taken, and the antacid panels transcripts are therefore now available, the Commissioner of Food and Drugs does not regard the decision as necessitating a modification in existing policy, and where necessary and appropriate, will continue to authorize the closing of the deliberative portions of advisory committee meetings pursuant to exemption 5. The basis for this policy has been set forth numerous times: see, e.g., Notice of Meetings of Food and Drug Administration Advisory Committees published in the FEDERAL REGISTER of February 5, 1973 (38 FR 3345, 3347). The Department of Justice has advised the Food and Drug Administration that, because the decision in *Wolfe* is explicitly not based on the Federal Advisory Committee Act, the agency may adhere to its existing policy and, if necessary, defend that policy in court.

Dated: December 8, 1975.

SAM D. FINE,
Associate Commissioner for Compliance.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
PUBLIC HEALTH SERVICE,
FOOD AND DRUG ADMINISTRATION,
Rockville, Md., December 29, 1975.

MS. ANITA JOHNSON,
Public Citizen,
Health Research Group,
Washington, D.C.

DEAR MS. JOHNSON: This is in response to your letter of December 5, 1975, received in the Food and Drug Administration's Public Records and Documents Center on December 9, 1975, requesting the release of the transcripts of closed sessions of FDA's Neuropharmacology Advisory Committee meetings where the drug product Cylert was discussed. This information which you previously requested, was denied on March 27, 1975. However, as a result of the opinion of the court in *Wolfe* v. *Weinberger* you have again requested this informtion.

I must again deny your request. The verbatim transcripts of the closed advisory committee sessions you have requested reflect internal deliberations of the committee and thus are exempt from disclosure pursuant to Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), the Federal Advisory Committee Act, 5 U.S.C. App. 1, and the Public Information Regulations of the Food and Drug Administration, 21 CFR 4.62.

As you know, Judge Richey of the U.S. District Court for the District of Columbia, in *Wolfe* v. *Weinberger*, No. 74–454, ordered certain transcripts of closed sessions of the Over-the-Counter Drug Review Panel on Antacid Drug Products to be produced, holding that the transcripts were not exempt under 5 U.S.C. 552(b)(5). Because the *Wolfe* case did not reach any issue involving the Federal Advisory Committee Act, and because the issue of availability of Exemption 5 to closed deliberative sessions of advisory committees (and, by implication, to protect advisory committee transcripts) under the Federal Advisory Committee Act, is presented in a case now pending in the United States Court of Appeals for the District of Columbia (*Aviation Consumer Action Project* v. *Washburn*, No. 75–1086), the Government has decided not to appeal the *Wolfe* decision. Nonetheless, the FDA, with the concurrence of the Department of Justice, does not regard the *Wolfe* decision as necessitating a change in existing policy.

Where necessary and appropriate, the Commissioner of Food and Drugs will continue to authorize the closing of deliberative portions of advisory committee meetings pursuant to Exemption 5, and the FDA will, accordingly continue to deny requests for verbatim transcripts of the closed deliberations pursuant to 5 U.S.C. 552(b)(5). This portion of the release of advisory committee closed session transcripts was published in the Federal Register of December 15, 1975 (40 FR 58165). Copy enclosed.

Subpart G of the Department's regulations, 45 CFR Part 5, sets forth the procedures to be followed should you choose to appeal this decision not to provide you with the document you have requested. Any such appeal should be filed within 30 days and addressed to the Assistant Secretary for Health, Department of Health, Education, and Welfare, 330 Independence Avenue, S.W., Washington, D.C. 20201.

Sincerely yours,

JOHN T. WALDEN,
Assistant Commissioner for Public Affairs.

Enclosures as indicated.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Food and Drug Administration

ADVISORY COMMITTEES

Notice of Meetings

This notice announces forthcoming meetings of the public advisory committees of the Food and Drug Administration. It also sets out a summary of the procedures governing the committee meetings and the methods by which interested persons may participate in the open public hearings conducted by the committees. The notice is issued under section 10(a)(1) and (2) of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770-776 (5 U.S.C. App. I)). The following advisory committee meetings are announced:

Committee name	Date, time, and place	Type of meeting and contact person
1. Panel on Review of Dental Devices.	Feb. 2 and 3, 9 a.m., Room 5169, HEW-N, 330 Independence Ave. SW., Washington, D.C.	Open public hearing Feb. 2, 9 to 10 a.m.; open committee discussion Feb. 2, 10 a.m. to 4 p. m.; open public hearing Feb. 3, 9 a.m. to 4 p.m.; D. Gregory Singleton, D.D.S. (HFK-400), 8757 Georgia Ave., Silver Spring, Md. 20910, 031-427-7238.

General function of the committee. Reviews and evaluates available data concerning the safety and effectiveness of devices currently in use and makes recommendations on their regulation.

Agenda—Open public hearing. Interested parties are encouraged to present information pertinent to the classification of pit and fissure sealants and oral implants to D. Gregory Singleton, D.D.S., executive secretary. Submission of data relative to tentative classification findings is also invited.

Open committee discussion. Discussion of current literature concerning cyanoacrylates; discussion of electrosurgical unit standard; discussion of subcommittee formation; discussion of the classification of pit and fissure sealants and ultraviolet lights.

Committee name	Date, time, and place	Type of meeting and contact person
2. Psychopharmacological Agents Advisory Committee.	Feb. 5 and 6, 9:30 a.m., Conference Room M, Parklawn Bldg., 5600 Fishers Lane, Rockville, Md.	Open public hearing Feb. 5, 9:30 to 10:30 a.m.; open committee discussion Feb. 5, 10:30 a.m. to 12:30 p.m.; closed committee deliberations Feb. 5, 2 to 4:30 p.m.; open committee discussion Feb. 6, 9:30 a.m. to 1 p.m.; Stephen C. Groft (HFD-120), 5600 Fishers Lane, Rockville, Md. 20852, 301-443-3890.

General function of the committee. Reviews and evaluates available data concerning safety and effectiveness of marketed and investigational prescription drugs for use in the practice of psychiatry and related fields.

Agenda—Open public hearing. During this portion of the meeting any interested person may present data, information, or views, orally or in writing, on issues pending before the committee.

Open committee discussion. Discussion of antipsychotic guidelines—box warning for long term use of antianxiety and antidepressant drugs; hypnotic drug guidelines.

Closed committee deliberations. Discussion of Lorazepam NDA 17-794. This portion of the meeting will be closed to permit the free exchange of internal views and formulation of recommendations (5 U.S.C. 552(b)(5)).

Committee name	Date, time, and place	Type of meeting and contact person
a. Panel on Review of General and Plastic Surgery Devices.	Feb. 5, 8 a.m., Room 1137, HEW-N, 330 Independence Ave. SW., Washington, D.C.	Open public hearing 8 a.m. to 3:30 p.m.; Mark F. Parrish, Ph. D. (HFK-400), 8757 Georgia Ave., Silver Spring, Md. 20910, 301-427-7238.

General function of the committee. Reviews and evaluates available data concerning the safety and effectiveness of devices currently in use and makes recommendations on their regulation.

Agenda—Open public hearing. The general and plastic surgery panel has made a preliminary classification of the following devices into the Class II regulatory category—standards: arterial grafts, biological and synthetic; electrosurgical units and accessories; endoscopes, fiberoptic. Following this preliminary recommendation, an interpanel ranking of devices has resulted in the placement of the above devices among those judged by all classification panels to most urgently require the development of standards.

The panel, having made their preliminary recommendations, wishes now to reexamine the above listed devices, specifically addressing: (1) any potential for hazard in their use and their efficacy and (2) whether the development of standards will be an effective and appropriate method to reduce potential hazards and ensure the efficacy of these devices.

The panel invites the participation of representatives of the concerned medical devices industries.

Committee name	Date, time, and place	Type of meeting and contact person
3. Ophthalmic Drugs Advisory Committee.	Feb. 9, 9 a.m., Conference Room C, Parklawn Bldg., 5600 Fishers Lane, Rockville, Md.	Open public hearing 9 to 10 a.m.; open committee discussion 10 a.m. to 3:30 p.m.; closed committee deliberations 3:30 to 4:30 p.m.; Mary K. Bruch (HFD-140), 5600 Fishers Lane, Rockville, Md. 20852, 301-443-4310.

General function of the committee. Reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational prescription drugs for use in diseases of the eye.

Agenda—Open public hearing. During this portion of the meeting any interested person may present data, information, or views, orally or in writing, on issues pending before the committee.

Open committee discussion. Discussion of alternative plans for post-marketing surveillance of new contact lenses; review of approved guidelines (clinical and manufacturing) for new contact lenses; clinical use of fluorescein strips.

Closed committee deliberations. Discussion of subjects in agenda for open session. This portion of the meeting will be closed to permit the free exchange of internal views and to avoid undue interference with agency operations (5 U.S.C. 552(b)(5)).

Committee name	Date, time, and place	Type of meeting and contact person
4. Pediatric Subcommittee of the Psychopharmacological Agents Advisory Committee.	Feb. 9, 8:30 a.m., Room 1406, FH-8, 200 C St. SW., Washington, D.C.	Open public hearing 8:30 a.m. to 5:30 p.m.; Julius C. Cinque (HFD-120), 5600 Fishers Lane, Rockville, Md. 20852, 301-443 3800.

General function of the committee. Reviews and evaluates available data concerning the safety and effectiveness of marketed investigational prescription drugs for use in the practice of psychiatry and related fields.

Agenda—Open public hearing. Discussion of phenothiazines for the nonmentally retarded; pediatric guidelines report; long term protocol report; uniform labeling of neuroleptics; and atarax review. During this portion any interested person may present data, information, or views, orally or in writing, on issues pending before the committee.

Committee name	Date, time, and place	Type of meeting and contact person
5. Panel on Review of Viral Vaccines and Rickettsial Vaccines.	Feb. 10 and 11, 10 a.m., Room 121, NIH, Building 29, 8800 Rockville Pike, Bethesda, Md.	Open public hearing Feb. 10, 10 to 11 a.m.; open committee discussion Feb. 10, 11 a.m. to 2:30 p.m.; closed committee deliberations Feb. 10, 2:30 to 4:30 p.m., Feb. 11, 10 a.m. to 4:30 p.m.; Jack Gertzog (HFB-5), 8800 Rockville Pike, Bethesda, Md. 20014, 301-496-4545.

General function of the committee. Reviews and evaluates available data concerning the safety and effectiveness of biological products.

Agenda—Open public hearing/open committee discussion. Presentation and discussion of previous meeting's minutes; review and discussion of communications received; comments and presentations from interested persons on issues pending before the committee; continued presentations of staff members on the bureau's hepatitis program.

Closed committee deliberations. Discussion of panel report on bureau's hepatitis program; discussion of panel report on the safety and effectiveness of licensed viral

and rickettsial vaccines. This portion of the meeting will be closed to permit the free exchange of internal views, formulation of recommendations, and to avoid undue interference with committee operations (5 U.S.C. 552(b) (5)).

Committee name	Date, time, and place	Type of meeting and contact person
6. FDA/NIDA Drug Abuse Research Advisory Committee.	Feb. 12, 8:30 a.m., Billings Auditorium, National Library of Medicine, National Institutes of Health, Bethesda, Md.	Open public hearing 8:30 to 9:30 a.m.; open committee discussion 9:30 a.m. to 12:30 p.m.; closed committee deliberations 1:30 to 5 p.m.; John A. Seglliano, Ph. D. (HFD-120), 5600 Fishers Lane, Rockville, Md. 20852, 301-443-3594.

General function of the committee. Advises the Food and Drug Administration on action to be taken with respect to investigational use of substances with abuse potential. Advises the National Institute on Drug Abuse on supplies of substances for clinical studies and on quantities of substances for animal and in vitro studies. Advises FDA and NIDA on development of broad outlines for studies of substances with abuse potential and on new methods and tests in animals and man by which the dependence liability of investigational drugs may be estimated.

Agenda—Open public hearing. During this portion any interested person may present data, information, or views, orally or in writing, on issues pending before the committee.

Open committee discussion. Discussion of scientific merit of research protocols; reordering of Schedule I substances for approved INDs; instructions for licensure, drug procurement and IND submissions; expediting advisory committee minutes release to public; meeting dates for calendar year 1976; "Toxline" and "The Toxicology Data Bank"; and report on "Chronic Cannabis Use" conference.

