THE FEDERAL ADVISORY COMMITTEE ACT AND THE EXECUTIVE PRIVILEGE: RESOLVING THE SEPARATION OF POWERS ISSUE

Andrea L. Wolff

I. INTRODUCTION

An advisory committee is any group of individuals that considers governmental issues and furnishes its views and conclusions to government agencies and officers.[1] A public advisory committee is one whose members are not all government officials.[2] The Federal Advisory Committee Act ("FACA" or "Act") was enacted in 1972 to control the establishment and use of public advisory committees.[3] The Act imposes public "oversight" upon the use of advisory committees by requiring open meetings and public access to documents used in such meetings.[4] Advisory committees that advise the President are also subject to the Act's requirements, including openness.[5]

In exercising constitutional powers, the President is privileged to receive communications in confidence.[6] This privilege is implied in the

---

[1]Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1, 3 (1988).

[2]*Id.* at 3.

[3]Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. app. (1988)).

[4]Openness is imposed by § 10 of the Act. 5 U.S.C. app. § 10 (1988). *See also* James T. O'Reilly, *Advisers and Secrets: The Role of Agency Confidentiality in the Federal Advisory Committee Act*, 13 N. KY. L. REV. 27, 27 (1986).

[5]5 U.S.C. app. § 10 (1988).

[6]The executive powers are set forth in Article II of the Constitution of the United States. These powers include:

> Section 1. The executive Power shall be vested in a President of the United States of America. . . .
>
> Section 2. The President shall be commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive

Constitution and has been recognized by the Supreme Court.[7] This power, however, is not absolute, and the Court has developed a balancing approach which requires the President to disclose confidential, privileged information when the President's right is outweighed by other constitutional needs.[8] *United States v. Nixon*[9] and *Nixon v. Administrator of General Services*[10]

> Departments, upon any Subject relating to the Duties of their respective Offices and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.
>
> Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take care that the Laws be faithfully executed, and shall Commission all the Offices of the United States.

U.S. CONST. art. II. *See infra* part III (discussing the executive privilege to receive confidential communications).

[7]United States v. Nixon, 418 U.S. 683 (1974) [hereinafter *Nixon I*], is the case most often cited for the recognition of such privilege. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-15, at 278 (2d ed. 1988) (noting that *Nixon I* is the leading case concerning the executive privilege).

[8]*See, e.g., infra* notes 111-26 and accompanying text (discussing *Nixon I*); S.C.M. Corp. v. United States, 473 F. Supp. 791, 798 (Cust. Ct. 1979) (granting the Secretary of the Treasury's motion for a protective order as to certain "documents and things in the files of the International Trade Commission and each Commissioner" on the ground that plaintiff failed to demonstrate "a clear and persuasive need for the documents in question").

[9]418 U.S. 683 (1974).

are two important instances where the Court found that the privilege was overcome by competing constitutional issues, thereby requiring the disclosure of information received by the President in confidence.[11] FACA's openness requirements, as applied to Executive advisory committees, conflict with the President's privilege to receive confidential communications.[12]

This Comment will examine the constitutional conflict resulting from the application of FACA to committees that consult the President. Part II of this Comment will review the history leading to the enactment of FACA and will discuss the purpose and application of various sections of the Act. This Comment will then evaluate the development of the executive privilege and the application of the balancing test pronounced in *United States v. Nixon*.[13] Part IV will illustrate the conflict between the Act and the executive privilege and will examine how courts have avoided the separation of powers issue, at times using strained construction of the Act and the definitions included therein to exclude certain executive advisory committees from the Act's requirements. Finally, part V will conclude that the openness requirements of the Act, when applied to Presidential advisory committees that formulate and report advice and recommendations to the President, violate the executive privilege. This section will then argue that the constitutional conflict should be resolved by amending the Act to specifically exempt such advisory committees.

II. THE FEDERAL ADVISORY COMMITTEE ACT

The United States Government has a long history of using advisory committees.[14] The use of advisory committees dates back to the 1790's when George Washington formed a cabinet and convened committees.[15]

---

[10]433 U.S. 425 (1977) [hereinafter *Nixon II*].

[11]Although disclosure was required in both cases, the disclosure was regulated and safeguarded so that the intrusion on confidentiality was minimal. *See infra* notes 126, 128.

[12]*See infra* part IV (discussing cases wherein the court acknowledged the separation of powers problem, but used judicial construction to avoid the constitutional issue).

[13]418 U.S. 683 (1974).

[14]Cardozo, *supra* note 1, at 1.

[15]*Id.* President Washington used an advisory committee to aid in resolving the whiskey rebellion. Jerry W. Markham, *The Federal Advisory Committee Act*, 35 U. PITT. L. REV. 557, 557 (1974) (citing *Hearings Before the House Subcommittee on Legal and Monetary Affairs of the Committee on Government Operations on H.R. 4383*, 92d Cong., 1st Sess.

These committees have been established by both the executive and the legislative branches for the purpose of obtaining advice, recommendations, and expert insights.[16] The value of these committees is illustrated by the numerous important events surrounding their work. For example, due in part to the recommendations of the General and Plastic Surgery Devices Committee, the Food and Drug Administration instituted the voluntary ban on the sale and use of silicone gel breast implants.[17] Additionally, on January 25, 1993, President Clinton established the Task Force on Health Care Reform to prepare health care reform legislation.[18] More recently, in January 1994, President Clinton released an Executive Order establishing an Advisory Committee on Human Radiation Experiments.[19] This Advisory Committee was responsible for uncovering "the nature and extent of government-sponsored experiments on individuals involving intentional exposure to ionizing radiation."[20]

Although Congress did not question the importance of these committees,[21] it did recognize the need to regulate their establishment,

---

1 (1971)).

[16]Michelle Nuszkiewicz, *Twenty Years of the Federal Advisory Committee Act: It's Time for Some Changes*, 65 S. CAL. L. REV. 957, 963 (1992).

[17]*Id.* at 958.

[18]Remarks on Health Care Reform and an Exchange With Reporters, 29 WKLY COMP. PRES. DOC. 96 (Feb 1, 1993) (indicating that the task force's mission was to "[b]uild on the work of the campaign and the transition, listen to all parties, and prepare health care reform legislation to be submitted to Congress within 100 days of our taking office").

[19]Exec. Order No. 12,891, 59 Fed. Reg. 2935 (1994).

[20]*Id.*

[21]Federal Advisory Committee Act, 5 U.S.C. app. § 2 (1988). The statute specifically states:

> Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

Id. See also Cardozo, *supra* note 1, at 2 (noting that advisory committees are valuable aides to the efficient administration of the government).

operation, and use.[22] During the 1950's, it was revealed in the Hearings before the House Subcommittee on Executive and Legislative Reorganization of the Committee on Government Operations ("House Subcommittee") that many existing advisory committees were not subject to any formal control during their creation, organization, or operation, and some had been formed without specific statutory authorization.[23] Moreover, many of these committees met without agendas and failed to keep records of their deliberations.[24] Some also kept their existence concealed from public scrutiny, allowing internal conflicts of interest as well as domination by special interests to go unrecognized.[25]

Prior to 1957, there were few attempts to regulate advisory committees.[26] In 1957, following numerous studies and hearings on congressional committees by the House Subcommittee, Congress began consideration of a bill which attempted to regulate advisory committees and required public disclosure and input concerning the committees.[27] This House Bill was "the consanguineous forbearer of the Federal Advisory

---

[22]Richard K. Berg, *Conflict of Interest Requirements for Members of Federal Advisory Committees: The Interaction Between FACA, 18 U.S.C. §§ 201-219, and the Federal Personnel Statutes and Regulations*, 37 FED. BAR & NEWS J. 396, 396 (1990). *See also* Nader v. Baroody, 396 F. Supp. 1231, 1232-33 (D.D.C. 1975) (noting that the legislative history of the Act indicates that "Congress was aware that advisory committees had proliferated the federal bureaucracy to such numbers and at such expense that there was need for some regulation and greater disclosure").

[23]Markham, *supra* note 15, at 558.

[24]*Id.*

[25]*Id.* In a 1957 report, the House Committee on Government Operations noted that some of the advisory committees consisted of members whose special interests did not coincide with the interests of the country as a whole. *Id.* at 559.

[26]Cardozo, *supra* note 1, at 10. During the 1950's, the Justice Department promulgated guidelines to help government agencies avoid antitrust problems arising through the use of advisory committees heavily influenced by industry groups. Nuszkiewicz, *supra* note 16, at 963. The advisory committees and the employing agencies, however, ignored the regulations because they did not have the force of statute, regulation, or executive order. *Id. See also* Richard O. Levine, Comment, *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217, 221-25 (1973) (discussing the background and history leading to the enactment of the Act).

[27]Cardozo, *supra* note 1, at 10.

Committee Act" which was enacted in 1972.[28] The hearings conducted in 1957 and those on the bills introduced in 1970 and 1971 revealed the condition of the Federal Government's advisory committee system.[29] The system was characterized as lacking adequate guidelines, supervision or direction and advisory committees were found so numerous as to defy accurate accounting.[30] Additionally, the Presidential Advisory Committee Hearings indicated that there were approximately 1,800 advisory committees in the Federal Government.[31] Included in this number were 198 presidential advisory committees.[32] These Presidential advisory committees constituted only thirteen percent of all advisory committees, but operated at an estimated cost of $75 million per year or approximately seventy-five percent of the total estimated cost associated with all advisory committees.[33] As such, controls were needed to eliminate unnecessary committees, to govern the administration of the remaining committees, and to provide information to the public regarding the membership and activities of these committees.[34] Accordingly, FACA was enacted for these purposes.[35]

---

[28]Markham, *supra* note 15, at 558.

[29]The hearings are discussed at length in Markham, *supra* note 15, at 558-70.

[30]*Hearings Before the Senate Subcommittee on Intergovernmental Relations of the Committee on Government Operations on S. 1637, S. 1964 and S. 2064*, 92d Cong., 1st Sess., pt. 1, at 7 (1971).

[31]*Presidential Advisory Committee, Hearings Before the House Special Studies Committee on Government Operations*, 91st Cong., 2d Sess., pt. 1, at 31 (1970).

[32]*Id.*

[33]*Id.* at 32.

[34]Markham, *supra* note 15, at 564.

[35]5 U.S.C. app. § 2(b) (1988). The Act provides in pertinent part:

> The Congress further finds and declares that-
> (1) the need for many existing advisory committees has not been adequately reviewed;
> (2) new advisory committees should be established when they are determined to be essential and their number should be kept to the minimum necessary;
> (3) advisory committees should be terminated when they are no longer carrying out the purpose for which they were established;
> (4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

> Section 3 of the Federal Advisory Committee Act defines an advisory committee as: any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is —
>
> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . .[36]

Section 3 lists committees which are specifically exempt from the requirements of the Act, including the Advisory Committee on Intergovernmental Relations, the Commission on Government Procurement, and any committee exclusively composed of full-time officers or employees of the Federal Government.[37] This last exemption indicates that the Act is only concerned with "public advisory committees," or those containing members who are not government employees or officers.[38]

> (5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and
>
> (6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

Id. *See also* Cardozo, *supra* note 1, at 10.

[36]5 U.S.C. app. § 3(2) (1988).

