

GAO

Report to the Honorable
Richard H. Bryan
U.S. Senate

April 1999

NATIONAL GAMBLING IMPACT STUDY COMMISSION

Selected Operational Practices



General Government Division

B-281953

April 16, 1999

The Honorable Richard H. Bryan
United States Senate

Dear Senator Bryan:

This report responds to your request that we review selected operational practices of the National Gambling Impact Study Commission (NGISC). As agreed with your office, the objectives of our review were to answer the following questions that were based on allegations made to your office: (1) Is NGISC subject to the Federal Advisory Committee Act (FACA) and, if so, did it follow FACA with respect to three specific meetings? (2) What contracting procedures were used in NGISC's award of three major contracts? (3) Why did NGISC contract for legal counsel instead of using government legal support? (4) Did NGISC attempt to interfere with the work of one of its contractors? (5) How were Regent University employees involved in NGISC activities? (6) Has NGISC paid for relocating any staff? (7) Were NGISC employees allowed to work at a location other than the NGISC office?

Results in Brief

In our opinion, FACA applies to NGISC. For one of the three meetings you asked us to examine, an October 1998 teleconference, NGISC did not provide the 15-day advance notice in the Federal Register that is required under FACA and its implementing regulations. However, a 2-day notice faxed to about 730 people from the media and general public allowed them to participate. For another meeting, a retreat held in February 1999, NGISC published notice of the meeting in the Federal Register more than 15 days in advance but did not publish a summary of the agenda in the time required by FACA's implementing regulations.

Information obtained from procurement records and provided by NGISC's Chair and staff indicated that NGISC sought competition in the award of two of the three major contracts that we reviewed and awarded the third on a sole-source basis after determining that one source was uniquely qualified. However, NGISC did not document its efforts to seek competition for one of the three contracts, which left no record to assess NGISC's efforts.

NGISC contracted for legal counsel instead of using government legal support because the federal agencies from which NGISC sought legal assistance either could not or would not provide it, and NGISC determined

that it would not be feasible to hire in-house counsel with the variety of expertise desired.

A National Academy of Science's National Research Council (NAS-NRC) official involved in the administration of the NGISC's contract said that NGISC did not attempt to interfere in the Academy's contract work, as alleged to your office.

Through review of NGISC records and discussion with NGISC and Regent University employees, we identified six persons affiliated with Regent University—in addition to NGISC's Chair—who had some involvement in NGISC's work. Two of these persons were Regent University graduate students and a third was a graduate, all of whom volunteered their services for 2 days in August 1997 to assist in meeting preparations. In July 1998, one of these individuals became a full-time NGISC employee. A fourth person, another Regent University graduate, worked part-time for NGISC for approximately 2 weeks in June 1997 to assist in NGISC's establishment. The fifth and sixth individuals were Regent University employees who worked for NGISC's Chair in her capacity as Dean of Regent University's Robertson School of Government. Both of these individuals said they took a leave of absence from Regent University to work for NGISC for brief periods of time as employees to assist in NGISC's establishment and to help prepare for meetings.

NGISC records did not indicate it had paid for the relocation costs for any employee, and NGISC's Chair said that NGISC does not plan to pay such costs in the future.

According to NGISC, two employees worked at locations other than NGISC's office for part of their regular work schedule for some period of time. Both of these employees' supervisors told us that these two employees accomplished the work expected of them, and we found no evidence that they did not work their scheduled hours or perform their expected work. However, we found some confusion among NGISC staff concerning the details associated with the alternate work location arrangement for one of the employees; thus, we believe that NGISC's internal controls over time and attendance were insufficient to prevent misunderstandings. NGISC improved these controls in early 1999.