Closed committee deliberations. Review of IND applications (new and amendments); review of preclinical staff action. This portion of the meeting will be closed to permit the free exchange of internal views, to avoid undue interference with committee operations, and to permit the formulation of recommendations (5 U.S.C. 522(b) (5)).

Committee name	Date, time, and place	Type of meeting and contact person
7. Dermatology Advisory Committee.	Feb. 17, 9 a.m., Conference Room A, Parklawn Bldg., 5600 Fishers Lane, Rockville, Md.	Open public hearing 9 to 10 a.m.; open committee discussion 10 a.m. to 2:30 p.m.; closed committee deliberations 2:30 to 4:30 p.m.; Mary K. Bruch (HFD-140), 5600 Fishers Lane, Rockville, Md. 20852, 301-443-4310.

General function of the committee. Reviews and evaluates available data concerning the safety and effectiveness of presently marketed and new prescription drug products proposed for marketing for use in the practice of dermatology.

Agenda—Open public hearing. During this portion of the meeting any interested person may present data, information, or views, orally or in writing, on issues pending before the committee.

Open committee discussion. Discussion of the use of Psoralens ultraviolet light in treatment of psoriasis.

Closed committee deliberations. Use of Psoralens and ultraviolet light in the treatment of psoriasis. This portion of the meeting will be closed to permit the free exchange of internal views and to avoid undue interference with agency operations (5 U.S.C. 552(b) (5)).

Committee name	Date, time, and place	Type of meeting and contact person
8. Endocrinology and Metabolism Advisory Committee.	February 19 and 20, 9 a.m., Conference Room G-H, Parklawn Bldg., 5600 Fishers Lane, Rockville, Md.	Open public hearing Feb. 19, 9 to 10 a.m.; open committee discussion Feb. 19, 10 a.m. to 12 m.; closed committee deliberations Feb. 19, 1 to 4 p.m.; closed presentation of data Feb. 20, 9:30 a.m. to 12 m.; closed committee deliberations Feb. 20, 1 to 4 p.m.; A. T. Gregoire, Ph. D. (HFD 130), 5600 Fishers Lane, Rockville, Md. 20852, 301-443-3510.

General function of the committee. Reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational prescription drugs for use in endocrine and metabolic disorders.

Agenda—Open public hearing. During this portion any interested person may present data, information, or views, orally or in writing, on issues pending before the committee.

Open committee discussion. Proposed labeling for lipid lowering drugs; review of proposed guidelines for lipid-lowering drugs, Phases I through III; FDA objectives of Phase IV lipid-lowering drug investigations.

Closed presentation of data. Presentation by the sponsor on IND 11-200 (European Chemicals Co., Inc.). The committee will consider the drug's safety and efficacy, which involves the discussion of individual patient's response to therapy. This portion of the meeting will be closed to protect the confidentiality of medical files (5 U.S.C. 552(b) (6)).

***Closed committee deliberation.* This portion of the meeting will be closed to permit the free exchange of internal views and for formulation of recommendations (5 U.S.C. 552(b) (5)).**

Committee name	Date, time, and place	Type of meeting and contact person
9. Panel on Review of Obstetrical and Gynecology Devices.	Feb. 23 and 24, 9 a.m., Room 6821, FB-8, 200 C St. SW., Washington, D.C.	Open public hearing Feb. 23, 9 to 10 a.m.; open committee discussion Feb. 23, 10 a.m. to 4 p.m.; open public hearing Feb. 24, 9 to 10 a.m.; open committee discussion Feb. 24, 10 a.m. to 12 n.; closed committee deliberations Feb. 24, 1 to 3 p.m.; Lillian Yin, Ph. D. (HFK-400), 8757 Georgia Ave., Silver Spring, Md. 20910, 301-427-7238.

General function of the committee. Reviews and evaluates available data concerning the safety and effectiveness of devices currently in use and makes recommendations for their regulation.

Agenda—Open public hearing. Interested parties are encouraged to present information pertinent to the development of specific performance standards of those devices that have been tentatively classified in the standards category.

Open committee discussion. The panel will identify specific device hazards and will consider specific performance standards for those devices that have been classified in the standards category. Dr. Melvin Sikov will report to the panel on the Biologic Effects of Ultrasound Subcommittee meeting of January 22 and 23, 1976.

Closed committee deliberations. The panel will discuss and deliberate the Biologic Effects of Ultrasound Subcommittee's recommendations on the classification of the obstetrical-gynecological diagnostic ultrasound devices. This portion of the meeting will be closed to permit the free exchange of internal views and to avoid undue interference with agency or committee operations (5 U.S.C. 552 (b)(5)).

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairman determines will facilitate the committee's work.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this FEDERAL REGISTER notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairman's discretion.

Persons interested in specific agenda items to be discussed in open session may ascertain from the contact person the approximate time of discussion.

The Commissioner, with the concurrence of the Chief Counsel, has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. Both the Federal Advisory Committee Act and 5 U.S.C. 552(b) permit such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed shall, however, be closed for the shortest time possible consistent with the intent of the cited statutes.

Generally, FDA advisory committees will be closed because the subject matter is exempt from public disclosure under 5 U.S.C. 552(b) (4), (5), (6), or (7), although on occasion the other exemptions listed in 5 U.S.C. 552(b) may also apply. Thus, a portion of a meeting may be closed where the matter involves a trade secret; commercial or financial information that is privileged or confidential; personnel, medical, and similar files, disclosure of which could be an unwarranted invasion of personal privacy; and investigatory files compiled for law enforcement purposes. A portion of a meeting may also be closed if the Commissioner determines: (1) That it involves inter-agency or intra-agency memoranda or discussion and deliberations of matters that, if in writing would constitute such memoranda, and which would, therefore, be exempt from public disclosure; and (2) that it is essential to close such portion of a meeting to protect the free exchange of internal views and to avoid undue interference with agency or committee operations.

Examples of matters to be considered at closed portions are those related to the review, discussion, evaluation or ranking of grant applications; the review discussion, and evaluation of specific drugs or devices; the deliberation and voting relative to the formation of specific regulatory recommendations (general discussion, however, will generally be done during the open committee discussion portion of the meeeting); review of trade secrets or confidential data; consideration of matters involving FDA investigatory files; and review of medical records of individuals.

Examples of matters that ordinarily will be considered at open meetings are those related to the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices, consideration of labeling requirements for a class of marketed drugs and devices, review of data and information on specific investigational or marketed drugs and devices that have previously been made public, and presentation of any other data or information that is not exempt from public disclosure.

Dated: January 14, 1976.

SHERWIN GARDNER,
Acting Commissioner of Food and Drugs.

[FR Doc.76-1455 Filed 1-16-76;8:45 am]

FDA told us bluntly that if we want access to other FDA advisory committee meetings, or their transcripts, we would have to bring new litigation for that purpose. Last month, as Professor Steck pointed out, FDA used exemption 5 to exclude interested members of the public from proceedings of such groups as the Psychopharmacological Agents Advisory Committee, the Ophthalmic Drugs Advisory Committee, the Panel on Review of Viral Vaccines and Ricketsial Vaccines, the FDA/NIDA Drug Abuse Research Advisory Committee, the Dermatology Advisory Committee, the Endocrinology and Metabolism Advisory Committee, and the Panel on Review of Obstetrical and Gynecology Devices.

Mr. Chairman, these advisory committees are dealing with issues of health and safety that are of great importance to the citizens of this country. The FDA officials who are responsible for these committees, in closing these meetings, however, exhibit a contemptuous attitude toward the public's right to know and the mandate of the Federal Advisory Committee Act.

Secrecy is necessary, they say, "to permit the free exchange of internal views, to avoid undue interference with committee operations, and to permit the formulation of recommendations." What "undue interference" do these bureaucrats have in mind? How is the presence of public as observers going to interfere with legitimate committee activities?

Why is the "free exchange" of opinions and the "formulation of recommendations" by FDA's advisers not possible unless the public is fenced out, and even prevented from reviewing the transcripts later?

Contrary to the claimed public interest in excluding the public, the GAO's recent report and the Fountain committee reports in the house underscore the problem of conflict of interest and the urgent need for openness in these FDA meetings.

I know that you are going to have officials of the HEW come in tomorrow and testify. I hope that during these hearings you will have the opportunity to have them or responsible FDA officials answer these and other relevant questions. It would be very instructive to reveal how such an utterly erroneous view of the agency's responsibilities under FACA came to be adopted—particularly in light of Judge Richey's ruling in the *Wolfe* case that exemption 5 is inapplicable to advisory committees.

The courts have repeatedly rejected the argument that exemption 5 may be used in the advisory committee context. Still the agencies continue to invoke it on a wholesale basis, and the Justice and Commerce Departments are vigorously urging the U.S. court of appeals to rule that advisory committee meetings may be closed whenever it is considered by the agency head that the candor of discussions might be facilitated by keeping out the "sunshine" of public scrutiny.

I had the opportunity to review the testimony given yesterday by Miss Mary Lawton, who is the Deputy Assistant Attorney General in the Justice Department, Office of Legal Counsel. I was very interested to compare what Miss Lawton was saying yesterday with a statement that she gave 1½ years ago at a forum on secrecy in government.

Mr. Chairman, I will provide relevant excerpts from the transcript of these 1974 proceedings for the record. You may wish to look at this, because it is very interesting as far as the Government's position is concerned.

[The information referred to follows:]

STATEMENT OF MARY LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. JUSTICE DEPARTMENT, AT THE FORUM OF SECRECY IN GOVERNMENT, SPONSORED BY GOVERNMENTAL RESPONSIBILITY, FRIDAY, MAY 10, 1974 (AFTERNOON SESSION), WASHINGTON, D.C.

(Transcript of Proceedings, pp. 80 et seq.)

* * * * * * *

LAWTON. If I can get into that, please? The Federal Advisory Committee Act, I don't think to the best of my knowledge, that the administration did have any hand or pressure in that because it's my recollection is that we woke up one morning and there it was. And the first reaction on looking at the Advisory Committee Act was, "Good Lord, it self-destructs!" It says that advisory committees will be open, public meetings except where Freedom of Information Act exceptions apply, one of which Ron alluded to, which is this inter-agency memoranda, the content of which, basically, are the giving of advice. But when the advisory meetings are open to the public except when they're giving advice, you have just self-destructed the Act, which was a distinct problem with it.

Rather, than, now I grant you, some agencies have attempted to make this fight, but our immediate reaction was, "Let's not play games with the Congress; it is not what they meant," and we worked with the Office of Management and Budget to get out a set of guidelines for federal advisory committees telling them, in effect, "Look, that's not really what they mean with exemption five; this does not self-destruct; you're supposed to live with it."

And we are getting out another set of guidelines, and when I say guidelines, I'm talking about a big, thick you know, "You can't close the meeting unless" set of instructions. We have attempted, now when I say we, I'm talking about the Justice Department, more specifically our office, which happens to have this bailwick, too.

It is a problem. There is resistance; there 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.

And we have attempted, now here we don't have or at least have not tried to exercise the same club which we used in the Freedom of Information Act, which is, "Unless you consult us, we won't defend you," partly because we're in an awkward position there; the actual administration of the Act is vested in the Office of Management and Budget and not in us, therefore we're hardly in a position to say that to the other agencies. But all I can say to you, Ron, is we're trying.

PLESSER. Not to cross-examine you, I don't like to do that. But the guidelines do say, Mary, there's no question about it, the guidelines say—the last versions that I've seen—say that a meeting, perhaps, and you shouldn't do this too often, they say that you can close advisory committee hearings to protect the internal deliberations of the advisory committee. Now, those guidelines do say that.

LAWTON. They have to be cleaned up. One of the things they're talking about there is when the National Science Foundation is passing upon the qualification of this scientist to carry out such and such a meeting.

PLESSER. That's a different issue.

LAWTON. That would pick up two exemptions.

PLESSER. The Justice Department is already litigated to pay the expenses of government attorneys litigating just this point in three cases.

LAWTON. Yes, I grant you that, but you know we don't pick our clients, or their cases.