[37]*Id.* § 3(2). Section 4 exempts advisory committees established or utilized by the Central Intelligence Agency or the Federal Reserve System and "any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any state or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies." *Id.* § 4(b)-(c). Also exempt from the Act are advisory committees established by an act of Congress which provides for their exemption. *Id.* § 4(a).

[38]Cardozo, *supra* note 1, at 3. Presumably, the third exception is permitted to apply to certain advisory committees because the Administrative Procedure Act, PUB. L. NO. 89-554, 80 Stat. 378 (codified as amended at 5 U.S.C. §§ 551 et seq., 701 et seq., 3105, 3344 (1988)), and the Government in the Sunshine Act, PUB. L. NO. 94-409, 90 Stat. 1241 (codified as amended at 5 U.S.C. § 552b (1988)), establish guidelines for insiders who would sit on these committees. Cardozo, *supra* note 1, at 3. Additionally, the Freedom of Information Act, 1966 PUB. L. NO. 89-554, 80 Stat. 378, § 1 (codified as

Advisory committees that are subject to the requirements of the Act are closely monitored to prevent the recurrence of problems that plagued the advisory committee system prior to the Act's adoption.[39] The Act imposes various administrative guidelines and record keeping requirements on the operations of the advisory committees.[40] For instance, section 5 establishes guidelines and responsibilities of Congressional committees monitored by the standing committees of the Senate and the House of Representatives.[41] Among the requirements imposed upon the standing committees is a requirement that they promote the efficiency and economy of advisory committees already in existence.[42] The standing committee, in exercising its legislative review function, is required to evaluate each advisory committee under its jurisdiction to determine whether any of the committees should be cancelled or merged with another existing advisory committee, whether revision of the advisory committee's responsibilities is needed, and whether the advisory committee is performing a necessary function, which is not also being performed by another committee.[43]

Section 5(b) sets forth the criteria that standing committees must follow when considering legislation establishing or authorizing the establishment of

---

amended at 5 U.S.C. § 552 (1988)), opens the documents of these committees to the public. Cardozo, *supra* note 1, at 3.

[39]*Infra* notes 48, 99 and accompanying text (illustrating problems and abuses of the system).

[40]Markham, *supra* note 23, at 270.

[41]5 U.S.C. app. § 5(a) (1988).

[42]*Id.*

[43]*Id.* Section 5(a) provides:

> In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

Id.

an advisory committee.[44] These criteria include ensuring that other existing committees are not serving the same function as the proposed committee, as well as determining whether the function of the proposed committee could be accomplished by an existing committee or agency.[45]

Legislation establishing an advisory committee must state the purpose of the advisory committee,[46] and must require "balanced" membership "in terms of the points of view represented and the functions to be performed by the advisory committee."[47] In order to assure that the advisory committee's advice and recommendations are the result of its independent judgment, the legislation must employ means to prevent influence by special interests.[48] Additionally, the legislation should set the duration of the advisory committee, dates for the submission of reports, and authorization for

---

[44]*Id.* § 5(b).

[45]*Id.* Regarding this legislation, the Act states:

> In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee.

Id.

[46]*Id.* § 5(b)(1).

[47]*Id.* § 5(b)(2). Broadening the membership would bring more diverse viewpoints and would make it difficult for members "to collude among themselves or to misuse their close access to government decisionmakers." Levine, *supra* note 26, at 228.

[48]5 U.S.C. app. § 5(b)(3) (1988). This section functions as a safeguard, ensuring that the advice and recommendations of an advisory committee are not inappropriately influenced by any special interest groups seeking to promote private concerns through committee membership. Markham, *supra* note 15, at 588. Rather than functioning as advisory aides, the committees were acting as an internal lobby. *Id.* For instance, an advisory committee on animal health, which had closed its operations to the public and other interested groups, recommended that the Department of Agriculture certify that cancerous chickens were safe for human consumption. *Id.* at 569. *See also* Federal Advisory Committee Act, 5 U.S.C. app. § 10 (1988) (imposing "openness" upon advisory committee meetings and documents).

appropriations.[49] Finally, the legislation is responsible for assuring that the advisory committee has sufficient staff, funding, and quarters.[50]

Subsection (c) further requires that the guidelines found in section (b) are followed by the President, agency heads, or other Federal officials to the extent applicable, when creating a federal advisory committee.[51]

Next, section 6 of the Act sets forth the President's responsibilities and requirements regarding advisory committees.[52] Initially, the President is permitted to delegate authority for evaluating and acting upon the recommendations received from an advisory committee.[53] After receiving a public report from an advisory committee, the President or his delegate, within one year, must report to Congress on his proposal for action or report reasons for not acting.[54]

---

[49]5 U.S.C. app. § 5(b)(4) (1988).

[50]*Id.* § 5(b)(5).

[51]*Id.* § 5(c). Section 8 lists the responsibilities of agency heads for establishing administrative guidelines and management controls as follows:

> (a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.
> (b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall-
>
> (1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;
> (2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and
> (3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

Id. § 8.

[52]*Id.* § 6.

[53]*Id.* § 6(a). "The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees." *Id.*

[54]*Id.* § 6(b).

The President is also required to submit annual reports to Congress regarding the activities, status, and changes in membership of the advisory committees in existence during the fiscal year.[55] The report should include, *inter alia*, the names of the members, the estimated annual cost, and a reference to reports which the advisory committee has submitted.[56] Only information which the President believes should be withheld for national security reasons can be excluded from the report.[57]

In addition to the guidelines that Congress and the President must follow, section 7 establishes a review and reporting system which the Administrator of General Services must follow.[58] The Administrator must establish and maintain a Committee Management Secretariat within the General Services Administration to be responsible for all matters concerning

---

[55]*Id.* § 6(c).

[56]*Id.* Concerning the report, the Act states:

> The report shall include the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor.

Id.

[57]*Id.* "The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such a report a statement that such information is excluded." *Id.*

[58]*Id.* § 7. The term "Administrator" means the Administrator of General Services. *Id.* § 3(1). Pursuant to Reorg. Plan No. 1 of 1977, 42 Fed. Reg. 56,101 (1977) *reprinted in* 91 Stat. 1634 (1977), all of the functions of the Office of Management and Budget and its Director relating to the Committee Management Secretariat were transferred to the Administrator.

The General Services Administration is established in the Executive branch and is headed by the Administrator of General Services who is appointed by the President with the Senate's advice and consent. 40 U.S.C. § 751 (1988). The Administration was established to achieve an economic and efficient program for property management within the Federal Government. 1949 U.S.C.C.A.N. 1475.

advisory committees.[59] In addition, the Administrator is responsible for reviewing the advisory committees to determine if each is fulfilling its purpose,[60] whether any should be abolished[61] or merged with another,[62] and whether its responsibilities should be revised.[63] This review is to be carried out annually, and after each review the Administrator must make recommendations to the President, agency head, or the Congress regarding the action which he believes should be taken.[64]

To assist the advisory committees in improving their performance, the Administrator shall "prescribe administrative guidelines and management controls . . . and, to the maximum extent feasible, provide advice, assistance, and guidance . . . ."[65] To ensure financial economy of the advisory committees, the Administrator is required to consult with the Director of Personnel Management, and establish "guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors."[66]

Prior to the authorization and creation of an advisory committee, certain standards must be met.[67] This procedure was intended to arrest the "bureaucratic proliferation of advisory committees," and to ensure that the committees serve a significant advisory purpose.[68] Section 9 mandates that the establishment of an advisory committee be specifically authorized by

---

[59]Federal Advisory Committee Act, 5 U.S.C. app. § 7(a) (1988).

[60]*Id.* § 7(b)(1).

[61]*Id.* § 7(b)(4).

[62]*Id.* § 7(b)(3).

[63]*Id.* § 7(b)(2).

[64]*Id.*

[65]*Id.* § 7(c).

[66]*Id.* § 7(d)(1).

[67]*See id.* § 9. *See also* Markham, *supra* note 15, at 585 (discussing the standards imposed by the Act upon the authorization and creation of an advisory committee).

[68]S. Rep. No. 1098, 92d Cong., 2d Sess. 13 (1972).

statute,[69] or determined as a matter of formal record to be in the public interest.[70] Timely notice of the advisory committee's creation must also be published in the Federal Register to give the public and Congress ample opportunity to challenge the committee's establishment.[71] After establishment, no advisory committee can meet or take action until a charter has been filed with the appropriate body.[72] The charter should contain specified information which will aid in the monitoring and supervision of the committee's effectiveness, responsibilities, and expenses.[73]

---

[69]5 U.S.C. app. § 9(a)(1) (1988).

[70]*Id.* § 9(a)(2). This section states:

> No advisory committee shall be established unless such establishment is . . . determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

Id.

[71]*See* S. Rep. No. 1098, 92d Cong., 2d Sess. 13 (1972).

[72]5 U.S.C. app. § 9(c) (1988). Charters are to be filed with "(1) the Administrator, in the case of Presidential Advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency." *Id.* Additionally, a copy of the charter should be furnished for the Library of Congress. *Id.*

[73]*Id.* § 9(c)(A)-(J). Such charter shall contain the following information:

> (A) the committee's official designation;
> (B) the committee's objectives and the scope of its activity;
> (C) the period of time necessary for the committee to carry out its purposes;
> (D) the agency or official to whom the committee reports;
> (E) the agency responsible for providing the necessary support for the committee;
> (F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;
> (G) the estimated annual operating costs in dollars and man-years for such committee;
> (H) the estimated number and frequency of committee meetings;
> (I) the committee's termination date, if less than two years from the date of the committee's establishment; and
> (J) the date the charter is filed.

Section 10 establishes additional procedures which must be followed prior to any advisory committee meeting.[74] Specifically, subsection (e) mandates that an officer or employee of the Federal Government be designated to chair or attend every meeting of the advisory committee and that no meeting may be conducted in the absence of the designated officer or employee.[75] This subsection is intended to prevent advisory committee meetings from becoming forums for antitrust law violations, and to prevent discussions which could inappropriately influence government decision-making.[76] Subsection (f) requires that meetings only be held at the call of, or after advanced approval by, the designated officer or employee.[77] Additionally, advisory committee meetings, other than Presidential advisory committees, must have an agenda approved by the officer or employee.[78]

Moreover, to prevent abuses of the advisory process, the Act limits the functions of established advisory committees.[79] These functions are limited solely to "advisory functions," unless otherwise provided by Presidential directive or statute.[80] Therefore, the Act does not apply to operational

---

Id. *See also* Markham, *supra* note 15, at 586 (noting that the information is used for the Office of Management and Budget review, and to assist Congress and the public in identifying the effectiveness and responsibilities of the advisory committees).

[74]5 U.S.C. app. § 10 (1988).

[75]*Id.* § 10(e). This officer or employee has the authority to adjourn any meeting of the advisory committee if he or she determines that adjournment is in the public interest. *Id.*

[76]*Id.* § 10(f). *Hearings Before the House Subcommittee on Executive and Legislative Reorganization of the Committee on Government Operations*, H.R. 3378, 85th Cong., 1st Sess. (1957). The primary purpose of subsections (e) and (f) is to "prevent illegal interactions between committee members themselves, rather than to prevent abuses in the relationship between committee members and agency officials." Levine, *supra* note 26, at 233.