Background

NGISC was established pursuant to the National Gambling Impact Study Commission Act (NGISC Act).¹ The act requires NGISC to conduct a

¹ P. L. 104-169, 110 Stat. 1482, Aug. 3, 1996, 18 USC 1955 note.

comprehensive legal and factual study of the social and economic impacts of gambling in the United States and report its findings, conclusions, and recommendations to the President, Congress, state governors, and Native American tribal governments. The report is due no later than June 20, 1999, 2 years after the date of NGISC's first meeting. This study is to include, at a minimum, the following elements:

- a review of existing federal, state, local, and Native American tribal government policies and practices with respect to the legalization or prohibition of gambling, including a review of the costs of such policies and practices;
- an assessment of the relationship between gambling and levels of crime, and of existing enforcement and regulatory practices that are intended to address any such relationship;
- an assessment of pathological or problem gambling, including its impact on individuals, families, businesses, social institutions, and the economy;
- an assessment of the impacts of gambling on individuals, families, businesses, social institutions, and the economy in general, including the role of advertising in promoting gambling and the impact of gambling on depressed economic areas;
- an assessment of the extent to which gambling provides revenues to state, local, and Native American tribal governments, and the extent to which possible alternative revenue sources may exist for such governments; and
- an assessment of the interstate and international effects of gambling by electronic means, including the use of interactive technologies and the Internet.

NGISC is to be terminated 60 days after it submits its final report, which is due in June 1999.

NGISC is a nine-member commission with three members (or commissioners) appointed by the President, three by the Speaker of the House of Representatives, and three by the Majority Leader of the Senate. The act provides for the appointing officials to jointly designate one commissioner to serve as the Chair. The Chair has the authority to call NGISC meetings, hire the personnel necessary for NGISC to perform its duties, and procure temporary and intermittent services to assist NGISC in its work. The commissioner selected to serve as Chair is the Dean of Regent University's Robertson School of Government.

NGISC's enabling legislation directed that NGISC contract with the Advisory Commission on Intergovernmental Relations and NAS-NRC for some of its research. The Advisory Commission on Intergovernmental Relations contract was to include a thorough review and cataloging of all applicable laws, regulations, and ordinances that pertain to gambling in the United States. The NAS-NRC contract was to include an assessment of pathological or problem gambling, including its impact on individuals, families, businesses, social institutions, and the economy.

The legislation that established NGISC does not specify the branch of government in which NGISC is located. In our view, NGISC is a legislative branch entity. As explained in an August 13, 1997, letter from the Justice Department's Office of Legal Counsel (OLC) to NGISC, NGISC is a legislative branch entity because (1) six of the nine members are appointed by the congressional leadership, (2) congressional leadership has the majority role in choosing the Chair of the Commission, and (3) only information gathering and advisory functions are performed by NGISC.² Because NGISC is a legislative branch entity, General Services Administration (GSA) found NGISC to be exempt from the procurement and personnel laws that apply to executive branch agencies.³ GSA also concluded that FACA applies to NGISC.

NGISC's enabling legislation specifies that the Chair may, without regard to civil service laws and regulations, appoint and terminate an executive director and other personnel necessary for NGISC to perform its duties. In 1997, legislation was passed to clarify that NGISC members and personnel are considered to be federal employees under the Federal Tort Claims Act and would not incur personal liability while acting within the scope of their employment at NGISC. In response to a request from GSA, on January 26, 1999, the Department of Justice's OLC issued an opinion concluding that NGISC is not subject to 18 U.S.C. 208, a criminal conflict of interest statute.

To address the objectives of this report, we interviewed GSA officials, NGISC employees, NGISC's Chair and two of her staff from Regent University, located in Virginia Beach, VA, and an official from NAS-NRC. We reviewed necessary documentation, including NGISC travel vouchers,

² Similarly, the Office of Personnel Management, Office of Government Ethics, Office of Management and Budget, and General Services Administration characterized NGISC as a legislative branch entity.

³ In June 1997, GSA entered into a Memorandum of Understanding with NGISC, whereby GSA agreed to provide specified administrative services to NGISC on a reimbursable basis.

time and attendance records, and contract files. We also reviewed the applicability of laws pertaining to NGISC.

We conducted our review in Washington, D.C., and Virginia Beach, VA, from October 1998 through February 1999 in accordance with generally accepted government auditing standards. We requested comments on a draft of this report from NGISC's Chair and the Administrator of GSA. Their comments are summarized near the end of this letter and are included in appendix III. Appendix I provides further details about our scope and methodology.