* * * * * * *

Mr. ROBERTSON. According to what Ms. Lawton said in this May 1974 forum, their first reaction at Justice Department in looking at the text of the Advisory Committee Act was , "Good Lord, it self destructs." To quote her:

"It says that advisory committees will be open, public meetings except where Freedom of Information Act exceptions apply, one of which Ron [Plesser, another panelist] alluded to, which is this inter-agency memoranda, the content of which, basically, are the giving of advice. But when the advisory meetings are open to the public except when they're giving advice, you have just self destructed the Act, which was a distinct problem with it.

Ms. Lawton continued, however:

Now I grant you, some agencies have attempted to make this fight, but our immediate reaction was, "Let's not play games with the Congress; it is not what they meant," and we worked with the Office of Management and Budget to get out a set of guidelines for federal advisory committees telling them, in effect, "Look, that's not really what they mean with exemption five; this does not self destruct; you're supposed to live with it."

I might add, those detailed guidelines have never been issued. And as you can see from the Federal Register publications, the agencies do continue to take the position that the Federal Advisory Committee Act essentially self-destructs under exemption 5.

Mr. TURNER. On that particular point, Mr. Robertson, Ms. Lawton testified yesterday:

There are compelling reasons for closing all or part of an advisory committee meeting and in which the only applicable exemption is Exemption 5.

So she does see compelling reasons. She goes on to talk about negotiations with foreign governments and qualifications of persons and a meeting for premature disclosure and such.

Some of these look to me like they involve other exemptions. But the Justice Department stated to us yesterday that there are specific reasons where exemption 5 should apply.

I sent you a copy of this and I think you read that. Would you comment on that?

Mr. ROBERTSON. Yes, Mr. Turner. Because they made a strong pitch here, I think it is useful to go through these one at a time so there will be no mistake on the record as to what is applied to where.

First of all, Ms. Lawton says:

Exemption 5 is needed where you are discussing U.S. negotiating positions for international negotiations.

It should be pointed out that exemption 1 may be involved for this kind of discussion, and I think properly so in certain limited circumstances involving sensitive national defense or foreign policy considerations. Then it can certainly be closed under the terms of exemption 1.

Senator METCALF. Would you stop right there?

Mr. ROBERTSON. Yes, Mr. Chairman.

Senator METCALF. I went this morning down to the National Oceanic Association to talk about deep seabed mining. That is a subject for negotiation at the Law of the Sea Conference, which is coming up in New York in the middle of this month.

Prior to that, of course, I asked the members of the industry who are concerned with deep sea mining, Mr. John North and Mr. Moore and his group who are concerned with representing the United

States at this international conference, Mr. Lee Ratina, who was a representative of our Government, to testify at an open hearing before the Interior Committee:

> What is the difference between such a hearing for negotiations which is completely open—the government is there, industry is there, the academicians are there, the people who want heritage of mankind for the Law of the Sea are all there—what is the difference between that and an advisory committee when they are all there telling the government what to do when they go up to negotiate with the other countries in the United Nations?

Can you comment?

Mr. ROBERTSON. The fact of the matter is there are very few negotiations in which the U.S. position is developed totally in secret. There are lots of negotiations in which the U.S. policy is formulated through open public procedures.

This I think is a pretty good example, the law of the Sea Conference. If you are negotiating a trade agreement, where it is give-and-take, it is really like a business proposition, where you might be discussing elimination of a tariff or a nontariff barrier in exchange for something else, and you want to keep your bottom line position hidden until the right moment. That might be a case for confidentiality. But I think that is quite a different situation than the Law of the Sea conferences.

Senator METCALF. But the advice of people who are skilled and concerned should be given frankly and freely in open meetings. Then, of course, whether they follow that advice or not in their negotiating sessions back and forth with the other country is another thing.

Mr. ROBERTSON. Right.

Senator METCALF. But it would seem to me in a trade agreement, when you call upon people to come up and tell you about the way their business operates and whether there should be a tariff set aside or something, it would seem to me that that cannot imperil the government's negotiating position.

Mr. ROBERTSON. What you are saying I agree with. But there is a law to the contrary on trade agreement negotiations.

Senator METCALF. I understand.

Mr. ROBERTSON. The Trade Act of 1974, specifically covers these.

Senator METCALF. But if it is an advisory committee on that——

Mr. ROBERTSON. The Trade Act of 1974 in fact does specifically cover the advisory committees.

Senator METCALF. Does it overrule the Advisory Committee Act?

Mr. ROBERTSON. Yes, so far as those particular committees are involved. I'm certain it would be considered a specific statutory exemption from mandatory disclosure, within the meaning of exemption 3. So again, Ms. Lawton was not accurate in saying that these sensitive negotiating positions would have to be disclosed unless exemption 5 is available.

As a policy matter, Mr. Chairman, I agree with you that most advisory committees ought to operate in the open. But if it involves very sensitive negotiations relating to foreign policy or national security, properly classified under an Executive order as set forth in exemption 1, or if it comes under the Trade Act or some other

statute under exemption 3, then those laws ought to be complied with.

But you certainly don't need exemption 5 for this purpose.

The next item Ms. Lawton discusses is grant applications. She says that you have to close meetings when an advisory committee is reviewing the qualifications of institutions or individuals to receive Federal money under grants.

I certainly don't agree that the public interest requires these proceedings to be closed. These people on the committees are essentially making the decisions as to who is going to get the Federal grant money and why. I think that is a very public type of decision. I would think that those meetings should be open so that the public can know who is saying what about who, and evaluate the operations of the committees.

There are serious potential conflicts of interest in these peer review councils and grant application review committees. It can get into a "you scratch my back and I'll scratch yours" type of situation if you are not careful.

Suppose there are trade secrets involved in the sense of a specific research regime set forth in a specific grant proposal or application. If it is not truly trade secret information whose disclosure would cause substantial and unfair competitive injury, then it should not be kept secret from the public which needs this information to evaluate proposals. Exemption 4 would cover that sitaution, although my experience is that little, if any, of this information is of the commercial type protected by the fourth exemption.

Or in case it is considered a matter of invading somebody's personal privacy, the agency could assert the exemption for personnel and similar files.

So it is not correct to say there is no other exemption that can cover these things. In fact, if you look back to the discussion by Ms. Lawton in 1974 she says so herself. Starting on page 81, she is discussing the situation when the National Science Foundation is passing upon the qualification of a particular scientist to carry out such and such a project. And she says, on page 82: "That would pick up two exemptions."

Yesterday she came in and said that only one exemption would apply to such a case, and that is exemption 5. I don't think she has told the whole story about it.

Senator METCALF. Did you put into the record this excerpt from the testimony?

Mr. ROBERTSON. Yes, sir.

Senator METCALF. When it is printed I hope that pages 80, 81, and 82 are set forth so that we can identify what you are referring to here.

Mr. ROBERTSON. The next case Ms. Lawton cited in her testimony is the situation where possible regulatory action is to be discussed which might affect the interests of a company or an industry or someone's financial interests if prematurely publicized.

First of all, she doesn't tell us what regulatory action she is talking about. If she is referring to some kind of rulemaking about to be undertaken, the Administrative Procedure Act says that that has to be open. Rulemaking is not to be conducted in secret.

There should be equal access for the public to information about what is going on there.

If she is talking about an enforcement case of some kind, then you have the exemption that applies to investigatory records that are compiled and used for law enforcement purposes. That conceivably might apply to a portion of a meeting in an appropriate case.

If she is talking about regulatory action affecting a financial institution, there is an exemption for that.

I don't think that this is a situation where exemption 5 has to be used.

Finally, Ms. Lawton says that if the meeting involves discussion or preparation of a final report that would be exempt on its own, then you would have to use exemption 5.

I don't know why. If it is exempt on its own for some reason under the Freedom of Information Act, then is would seem to me that the relevant exemption would equally apply to the discussions and documents that go into the making up of the exempt report. You certainly don't have to use exemption 5 for that purpose.

What the Justice Department people are saying, basically, Mr. Chairman, is that they think exemption 5 should be used to protect the privacy of internal discussions of the advisory committees. That is all.

In each of the cases mentioned, there are other exemptions for appropriate circumstances to protect anything that is legitimately secret.

I hope that will shed some further light on the testimony on that question.

Mr. TURNER. Except that on (d), I don't want to belabor this, but this raises a matter at least in counsel's mind. She says:

A meeting devoted to the final preparation of a report which, when written, will be exempt from disclosure.

Does that mean that private citizens will be sitting and preparing a final report which, when written, would be subject to the exemption 5? In other words, private citizens are making an interagency or an intraagency memorandum, and non-Government people would be making that kind of a document. That is what that statement would indicate to me.

Mr. ROBERTSON. It is very vague, Mr. Turner. I can't tell what she is really talking about—under what basis would this report be exempt. But supposing you are right, I think that that is what she is suggesting.

Mr. TURNER. Intra or interagency memorandums, that is the only exemption, government-to-government relationship there.

Mr. ROBERTSON. As I read it, I thought she was suggesting that if, for example, a report when completed would be classified under exemption 1, the discussions and final preparation of that report should also be classified or closed. That is not a totally unreasonable position.

However, I think that the right to answer to it is that the legitimately covering exemption would also apply to the discussions, because section 10(d) refers to meetings "concerned with" matters

that would fall within the exemptions of the Freedom of Information Act.

So I think that the covering exemption would probably apply to the preparation of the document. Exemption 5 is not needed here.

This exemption 5 situation, I think, can be resolved most speedily and completely by a very simple clarifying amendment to the Advisory Committee Act, to eliminate or reduce the burden on the courts caused by continued improper application of exemption 5 to advisory committees. And the burden on individual citizens who are interested in going to these meetings or at least knowing about them.

This would not, as Ms. Lawton suggested yesterday, take anything legitimately out of the act that was ever meant to be there, as she herself recognized in the 1974 speech.

Section 9(2)(B) of S. 2947 would do this with respect to meetings, but I would also urge that appropriate language be added to make clear that exemption 5 cannot be used to shield advisory committee records from public disclosure.

I would like to turn to the procedures for closing meetings. I think this is a very important issue and a very important part of the proposals.

Some agencies, from the time of enactment of the Advisory Committee Act, have been so hostile to its spirit and purpose that almost any pretext has been considered acceptable for excluding the public from their advisory committee meetings.

A case in point is the National Advisory Committee on Oceans and Atmosphere—NACOA—of the Department of Commerce, which had six meetings during 1973 entirely or partially closed to the public, according to a report filed under section 10(d). I have provided a copy of the complete report to the subcommittee staff.

The first meeting was closed simply on the ground that no one had told the Commerce Department that this committee had to comply with the Advisory Committee Act, and it had not yet received OMB guidelines.

The next meeting was closed in its entirety under exemption 1, which covers national defense and foreign policy matters as to which secrecy is specifically required by Executive order.

Nonclassified items covered at that meeting included the agency's response to certain committee recommendations, review and discussion of draft report chapters, and a staff memorandum on "Federal Priorities and Problems." Thus, while the exemption involved applied only to a part of the proceedings, it nevertheless was used to close the entire meeting.

Committee members were prepared for the discussions by receiving, among other things, a summary of certain laws enacted by the 92d Congress, and copies of an address by Arthur Godfrey to the Florida Audubon Convention.

The rest of the closed meetings during 1973 were under cover of exemption 5.

I think you get a good idea of the general thrust of these closing determinations from the following report on the September 27 closed session:

The closed session was devoted to a discussion of pending legislation affecting the organization of oceanic and atmospheric affairs in order to establish the substance of a NACOA position to be prepared in anticipation of public testimony before Congress by selected NACOA members. The information used in formulating a position was considered privileged under exemption 5 and the position itself was treated as privileged until it was conveyed to the Congress.

Matters such as these, involving the development of national policies affecting the Government's support for marine and atmospheric research, are of immense interest to the institutions represented in the makeup on NACOA—at least seven major universities, plus the Woods Hole Oceanographic Institution, Virginia Institute of Marine Sciences, the Rand Corp., Marine Science Center, Holcomb Research Institute, Ocean Systems, Inc., and Global Marine, Inc., not to mention such firms as Lockheed, Cabot Corp., Eastern Airlines, and International Nickel of Canada, all of whom have tremendous interest in what kinds of resources are devoted to these matters by the Government.

Moreover, the members of NACOA also serve at least 18 other Federal advisory committees, including the State Department's Ocean Affairs Advisory Committee—four interlocks; the National Science Foundation's Advisory Panel for International Decade of Ocean Exploration—three interlocks; the National Petroleum Council, the Navy Resale System Advisory Committee and Navy Oceanographic Advisory Committee, and the Sea Grant Advisory Panel of the Commerce Department, which makes its own determinations of who should be receiving Federal funds for research in the sea area.