[77]5 U.S.C. app. § 10(f) (1988).

[78]*Id.*

[79]*Id.* § 9.

[80]*Id.* § 9(b).

committees which provide substantive functional duties under statute, rather than merely providing advice.[81]

To control the growth of the number of advisory committees, the Act limits the duration of each advisory committee's existence to two years from the date of its establishment with allowance for renewal.[82] Advisory committees renewed by the President or an officer of the Federal Government may continue for successive two-year periods.[83] Upon renewal, a charter is required to be filed in accordance with section 9(c),[84] and no action other than preparing and filing the charter can be taken prior to filing the charter.[85]

In addition to the housekeeping functions discussed above, the Act attempts to correct internal abuses in the advisory system by imposing "openness" on the advisory process.[86] The openness requirement is the touchstone of the Act and prevents subjective influences from being too easily exerted upon federal decision makers.[87]

Section 10 of the Act outlines the procedures that each advisory committee must follow, the first being that the each meeting be open to the public.[88] In order that the public becomes aware of the meetings, the Act

---

[81]Markham, *supra* note 15, at 576 (noting that exempting operational groups conforms with the intent of the Act, as the Act is directed only at committees that supply advice to the government).

[82]5 U.S.C. app. § 14(a)(2) (1988). Advisory committees established by the President or an officer of the Federal Government can be renewed by the President or that officer prior to the expiration of the two-year period and upon appropriate action. *Id.* § 14(a)(2)(A). An advisory committee established by Act of Congress is not limited to a duration of two years if its duration is provided for by law. *Id.* § 14 (a)(2)(B). *See also* Markham, *supra* note 15, at 589.

[83]5 U.S.C. app. § 14(c) (1988).

[84]*See supra* notes 72-73 (discussing § 9(c)).

[85]5 U.S.C. app. § 14(b)(3) (1988).

[86]*Id.* § 10. The most notable abuse corrected by the openness requirement is undue influence of special interest groups. 118 Cong. Rec. S14,647 (1972).

[87]Markham, *supra* note 15, at 590 (citing S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972)).

[88]5 U.S.C. app. § 10(a)(1) (1988). This section permits any interested persons, subject to reasonable regulations prescribed by the Administrator, to "attend, appear before, or file statements with any advisory committee . . . ." *Id.* § 10(a)(3). The application of

requires that timely notice of the meeting is published in the Federal Register.[89] In addition, the Administrator is to prescribe regulations providing for other types of public notice to insure that all interested members of the public are notified prior to a meeting.[90]

The Act also imposes the openness requirement on the documents included in the advisory committee meetings.[91] Subject to the Freedom of Information Act,[92] all "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which are made available to or prepared for or by each advisory committee" are to be made available for public inspection and copying.[93] The minutes of each meeting, required to be kept by every advisory committee, must include: a list of all

---

subsections (a)(1) and (a)(3) is limited by subsection (d). *Id.* § 10(d). Subsection (d) applies if the President, or the head of an agency to which the advisory committee reports, determines that any portion of an advisory committee meeting may be closed to the public under the Government in the Sunshine Act, 5 U.S.C. § 552b(c) (1988). 5 U.S.C. app. § 10(d). The determination made by the President or agency head, that disclosure limitations apply, must be made in writing and shall include the reasons for the determination. *Id.*

[89]5 U.S.C. app. § 10(a)(2) (1988). This notice requirement is also subject to the President's determination that national security will not be infringed upon. *Id.*

[90]*Id.*

[91]*Id.* § 10(b). *See also* O'Reilly, *supra* note 4, at 35. This public access provision does not apply to the financial records of an advisory committee, but only to the records "made available to or prepared for or by each advisory committee." American Ass'n of Physicians & Surgeons v. Clinton, No. 93-0399 1994 WL 692814 (D.D.C. Dec. 1, 1994).

[92]The Freedom of Information Act, 5 U.S.C. § 552 (1988), was designed "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). The categories of information which are protected from disclosure under the Freedom of Information Act include, *inter alia*, matters of national defense or foreign policy; matters concerning internal personnel rules and practices of the agency; information specifically exempt from disclosure by statute; certain inter-agency or intra-agency documents available only to "an agency in litigation with the agency"; information containing privileged or confidential trade secrets and commercial or financial information; personnel and medical files; and investigatory files compiled for law enforcement purposes. 5 U.S.C. § 552 (b)(1)-(9) (1988).

[93]5 U.S.C. app. § 10(b) (1988). The documents should be available at "a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist." *Id.*

persons in attendance; an accurate description of all matters discussed and all conclusions reached; and copies of all reports the committee received, issued, or approved.[94] The accuracy of the minutes must then be certified by the chairperson of the advisory committee.[95] Copies of transcripts of advisory committee meetings are available to any person upon payment of duplication costs.[96]

Finally, the Librarian of Congress is required to establish a depository for each report made by every advisory committee including, in some cases, background reports furnished by consultants.[97] The Administrator is responsible, subject to the Freedom of Information Act exemptions, for filing at least eight copies of such reports and papers.[98]

Although advisory committees are valuable governmental tools, they must be regulated to increase the efficiency of their utilization and to reduce the danger of abuse by special interest groups.[99] FACA provides this necessary regulation by instituting administrative control and by opening to the public the operations of groups that supply advice to the government.[100] This regulation applies to all groups which fall under the definition of "advisory committee" provided in the Act[101] and the definitions established through case law.[102]

---

[94]*Id.* § 10(c).

[95]*Id.*

[96]*Id.* § 11(a). Section 11 also applies to transcripts of "agency proceedings" as defined in the Administrative Procedure Act, § 12, 5 U.S.C. § 551 (1988). 5 U.S.C. app. § 11(a) (1988).

[97]5 U.S.C. app. § 13 (1988).

[98]*Id. See supra* note 92 (discussing the Freedom of Information Act).

[99]Markham, *supra* note 15, at 607. Such abuses include diverting attention from or delaying decisions on sensitive issues, or bestowing political favors. *Id.*

[100]*Id.* at 606 (summarizing the purpose of the Act).

[101]*See supra* notes 36-38 and accompanying text (setting forth the statutory definition of advisory committees and certain exemptions from that definition).

[102]*See infra* note 136-39 and accompanying text (raising questions about what groups constitute advisory committees).

III. THE EXECUTIVE PRIVILEGE

Pursuant to Article II, Section 1, Clause 1, of the United States Constitution,[103] the President of the United States has a right to receive confidential communications from his aides and advisors.[104] In discharging his enumerated powers effectively, the President has a great interest in confidentiality of communications.[105] Therefore, although the Constitution does not explicitly reference a privilege of confidentiality, to the extent the President's interest in confidentiality relates to the effective discharge of Executive powers, it is constitutionally based.[106] The need to protect

---

[103]"The executive power shall be vested in a President of the United States of America . . . ." U.S. CONST. art. II, § 1, cl. 1. *See* Meyers v. United States, 272 U.S. 54, 151 (1926) (noting that the provisions of art. II, § 1, cl. 1, of the Constitution, vesting the executive power in the President, are a grant of power and not merely a designation of an office of the government).

[104]39 Op. Att'y Gen. 343 (1962) (noting that the President has powers not enumerated in the statutes; constitutional powers which have not been and cannot be specifically defined, as their extent and limitations are largely dependent upon conditions and circumstances). *See Nixon I*, 418 U.S. 683, 704 (1974) (noting that the executive privilege to receive confidential communications is not derived from a power expressly granted by the Constitution but is a power derived from an enumerated power). *See also* Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1384 (1974) (noting that although the Constitution is silent with regard to a privilege to withhold information, the controversy concerning executive privilege arises from the tripartite system of government).

[105]*Nixon I*, 418 U.S. at 711. In 1955 President Eisenhower stated:

> But when it comes to the conversations that take place between any responsible official and his advisers . . . expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody; and if they are, will wreck the Government.
>
> There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.

Cox, *supra* note 104, at 1386 (citation omitted).

[106]*Nixon I*, 418 U.S. at 711, 705-06 & n.16 (quoting Marshall v. Gordon, 243 U.S. 521, 537 (1917), for the rule established in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), "that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant . . . ."). *See contra*

confidential information is derived from the constitutional doctrine of the separation of powers[107] and is recognized, not as an absolute privilege, but

---

RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974). *See generally* K.A. McNeely-Johnson, Comment, United States v. Nixon, *Twenty Years After: The Good Bad and the Ugly — an Explanation of the Executive Privilege*, 14 N. ILL. L. REV. 251 (1993) (discussing the evolution of the executive privilege).

[107]*Nixon I*, 418 U.S. 603, 708 (1974) (noting that the privilege is premised upon the concern that the release of confidential government information to the public or coordinate branches of government would offend principles of separation of powers). *See also* Black v. Sheraton, 371 F. Supp. 97, 100 (D.D.C. 1974) (noting that the executive privilege is based on the constitutional doctrine of the separation of powers and it "exempts the executive from disclosure requirements applicable to the ordinary citizen or organization, where such exemption is necessary to the discharge of highly important executive responsibilities involved in maintaining governmental operations").

In the United States, the federal and state governments are divided into three branches: the legislative, the executive, and the judicial. TRIBE, *supra* note 7, § 2-2. Each branch has a different function and power. *Id.* Simply stated, the legislative branch makes the laws, the executive branch is required to carry out the laws, and the judicial branch interprets the laws and adjudicates disputes arising under the laws. *Id.* For the specific powers and duties of each branch, see U.S. CONST. arts. I-III.

Under the constitutional doctrine of separation of powers, each branch is prohibited from encroaching on the domain, or exercising the powers of another branch. BLACK'S LAW DICTIONARY 1365 (6th ed. 1990). This concept was illustrated in *Nixon I*, wherein the Court stated:

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

418 U.S. at 704 (quoting THE FEDERALIST No. 47 (James Madison) (S. Mittell ed., 1938)). The Court in Humphrey's Executor v. United States, 295 U.S. 602 (1953), described the principle of separation of powers as follows:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and [in] the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

as a qualified privilege.[108] This Presidential or executive privilege applies to military and diplomatic secrets, as well as to "documents integral to an appropriate exercise of the executive's domestic decisional and policy making functions."[109]

Although the executive privilege is not expressly set forth in the Constitution, the United States Supreme Court has recognized and honored its existence, but has not defined its scope.[110] In *United States v. Nixon*,[111] a grand jury indicted several White House staff members and political supporters of the President for alleged violations of federal statutes.[112] Following the indictment, the Special Prosecutor filed a motion

---

Id. at 629-30. *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1801) (asserting that a federal court has the power to refuse to give effect to congressional legislation that is inconsistent with the Court's interpretation of the Constitution); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500 (1867) ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.").

[108]When a privilege is qualified, a court will balance the moving party's need for whatever is protected by the privilege against the reasons for maintaining the privilege. TRIBE, *supra* note 7, at 207. *See, e.g., Nixon I*, 418 U.S. at 707 (ruling that the executive privilege of confidentiality is not an absolute unqualified privilege, but rather is a presumptive privilege that can be outweighed in certain circumstances); Armstrong Brothers Tool Co. v. United States, 463 F. Supp. 1316, 1320 (Cust. Ct. 1979) (noting that the executive privilege to withhold certain governmental documents is not absolute, but qualified, and in the absence of a proper showing of need for the production of the privileged information, which outweighs the harm that might result to intra-governmental candor, the claim of privilege should be sustained).