Applicability of and Compliance With FACA

Is NGISC subject to FACA and, if so, did it follow FACA with respect to three specific meetings?

FACA establishes requirements pertaining to the creation, operation, duration, and review of covered advisory committees. For example, the act requires advisory committees to file charters, publish notice of their meetings, open their meetings to the public, and make their minutes and other committee records publicly available. Whether a particular group is subject to FACA's requirements depends on whether it is an advisory committee to the President or a federal agency.

GSA concluded that NGISC is an advisory committee to the President and is therefore subject to FACA. NGISC's outside counsel reached a contrary conclusion primarily based on the view that NGISC was not established to advise the President, but rather to study the impact of gambling to advise the Congress and state and tribal governments. For the reasons explained in appendix II and summarized below, we believe that NGISC is an advisory committee under FACA.

FACA's definition of an advisory committee is broadly worded and includes, in relevant part, any commission that is established by statute, the President, or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." FACA section 3(2), 5 U.S.C. app. 2. The definition does not cover committees that are established solely to advise the Congress. However, a committee can be established in the interest of advising the President or the executive branch, and thus subject to FACA, even though part of the purpose of the committee is to report to the Congress.⁴

⁴ See California Forestry Ass'n v. United States Forest Service, 102 F.3d 609 (D.C. Cir. 1996).

As recognized by the courts and OLC, the starting point for determining whether a commission was established in the interest of obtaining advice or recommendations for the President or an executive agency is the text of the commission's authorizing legislation.⁵ In this case, the text of the NGISC Act clearly identifies the President as a recipient of NGISC's advice and recommendations. Specifically, section 4(b) of the NGISC Act provides that NGISC "shall submit to the President, the Congress, State Governors, and Native American tribal governments a comprehensive report of the Commission's findings and conclusions, together with any recommendations of the Commission."

In support of its position that FACA does not apply to NGISC, NGISC's outside counsel relied on OLC's opinion in Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission ("Native Hawaiians"), 6 Op. Off. Legal Counsel 39, 1982. In Native Hawaiians, OLC concluded that the Native Hawaiians Study Commission was not an advisory committee to the President because, even though the Commission was required to provide the President as well as the Congress with a copy of its final report, the Commission's recommendations were to be provided only to the Congress. Further, the legislative history of the Native Hawaiians Study Commission's authorizing legislation established that it was created to provide advice and recommendations to the Congress and not to the President.

Unlike the statutory provisions addressed in Native Hawaiians, the NGISC Act does not draw a distinction between the types of work results to be provided to the Congress and the President (i.e., a copy of the report with and without recommendations). Rather, as discussed above, the NGISC Act places the President, the Congress, and the other listed recipients of the Commission's work on an equal footing by requiring NGISC to provide each recipient with (1) a report on its findings and conclusions and (2) any recommendations it has developed. Further, there is nothing in the legislative history of the NGISC Act to suggest that the Congress viewed NGISC's work as being directed to the Congress rather than to the President or that it otherwise intended for FACA not to apply to NGISC. The only specific reference to FACA was made during the Senate's consideration of H.R. 497, the bill that eventually was enacted as the NGISC Act, and this statement was to the effect that FACA was intended

⁵ See Sofamor Danek Group v. Gaus, 61 F.3d 929 (D.C. Cir. 1995); Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission, 6 Op. Off. Legal Counsel 39 (1982).

to apply to NGISC.⁶ Accordingly, we conclude that NGISC is an advisory committee subject to FACA.

While the NGISC's outside counsel ultimately concluded that FACA does not apply to NGISC, NGISC has taken steps to comply with FACA's requirements. For example, before its first meeting, NGISC filed a charter with GSA.⁷ NGISC designated an official (the current Executive Director) to serve as NGISC's Designated Federal Officer; under FACA this official, among other things, is responsible for approving and attending committee meetings. NGISC's operating rules, adopted in October 1997, state that, "in general, [the commission] will conduct its activities in accordance with the standards and requirements of the Federal Advisory Committee Act (FACA)"

We were asked to review three specific NGISC meetings to determine their compliance with FACA: (1) a September 29, 1998, Research Subcommittee meeting; (2) an October 9, 1998, teleconference; and (3) a retreat held in February 1999. FACA requires that each meeting of an advisory committee be open to the public (unless, for an advisory committee that is advising the President, approval is received from GSA to close a meeting) and that appropriate notice of each meeting be published in the Federal Register. GSA's regulations implementing FACA require that notice of advisory committee meetings be published in the Federal Register at least 15 days prior to the meeting.