Mr. Turner, a few minutes ago in your discussion with Professor Steck, you pointed out the need for a disclosure statement by the head of the agency when committee memberships are appointed.

I think that these interlocking patterns with other advisory committees also should be included on that disclosure statement, because the Government keeps getting the same advice from these people through different agencies.

It is not unfair to suggest that at least some of these advisers would stand to benefit from expansion of the Government's commitment to and support for research in their chosen fields of endeavor, just as they would suffer from a termination of that support.

Yet these are the very people who advise the Government on its priorities and budgetary matters, who recommend what kind of research should be done and by whom, and who even engage in legislative activities.

There is an inherent conflict of interest here, or at least the appearance of one, and the problem is magnified by the pattern of interlocking committee memberships that assures all agencies will be getting substantially similar advice, and further compounded by mounting a wall of secrecy around committee deliberations.

The absurdity of some of this secrecy is exemplified by minutes of the Sea Grant Advisory Panel's closed 1973 meetings that were recently provided to me, but only after being censored by Commerce Department officials to eliminate "sensitive" information and prevent identification of the participants.

Even the editor of the White House tapes could not have done a more thorough job of censorship. Still, it is apparent from the

remaining shreds of text that much of the discussion is of legitimate public concern and should not have been cloaked under the mantle of secrecy.

Thus, for example, the panel in October 1973 discussed the relationship of the sea grant program to the coastal zone management program (see minutes pages 34–35). Much of this discussion was blanked out by censors, however, leaving only such tidbits as the following exchange on page 35:

[Paragraph deleted, name deleted]—Why don't you suggest to [deleted] that they insist that all meetings be held jointly?

[Name deleted]—Wouldn't it be fair for us to ask [deleted] to clarify it for us?

[Name deleted]—You have power and connections in Congress and they are in a perfect position to ask [deleted].

[Name deleted]—The Office of Coastal Environment is ready to announce their own advisory panel.

[Name deleted]—This panel is in a perfect position to ask [deleted] to clarify this.

[End of minutes].

Senator METCALF. Every year we have a whole volume of such interesting material emanating from the hearings of the Defense Appropriations Subcommittee. If you want to read some deleted material. I suggest that you get that and read it.

Yes, deleted. Answer from Admiral so-and-so, Mr. Chairman, the balance deleted, and so forth. So the advisory committee in that case is responding to very appropriate congressional examples.

Mr. ROBERTSON. It is absolutely fascinating reading.

Senator METCALF. Yes; I think that excerpt should be an entertaining item for the record.

[The material follows:]

EXCERPTS FROM MINUTES OF AN OCTOBER 1973 MEETING OF THE SEA GRANT ADVISORY PANEL

[Deleted]—I think it's perfectly salvageable. [Deleted]. I think you have to put this into the perspective of a transition period in management. [Deleted] There hadn't even been a trial run in the oral presentation. He is especially burdened because he is not only director of the SG program but the entire A&M Marine Science program. I think he hasn't yet been able to make a proper evaluation of it. His initial reactions were to defend everything. [Deleted] they are a real contrast. I think that under the circumstances you should give him a chance. He is certainly a person with ability. [Deleted]—Not so with OSU.

[Deleted.]

[Deleted.] I agree that the program should be given a chance to reform. I found [deleted] written comments very helpful. It would be more helpful if the projects' numbers had been followed by a brief title and the amount.

UNIVERSITY OF HAWAII

[Deleted]—Hawaii is a well managed program with excellent people. They have an interesting education program including an experimental underwater agronomy course. The seaweed aquaculture program is an outstanding program. The aquaculture program is run by a strong individual who wrote an authoritative book on aquaculture. The program in the past has been a little too diverse and the program proposed, while it has abandoned some species, is still too diverse. It includes a shrimp aquaculture program which none of the reviewers felt should be in it. [Deleted.] The program we had most difficulty with was engineering. [Deleted.] The projects as presented were not supportable. We agreed [Deleted].

[Deleted]—Why don't you suggest to [deleted] that they insist that all meetings be held jointly?
[Deleted]—Wouldn't it be fair for us to ask [deleted] to clarify it for us?
[Deleted]—You have power and connections in Congress and they are in a perfect position to ask [deleted].
[Deleted]—The Office of Coastal Environment is ready to announce their own advisory panel.
[Deleted]—This panel is in a perfect position to ask [deleted] to clarify this.

Mr. ROBERTSON. I have given your staff copies of the entire minutes, so you will have them for your enlightenment or ignorization, whichever the minutes provide.

Senator METCALF. Almost anybody can write that kind of material.

Mr. ROBERTSON. The point is that there is no good reason for closing most of these discussions, yet the addiction to secrecy remains despite the Advisory Committee Act. Perhaps the answer is to make the requirements for closing a meeting much more rigorous, so that it will only be attempted when there is a truly compelling need. The approach to this problem in S. 2947 is good, and I would suggest some further refinements for your consideration.

For one thing, it might be provided that no meeting could be closed by an agency head without the approval of the Attorney General, based upon a written determination that secrecy is necessary and proper under section 10(d).

The determination should be supported by a full statement of facts and reasons from the Agency, including a certification by the agency head that the meeting will involve no actual or potential conflict of interest. If closing is approved by the Attorney General, the determination should be promptly published in the Federal Register at least 30 days before the meeting.

I was glad to see that Ms. Lawton and the Justice Department and we agree on at least one thing, which is that the 30-day rule is not a bad idea.

All supporting documentation should immediately be placed in the committee records and made available for public inspection and copying. Moreover, the act should explicitly provide that only the portion or portions of a meeting directly involving matters requiring secrecy may be closed, and all other portions must be open.

A verbatim transcript should be kept of each session that is closed or partially closed to the public.

These procedures, I believe, would help assure that agencies be more conscious of the requirements of the act, and less likely to abuse the public's right to observe advisory committee proceedings. They would also tend to obviate the need for administrative appellate procedures within the Agency as contemplated in S. 2947 and permit more prompt legal action if necessary.

A related problem is the availability of timely judicial relief from improperly closed meetings and other violations of the act's provisions. This is underscored by the FDA's outrageous conduct, which, after losing a suit involving the antacids review panel, told the Health Research Group that it would have to start new litigation to get access to any other FDA committee meetings or records.

Litigation, as FDA well knows, and as the Justice Department knows, is expensive and time consuming, and their attitude is a sneering affront to the public's rights.

The approach of S. 2947 on this matter essentially tracks the recent Fredom of Information Act amendments, for purposes of challenging determinations to close meetings and for imposing sanctions on bureaucrats who brazenly defy the law.

I am seriously concerned, however, about the provision for in camera proceedings in the courts and the possibility that this may lead to efforts by the Government to conduct ex parte litigation from which the plaintiff is excluded, as has been done under the FOIA.[1] I will furnish copies of the two recent district court decisions in which this problem was involved.

If it is ever necessary to allow litigation of such matters in secret, the statute should fully spell out the circumstances in which that would be permissible, and it should specifically include a provision for adversary participation by all affected parties.

I would also hope that the amendments will provide for standing and jurisdiction to challenge other violations of FACA, in addition to the improper closing of meetings. Otherwise, these abuses may go unremedied, as you know from your litigation involving the balanced membership requirement, in which it was held—at least in the district court—that outsiders, even Members of Congress, don't have standing to enforce the provision of the Act.[2]

Moreover, there are some technical drafting problems involved in assuring that the FOIA concepts are properly adapted to the substantive and procedural context of FACA. My colleagues and I will be happy to work with the subcommittee staff on these matters if we can be of assistance.

One important thing S. 2947 will do is eliminate some of the agency exemptions and generally broaden the scope of coverage by FACA. It is entirely proper, for example, that outside groups advising the Federal Reserve Board—certainly one of the most secretive and important of all Federal agencies—should be subject to the same reporting, management and disclosure requirements as those of any other agency.

I would suggest one particular revision to substantially enlarge the act's coverage by simply adopting the new definition of "agency" set forth in last year's FOIA amendments, rather than the old APA definition.

This would automatically and very simply bring in such Government-owned or Government-controlled corporations as the U.S. Postal Service and Amtrak, an entirely appropriate amendment in light of the many strong parallels between FACA and FOIA. Of course, the committee should also provide for the inclusion of non-executive branch advisory committees.

S. 2947 focuses on the question of public notice in connection with closed meetings, and I would certainly agree that at least 30 days is needed to afford sufficient opportunity to obtain a judicial determination of the legality of closing.

There is also a problem with notice of meetings that are not closed in a formal sense, but which interested persons are not able to attend because they are not given timely information.

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[1] *Phillippi v. CIA*, C.A. 75–1265 (D.D.C. Dec. 1, 1975) ; but *cf., Military Audit Project v. Bush*, C.A. 75–2103 (D.D.C. March 5, 1976).

[2] See, *e.g., Lee Metcalf v. National Petroleum Council*, C.A. 75–397 (D.D.C. Feb. 9, 1976).

Several years ago the situation was so bad that the director of the Federal Register had to announce that notices of meetings that had already been conducted would no longer be published.

[The document referred to follows:]

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS SERVICE,
Washington, D.C., November 13, 1972.

MEMORANDUM FOR CHIEF LEGAL OFFICERS OF FEDERAL AGENCIES

From: Director of the Federal Register.

As you know, in accordance with Section 13 of Executive Order 11671, each Federal agency is required to publish in the Federal Register notices of meetings of certain advisory committees (after January 4, 1973, Executive Order 11671 will be replaced by Public Law 92–463). Our office has received a number of complaints because these notices are frequently published only a day or two before the announced meeting or, even worse, in some cases after the meeting has already been held.

It is understandable that for a new requirement, such as that imposed by Executive Order 11671, it would take time for an agency to establish internal procedures to ensure that documents are signed and delivered to this office sufficiently in advance of the announced meeting for timely publication. However, some agencies apparently are still having problems in this regard. Section 10 of Public Law 92–463 requires that "*timely notice* of each such meeting shall be published in the Federal Register" (emphasis added). While this office would not presume to try to decide how much advance notice is "timely," we see no point in publishing documents that announce meetings that have already been held.

I would appreciate your help in establishing adequate procedures within your agency to avoid such problems in the future. If I can be of any assistance in this regard, please let me know.

FRED J. EMERY.

Mr. ROBERTSON. OMB's guidelines now generally require that notice be published at least 15 days in advance of a meeting, but that rule is not always observed.

One recent example is a meeting of an EPA advisory subgroup on the effects of pesticides on farm workers, which came to our attention only a few hours before it was scheduled to take place, because no notice at all had been published in the Federal Register.

The agency finally canceled the meeting altogether when legal action under the FACA was threatened, but there was no promise that it would not try the same thing in the future.

Another case which recently came to light involves the Sea Grant Panel, which printed a notice in the February 19 Register of an "open" meeting to be held 5 days later. The agency claimed that this was merely a "continuation" of an earlier meeting, and so it considered that 5 days' notice was sufficient under FACA. Nothing in that law or in the OMB guidelines to my knowledge provides for a continuation loophole.

[The materials referred to follow:]

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., March 4, 1976.

RUEBEN B. ROBERTSON, III, ESQ.
Washington, D.C.

Re: *Aviation Consumer Action Project, et al.* v. *Washburn, et al.* (C.A.D.C., No. 75–1086).

DEAR MR. ROBERTSON: Enclosed please find a copy of a letter dated March 2, 1976 from Alfred Meisner, Assistant General Counsel for Administration in which he sets forth the circumstances of the February 24, 1976 meeting of the Sea Grant Panel. We believe that the Panel's procedure was in full accordance

with the law, and trust that the enclosed letter will answer any questions you may have on this matter.

Very truly yours,

JUDITH S. FEIGIN,
Attorney Appellate Section,
Civil Division.

Enclosure.

GENERAL COUNSEL OF THE
U.S. DEPARTMENT OF COMMERCE,
Washington, D.C., March 2, 1976.

LEONARD SCHAITMAN, ESQ.,
Assistant Chief, Appellate Section
Civil Division, U.S. Department of Justice, Washington, D.C.

Re: *ACAP* v. *Washburn* (C.A.D.C. No. 75-1086) Your ref. LS:pac 145-9-253.