[109]*Black*, 371 F. Supp. at 100. Documents which are integral to the President's domestic decisional and policy making functions are "those documents reflecting the frank expression necessary in intra-governmental advisory and deliberative communications." *Id.* "The doctrine of executive privilege permits the executive branch to withhold disclosure of intragovernmental documents which contain advisory opinions, recommendations and deliberations in the formulation of governmental policies and decisions." S.C.M. Corp. v. United States, 473 F. Supp. 791, 797 (Cust. Ct. 1979) (citations omitted).

[110]*See supra* notes 104-06 and accompanying text (discussing the privilege as an unenumerated power of the President).

[111]418 U.S. 683 (1974). Chief Justice Burger delivered the opinion of the Court, in which all Members joined except, Justice Rehnquist, who took no part. *Id.* at 685.

[112]*Id.* at 687.

for a subpoena *duces tecum*[113] for the production at trial of certain documents and tapes concerning specified conversations and meetings between the President and others.[114] The President filed a motion to quash the subpoena, claiming that the information sought by the Special Prosecutor was protected under the executive privilege.[115] After concluding that the Special Prosecutor had standing to bring the case and that a justiciable controversy existed, the Supreme Court turned to the issue of the executive privilege.[116]

---

[113]"A subpoena *decus tecum* is a court process initiated by a party in litigation to compel production of certain specific documents and other items, [and] material . . . relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of a person or body served with process." BLACK'S, *supra* note 107, at 1426.

[114]*Nixon I*, 418 U.S. at 687-88. On March 1, 1974, a grand jury for the United States District Court for the District of Columbia indicted seven individuals who had occupied either a position of responsibility on the White House Staff, or a position with the Committee for the Re-election of the President, for various offenses, "including conspiracy to defraud the United States and to obstruct justice." *Id.* at 687 & nn.3-4. The grand jury named the President and others as unindicted coconspirators. *Id.* at 687.

The subpoena *duces tecum* was issued to President Nixon on April 18, 1974 requiring the production prior to trial of "certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others." *Id.* at 688.

[115]*Id.* at 687-88, 697.

[116]*Id.* at 697. The President's counsel argued that the district court lacked the authority to issue the subpoena because the matter was not subject to judicial resolution as it involved an intra-branch dispute between superior and subordinate officers of the Executive Branch. *Id.* at 692. The Court found that the President's resistance to the subpoena which was sought by the Special Prosecutor, also a member of the Executive Branch, fell within the scope of the Special Prosecutor's express authority delegated by the Attorney General, and thus presented issues "of a type which are traditionally justiciable." *Id.* at 697 (citing United States v. ICC, 337 U.S. 426, 430 (1949)). In so finding, the Court noted that "[i]n light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability." *Id.* at 697.

Before discussing the executive privilege, the Court determined that the Special Prosecutor satisfied the requirements of FED. R. CRIM. P. 17(c) governing the issuance of a subpoena *duces tecum* in federal criminal proceedings. *Id.* at 697-703. In a criminal case, there are certain fundamental characteristics of a subpoena *decus tecum*. *Id.* at 698. In order to sustain a subpoena, the moving party must show the following:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due

The President's claim of privilege was twofold.[117] The President first claimed that the doctrine of the separation of powers precluded judicial review of a President's claim of privilege.[118] Second, the President claimed that if he did not prevail on the claim of absolute privilege, then "the [C]ourt should hold as a matter of constitutional law that the privilege prevails over the subpoena *duces tecum*."[119]

Regarding the first claim, the Court turned to *Marbury v. Madison*[120]

> diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. (quoting United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)). Essentially, the Special Prosecutor had to show that the information sought from President Nixon was relevant to the proceeding, that it was admissible, and that the subpoena was specific. *Id.* at 700. The Court, affirming the district court's denial of the President's motion to quash the subpoena, concluded that each of the tapes sought contained evidence admissible regarding the offenses charged and found that they were not available from any other source. *Id.* at 702.

[117]*Id.* at 703.

[118]*Id.*

[119]*Id.*

[120]5 U.S. (1 Cranch) 137 (1803). The circumstances surrounding *Marbury* are as follows. After Jefferson's election in 1800, but prior to his inauguration on March 4, 1801, President John Adams, nominated his Secretary of State, John Marshall, as Chief Justice of the Supreme Court. DAVID CRUMP, ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 36 (1989). The nomination was confirmed on January 27, 1801, and for the month of February, Marshall occupied both positions. *Id.* During February, Congress passed the Circuit Court Act which doubled the number of federal judges, enabling President Adams to appoint sixteen judges to the newly created Federal Circuit Court. *Id.* Another piece of legislation enabled President Adams to appoint forty-two Justices of the Peace for the District of Columbia and Alexandria, Virginia. *Id.* The Senate confirmed the appointments, but Secretary of State, Marshall, was unable to deliver all of the commissions before Jefferson took office. *Id.* Jefferson and his Secretary of State, James Madison, refused to deliver the remaining commissions. *Id.*

William Marbury was one of the judges confirmed for the District of Columbia and Alexandria who did not receive his commission. *Id.* Marbury brought an action in the Supreme Court for mandamus to compel Madison to issue the commission. *Id.* Section 13 of the Judiciary Act granted the Supreme Court mandamus jurisdiction. *Id.* Chief Justice Marshall, however, writing for the Supreme Court, held that Congress could not give the original mandamus jurisdiction to the Supreme Court and that section 13 was

for the proposition that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[121] Thus, the Court found that it had the authority in this case to state what the law was regarding the President's claim of privilege.[122]

Turning to the second claim, the Court opined that an unqualified, absolute privilege of the President protecting the confidentiality of communications would impede the Court's Article III function and its constitutional duty to do justice in criminal actions.[123] The Supreme Court,

---

repugnant to the Constitution. *Id.* Noting that in order to issue a mandamus the Supreme Court would be exercising appellate jurisdiction, yet the Constitution only granted the Court original jurisdiction in cases "affecting ambassadors, other public ministers and consuls," Justice Marshall stated:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury, 5 U.S. at 174, 177-78. Marbury did not get his commission, but the essence of this decision is that the Supreme Court claimed the authority to declare unconstitutional acts of the legislative or executive branches. CRUMP, *supra* at 37.

[121]*Nixon I*, 418 U.S. at 703 (quoting *Marbury*, 5 U.S. (1 Cranch) at 137)).

[122]*Id.* at 704-05 (noting that "[s]ince this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers").

[123]*Id.* at 707. Article III specifically provides:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or

therefore, ruled that the President had a "presumptive privilege" which could be overcome in certain circumstances and justified the privilege on the ground that it "is fundamental to the operation of Government and inextricably rooted" in the constitutional doctrine of separation of powers.[124] The Court further noted that the public interest necessitates affording Presidential confidentiality the utmost protection consonant with the fair administration of justice.[125] Nevertheless, the Court found that in the limited circumstances presented in the case, the fundamental demands of due process of law in the fair administration of criminal justice would prevail over the President's generalized interest in confidentiality.[126]

Subjects . . . .

U.S. CONST. art. III, § 1; *id.* § 2, cl. 1.

[124]*Nixon I*, 418 U.S. at 708. In support of this justification, the Court noted:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

Id. The Court further concluded:

> The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversation will be called for in the context of a criminal prosecution.

Id. at 712. *See contra* Raoul Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. REV. 4, 19 (1974) ("In addition to the lack of precedent for the assumption that presidential privilege is 'inextricably rooted in the separation of powers,' there are historical materials that contradict that assumption." (citations omitted)).

[125]*Nixon I*, 418 U.S. at 715.

[126]*Id.* at 712 & n.19, 713. The Court, however, ordered an *in camera* inspection of the papers and further instructed that the district court be scrupulous in protecting against release or publication of material which the Court found inadmissible as evidence or irrelevant to the issues of the trial. *Id.* at 715-16.

United States v. Nixon has become one of the most often cited cases for the acknowledgment of a Presidential privilege to receive confidential communications in the exercise of Article II powers.[127] It has been applied in cases involving the disclosure of documents containing confidential communications,[128] and to cases involving the application of FACA, most notably, *Public Citizen v. United States Department of Justice*[129] and *American Association of Physicians and Surgeons v. Clinton*.[130] Despite its treatment by the courts and various discussions and studies by scholars and commentators, the scope and the effectiveness of the privilege remain largely undefined.[131]

---

[127]As Judge Silberman opined: "Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes." Association of American Physicians & Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993).

[128]See, for example, *Nixon II*, wherein the Supreme Court held that the Presidential privilege must yield to the important congressional objective of preserving Presidential materials and maintaining access to those materials for lawful governmental and historical purposes where the Act had built in safeguards to prevent the disclosure of confidential materials and any intrusion into the President's confidentiality was minimal. *Nixon II*, 433 U.S. 425, 454 (1977) (discussing Nixon's challenge to the Presidential Recordings and Materials Preservation Act which directs the Administrator of General Services to take custody of Presidential materials to preserve those with historical value and to make them available for use in judicial proceedings); McNeely-Johnson, *supra* note 106, at 283-92 (discussing the difficulty in documenting the scope of the use of the doctrine of the Executive Privilege in the Iran-Contra cases). *See supra* notes 111-26 and accompanying text (discussing *Nixon I* wherein the President attempted to avoid disclosing certain documents by claiming the executive privilege).

[129]491 U.S. 440 (1989).

[130]997 F.2d 898 (D.C. Cir. 1992).

[131]TRIBE, *supra* note 7 at 275 (noting that a President's claim of privilege may be asserted with varying degrees of success in both judicial and legislative investigations); Berger, *supra* note 124, at 19 (discussing the lack of precedent for an executive privilege); Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L. J. 281, 291-94 (1990) (commenting on the willingness of 3 Justices in *Public Citizen v. United States Department of Justice* to accept the government's argument that compliance with FACA interfered with the President's exclusive power to appoint federal judges, and noting that the balancing test makes the outcome of an executive privilege case difficult to predict); Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J. L. & POL. 719 (Summer 1993) (discussing the various contexts in which the claim of executive privilege arises and noting that the precise application of the privilege to "Congressional demands for information remains unsettled").

IV. AVOIDING THE CONSTITUTIONAL ISSUE

Although the Act does not expressly provide for a judicial process whereby the public can enforce its provisions, today's broad concepts of standing[132] permit interested groups or individuals to ensure that agency

---

[132]"Standing is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit . . . ." BLACK'S, *supra* note 107, at 1405 (citing Carolina Environmental Study Group, Inc. v. Atomic Energy Comm'n, 431 F. Supp. 203, 218 (D.N.C. 1977)). The concept of standing was discussed in Sierra Club v. Morton, 405 U.S. 727 (1971). In *Sierra Club*, Sierra Club filed suit seeking a declaratory judgment that aspects of Disney's proposed development of Mineral King Valley, a designated national game refuge, violated federal laws and regulations concerning preservation of national parks, forests, and game refuges. *Id.* at 730. Sierra Club also sought preliminary and permanent injunctions to prevent the approval of the development project. *Id.* Respondents challenged Sierra Club's standing to sue. *Id.* at 731.