Research Subcommittee Meeting

An NGISC Research Subcommittee meeting was held in Denver, CO, on September 29, 1998. The written minutes showed that the main topic of discussion was the results of a pilot patron survey conducted at three casinos and whether to proceed with the full patron survey. The outcome was a decision to elevate the matter for consideration by the full Commission. Because the subcommittee identified issues to be considered by the full Commission, the subcommittee meeting was not required to be open under FACA. Under FACA's implementing regulations, the act's requirements do not apply to meetings of subcommittees convened solely to do research, analysis, or work products that will be deliberated upon by the full committee. (41 C.F.R. 101-6.1004(k)).

⁶ See 142 Cong. Rec. S7977 (daily ed. July 17, 1996)(statement of Sen. Glenn): "This commission will be closely watched by many, including those with the power and resources to tie the commission up in costly litigation. It is subject to the Federal Advisory Committee Act [FACA], a statute which requires compliance with open meetings and public access"

⁷ The charter, filed at GSA's request on June 15, 1997, stated that "[t]he Commission is subject to the standards and requirements of the Federal Advisory Committee Act (FACA, as amended), with respect to meetings, hearings, and the availability of Commission records, and other matters."

Teleconference

A teleconference of NGISC members was held on October 9, 1998. The minutes showed that the purpose of the teleconference was for the full Commission to follow up on the subcommittee's earlier meeting and reach an immediate decision on whether the casino patron survey should proceed. NGISC did not publish a 15-day advance notice of the meeting in the Federal Register, as required by FACA's implementing regulations.⁸ A GSA official agreed that this was a departure from the notice requirement.

According to the current Executive Director, NGISC did not publish a 15-day advance notice of the teleconference due to time constraints. Two days before the teleconference, NGISC faxed a notice of the teleconference to approximately 730 people from the media and general public that expressed interest in NGISC activities. This fax stated that NGISC would make available a number of listening lines for interested members of the press and public and would allow interested individuals to listen live to the teleconference at NGISC's Washington, D.C., office. The minutes of the meeting showed that approximately 40 members of the public and the media used NGISC's listening lines during the teleconference.

Retreat

The third meeting we reviewed was a February 8 to 10, 1999, NGISC retreat to review preliminary research results. A copy of the initial NGISC 1999 workplan indicated that the meeting would be closed to the public; however, NGISC staff said that the Commissioners later decided to open the retreat to the public and it was an open meeting.

A notice was published in the January 12, 1999, Federal Register covering the February retreat as well as other scheduled meetings and activities of NGISC for 1999. This notice stated that meetings conducted by the full Commission and, where possible, those of its subcommittees would be fully open to the public unless otherwise announced at least 15 days in advance of the meeting. For the February retreat, the notice indicated that the meeting would be conducted by the full Commission, gave the dates of February 8 to 10, 1999, and provided the conference center's name and address where the retreat would be held. The notice stated that further details on times and locations of specific meetings would be made

⁸ FACA's implementing regulations require covered committees to publish, at least 15 calendar days prior to an advisory committee meeting, a notice in the Federal Register, including the time, date, place, and purpose of the meeting; a summary of the agenda; and whether the meeting is open to the public. This regulation also states that in exceptional circumstances, the committee may give less than 15 days notice, provided the reasons for doing so are included in the notice published in the Federal Register (41 C.F.R. 101-6.1015(b)).

available 15 days in advance of the meeting on NGISC's website and advisories would be distributed to individuals and organizations in its Fax directory. This approach for providing notice of the NGISC's meetings was adopted with the concurrence of the GSA official responsible for FACA compliance. We note that while NGISC did provide in its Federal Register notice the dates and location of the February retreat more than 15 days in advance of the meeting, information about the retreat agenda was posted to the website and sent by fax less than 15 days in advance of the meeting.⁹

Award of Major Contracts

What contracting procedures were used in NGISC's award of major contracts?