DEAR MR. SCHAITMAN: This is in response to your letter of February 22, 1976, requesting further details about the meeting of the Sea Grant Advisory Panel noticed in the Federal Register on February 19, 1976, and held on February 24, 1976, noted in Mr. Robertson's letter on February 24 to Ms. Feigin. The relevant facts can be summarized as follows.

On January 5, 1975, the Department published a Federal Register notice (copy enclosed) of a special open meeting of the Sea Grant Advisory Panel to be held on February 10, 1976. That meeting was held as scheduled, however, the Panel was unable to complete the first item of business on its agenda since some important sea grant legislative proposals were not yet completed by the time of the meeting, although it was anticipated that they would be at the time the meeting was scheduled.

Since it was vital that the Panel discuss these proposals and make its recommendations thereon prior to the commencement of legislative hearings, scheduled for early March, it was decided to *continue* the meeting in two weeks, by when it was expected that the other legislative proposals would be ready for discussion, and to publish notice thereof in the Federal Register.

This notice appeared on February 19 (copy enclosed). This decision was made by Dr. Abel, Director of the Sea Grant program, after consultation with my office. We considered the February 10 meeting as being recessed to continue with the same agenda on February 24. It was not thereby a new meeting to which we considered the emergency provision and the 30 day advance notice of the court order applicable. It was an unusual situation, and the February 19 notice in the Federal Register was deemed an appropriate explanation. In effect, although no formal declaration of emergency was made, we are of the opinion that the circumstances as indicated could be considered as such if the order is to be so narrowly construed. The order is silent on adjournment for completion of an original agenda, and the February 19 notice was in accord with the spirit and letter of Judge Bryant's order. (Although the notice was signed in the Department on February 12, for some reason its filing with the Federal Register was delayed until February 18.)

The continuation was announced when the meeting was recessed at the close of the February 10 meeting, and the February 19 notice reflected this fact, with the identical agenda. The continued meeting was completely open. Finally, it should be pointed out that while no one from the public attended the February 10 meeting, there was some public attendance at the February 24 continuation.

If this office can be of any further assistance, please do not hesitate to contact me.

Sincerely,

ALFRED MEISNER,
Assistant General Counsel for Administration.

Enclosures (2).

[From the Federal Register, Vol. 41, No. 2—Monday, January 5, 1976]

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

SEA GRANT ADVISORY PANEL

Notice of Public Hearing

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. Appendix I (Supp. III, 1973), notice is hereby given of a special meeting

of the Sea Grant Advisory Panel on Tuesday, February 10, 1976. The meeting will commence at 9:00 a.m. in Room 6802, Department of Commerce. The meeting will be open to the public. Approximately 30 seats will be available to the public on a first-come, first served basis.

The agenda for the meeting will be as follows:

9:00 a.m.—Sea Grant Legislation.

2:00 p.m.—Review of New Criteria for Sea Grant College Designation.

5:00 p.m.—Adjourn.

Interested persons may submit written statements relevant to the Panel's areas of interest before or after the meeting or by mailing such statements to the Executive Secretary at the address below.

Inquiries regarding the Panel or the meeting may be directed to the Executive Secretary, A. G. Alexion, National Oceanic and Atmospheric Administration (SG), Page Building 1, 3300 Whitehaven Street, N.W., Washington, D.C. 20235, (Telephone: 202/634-4019).

Dated: December 30, 1975.

T. P. GLEITER,
Assistant Administrator for Administration,
National Oceanic and Atmospheric Administration.

[From the Federal Register, Vol. 41, No. 34—Thursday, February 19, 1976]

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

SEA GRANT ADVISORY PANEL

Notice of Public Meeting

In the matter of continuation of February 10, 1976 meeting.

Pursuant to Section 10(a)(2) of the federal Advisory Committee Act 5, U.S.C., Appendix I (Supp. III, 1973), notice is hereby given of a continuation of the February 10, 1976 special meeting of the Sea Grant Advisory Panel on Tuesday, February 24, 1976: As announced when the meeting was recessed, the meeting will resume at 9:00 a.m. in the Penthouse Conference Room (5th floor), Page Bldg. No. 1, 2001 Wisconsin Avenue, N.W., Washington, D.C. and will be open to the public. Approximately 30 seats will be available to the public on a first-come, first-served basis.

The agenda for the meeting will be as follows:

9:00 a.m.—Sea Grant Legislation.

2:00 p.m.—Review of New Criteria for Sea Grant College Designation.

5:00 p.m.—Adjourn.

Interested persons may submit written statements relevant to the Panel's areas of interest before or after the meeting or by mailing such statements to the Executive Secretary at the address below.

Inquiries regarding the Panel or the meeting may be directed to the Executive Secretary, A. G. Alexion, National Oceanic and Atmospheric Administration (SG), Page Bldg. No. 1, 3300 Whitehaven Street, N.W., Washington, D.C. 20235, (Telephone: 202/634-4019).

T. P. GLEITER,
Assistant Administrator for Administration,
National Oceanic and Atmospheric Administration.

FEBRUARY 12, 1976.

Mr. ROBERTSON. I would suggest that the act be amended to provide that public notice of all meetings must be published in the Federal Register as soon as practicable, and no less than 30 days prior to the meeting. I do think it would be sensible, however, to provide for exemption from these limits on an emergency basis, pursuant to a written determination by the agency head, so that needed flexibility will not be lost.

Another proposal that deserves the subcommittee's favorable consideration, in my view, is the suggestion of Senator Percy to provide for reporting of all advisory committee recommendations and the agency's response thereto.

All too often, valuable committee recommendations are simply ignored by the agency, and substantial efforts and expenditures are essentially wasted. This proposal would at least force the agencies to account for their inaction.

The Advisory Committee Act has brought about definite improvements in the management and procedures of thousands of these advisory groups. The amendments now under consideration would eliminate some important gaps and loopholes, and generally improve the act.

There are, no doubt, other problems in FACA that will need resolution in the future, but the subcommittee's present efforts are steps in the right direction. Particularly with regard to the exemption 5 issue, I would urge the subcommittee to move ahead as promptly as possible, hopefully during this session, by reporting out and obtaining passage of an amendment to resolve that problem once and for all.

Thank you very much, Mr. Chairman.

Senator METCALF. Thank you very much, Mr. Robertson.

Would you comment on Professor Steck's suggestion for fair balance, to have publication in the Federal Register of the members of the Commission who were appointed and the justification for balance or something of that sort, analogous to the way that we have required them to justify closure of meetings.

Mr. ROBERTSON. I think that is an excellent suggestion. It makes the agency head go through a mental process and write down on paper and publish his rationale for why various people have been selected.

I must say I am a little troubled by the idea of an automatic one-third public membership, because who is a member of the public? What would probably happen, as in similar situations, where such requirements have been imposed, is to get the spouses of agency officials, or the spouses of big-time corporate bureaucrats or union bureaucrats, appointed to advisory committees, as so-called public members.

Senator METCALF. You better not appoint my wife or they will get in some trouble, if they think that she is going to think the same way as I do, because she doesn't.

Mr. ROBERTSON. There are lots of ways to get around a requirement that there be one-third members from the general public. But I think forcing the agency heads to rationalize on paper who they are appointing so that everybody can see it, and forcing them to spell out the qualifications, background and connections of these people, is a very important process.

Senator METCALF. Yes, I think so. Perhaps that would be the most important part of it, to require the appointing authority himself to justify the balance.

Mr. ROBERTSON. I think that is right. It is an excellent suggestion.

Senator METCALF. As I told Professor Steck, you have worked with the committee and of course you have been involved in some of the suits that public interest groups have brought to clarify and amplify some of the provisions of the act.

We have appreciated your testimony here today. We will appreciate your continued cooperation with us in trying to work out this act.

It may be that we will try to work it out, as was suggested by Mr. Lynn and Ms. Lawton, with an Executive order or something of that sort.

We may be able to arrive at the same conclusion.

I have always felt that it is better to put things into a statute, but some things can't be written into a statute. As you say, a one-third quota is sort of inflexible, so that may be where an Executive order would help.

Mr. ROBERTSON. Mr. Chairman, in reviewing Mr. Lynn's testimony and Ms. Lawton's testimony, they keep saying in effect: "Don't pass any law on this because we will take care of all these problems. We are aware of all of them."

Well, they have been aware of them for 3 years, and they haven't issued any Executive orders to deal with and resolve these grievous problems.

They do have guidelines which are generally vague. In some of these areas—like the exemption 5 issue—where they are suggesting an Executive order, I think that you ought to move ahead with a legislative resolution right now, because the Government has made clear that it is going to continue with its position on exemption 5.

Talk is cheap, in other words.

Mr. TURNER. There was the recommendation that we eliminate the reference to the Freedom of Information Act and start over again to list our own exemptions.

I would be interested, particularly because of your experience in litigation, of your response to that suggestion.

Mr. ROBERTSON. I must say that it was a very intelligent legislative shortcut just to adopt the freedom of information exemptions.

But as we have gained experience in litigation and communications with the agencies, we find that they have different ways of interpreting these things. No one would have seriously suggested in 1973 that advisory committees could use exemption 5. That was only for internal documents. But they did.

So I think there may be some validity to the point that the time has come to look at these exemptions one by one and see whether they make any sense anymore.

What about trade secrets? How are outside advisers to the Government getting privy to other people's or competitors' trade secrets or confidential financial information? It is unclear why these would ever be legitimate issues of discussion.

These are issues that can be explored in the future. It may make some sense to redraft the exemptions more narrowly than under the Freedom of Information Act.

Senator METCALF. In the statement to which you referred of Ms. Lawton's on May 10, 1974, which has been included in the record, she said, "We are getting out another set of guidelines." When I say guidelines, I mean a very precise legal sort of a statement. When I say guidelines, I am talking about a big, thick, you-can't-close-the-meeting-unless set of instructions.

We have attempted now—and I am talking about the Justice Department and our office— to see what happens in this bailiwick, too.

Did they ever get out those guidelines—that set of big, thick you-can't-close-the-meeting-unless sort of thing?

Mr. ROBERTSON. My understanding is that they did not.

Senator METCALF. I think probably they would be a little more credible in coming in to say, "We are able to do this by executive decision," if they had gotten out the guidelines that they suggested they were going to do more than a year ago.

Mr. ROBERTSON. They may be having some serious problems with working out some of these so-called guidelines. For example, on exemption 5, they all keep saying they don't want to use exemption 5 to swallow up the act, to use it for everything.

But, on the other hand, they can't draw the line as to when exemption 5 could be properly used.

Senator METCALF. You are saying we here in Congress should give them a little help?

Mr. ROBERTSON. That is right.

Mr. TURNER. Just a few questions, Mr. Chairman.

Back to the litigation phase. Yesterday the Department of Justice witness stated:

> Any standing of persons seeking judicial review should be limited to those who were aggrieved and who had exhausted their administrative remedy.

It would seem that this was a rather restrictive suggestion on the part of the Department as to the type of standing that they would support for Advisory Committee meetings.

Would you care to comment on the present state of the art in terms of standing and whether or not you feel at this time, in your viewing of the cases, that there would be any necessity for Congress to look at that and to come up with its own specifications or statutory requirements with respect to standing relating to advisory committee matters?

Mr. ROBERTSON. Yes. I think it would be very useful for Congress to put this into the act.

As far as cases involving challenges to closed meetings, the Justice Department basically hasn't raised the standing issue.

As far as violations of other provisions of the act, they have definitely taken the position that people who merely want to see the law enforced, who have an interest in seeing that, for example, membership is balanced on these committees, have no right to complain in the Federal courts about these violations.

I would think that the statute could very simply spell out that any person has the right to file a complaint in court concerning violation of the act. This is done in many other statutory contexts.

It would clarify for the courts how they should respond. I certainly think it should be a more liberal approach to standing than that suggested by the Justice Department. I think any person should be able to sue here, because the act contains a presumption that all citizens have a legitimate interest in what is going on in these advisory committees. They might even be appointed to a committee.

As far as the aggrievement question is concerned, this should be defined in the statute. It should assure, for example, that anyone excluded from a meeting could sue. I think a general provision that any person has a right to bring an action for violation would be sufficient.

As far as exhaustion of remedies is concerned, if this should be required, the procedures and timing for available administrative

remedies should be spelled out in the statute so that the litigants aren't required to be exhausted, rather than the remedies.