The Court examined the traditional test of standing, "[w]hether a party has a sufficient stake in an otherwise justiciable controversy" and noted that this case involved a claim of injury of a noneconomic nature to an interest that is shared by many. *Id.* at 731-32, 734. In considering Sierra Club's standing, the Court noted that the suit was brought under the Administrative Procedure Act ("APA"), § 10, 5 U.S.C. § 702, (APA) which states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Sierra Club*, 405 U.S. at 732-33.

The Court held that Sierra Club lacked standing to sue because it failed to prove that its members would be injured by the development. *Id.* at 735. *See also* NAACP v. Button, 371 U.S. 415, 428 (1963) (noting that where members of an organization are directly injured, the organization may represent those members in seeking judicial review); Flast v. Cohen, 392 U.S. 83, 101 (1968) (noting that where a party is not bringing suit under the authority of a statute, the issue of standing depends upon whether "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution"); Baker v. Carr, 369 U.S. 186, 204 (1962) (opining that standing depends upon whether the party alleges "a personal stake in the outcome of the controversy").

Recently, in *Lujan v. Defenders of Wildlife*, Justice Scalia set out the modern test for standing consisting of 3 elements:

> First, the plaintiff must have suffered an "injury in fact" an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 112 S. Ct. 2130, 2136 (1992) (citations omitted).

action is taken in accordance with the statute.[133] Much litigation has ensued over certain advisory committees not adhering to the Act's requirements.[134] Generally, the focus has been on the status of the committee, and whether it falls under the classification of an advisory committee, which is subject to the Act, or whether it meets any of the exceptions.[135] The statutory definition is very broad and includes any committee, task force, or similar group or subgroup which is "established or utilized" by the President or agencies for the purpose of obtaining advice or recommendations.[136] Many of the cases involve the following issues: the definition of "established by";[137] the definition of "utilized by";[138] and

---

[133]Markham, *supra* note 15, at 607. In Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989), the American Bar Association ("ABA") argued that Washington Legal Foundation ("WLF") lacked standing to bring suit under FACA to compel the disclosure of certain information. The ABA contended that the WLF did not have a sufficiently concrete and specific injury and that the WLF failed to demonstrate that a verdict in their favor would redress any alleged harm. *Id.* at 448-49. The Court rejected the ABA's contention and opined that refusing to allow appellants to scrutinize the ABA Committee's activities constituted sufficiently distinct injury to confer standing. *Id.* at 449-51. Additionally, the Court found the potential gains to appellant if they prevailed were sufficient to give them standing. *Id.*

[134]*See infra* notes 137-39 and accompanying text (reviewing case law).

[135]*See supra* notes 36-38 and accompanying text (examining the definition of advisory committee and the exceptions).

[136]Federal Advisory Committee Act, 5 U.S.C. app. § 3 (1988). Markham, *supra* note 15, at 572 (discussing § 3 exceptions). The definition of "advisory committee" provided in § 3 of the Act has been described as "'another example of unimpressive legislative drafting. It is obscure, imprecise and open to unduly broad interpretation.'" Nuszkiewicz, *supra* note 16, at 973 (quoting National Anti-Hunger Coalition v. Executive Comm., 557 F. Supp. 524, 530 (D.D.C. 1983), *aff'd* 711 F.2d 1071 (D.C. Cir. 1983)). The definition, therefore, has been established through case law and courts using statutory construction. Cardozo, *supra* note 1, at 11-12. *See, e.g.*, Consumers Union of U.S. Inc. v. Department of Health, Educ. & Welfare, 409 F. Supp. 473, 477 (D.D.C. 1976) (holding that meetings between Food and Drug Association ("FDA") officials and representatives of the Cosmetic, Toiletry and Fragrance Association, Inc. ("CTFA") were not "advisory" in nature because the CTFA was merely seeking the FDA's comments and advice regarding an industry sponsored proposal concerning cosmetic testing).

[137]Lombardo v. Handler, 397 F. Supp. 792 (D.D.C. 1975) (holding that the National Academy of Sciences Advisory Committee on Motor Vehicle Emissions was not an advisory committee established by statute or one established or utilized by the Environmental Protection Agency). The court in *Lombardo* reasoned that the term "established" denotes measures of direct congressional creation, not merely legislation

what constitutes an advisory committee.[139] To avoid constitutional

---

concerning the making of a contract to perform a scientific study which results in the formation of a committee. *Id.* at 796. *See also* Food Chemical News v. Young, 900 F.2d 328 (D.C. Cir. 1990) *cert. denied* 111 S. Ct. 132 (1990) (holding that FACA's established by definition indicates a government formed advisory committee, not an expert panel assembled pursuant to a contract with the Food and Drug Association).

[138]The term "'utilized' encompasses a group organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Young*, 900 F.2d at 333 (quoting Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989)). *See also* Washington Legal Foundation v. United States Sentencing Comm'n, 17 F.3d 1446, 1450 (D.C. Cir. 1994) (noting that "utilized" is "a stringent standard, denoting something along the lines of actual management or control of the advisory committee"); Cardozo, *supra* note 1, at 59 ("The conference believes that the definition of 'advisory committee' is limited to committees established by government action or affirmatively supported and 'utilized' by the government through institutional arrangements which amount to the adoption of the group as a preferred source of advice." (citations omitted)).

[139]The question arises whether committees which give advice to the government, but which are created by private organizations are subject to FACA. Cardozo, *supra* note 1, at 20. *See Lombardo*, 397 F. Supp. at 800 (noting that the Act's legislative history evidences Congress's intent to exclude private groups providing advice to government agencies under a contractual relationship, such as the National Academy of Sciences, from coverage of the Act); *Consumers Union*, 409 F. Supp. at 476 (reviewing the legislative history of the Act, and concluding that the purpose being served by the committee meetings would be a crucial factor in determining whether the Act will apply to privately organized groups); Center for Auto Safety v. Cox, 580 F.2d 689, 693 (D.C. Cir. 1978) ("When an administrator establishes or utilizes an advisory committee, he must comply with the provisions of the Act; it makes no difference whether the committee is his own creation or a pre-existing group.").

Another question presented to the courts is whether meetings of unstructured ad hoc groups or "one-shot meetings" are subject to the Act. Cardozo, *supra* note 1, at 26. "[T]he Act was not intended to apply to all amorphous, ad hoc group meetings." Nader v. Baroody, 396 F. Supp. 1231, 1233 (D.D.C. 1975) (holding that the unstructured, informal group meetings, which were "not conducted for the purpose of obtaining advice on specific subjects indicated in advance," did not involve advisory committee meetings as defined by the Act). *See also* NRDC v. EPA, 806 F. Supp. 275, 278 (D.D.C. 1992) (holding that the Governors' Forum's organization did not resemble an advisory committee because it was not seeking to influence the EPA, it did not receive federal funds, the membership was not fixed, and it was uncertain whether the Forum would conduct future proceedings).

It is also undetermined whether an advisory committee can be composed of a single person. Markham, *supra* note 15, at 576. If so, the President and other federal officials may have to comply with the provisions of the Act before seeking advice from any person who is not a government employee. *Id.* The President, then, may be required to comply with the Act before consulting his or her spouse for advice on certain issues. *See infra*

conflicts, courts have cleverly applied various interpretations of these definitions, holding that groups do not constitute advisory committees subject to the Act.[140]

The executive privilege of confidentiality appears to be at odds, in some instances, with the Act.[141] In contrast to the Act, which requires "openness," the executive privilege permits the President to obtain information in confidence.[142] The courts, however, have avoided the constitutional questions regarding the conflict of the Act's openness requirement with the executive privilege of receiving confidential communications.

---

notes 165-82 and accompanying text (discussing whether an advisory committee chaired by the First Lady is exempt from the Act).

Regarding the issues that arise concerning which groups are subject to the Act, Markham, *supra* note 15, at 576-77 notes:

> The Office of Management and Budget has taken the view that "while broad coverage was intended, the statute is aimed at advisory committees or similar groups in the ordinary sense," and this would intend that such bodies have all or most of the following characteristics of fixed memberships: establishment by a federal official, definite purpose of providing advice regarding a particular subject or particular subjects, organizational structure, and regular or periodic meetings.

Id. (citation omitted).

[140]In evading the constitutional implications, the courts have relied on the rule that when the constitutionality of an act of Congress is called into question, the Court will first determine whether a plausible alternative construction can be used in order to avoid formidable constitutional difficulties. *Public Citizen*, 491 U.S. at 465-66 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)). When such an acceptable alternative exists, the Court will use it unless it is "plainly contrary to the intent of Congress." *Id.* at 466 (citations omitted). This rule "'reflects the prudential concern that constitutional issues not be needlessly confronted'" and is especially applicable where the Court is reluctant to decide a constitutional issue that concerns the "relative powers of coordinate branches of government." *Id.* (citations omitted).

[141]*See infra* notes 144-97 and accompanying text (reviewing cases which address the conflict between the Act and the executive privilege).

[142]*See supra* notes 86-94 and accompanying text (examining § 10 of the Act).

For instance, in *Nader v. Baroody*,[143] the district court acknowledged that it was interpreting the Act so as to avoid constitutional issues.[144] In *Nader*, the plaintiff sought an injunction directing the Assistant to the President of the United States for Public Liaison to comply with the requirements of FACA regarding various meetings between certain executive branch officials and business organizations, or private sector groups.[145] These meetings were regularly convened every two weeks and were designed to increase the flow of information between the private sector and the Executive, including the President, through the exchange of views on a variety of subjects.[146]

Regarding the purpose of FACA, the court opined that the Act was not intended to interfere with the day-to-day operations of the presidency or to inhibit casual, informal contacts between the President, or his staff, and the interested public.[147] In addition, the court determined that it was not Congress's intent to restrict the President's ability to receive unsolicited opinions concerning topics that are useful to the exercise of his executive and political obligations.[148] The court then held that the meetings did not involve advisory committees and, therefore, were not subject to the Act's requirements.[149]

---

[143]396 F. Supp. 1231 (D.D.C. 1975).

[144]The Court ruled "[t]o avoid serious constitutional questions . . . and to reach an interpretation of the statute consistent with its overall provisions and legislative history, the Court declares that the White House meetings here under review do not involve 'advisory committees,' since the group meetings are unstructured, informal and not conducted for the purpose of obtaining advice on specific subjects indicated in advance." *Id.* at 1234-35.

[145]*Id.* at 1231-32. Of the fifteen meetings that were held, the President attended a portion of four. *Id.* at 1232.

[146]*Id.* Representatives of the following groups were present: housing construction and residential financing industries; senior citizens; life insurance industry; agriculture and livestock industries; electric utilities; printing industry; professional service firms; food processing firms; women business leaders; National Council of Churches; home economists in business; grocery manufacturers; youth and technology; and insurance. *Id.*

[147]*Id.* at 1234.

[148]*Id.*

[149]The court further opined that "[t]o hold that Congress intended to subject meetings of this kind to press scrutiny and public participation . . . as required by the Act, would raise the most serious questions under our tripartite form of government as to the congressional power to restrict the effective discharge of the President's business." *Id.*

The Supreme Court has similarly avoided the constitutional issue. For example, in *Public Citizen v. United States Department of Justice*,[150] the Washington Legal Foundation ("WLF") and Public Citizen sued the Justice Department under the Act after the American Bar Association ("ABA") Committee refused the WLF's request for the names of potential nominees for judgeships that the ABA was considering.[151] In addition, the WLF sought the ABA Committee's reports and minutes of its meeting.[152]

The Justice Department, in aiding the President in performing his Article II function of appointing federal judges, often seeks advice from the Standing Committee on Federal Judiciary of the ABA.[153] The ABA Committee's ratings of particular candidates who are nominated are made public.[154] The Committee's investigations, reports, and votes on the potential nominees, however, are kept confidential.[155] It was this undisclosed information that the WLF sought, arguing that the ABA Committee was utilized by the President or the Justice Department, thus requiring compliance with FACA.[156]

The Court, however, was not convinced that Congress intended to use the term "utilize" in the Act in the literal sense, and noted that "[u]tilize is a woolly verb, its contours left undefined by the statute itself."[157] Concluding that the application of FACA to the Justice Department would present "formidable constitutional difficulties" as "the relative powers of coordinate branches of government" were concerned, the Court held that the President and the Justice Department did not "utilize" the ABA when seeking advice for potential nominees for judgeships.[158]

---

[150]491 U.S. 440 (1989).

[151]*Id.* at 447.

[152]*Id.*

[153]*Id.* at 443.

[154]*Id.* at 444-45.

[155]*Id.*

[156]*Id.* at 447.

[157]*Id.* at 452.

[158]*Id.* at 450-51, 463, 466.

Similarly, in *National Resources Defense Council v. E.P.A.*,[159] the district court interpreted the definition of advisory committee to exclude from the Act, meetings of the Environmental Protection Agency ("EPA") and the Governors' Forum on Environmental Management ("Forum").[160] The court did not view the governors sitting on the forum as mere advisors to the EPA, but opined that they acted "operationally as independent chief executives in partnership with the federal agency."[161] Such committees, which perform primarily operational functions specifically provided by law "such as making or implementing Government decisions or policy," are specifically exempted from the Act.[162] In its holding, the court further noted that federalism, separation of powers, and Executive powers issues would arise if it found that the Forum was subject to the Act.[163]

An interesting interpretation to avoid application of the Act is found in *Association of American Physicians and Surgeons v. Clinton*, which involved the determination of the status of the First Lady, Hillary Rodham Clinton.[164] On January 25, 1993, President Clinton established a Task Force on National Health Care Reform to be chaired by Mrs. Clinton.[165] The President also formed an "interdependent working group" which was responsible for collecting data and developing options for health care

---

[159]806 F. Supp. 275 (D.C. Cir. 1992).

[160]*Id.* at 275. The Administrator of the EPA invited nine governors to participate in the Forum to address the problem of the states' abilities to carry out program activities under the Safe Drinking Water Act which makes the EPA and the states responsible for implementing the drinking water program. *Id.* at 276.

[161]*Id.* at 277. The court noted that the "workings of the Forum underscore its independent, nonadvisory, operational capacity. . . . The Forum's program appears to propose the coordination of federal and state efforts in three general areas. . . . Thus, many of the Forum's proposals cannot be implemented through unilateral action on the part of either the EPA or the states. Instead, they may require legislative action on both the state and federal levels." *Id.* at 278.

[162]*Id.* at 276.

[163]*Id.* at 278.

[164]997 F.2d 898 (D.C. Cir. 1993) [hereinafter *AAPS*].

[165]*Id.* at 902. Other members of the Task Force included the Secretaries of the Treasury, Defense, Veterans Affairs, Health and Human Services, Labor, and Commerce Departments, the Director of the Office of Management and Budget, the chairman of the Council of Economic Advisors, and three White House advisors. *Id.*

reform.[166] It was contemplated that only the Task Force would directly advise and provide recommendations to the President.[167]

Although the Task Force did conduct open meetings at which members of the public could present their views on health care reform, at least twenty of the meetings were closed to the public.[168] In the closed meetings, the Task Force reviewed the information of the working group, developed proposals and options for health care reform, and presented its proposals to the President.[169] The Task Force terminated on May 30, 1993.[170]

The Association of American Physicians and Surgeons ("AAPS"), the American Council for Health Care Reform, and the National Legal & Policy Center sought access to the meetings under FACA.[171] Access, however, was denied by Counsel to the President on the grounds that the Task Force did not constitute an advisory committee subject to the Act.[172] Thereafter, the plaintiffs brought suit seeking a temporary restraining order and a preliminary injunction to prevent the Task Force from operating until it complied with the Act and opened its meetings to the public.[173]

The plaintiffs claimed that the Task Force was an advisory committee subject to the Act because it was chaired by the First Lady, who was not a full-time government officer or employee.[174] In response, the government asserted that the Task Force came under the exemption of section 3(2)(iii) of the Act because all of the members, including Mrs. Clinton, were full-time

---

[166] *Id.* at 901. The working group was composed of 300 employees from the Executive Office, federal agencies and Congress; 40 "special government employees"; and various consultants. *Id.* The special government employees were hired for a limited duration by agencies of the Executive Office of the President. *Id.* The head of the working group, Ira Magaziner, was the senior advisor to the President for Policy and Development. *Id.*

[167] *Id.*

[168] *Id.* (citations omitted).

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* The plaintiffs alleged that the Task Force violated the Act by failing to file a charter and closing its meetings to the public. *Id.*

[174] *Id.*

officers or employees of the Federal Government.[175] In the alternative, the government asserted that an unconstitutional infringement on the President's executive power would result if the Act was applied to the Task Force.[176] Agreeing with the government's alternative argument concerning executive power, the district court held that meetings in which the Task Force formulated advice and recommendations were not subject to the Act.[177] In addition, the court regarded the working group as "staff" of the advisory committee and, hence, not itself an advisory committee subject to the Act.[178]

---

[175]*See supra* note 37 and accompanying text (discussing § 3 exemptions to the Act).

[176]*AAPS*, 997 F.2d at 901.

[177]The district court held that Mrs. Clinton was not an officer or employee of the federal government, and therefore, the Task Force did not qualify for the § 3(2)(iii) exemption. *See AAPS*, 813 F. Supp. 82, 89-90 (D.D.C. 1993). The court agreed, however, that application of the Act to the Task Force encroached on the President's constitutional authority to receive confidential advice for the purpose of recommending legislation, but only when the Task Force was actually advising the President. *Id.* at 91-92. Therefore, the court balanced the interests and granted the preliminary injunction requiring the Task Force to satisfy the Act when it was meeting to gather and report information, but not when it was meeting to formulate advice or recommendations for the President. *Id.*

[178]*AAPS*, 997 F.2d at 911. Regarding the working group, the court found that it was not an advisory committee because it was engaged in fact-gathering and did not provide advice to the President. *Id.* The government appealed and the plaintiffs cross-appealed. *Id.*

On appeal, the government argued that Mrs. Clinton is the functional equivalent of a full-time officer or employee and hence all meetings, whether they involved information-gathering or advisory functions, were exempt from the Act. *Id.* at 902. Plaintiffs responded that despite Mrs. Clinton's status as First Lady, she could not be an officer or employee of the federal government due to the Anti-Nepotism Act which statutorily bars her from such a position. *Id.* at 903. Further, plaintiffs challenged the district court's determination that the working group was not subject to the Act. *Id.*

The Anti-Nepotism Act provides:

> A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of

The circuit court reversed the district court's injunction on the operations of the Task Force, and criticized the district court for determining that the Act applied to the Task Force and for truncating the Act due to the constitutional concerns.[179] The circuit court, finding that the "question whether the President's spouse is 'a full-time officer or employee' of the government is close enough for us properly to construe FACA not to apply to the Task Force merely because Mrs. Clinton is a member," concluded that, for purposes of FACA, the President's spouse was a full-time officer or employee of the Federal Government.[180] Hence, the circuit court held that section 3(2)(iii) applied to exempt the Task Force from the Act's requirements.[181]

---

the individual.

5 U.S.C. § 3110(b) (1988).

[179]*AAPS*, 997 F.2d at 910, 916. Although the court opined that the operational *proximity* of the Task Force to the President, implicated the executive powers and that regardless of the function that the Task Force was exercising, the President had a strong interest in confidentiality, it declined to consider the constitutional dilemma. *Id.* at 910 (noting that "[i]f public disclosure of the real information gathering process is required, the confidentiality of the advice-giving function inevitably would be compromised," therefore confidentiality is required at each stage of advice formulation).

[180]*Id.* at 910-11.

[181]*Id.* The court found some weight to the government's argument that in enacting 3 U.S.C. § 105(e), Congress recognized that the President's spouse acts as the functional equivalent of a President's assistant. *Id.* at 904. That section provides in part:

> Assistance and services authorized pursuant to this section to the President are authorized to be provided to the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities. If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President's family whom the President designates.

3 U.S.C. § 105(e) (1988). Noting that the statute neither limited the type of assistance rendered nor defined the Presidential responsibilities which could be aided, the court thought it reasonable to construe § 105(e) as treating the President's spouse as a *de facto* officer or employee. *AAPS*, 997 F.2d at 904-05. "Otherwise, if the President's spouse routinely attended, and participated in, cabinet meetings, he or she would convert an all-government group, established or used by the President, into a FACA advisory committee." *Id.* at 905. Moreover, a presidential spouse has a supporting staff which is composed of members who would be considered full-time government officers or employees. *Id.* The court thought it anomalous to conclude that one of the spouse's staff

Further, the court ruled that it had insufficient information to determine the character of the working group, and remanded the district court's dismissal of the plaintiffs' claim for further proceedings and expedited discovery.[182] Determining that an advisory committee subject to the Act is one that is required to render advice or recommendations *as a group*, rather than as a collection of individuals, the court required the formality and structure of the group to be considered on remand.[183] Regarding the government's contention that the working group was also made up of full-time government officials and, therefore, was exempt from the Act, the court opined that more discovery was necessary to determine the status of the "special government employees" and the consultants.[184]

---

could serve as a member of an advisory committee without implicating FACA, but the spouse could not. *Id.*

Further, in the court's opinion, although the anti-nepotism provision defines "agency" as an "executive agency," it was not intended to apply to the Executive Office of the President or to the White House. *Id.* In addition, the court noted that the anti-nepotism statute bars appointment only to paid government positions, and therefore, although it might "prevent the President from putting his spouse on the federal payroll, it does not preclude his spouse from aiding in the performance of his duties." *Id.*

Judge Buckley concurred in the judgment but criticized the majority for "straining the plain meaning" of the Act rather than considering the constitutional challenge. *Id.* at 922 (Buckley, J., concurring). The judge commented that Public Citizen v. United States Dep't of Justice, does not sanction such a strained statutory interpretation. *Id.* at 923 (Buckley, J., concurring) (holding that the ABA Committee was not "utilized" by the President and hence, not subject to FACA (citing Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989))). Further, the Judge would have held that the Task Force was subject to FACA and would have addressed the constitutional issues implicated by such a holding. *Id.* at 924 (Buckley, J. concurring). Applying the balancing approach used in *Nixon I*, the Judge concluded that "[b]ecause none of Congress's purposes in enacting FACA are of a gravity that would justify overriding the Presidential privilege in this case," the Act is unconstitutional as applied to the Task Force. *Id.* at 925 (Buckley, J., concurring) (noting that in contrast to *Nixon I*, where the Court permitted very limited intrusion on the Presidential privilege, this case would require the Task Force to "operate in the full glare of provisions requiring public meetings and disclosure of records").