Mr. TURNER. I don't know of any definition of standing that includes the exhaustion of remedies. Does that come later?

Mr. ROBERTSON. They are two separate concepts. They are related but separate concepts. As a practical matter, the courts tend to be more comfortable if the person suing has actually asked the agency to cure its own violation before coming to court.

In some cases there is not time to do that, or it would be futile to do it.

Mr. TURNER. FOIA provides for administrative appeals procedure at the administrative level with respect to their quest for documents. If the agency fails to comply with those administrative procedures, the petitioner is deemed in the act to have exhausted his administrative remedies for purposes of going to court.

Given the 30-day period between notice and the holding of the closed meeting, does it make any sense to provide for such agency appeal procedures? I mean shouldn't a party for cause be able to go to court at any time after that notice to close the meeting without getting entangled in administrative redtape or being faced with the requirement that he exhausts administrative remedies?

He has 30 days and it is going to be a closed meeting. He may not only be exhausted, but the meeting may well be closed and have happened before he ever achieved his administrative remedies.

Mr. ROBERTSON. Yes, this is right. I think the agency's decision to close a meeting should be a very carefully considered one. There should be internal safeguards on this decision. So the need for administrative appeals at various levels should not even exist when it comes to closing meetings.

As I suggested, you might consider using such safeguards as approval by the Attorney General, based on a written determination by the agency head, with a certificate that there is no conflict of interest involved.

Procedures like that would certain abnegate any need for further administrative procedures before going to court.

If I can say something about the freedom of information procedures, these have themselves been too burdensome, I think. These procedures can take months to complete before you can even go to court—literally months.

They frequently involve two different levels of administrative review within the agency. Some agencies require a written request even to initiate the process. Generally, I think it has not worked out as speedily as was originally intended.

Mr. TURNER. I think the point I wanted to make, and this is my final point, is that when you go so far as to put a notice of a meeting in the Federal Register, and the Federal Register knows the meeting is going to be held and it is going to be closed, that that in fact is a final order.

Mr. ROBERTSON. That would be my view. Yet, as a practical matter under the present law, when you are litigating these cases, if you have the time, you do try to get a separate response from the agencis so the court is satisfied that you have done everything you could before you came to the court.

I think if the statute dealt with this, it should spell out precisely what is required, if anything.

I think that your interpretation is the best one with respect to determinations to close meetings.

Mr. TURNER. Thank you.

Mr. ROBERTSON. A different case arises when you are talking about other kinds of violations of the act—balance of membership, and so forth.

I think it makes a lot of sense to go to the agency, to have a procedure for going back to the agency and saying, "Look, you really didn't do the balanced membership very well here."

But when you are talking about closed meetings the die is cast, and the meeting is going to go forward, and time is of the essence. So I would certainly hope that there wouldn't be a lot of burdensome extra procedures to go through.

Senator METCALF. Thank you very much for your help and your assistance, Mr. Robertson. As I said, we look forward to continuing to work with you on our continuous attention to this special problem.

Mr. ROBERTSON. Thank you.

Senator METCALF. The subcommittee will be in recess until 10 o'clock tomorrow. We will go back to our meeting room 3302.

(Whereupon, at 12:55 p.m., the subcommittee recessed, to reconvene at 10 a.m., Wednesday, March 10, 1976.)

TO AMEND THE FEDERAL ADVISORY COMMITTEE ACT—P.L. 92-463

WEDNESDAY, MARCH 10, 1976

U.S. SENATE,
SUBCOMMITTEE ON REPORTS,
ACCOUNTING, AND MANAGEMENT OF THE
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to recess, in room 3302, Dirksen Senate Office Building, Hon. Lee Metcalf (chairman of the subcommittee) presiding.

Present: Senators Metcalf and Percy.

Also present: Vic Reinemer, staff director; E. Winslow Turner, chief counsel; Gerald Sturges, professional staff member; Jeanne McNaughton, chief clerk; James George, minority, professional staff member.

Senator METCALF. The subcommitee will be in order.

Today is the third of 3 days of hearings by the Subcommittee on Reports, Accounting, and Management on two bills to amend the Federal Advisory Committee Act, S. 2947 and S. 3013.

Witnesses from the Department of Health, Education, and Welfare and Department of the Interior will be heard today.

Recently, I pointed out that it has never been formally determined whether the National Council on Educational Research is or is not subject to the Federal Advisory Committee Act. The Council, which is part of the National Institute of Education, was listed initially as a Federal Advisory Committee and then removed from the list.

I am pleased to announce that the Chairman of the National Council on Educational Research, John E. Corbally, has written to inform me that, through officials of the National Institute of Education, he has directed that the question of the Council's status under the act be properly presented to the Office of Management and Budget and the Department of Justice for a formal determination.

Without objection, this letter will be placed in the record at this time, along with a prior letter to me from Dr. Corbally.

[The information referred to follows:]

70-426 O - 76 - 12

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
NATIONAL INSTITUTE OF EDUCATION
WASHINGTON, D.C. 20208

254-7924
Weinberg

February 25, 1976

Honorable Lee Metcalf
Chairman, Subcommittee on Reports,
Accounting, and Management Committee
on Government Operations
United States Senate
Washington, D. C. 20510

Dear Senator Metcalf:

I have read your statement in the February 6, 1976 Congressional Record discussing the relationship between the Federal Advisory Committee Act (FACA) and the National Council on Educational Research (NCER).

The Council was created by the Congress as you stated to "establish general policies for, and review the conduct of," the National Institute of Education (NIE) as well as to perform advisory roles. You also noted that the Director of NIE "shall perform such duties and exercise such powers" as the Council "may prescribe."

Thus the Council has substantial statutory responsibilities not characteristic of advisory committees. The Council's policy-making responsibilities have been the focus of our attention. Occasionally it is necessary for the Administration to provide information not available to the public. Without such information the Council cannot make informed and timely policies. This is especially true in the lengthy process of preparing the budget which is central to the effectiveness of general policy.

The Council's regular policies and practices are consistent with the spirit of the FACA and with the posture of the NCER as a body which is coordinate with the NIE Director and which initiates policy actions as well as reviews executive decisions. Our record of the past year for the announcement, conduct and reporting of meetings is a good one, although it is not unblemished, as you have noted. We certainly strive, in light of our responsibilities, to conduct our business in a public manner and have benefited from substantial public attendance and participation at our meetings.

In 1975 the Council held seven general meetings for a total of forty-four hours, of which twelve hours, or twenty-seven per cent, were in closed session (with seven of those hours during a two-day meeting in January, 1975). In each closed session either the FY 1976 or 1977 budget and program were considered as a matter for policy action.

During two of the seven meetings, the Council did not have any closed sessions. We have proceeded under guidelines established upon the recommendation of the NIE Director who was informed by consultation with authorities in the Department of Health, Education & Welfare. I understand that the Council is also acting in accord with the pertinent statements about the FACA issued by the Department of Justice and by the Office of Management and Budget regarding policy-making bodies.

To further clarify the current situation I have asked the NIE Director to cooperate fully with Administration officials in reviewing the matter and to advise the Council at its upcoming meeting on March 26 of any further steps which are needed to resolve satisfactorily the issues you have raised.

The Council's records show that in 1974 the NIE and HEW staffs provided your staff with information about Council policies and practices in the areas how under discussion. I will have similar current information provided to your staff on the Council's behalf.

Sincerely,

John E. Corbally

John E. Corbally
Chairman
National Council on Educational Research

c. Dr. Hodgkinson
Dr. Gerber

NATIONAL COUNCIL ON
EDUCATIONAL RESEARCH

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
NATIONAL INSTITUTE OF EDUCATION
WASHINGTON, D.C. 20208

March 5, 1976

Honorable Lee Metcalf
Chairman, Subcommittee on Reports, Accounting,
and Management
Committee on Government Operations
United States Senate
Washington, D.C. 20510

Dear Senator Metcalf:

On February 25 I wrote to you in response to your comments on the need for the National Council on Educational Research to secure a formal determination of its relationship to the Federal Advisory Committee Act. I am now writing to inform you that upon receiving further information through officials of the National Institute of Education I have directed that the question be properly presented to the Office of Management and Budget and the Department of Justice. This is to be done in concert with the Department of Health, Education and Welfare. We are confident that the findings will be consistent with the Council's predominant policy-making functions provided in current legislation and reauthorization bills developed by the appropriate committees in both the Senate and House.

I have further instructed the Director of NIE to insure that your staff is kept informed about the progress of our efforts to resolve this issue.

Sincerely,

John E. Corbally
Chairman

Senator METCALF. This morning, the first witness is Hon. Marjorie Lynch, Under Secretary of the Department of Health, Education, and Welfare. You are accompanied by two of your colleagues, Madam Secretary.

We are delighted to have you here and to hear your testimony this morning. If you will identify your colleagues, then go right ahead.

TESTIMONY OF MARJORIE LYNCH, UNDER SECRETARY OF HEALTH, EDUCATION, AND WELFARE; ACCOMPANIED BY DR. DONALD S. FREDRICKSON, DIRECTOR, NATIONAL INSTITUTES OF HEALTH, AND DR. DUANE J. MATTHEIS, EXECUTIVE DEPUTY COMMISSIONER OF EDUCATION; WILLIAM S. BALLENGER, ASSISTANT TO THE SECRETARY; SAM D. FINE, ASSOCIATE COMMISSIONER FOR COMPLIANCE, FOOD AND DRUG ADMINISTRATION; THOMAS SCARLETT, ASSOCIATE COUNSEL, FOOD AND DRUG ADMINISTRATION

Ms. LYNCH. Thank you, Mr. Chairman. I am pleased to appear before you today to testify on S. 2947, amendments to the Federal Advisory Committee Act of 1972.

We have provided the committee with a full statement of our detailed comments which cover the points raised in your letter of invitation. With your permission, I would request that the statement, and inserts for the record referred to therein be included in the record and that I be permitted to summarize the key points.

Senator METCALF. Please go ahead. It is so ordered. Your prepared statement and additional material will be entered at the conclusion of your testimony.

Ms. LYNCH. I am, as you know, vitally interested in advisory committees. Because of my previous experience and involvement with them as a State legislator, I believe the Department faces a challenge to do a better job of informing committee members of their responsibilities under the Federal Advisory Committee Act, conflict of interest statutes, and other laws affecting their behavior as members. I am sure you will be pleased to know that HEW already requires advisory committee members to read a pamphlet on conflict of interest and to file a confidential statement relating to financial interests and other employment.

However, I am deeply concerned that several of the provisions of this bill would have a serious negative impact on our ability to adequately conduct reviews of scientific and technical proposals.

I have reference to the amendment which would open all sessions of our scientific review panels and thereby inhibit free and candid consideration of proposals.

No organization can manage its affairs effectively without certain degrees of confidentiality in the development of proposals, the steps taken to refine them, and the discussions leading to decisions—decisions which should be made and then be opened to the public along with the reasons which support them.

This policy was recognized by the Congress initially with the enactment of exemption (b) (5) of the Freedom of Information Act, and again when Congress incorporated this exemption, along with eight others, into the Federal Advisory Committee Act.

The proposed amendments appear to eliminate or excessively constrain the preservation of confidentiality in the process of weighing

sensitive and delicately balanced evidence in the course of reaching a decision and we, therefore, oppose them.

Mr. Chairman, I should like to address a number of specific provisions in the proposed legislation under consideration today.

S. 2947 would amend section 10(b) of the Federal Advisory Committee Act by requiring a complete audio or audiovisual recording of each closed meeting. Every such recording shall be deposited with the Librarian of Congress not later than 24 hours after the meeting has been completed. Any committee member may request that the recording be reduced to typescript.

Mr. Chairman, the cost of complying with this provision would come to approximately $500,000 each year for the National Institutes of Health alone. It might be more than $1,250,000 each year for the whole Department.

The 24-hour rule appears to be rather arbitrary and harsh. The bill does not specify whether the recording, filing, and transcription also requires public disclosure. We assume that it does not. But the existence of such tapes will probably generate a number of costly lawsuits demanding their release.

Such a costly procedure for tapes not intended for public release seems to be unwarranted. A similar provision was considered by the House-Senate conference on this act in 1972, at which time it was modified for some of the above-mentioned reasons.