[182]*Id.* at 916.

[183]*Id.* at 914.

[184]*Id.* at 915. After the trial, the plaintiffs refused a settlement offer by the defendants. AAPS v. Clinton, No. 93-0399, 1994 WL 692814 (D.D.C. Dec. 1,1994). The defendants then unilaterally released some of the documents created by the working group to the public. *Id.* Subsequently the defendants brought a motion to dismiss the case as moot. *Id.* Because some documents were not disclosed, the court ruled that the case was "almost" moot. *Id.* The court required the defendants to create an adequate index of each

In cases involving the implications of the constraints placed on the President's ability to receive information and advice by FACA, courts have taken great pains to "elide the literal reading of FACA to avert what those courts believed were surely legislatively unintended consequences on the one hand, or a major constitutional issue on the other."[185] A recent case, however, used another means to avoid the constitutional issue.[186]

In *Northwest Forest Resource Council v. ESPY*, to avoid separation of powers conflicts, the court refused to enjoin the President from using a report issued by an advisory committee that did not comply with the Act.[187] The plaintiff, NFRC, a nonprofit corporation protecting the concerns of forest product industries in Washington and Oregon, alleged that the Forest Ecosystem Management Assessment Team ("FEMAT"), as convened and employed by the President to assist in the formulation of a policy regarding over twenty-four million acres of federally owned forest lands, constituted an advisory committee under FACA.[188] Defendants claimed that FEMAT did not function as an advisory committee, and if the court found otherwise then "FACA itself must be deemed an unconstitutional invasion of the executive privilege for communications necessary to his exercise of the powers entrusted by the Constitution to the President."[189]

---

document that had not been released, along with an explanation of the reason for withholding. *Id.* The court would then evaluate the index to determine whether any more documents needed to be released and whether the case was in fact moot. *Id.* at 2. Defendants then released the remaining records and the court dismissed the case with prejudice. AAPS v. Clinton, No. 93-0399, 1994 WL 774769 (D.D.C. Dec 21, 1994).

[185]Northwest Forest Resource Council v. ESPY, 846 F. Supp. 1009, 1010 (D.D.C. 1994) The court noted that "[b]oth the Supreme Court majority in *Public Citizen* and the D.C. Circuit majority in *AAPS* were able, by adroit semantics and near-clairvoyant discernment of legislative intent, to avoid that drastic result in the circumstances of those cases, but not, however, without difficulty, and in doing so incurred stern disapprobation from concurring brethren who were less squeamish." *Id.* at 1014.

[186]*Id.* at 1010 (acknowledging the constitutional issue which arose by finding FEMAT to be an advisory committee, but limiting plaintiff's remedy to avoid constitutional and separation of powers conflicts).

[187]*Id.* at 1013-14.

[188]*Id.* at 1010. In addition, NFRC requested that the court declare FEMAT's proceedings null and void for failure to comply with the Act and enjoin the Executive Branch from relying on FEMAT's recommendations in managing federal forest land until FEMAT complies with the Act. *Id.*

[189]*Id.*

The court found that FEMAT was an advisory committee within the contemplation of FACA.[190] The court determined that FEMAT was established and utilized by the President in devising a forest management policy and that the committee rendered advice and recommendations which the President accepted and followed.[191] The court further found that FEMAT was convened and operated in violation of the Act.[192]

Nevertheless, because FACA does not prescribe remedies for violations of its provisions, the court fashioned a remedy using its general equitable powers.[193] Observing its constitutional limitations, the court granted a declaratory judgment that FACA was violated.[194] The court, however, considering separation of powers principles, declined to issue an order enjoining the Administrator from relying on the FEMAT report in promulgating its Forest Plan.[195] The court reasoned that there was no

---

[190]*Id.* at 1012.

[191]*Id.*

[192]*Id.* 1013-14 (finding that FEMAT violated the open meeting requirement; failed to publish notice of its meetings; failed to allow volunteers to attend meetings and participate in its activities; failed to make records available for public inspection and copying; failed to keep detailed minutes; failed to obtain authorization for its establishment; failed to file a charter; failed to fairly balance its membership; failed to insure against inappropriate influence by special interests; and failed to comply with the termination provisions).

[193]*Id.* at 1014-15.

[194]*Id.* at 1015.

[195]*Id.* The court noted:

> The Court is aware of no authority upon which it could confidently rely in concluding that it may forbid the President and his Cabinet to act upon advice that comes to them from any source, however irregular. There is no "exclusionary rule" applicable to the decisionmaking processes of the President. And it is certainly no less presumptuous than would be a similar instruction from Congress to the President — as plaintiff deems FACA to be — as to what he can and cannot consider in executing the duties of his office.

Id.

indication that the report, advice, or recommendations would have been altered had the government complied with the Act.[196]

V. CONCLUSION

Courts and scholars have recognized that the President has a legitimate interest in maintaining the confidentiality of certain information obtained from aides, advisors, and advisory committees.[197] This interest in confidentiality has become the basis for the executive privilege to receive confidential communications.[198] As a result of the Supreme Court's decision in *United States v. Nixon* and subsequent cases, the executive privilege to receive confidential communications has achieved a constitutional basis.[199] Nevertheless, this privilege is not expressly granted in the United

---

[196]*Id.* In contrast, in *Alabama-Tombigbee Rivers Coalition v. Department of the Interior*, the circuit court held that injunctive relief is an appropriate remedy under the Act where the advisory committee did not comply with the provisions of FACA. *Alabama-Tombigbee Rivers Coalition*, 26 F.3d 1103, 1107 (11th Cir. 1994). The court reasoned that such relief was the best method to assure future compliance with the Act. *Id.* at 1107.

[197]Confidentiality is needed to encourage candid communications between government advisors and decisionmakers and to honor their expectations of privacy. TRIBE, *supra* note 131, at 276. Succinctly stated:

> [i]f executive officials fear being held answerable in a different forum for their tentative judgements, off-the-cuff remarks, or dissenting views, then the officials will tend toward self-censorship, thereby reducing the vigor of internal executive branch debate and degrading the quality of executive decisions.

Geoffrey Miller, *Separation of Powers May Become Focus of Dispute Over NSC*, 9 LEGAL TIMES 16, 17 (Dec. 15, 1986).

[198]Although the courts acknowledge its existence, the scope of this privilege is not well-defined, and some scholars question its necessity as well as its validity. *See supra* note 131.

[199]*See* McNeely-Johnson, *supra* note 106, at 292, noting that the "pragmatic reality is the doctrine [of Executive Privilege] is here, it is recognized by the Supreme Court, and it must be effectively contained." *But see* Cox, *supra* note 104, at 1435, noting that the Supreme Court in *Nixon I*, carefully "chose the words 'constitutionally based,' not 'constitutionally secured' or 'guaranteed by the Constitution.'" *See contra* Berger, *supra* note 124, at 21 (noting that there are bizarre side-effects from rooting the executive privilege in the separation of powers; i.e. does it impair Congress's attempts to provide executive information to the public? "Is the Freedom of Information Act then unconstitutional?").

States Constitution, and therefore, when it is raised by the President, the courts will balance the need for the information against the need for maintaining confidentiality.[200]

In *United States v. Nixon*,[201] the Supreme Court established that when evidence is needed in a criminal case, the privilege must give way to disclosure. The privilege was then narrowed in *Nixon v. Administrator of General Services*,[202] wherein the Court determined that the American public's need for knowledge may overcome the privilege.[203] The courts, however, have avoided the issue of whether the privilege is valid against a demand for information under the Act.[204]

Information is given to the President through many sources, one important source being advisory committees.[205] Congress established FACA to regulate the use, establishment, and termination of these and other

---

[200]Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 467 (1988) (Kennedy, J., concurring). When the Constitution explicitly grants the power to the President, then congressional regulation of that power will not be tolerated and no balancing approach is necessary. *Id.* at 483-87 (Kennedy, J., concurring). *See also* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (holding that Congress cannot limit the full legal effect of the President's powers); Schick v. Reed, 419 U.S. 256, 266 (1974) (noting that the pardon power "flows from the Constitution alone . . . and . . . cannot be modified, abridged or diminished by the Congress"); INS v. Chadha, 462 U.S. 919 (1983) (noting that one reason for striking down a legislative veto provision of the Immigration and Naturalization Act was that it violated the constitutional requirement that all legislation be presented to the President for signing before becoming law).

If, however, Congress does not directly limit an express power of the President, but rather indirectly affects an executive power that is not specifically enumerated in the Constitution, the statute is not unconstitutional *per se*, but a balancing test is applied. *Public Citizen*, 491 U.S. at 467 (Kennedy, J., concurring). Justice Kennedy explained that the Court balances the extent to which the Congressional regulation restricts another branch's accomplishment of a constitutionally assigned function against the need "to promote objectives within the constitutional authority of Congress." *Id.* at 484-85 (Kennedy, J., concurring). Applying the test to the case, Justice Kennedy opined that the application of FACA constituted "a direct and real interference with the President's exclusive responsibility to nominate federal judges." *Id.* at 488 (Kennedy, J., concurring).

[201]418 U.S. 683 (1974).

[202]433 U.S. 425 (1977).

[203]*Id.* at 452-53.

[204]*See supra* part IV.

[205]*See supra* notes 14-20 and accompanying text (discussing the importance of advisory committees and giving examples of their work).

advisory committees.[206] The Act, however, in regulating the advisory committees, may encroach upon the President's privilege of confidentiality.[207] For instance, information provided by advisory committees is subject to disclosure by way of open meetings and document production.[208] Hence, the confidentiality is not preserved.

Although Congress has the power to make laws,[209] this power is limited by the doctrine of separation of powers. Congress may not use its legislative authority to usurp or limit the power of another branch if such limitation prohibits the other branch from accomplishing its constitutional function.[210] The Act has the effect of inhibiting the President's ability to perform his constitutional duties by tempering his ability to organize and obtain advice from his advisors.[211] Therefore, according to the existing

---

[206]*See supra* part II (setting forth sections of the Act in detail).

[207]*See, e.g., AAPS*, 997 F.2d 898 (D.C. Cir. 1993).

[208]Federal Advisory Committee Act, 5 U.S.C. app. § 10 (1988).

[209]U.S. CONST. art. I, § 1, cl. 1 states "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." In addition, Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

[210]Morrison, *supra* note 131, at 291.

> Even when there has been no textual violation and one branch has not exercised power given by the Constitution to another, separation of powers problems may still exist if a statute "disrupts the proper balance between the coordinate branches."

Id. (citation omitted) (noting that the context in which this separation of powers issue arises is through legislative restrictions on the President or the Executive Branch). Morrison noted that Congress's failure to consider separation of powers problems when creating legislation, has led to its involvement in law suits based on separation of powers issues. *Id.* at 309.

[211]*See, e.g., AAPS*, 813 F. Supp. 82, 90-91 (D.D.C. 1993). In *AAPS*, the district court opined:

> Article II, section 3 of the Constitution states that the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." In order to formulate these measures, defendants claim, the President must be able to meet confidentially

state of the law, the application of FACA to advisory committees that formulate and present advice and recommendations to the President when he is exercising a constitutional function, is a violation of the separation of powers.[212]

Many courts, however, have not reached such a conclusion. Rather, they have relied on legal precedent, which allows them to avoid constitutional issues through statutory construction.[213] Such a resolution, however,

---

> with his advisors. He must be able to trust that his advisors shall speak with complete candor and that they will not be cowed by the fear of premature public reaction. That candor is risked should FACA apply to the Task Force. A realistic and practical appraisal of the application of FACA to these presidential advisors reveals that FACA prevents the President from receiving the full measure of the Task Force's advice. When confidentiality is compromised and advisors are afraid to speak, the President is necessarily hampered in his ability to obtain the information he needs to offer proposed legislation to Congress. Thus, the court holds that the application of FACA presents "the potential for disruption" of the President's accomplishing his constitutionally assigned functions . . . .

Id. (citations omitted). In a concurring opinion in *Soucie v. David*, Judge Wilkey stated:

> When President Washington first declined to furnish the House of Representatives with a document requested by it, he gave as his reason for refusal, it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.

Soucie, 448 F.2d 1067, 1082 (D.C. Cir. 1971) (Wilkey, J., concurring) (citation omitted).

[212]*See, e.g.*, *AAPS*, 813 F. Supp. at 85 & n. 5, wherein the court acknowledged that the constitutional issue of the power of Congress to regulate the power of the President was at issue, and such an issue was undoubtedly a "serious constitutional question." Cox, *supra* note 104, at 1418, noted that amending the Freedom of Information Act to grant the public greater access to information concerning intergovernmental affairs may conflict with the executive privilege of confidentiality.

[213]*AAPS*, 813 F. Supp. at 85 ("[I]t is the cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))). Nevertheless, as Justice Kennedy pointed out in a concurring opinion in Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989), there is an exception to the rule that "[w]here the plain language of a statute is clear in its application, the normal rule is that [the court] is bound by it." *Id.* at 470 (Kennedy, J., concurring). The exception exists "[w]here the plain language of the statute would lead to 'patently absurd

presents two problems. First, the resulting interpretations have restricted the application of the Act, in contradiction to the Act's intended scope. The legislative history indicates that Congress intended the scope of the Act to be very broad.[214] By manipulating the definitions contained in the Act, such as "established" and "utilized," the courts have narrowed the statute's application.[215] Moreover, by stretching the definition of "full time officers or employees of the federal government," the courts have opened the doors to allow more advisory committees to come within the exceptions to FACA.[216]

A second and related problem is that citizens may be deterred from bringing actions to compel compliance with the Act. Although the goals of the Act are salutary, the efficient utilization of advisory committees can only be achieved through effective enforcement.[217] Effective enforcement depends in a large part on actions by private citizens to compel compliance with the Act.[218] Moreover, the success of the openness provision depends upon the existence of persons willing to act as advisory committee

---

consequences' that 'Congress could not possibly have intended.'" *Id.* (Kennedy, J., concurring) (quoting United States v. Brown, 333 U.S. 18, 27 (1948); F.B.I. v. Abramson, 456 U.S. 615, 640 (1982) (O'Connor, J. dissenting)). Justice Kennedy opined that the majority was loosely invoking the "absurd result" exception which created the risk that the court would exercise "its own 'WILL instead of JUDGMENT,' with the consequence of 'substituti[ng] [its own] pleasure to that of the legislative body.'" *Id.* at 471 (Kennedy, J., concurring) (citation omitted). The Justice further stated, "I cannot go along with the unhealthy process of amending the statute by judicial interpretation." *Id.* at 470 (Kennedy, J., concurring).

[214]Nuszkiewicz, *supra* note 16, at 972.

[215]*See id.* The Supreme Court's definition of "utilize" "pushed statutory construction to the extreme and therefore was not fairly plausible." *AAPS*, 813 F. Supp. at 86 & n.7 (discussing Judge Joyce Green's decision in WLF v. United States Dep't of Justice, 691 F. Supp. 483, 491 (D.D.C. 1988)).

[216]*See, e.g.*, AAPS v. Clinton, 997 F.2d 898 (D.C. Cir. 1993) (interpreting this exemption to include the First Lady).

[217]Markham, *supra* note 15, at 607.

[218]*Id.* Enforcement also depends upon the "vigilance of the standing committees of Congress and the forcefulness of the Office of Management and Budget in fulfilling its role as administrator of the provision of the Act . . . ." *Id.*

"watchdogs."[219] Citizens have made attempts to enforce the provisions of the Act but have been thwarted by the courts' unwillingness to apply the Act to advisory committees, which provide advice and recommendations to the President. Due to the narrowing coverage of the Act, a greater number of committees will not be subject to the Act; hence, more cases will be lost by citizens or groups still interested in attempting to bring actions to force compliance.

An appropriate solution is not judicial resolution through statutory construction, but rather statutory amendment. The Act should be amended to specifically exempt advisory committees that advise the President from the openness requirement and the document disclosure requirement[220] when such committees are formulating policy or presenting advice and recommendations to the President.[221] As the privilege exists when the President is exercising a constitutionally assigned function, the exemption from FACA should be limited to those situations where the President consults

---

[219]Levine, *supra* note 26, at 233. Levine noted that "the supply of such persons should not be taken for granted." *Id.*

[220]The Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), specifically exempts privileged documents. Section (b)(5) excludes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Under this exemption, the agency could protect its "policy papers" containing the "deliberative discussions, selections of key policy points, or legally-privileged documents." O'Reilly, *supra* note 4, at 37. In enacting this exemption, Congress intended to codify some of the components of the executive privilege doctrine. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Stokes v. Hodgson, 347 F. Supp. 1371 (D. Ga. 1972). Under FACA, documents are exempted from disclosure under the exemptions contained in the FOIA, and meetings are exempted from openness under the narrower exceptions contained in the Government in the Sunshine Act, 5 U.S.C. § 552b (1988), which does not have an interagency memorandum exemption. Nevertheless, litigation has indicated that the FOIA § (b)(5) exemption is inherently inapplicable to advisory committees. *See, e.g.*, Wolfe v. Weinberger, 403 F. Supp. 238 (D.C. Cir. 1975) (ruling that an advisory committee cannot also be an agency, hence the documents cannot be interagency memoranda subject to the exemption). *But see* Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 109 (D.C. Cir. 1976) (using the inter-agency memorandum exemption to allow an advisory committee to keep its meetings closed).

[221]AAPS v. Clinton, 813 F. Supp. 82, 93 (D.D.C. 1993) (concluding that sections 10(a)(1), 10(a)(3), and 10(c) of FACA detrimentally affect the candor of advisory committee deliberations and hence prevent the President from receiving advice necessary to recommend legislation to Congress).

a committee in furtherance of his constitutionally assigned functions.[222] When an advisory committee is not subject to the Act, *none* of the Act provisions will apply. By exempting specific committees from only the openness and document disclosure provisions of section 10, the express purposes of the Act contained in section 2 is still satisfied. Section 2 does not include any express intent with regard to opening or closing advisory committee meetings, but refers to housekeeping functions.[223] The administrative controls and housekeeping provisions would remain enforceable. Moreover, such advisory committees can still be monitored for expense, efficiency, and balanced membership without raising constitutional issues.[224]

Nevertheless, until legislative action is taken, the courts can "say what the law is" regarding the issue, rather than avoid the constitutional implications.[225] The Supreme Court should entertain the issue of whether

---

[222]*Nixon I*, 418 U.S. 683, 711 (1974) (To the extent the privilege "relates to the effective discharge of a President's powers, it is constitutionally based."); Nader v. Baroody, 396 F. Supp. 1231, 1234 n.5 (D.D.C. 1975) (noting that the constitutional issue arises because FACA impinges upon the President's effective discharge of a constitutional power, not because it impinges the executive privilege).

[223]Cardozo, *supra* note 1, at 11. "The statutory statement of purposes refers to [the] need to review the value of the existing and new committees; the importance of keeping Congress and the public informed about their activities; and the importance of 'standards and uniform procedures to govern' the establishment, operation, administration and duration of advisory committees." *Id.*

[224]Scholars have noted that invocation of the executive privilege is a means of hiding inefficiency, and maladministration. Cox, *supra* note 104, at 1433. The proposed amendment prevents this avoidance.

[225]One commentator noted:

> [C]ommunications to and from the President may be constitutionally protected to the extent determined by the Judicial Branch, but since Congress creates the executive departments and agencies it may be empowered to legislate concerning legislative and public access to their internal affairs.

Cox, *supra* note 104, at 1419. Professor Tribe agreed that it is the right of the Judiciary to evaluate the propriety of a claim of executive privilege and that such an evaluation involves a determination whether the information falls within a privilege and whether a privilege should be honored in the particular procedural setting. TRIBE, *supra* note 7, at 277. Professor Tribe further commented:

> Although respect for the Presidency and concern for the political implications of a confrontation with a co-equal branch of government doubtless induce the

FACA conflicts with the executive privilege to receive confidential communications by applying the balancing test announced in *United States v. Nixon*.[226] As much controversy exists concerning the executive privilege, the Court should not bypass the opportunity to define the strength and scope of this privilege. Delineating the extent of the executive privilege may answer the question of whether FACA violates separation of powers principles.

> courts to tread more circumspectly when the President, rather than a subordinate executive official, asserts a privilege, the Judiciary is nonetheless responsible for determining whether a privilege obtains.

Id.

[226]In the context of a conflict between the privilege and FACA, the Court must balance the President's interest in confidentiality in discussions with and between his aides and advisors, including those who are members of the public, against Congress's and the public's need for access to the information. This analysis must take into consideration the function being performed by the President in seeking advice, such as recommending legislation to Congress, as in AAPS v. Clinton, 997 F.2d 898 (D.C. Cir. 1993), or nominating Justices, as in Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989). When the President is exercising a constitutional function, the privilege weighs heavily against the public's right to know. *See, e.g., Nixon I*, 418 U.S. at 711. Moreover, a general need for information asserted by the public or interested parties is far less compelling than the needs of a criminal or civil defendant for evidence at trial. *See id.* at 683 (holding that criminal defendant's need for evidence outweighs President's claim of privilege); Halperin v. Kissinger, 401 F. Supp. 272 (D.D.C. 1975) (finding that plaintiffs in civil suit were entitled to take former President Nixon's deposition where they sought damages for illegal wiretapping of their home telephone and where Nixon had occasionally accepted personal responsibility for the surveillance program at issue); TRIBE, *supra* note 7, at 283 (noting that the argument for disclosure is more compelling when the request is made by a *defendant* in a civil suit brought by the government).

The privilege was overcome by Congress's interest in preserving Presidential materials and maintaining access to them for lawful historical and governmental purposes in *Nixon II*. *Nixon II*, 433 U.S. 425, 452 (1977). The Court concluded that screening Presidential materials by professional archivists would not impede candid communications between the President and his advisors. *Id.* at 451. The Court was also convinced that the regulations restricting public access to the materials would be adequate to preserve confidentiality. *Id. But see AAPS*, 997 F.2d 898, 924, 925 (D.C. Cir. 1993) (Buckley, J., concurring) (commenting that the intrusion imposed by FACA is great and the purposes underlying the Act are not sufficient to justify interfering with the executive privilege).