S. 2947 would amend section 10(d) by eliminating exemption (b)(5) of the Freedom of Information Act as a basis for closing a meeting.

The Department believes that the deletion of exemption (b)(5) would not be in the public interest, because it would effectively undermine the peer review system, which is justified by the fact that it is considered the best available method of obtaining high quality review of research grant applications and contract proposals.

The preservation of candor and confidentiality is equally vital to the process of regulatory decisionmaking. If we are to produce sound regulatory programs, it is essential that the agency have the discretion to close a portion of a meeting.

The agency should be permitted to close a meeting when the closing is essential to the free exchange of views of a committee involved in a regulatory matter, and necessary to avoid undue interference with agency or committee operations. The courts and the Congress have long recognized the importance of preserving the integrity of the deliberative process of an agency. This policy should be maintained.

If advisory committee meetings in which research applications are evaluated should be opened to the public, the resulting premature disclosure of the contents of research designs would constitute a strong disincentive to scientists to submit their research concepts.

Both individuals and institutions submitting such applications have a proprietary interest in them—at least until they are funded by public money. If the confidentiality of the peer review process should be breached, investigators may be inhibited with consequent loss to public welfare.

The Public Health Service agencies have made extensive efforts to open their advisory apparatus to the public in all areas in which they can do so without diluting the quality of advice provided by

advisory committees and without compromising the rights of applicants.

Exemption 5 is in most instances the only exemption of the Freedom of Information Act that the courts have allowed as applicable to advisory bodies reviewing grant applications. The courts have ruled that exemption 4—trade secrets—does not apply to the review of research proposals—with the possible exception of initial unfunded applications.

While the courts have not spoken to the applicability of exemption 6—unwarranted invasion of personal privacy—this exemption would not apply to persons whose applications are under review.

The Department is convinced that the deletion of exemption 5 would seriously impair the peer review system which has served the public so well for so many years.

Another very serious affect of removing exemption (b)(5) as a basis for closing advisory meetings would result in the removal of the legal basis for preventing premature disclosure of clinical trial data.

Premature release of such data could cause the trial to be aborted, the desired information not to be obtained, and in some cases inferior or harmful treatment to remain unexamined.

Such disclosure can hardly be said to be in the public interest. In some instances, it may work harm or injustice on the patients involved in the trial. Only exemption 5 is presently available to close committees which provide safety monitoring for trials involving human subjects. We believe this matter is so serious that it alone would justify retention of exemption 5.

Mr. Chairman, this summary states the major concerns of our Department with this bill. I will be pleased to answer any questions that you or the members of your subcommittee may wish to ask.

Dr. Donald S. Frederickson, Director, National Institute of Health, and Duane J. Mattheis, Executive Deputy Commissioner, Office of Education, will provide specific examples of how the proposed amendments could hamper them in the conduct of their responsibilities.

Senator METCALF. Dr. Frederickson, do you have something to add?

Dr. FREDERICKSON. Mr. Chairman, I would like first of all to endorse with enthusiasm the remarks of Madam Secretary in regard to this legislation and to indicate that I do regard several aspects of the proposed amendments as matters deserving urgent attention and raising two special problems for us.

They are: Preservation of the peer review system, which is now about a quarter of a century old, which was established at the National Institutes of Health, and the smaller but significant problem of the protection of information relative to clinical trials, to which Madam Secretary alluded.

If you should desire, sir, I would be glad to provide amplification in any way you might wish.

Mr. MATTHEIS. Mr. Chairman, on behalf of the Division of Education, our primary concern would be the section with regard to peer review as well. We heartily endorse the comments of Madam Secretary and indicate that our concern would be the same as that expressed, in that the peer review process would be substantially hampered by the opening up of these activities with regard to research proposals in the National Institute of Education.

Senator METCALF. Thank you very much for your summary and for your statement, Madam Secretary.

How many advisory committees do you have in HEW?

Ms. LYNCH. Mr. Chairman, I have been with the Department a little over 3 months. What I would like to do, if I may, is ask Mr. Ballenger to reply to some of those questions for me, if you would give me that privilege.

Senator METCALF. Surely.

Mr. BALLENGER. Mr. Chairman, your question is how many advisory committees there are in the Department at this moment?

Senator METCALF. Yes.

Mr. BALLENGER. At the present time, Mr. Chairman, there are 321 advisory committees housed within HEW altogether.

Senator METCALF. 321?

Mr. BALLENGER. Yes.

Senator METCALF. Senator Percy has to leave. I am going to defer to him at this time and then we will come back with some other questions after Senator Percy is through.

Senator PERCY. Thank you very much, Mr. Chairman.

Secretary Kissinger is testifying before the Foreign Relations Committee this morning and I will have to leave. But I wanted to be here first to welcome you. This is the first time I have had an opportunity to have you testify. Madam Secretary, and your distinguished colleagues as well.

We are going to reach out and ask for your help in this regard. I would like to relate to you our relationship with the Federal Reserve Board.

In disclosure of adequate information to protect the public interest, we had a talk with the Fed, and we respected the fact that certain discussion of matters that were confidential had to be kept confidential, that it would be contrary to the public interest to have such discussions open, and that we could develop proof that it would be contrary.

Others dealing with matters that affected consumers, however, ought to be known because those discussions involve rates of money or interest rates or confidentiality of banks.

There were sometimes sensitive matters, but affecting the consumer. And the Fed agreed with us that they had been too stringent in saying that everything they do should be put under a cloak. We are not asking that anything be done that we haven't done.

The thought was abhorrent to some members of this committee that we should open up our markup sessions. Why, for us to sit there and discuss in the open the give-and-take of legislation, of writing provisions in the law, and so forth, why it is a calamity, the roof would fall in.

Yet a few of us fought tenaciously for the right to have the public see how laws are really made. It has been a wonderful experience. We have had better attendance. The members show up on time. We have not had an outbreak.

Sometimes we have had more people than the room could accommodate, but we were glad of that. We didn't have apathy about it.

It has strengthened the process of legislation. It has speeded it up. It has helped us enormously. So what we thought we couldn't do has been done.

Certainly in this regard, I can see that where you have peer review, where you are depending on the candor of one specialist, a scientist, a professional, to comment on the qualifications of an application or something for another, and it has to get into the capability and the quality of work done, and so forth, I think we can understand that.

I would support an exemption for such reviews. You cannot, in fact, refuse the request to go into immediate executive session when the qualifications of people are discussed when it could do injury to the reputation of an individual to have the meeting open.

That, I think, we would be very willing to exempt. So I would ask that you really try to go back and strain to put yourself in our shoes and the public's shoes in saying let's open this process up, not dangerously so, not to restrict the flow of information but let's be awfully careful that we don't just try to cling to the past. Those days are over.

Watergate ended them. A lot of things ended the days of secrecy. We are going to tear more of those signs down "closed to the public," on our Senatorial and House meetings. I think the executive branch has to do the same thing.

For us to record everything, I can see the cost is going to be exorbitant. Who is going to read all this material? There are certain discussions that go on that don't need to be recorded, but certainly there are some that go on, where a record can and should be made.

It should be available for review.

I have in this area gotten into deep discussions with the President on covert activity. I happen to think we shouldn't undertake a covert or major intelligence action not committed to writing. The President has agreed.

In fact, he says that if the action is major he is going to have to sign it before we undertake it as a Government. We ought to have the right to go back and review the record and take a look at it and participate in oversight as to whether a good decision was made.

So, again, I ask that you try to think through what should be there available for oversight, to look back and scan that record. That is sensible. But certainly we are not trying to look for ways to create paper.

We are participating on a paperwork commission to eliminate work. We don't want to, on the one hand, eliminate it and then, on the other hand, needlessly pile up paperwork. I would like to reach out to try to see your point of view and you reach out to try to see ours.

Go back again and see whether or not you can't submit to us for a final entry in the record—and I would ask unanimous consent that it be kept open for another week so that that could be done—to see where there is a middle line that could be fully justified.

I ask unanimous consent that a letter I received—I think most committee members probably have—from Jo Anne Brasel, be inserted in the record because I think Dr. Brasel makes a very good point about certain meeting topics that can and should not be opened up and the possibility of others that should be.

[The prepared statement of Marjorie Lynch with attachments follow:]

Columbia University
College of Physicians and Surgeons
INSTITUTE OF HUMAN NUTRITION
OFFICE OF THE DIRECTOR

511 WEST 166th STREET
NEW YORK, N. Y. 10032
212-568-6162

March 3, 1976

Senator Charles H. Percy
United States Senate
Washington, D.C. 20510

Re: S.2947

Dear Senator Percy:

I am writing to express my concern regarding the changes in the Federal Advisory Committee Act (P.L. 92-463) proposed by Senator Metcalf. The bill has been referred to Senator Metcalf's Subcommittee on Reports, Accounting and Management, but presumably will be considered by the Committee on Government Operations at some point. I fully support "sunshine" laws in general and am in favor of opening up the advisory committee selection process. As a current member of an NIH Study Section (Nutrition) and a recipient of NIH support, granted before becoming a member of the study section, I have grave concerns about the amendment which would delete exemption 5 of the Freedom of Information Act. If deleted, it will no longer be possible to close a study section meeting on the basis of inter-agency or intra-agency memoranda. If it is not possible to close a study section meeting by memorandum or some other reasonable means, one of the greatest strengths of the peer review system will be seriously affected. This strength is the frank, critical review and honest appraisal given the research applications with the knowledge that opinions will not be traced to an individual on the study section. In speaking for myself, and I expect other members of advisory committees, I take the responsibility of reviewing applications very seriously; I feel obliged to be critical and honest and make judgements which will result in spending tax dollars in ways which hopefully will benefit society at large and not just one scientist's research operation. There are many long hours of work involved which are not even laughingly compensated by the consultant fee of $100 per day at the actual meetings; instead there is satisfaction in participating in any orderly system of high integrity which has resulted in scientific discoveries the U.S. can justly take pride in. But study section members are only human with the usual frailties and opening up the meetings or the reviews so they can be traced will significantly reduce the frankness of the reviews. This does not mean to say that study sections do not feel accountable or wish total anonymity. Our names are a matter of public record and we take responsibility for and feel accountable for our actions

taken as a group. The group decision made after discussion, multiple input and presentation of conflicting views is the more valid for these reasons and would likewise suffer if exemption 5 is deleted from the FOIA. I have long felt that more openess of the review process is desirable from the applicant's point of view and would like to see the "pink sheets" which represent a summary of the study section's deliberations forwarded automatically to the applicant. Although I can only speak for myself as an applicant in the past, I can say I would like to see the "pink sheets" related to my applications, that I feel the peer review system is an excellent way to have one's ideas judged and assessed, but that I would strongly object to having my research grant and the study section discussions opened to the public at large. I feel equally strongly about the release to the public of research protocols which have no bearing on patient safety or question of ethical considerations, but that is a different matter unrelated to S.2947.

In summary, as an applicant for research support and as a member of an NIH advisory committee, I urge that study section deliberations remain closed to the public for I feel that the disclosure of the material discussed would be to the detriment of the peer review system of research applications and, secondarily in the long run, to the caliber of U.S. scientific research.

Thank you for your considerations of my comments. Please do not hesitate to contact me if you feel further discussion would be of assistance in reaching a decision on this matter.

Sincerely,

Jo Anne Brasel

Jo Anne Brasel, M.D.
Associate Professor of Pediatrics

JAB:fc

[Prepared statement of Marjorie Lynch]

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: I am pleased to have the opportunity of appearing before you to testify on S. 2947, a bill introduced for the purpose of amending the Federal Advisory Committee Act, P.L. 92-463 signed on October 6, 1972.

I appreciate your sharing with the Department your concern regarding the selection of candidates to serve on HEW advisory committees.

I am, as you may know, vitally interested in advisory committees, because of my previous experience and involvement with them as a state legislator. During my short time with HEW, I have already met with some committees and hope to get together with many more in the coming months. I am particularly interested in improving the training and communication HEW provides to the members of advisory committees. I believe the Department faces a challenge to do a better job of informing members of their responsibilities under the Federal Advisory Committee Act, conflict of interest statutes, and other laws affecting their behavior as members. I am sure you will be pleased to know that HEW already requires advisory committee members to read a pamphlet on conflict of interest and to file a confidential statement relating to financial interests and other employment.

This Department has long subscribed to the general principle that the interests of the citizens of the United States are best served by making information regarding the affairs of Government readily available to the public. The Department

neither believes in nor condones secrecy.

Nevertheless, one must distinguish between secrecy and confidentiality. Secrecy is an attempt to conduct business without allowing the public to know that deliberations are taking place or what decisions are reached. Confidentiality is the conduct of discussing in private, but with public knowledge that discussions are taking place and with open publication of decisions reached. No organization can manage its affairs effectively without certain degrees of confidentiality in the development of proposals, the steps taken to refine them, and the discussions leading to decisions--decisions which should then be opened to the public along with the reasons which support them. This policy was recognized by the Congress initially with the enactment of exemption (b)(5) of the Freedom of Information Act, and again when Congress incorporated this exemption, along with 8 others, into the Federal Advisory Committee Act. The proposed amendments appear to eliminate or excessively constrain the preservation of confidentiality in the process of weighing sensitive and delicately balanced evidence in the course of reaching a decision, and we therefore oppose them.

You have asked me to discuss today the Department's pro-

cedure which is used for selecting members of advisory committees. Let me begin by noting that there are presently some 321 advisory committees housed within HEW. Of this number, 62 are policy advisory committees whose candidates for appointment are submitted to the Secretary: 15 are appointed by the President and 47 by the Secretary. The remaining 259 are technical and grant or contract review committees appointed by the Assistant Secretary or the head of the appropriate agency.

The total membership on committees appointed by the President (for which the Secretary provides recommendations) and the Secretary is approximately 992 -- between seven and 21 members per committee (an average of about 15) with one-third or one-fourth of the membership terms expiring each year. Thus, in a normal year, with memberships kept current, the Secretary should fill about 245 vacancies and recommend persons for appointment to approximately 85 vacancies on committees appointed by the President.

Beginning in 1969, the appointment procedure was refined, improved and expanded to incorporate not only increased responsiveness to substantive considerations, but also Presidential (and, later, statutory) mandates for increased representation of women, minorities, and young people on committees. In its present form, the system works as follows:

First, members of the Secretary's staff are responsible for developing and nominating slates of candidates for the Secretary's appointments to policy advisory committees and for making Secretarial recommendations to Presidentially-appointed committees.

These staff members, situated in the Secretary's Office of Special Projects (OSP), receive nominees for policy advisory committees from the following sources:

1. Heads of the Department's component agencies (FDA, NIH, etc.);
2. Other government sources (the Congress, the White House, state and local units, etc.);
3. Professional and public interest groups with which the mission of the Department is concerned (AMA, Easter Seal Society, etc.);
4. Intra-Departmental groups (Special Concerns, Women's Action Program, etc.)
5. Individual requests to serve.

Some four months prior to the time when the vacancy occurs, the slate of candidates is reviewed in terms of candidate availability, geographic distribution, program objectives, and other statutory and administrative requirements. The evaluation process also considers the membership composition (women, minorities, student-youth) of the committee. A memorandum, nominating the slate, is prepared for the Secretary.

In many instances, however, one or more of the original agency nominations may not prove to meet the established criteria. Names of candidates on file in OSP are then presented as alternate choices to the agency. When proposed substitutions are found, they are forwarded to the appropriate agency for agreement.

After the Secretary has made the final decision, the appointees receive letters of invitation and the appropriate agency is notified of the Secretary's appointments, as are other organizations and parties interested in the committee membership. At this point, further processing of committee membership becomes a routine administrative matter handled by the agencies and the DCMO.

You expressed some concern, Mr. Chairman, in your letter to the Secretary of February 16, over past delays in appointing advisory committee members.

As you may be aware, great progress was made in filling all Departmental advisory committee vacanices during 1975. On January 6, 1975, there were 107 vacancies on Secretarially-appointed councils and committees, 71 of these in NIH alone. As of today, with the exception of several newly chartered committees, no regularly scheduled vacancies on chartered committees appointed by the Secretary remain.

Last November, Senators Edward M. Kennedy and Jacob K. Javits expressed similar concern over the staffing of HEW advisory councils and committees. Secretary Mathews sought to give the Senators as complete a report as the Department's records would provide. The Department also cooperated fully with an investigation of the advisory council and committee appointment process undertaken by the General Accounting Office at the behest of the Senators.

On February 3, 1976, upon receiving Secretary Mathews' response and the Department's report, and upon completion of the GAO investigation, Senators Javits and Kennedy wrote to the Secretary and expressed their satisfaction with the Department's procedures in this regard.

With your permission, Mr. Chairman, I would like to provide, for the record, a copy of the Department's report on which the Senators' reply is based as well as a copy of their February 3, 1976 letter to the Secretary.

I would like to comment, Mr. Chairman, on your amendments which would require annual publication of the names of all advisory committee members, indexed by business affiliation and occupation. All of HEW's agencies currently produce membership lists, complete with business addresses, which are available upon request. In the Office of Education, an annual list is part of the Commissioner's Annual Report to the Congress. Some of our agencies also publish a booklet periodically which includes brief information about each committee in addition to the roster of membership. We would hope to be able to extend this kind of publication to include all of the agencies in HEW. It would also be possible to add an index of business affiliations, although we question the value of publishing the names and business affiliations of past advisory committee members, or, as your proposed amendment would require, submitting this information in an annual report from OMB.

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As for your statement, Mr. Chairman, in the Congressional Record of February 6 about the applicability of the Federal Advisory Committee Act (FACA) to the National Council on Educational Research (NCER), I am pleased to report that the Chairman of NCER has instructed the Director of the National Institute of Education to commence the process of obtaining the opinion of HEW's General Counsel and, if needed, the advisories of the Office of Management and Budget and the Department of Justice on this topic.

For your information, we note also that since its creation in 1972 the Institute has utilized some 15 public advisory committees, all chartered and administered in accordance with the requirements of the FACA. The Institute has terminated these committees upon completion of their assigned duties.

Public Health Service Agencies:

Before addressing other specific provisions of the proposed legislation, I should like to describe in summary fashion the advisory committee system of the Public Health Service Agencies which comprises approximately 80% of the advisory committees within the Department.

The National Institutes of Health Advisory Committees

The mission of the Public Health Service and National Institutes of Health is to improve the health of all Americans. To this end, NIH conducts research in its own laboratories; provides grants to non-profit organizations for research and

research training; supports research in both nonprofit and profit-making institutions by means of contracts; supports the improvement or construction of library facilities; and, through a variety of instruments, encourages communication of biomedical information.

The major portion of the NIH effort is directed toward support of research being carried out in other than Federal laboratories. NIH uses approximately 160 public advisory committees composed of over 2,000 members, of whom approximately 1,800 participate in the review of grant proposals. The primary purpose of such committees is to assist us in achieving and maintaining the highest possible quality for NIH programs by obtaining expert advice on those research grant applications and contract proposals that offer the best hope of providing information which will improve the health and well-being, not only of the American people, but of populations in every part of the world. This committee system, commonly called the peer review system, is based on the premise that individuals best qualified to pass on research proposals are those scientists most knowledgeable in the specialized fields in which the proposals fall. Because research proposals are concerned with possible future results, no objective criterion is entirely adequate for evaluating proposed research. We must rely on trained, experienced, and tested scientists for advice on such matters.

The NIH peer review system has been evaluated on at least eight occasions by Presidential and Congressional committees. At the present time, under the direction of Congress, the President's Biomedical Research Panel authorized by P.L. 93-352 is again scrutinizing this system which is, and must continue to be, accountable to the public. In addition to external evaluation, the NIH itself is conducting a study (including evidence obtained from public hearings) of its own peer review system. When that study is completed, it will be made available to the public. This study is being conducted as one step in the ongoing process of review and monitoring of the peer review system.

Many NIH committees operate with no attendance restrictions, and portions of every NIH advisory committee meeting are open to the public. All policy issues that come before such committees are dealt with in open forum. Those portions of NIH committee meetings that are closed are properly announced in the Federal Register. These sessions are usually closed to review research applications. The names and organizational affiliations of all committee members are published at least twice each year. When a research grant application is funded, a public notice of the decision is promptly published and the content of the application (except for patentable material) is made available to anyone on request for inspection and copying.

The purpose of each of these steps is to make the peer review system accountable to the public while at the same time preserving a sufficient degree of confidentiality to allow the committee to function effectively.

Alcohol, Drug Abuse, and Mental Health Administration Advisory Committees:

The Alcohol, Drug Abuse, and Mental Health Administration has 31 chartered committees composed of approximately 360 members. Of these, 24 committees are initial review groups that review research, training, and service grant applications and contract proposals. The Alcohol, Drug Abuse, and Mental Health Administration committees follow essentially the same procedures as those described above for the National Institutes of Health.

Food and Drug Administration Advisory Committees:

The Food and Drug Administration (FDA) employs 61 public advisory committees to assist the agency in its regulatory deliberations. The total number of members who sit on these committees is 509 with an average of 7 to 9 members per committee. FDA advisory committees met a total of 312 times during calendar year 1975. FDA has comprehensive regulations governing the use of advisory committees. The regulations provide that no advisory committee meeting shall be closed entirely no matter what is being discussed. Also, a determination to close a portion of a meeting must restrict the closing to the shortest possible time.

As at NIH, however, a large percentage of FDA advisory committee meetings also include closed sessions. Most of

those sessions were closed because they were dealing with trade secret materials -- manufacturing information, safety and efficacy reports, etc. -- submitted to the agency in connection with and pursuant to its authority to approve new drugs for marketing. However, several sessions, most notable those of panels preparing recommendations on the marketing of over-the-counter drug products were closed to protect the deliberations of the panelists. FDA believes that such closing facilitates candor and open frank discussion in the formulation of final advice on very sensitive regulatory issues, and affords the Commissioner an opportunity to consider such advice before making a final decision. Both of these purposes are, we believe, consistent with Congress' rationale for enacting exemption (b)(5) to the Freedom of Information Act.

Other Health Agencies

The Center for Disease Control, the Health Service Administration, and the Health Resources Administration have a total of approximately 25 committees. They function in open format most of the time except when they are reviewing grant applications and contract proposals.

Amendments to Federal Advisory Committee Act

Now, with your permission, Mr. Chairman, I should like to address a number of specific provisions in the proposed legislation under consideration today.

S. 2947 would amend paragraph (2) of Section 3 of the Federal Advisory Committee Act by including "any ad hoc group" in the definition of an advisory committee. Although the bill does not define an "ad hoc" group, we are aware of at least three kinds of groups that are sometimes referred to as "ad hoc".

(1) Unchartered, standing advisory committees which have been used on occasion for the review of grant applications. Mr. Chairman, you referred to the use of these committees in your remarks on page S. 1867 in the February 18, 1976 Congressional Record. We believe that such committees should be chartered and should be subject to the provisions of the Federal Advisory Committee Act.

(2) "Ad hoc" advisors are occasionally utilized to provide review of an application for which no chartered committee exists. They are also used to avoid conflict-of-interest situations when, for example, the scientific review of an application of a member of a chartered committee cannot be reviewed by his own committee. The U.S. District Court for the Northern District of California has recently praised the use of "ad hoc" groups in such situations (see Grassetti v. DHEW).

To require a charter for such groups would remove flexibility from the review process, create delays, and generate conflict-of-interest situations in the peer review system. While we have no objection to reporting the existence and function of "ad hoc" groups, we feel that a simple post-factum reporting requirement would provide for accountability and meet the spirit of the Act without crippling the day-to-day ability of agencies to conduct their business.

(3) Finally, individuals, including Congressional staff, consumer groups, and professional organizations are often asked for opinions and, in effect, are used as "ad hoc" advisors by virtually every office within the Department in the day-to-day conduct of business. Sometimes these informal advisors are utilized through use of the telephone and the mails, while at other times, they provide advice in person. To charter committees for every such situation and require them to conform to the Federal Advisory Committee Act would be patently impractical. If the Department's agencies were required to charter all such groups, the business of the Department would be seriously impeded, and the number of committees enormously increased. Even to keep an accurate list of all such persons would constitute a heavy administrative burden. We do not believe this is what is intended by the "ad hoc" provision. This provision needs to be dropped or extensively revised and clarified.

S. 2947 would amend Section 10(b) of the Federal Advisory Committee Act by requiring a complete audio or audio-visual recording of each closed meeting. Every such recording shall