Because NGISC is a legislative branch entity, it is not subject to the Competition in Contracting Act of 1984 or the Federal Acquisition Regulation.¹⁰ Under section 6(d) of its enabling legislation, NGISC is authorized to procure temporary or intermittent services of experts and consultants pursuant to 5 U.S.C. 3109. Services procured under section 3109 are also specifically exempt from the requirements of 41 U.S.C. 5, a statute that generally applies to acquisitions by legislative branch agencies.¹¹

As we have reported in the past, we believe that even government entities exempt from the requirements that normally apply to executive agency procurements should procure goods and services using procedures designed to ensure that they are receiving the best value for the funds they spend and to protect the government's interests. Fundamentally, these procedures should entail identification of potential sources for the goods

⁹ On January 29, 1999, 10 days before the meeting, NGISC sent out a fax stating that the February 8 to 10, 1999, retreat would be dedicated to hearing from as many as 15 organizations, including the major research contractor—the National Opinion Research Center—and would hear findings from its subcommittees. NGISC said that this constituted a summary of the agenda. On February 3, 1999, NGISC sent out a fax relating to the February 8 to 10, 1999, retreat stating that "Commissioners will meet to receive recommendations from various organizations for possible inclusion into the Commission's Final Report." On February 4, 1999, NGISC posted an identical notice on its website. Under FACA's implementing regulations, a summary of the agenda is one of the items that is to be published 15 days in advance of the meeting.

¹⁰ The Competition in Contracting Act of 1984 (CICA), P. L. 98-369, amended the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, which apply to procurements by executive agencies. CICA requires, with certain limited exceptions, that executive agencies shall obtain full and open competition through the use of competitive procedures when procuring goods and services. The Federal Acquisition Regulation sets forth uniform policies and procedures for acquisitions by executive agencies.

¹¹ 41 U.S.C. 5 generally requires that acquisitions be advertised a sufficient time before proposals are due.

and services the agency is procuring and a reasonable effort to seek competition among them. Further, the agency's procurement actions should be documented in writing for management review purposes and to assist in the resolution of disputes over billings or costs.¹²

To determine the procedures used by NGISC in the award of its major contracts, we reviewed NGISC's award of three contracts: one each for (1) legal services, (2) research consulting services, and (3) a national survey on American gambling behavior and the creation of a database on the economic and social impacts of gambling. These contracts accounted for the largest dollar values of NGISC's contracts except for the two contracts awarded as directed by NGISC's enabling legislation.¹³

With respect to our review of the three contracts, we found that

(1) NGISC's Chair described an award process in which competition was sought, but NGISC's Chair did not document the selection process when contracting for legal services;

(2) NGISC entered into a sole-source contract for research consulting services, and we found no basis for questioning its determination that the person selected was uniquely qualified; and

(3) documentation maintained by NGISC showed that it made a reasonable effort to obtain competition when it contracted for the national survey on American gambling behavior and the creation of a database.

Contract for Legal Services

NGISC entered into a contract with a law firm for legal services for a maximum amount of \$35,000 per month.

NGISC's Chair said that the criteria she used to select a contractor were (1) the individual's stature; (2) knowledge on a variety of legal issues; and (3) the cost of the services. The Chair said that she went through a two-stage selection process. First, she said that she contacted several persons,

¹² See generally White House Travel Office Operations (GAO/GGD-94-132, May 2, 1994.) In that audit we determined that even an entity handling private funds (for press travel) should procure goods and services on a competitive basis and document its procurement actions to provide the public and others with the assurance that it is receiving the best value for the funds it spends. This is particularly true where, as with NGISC, the agency involved is using appropriated funds.

¹³ Section 7 of the National Gambling Impact Study Commission Act requires NGISC to contract with the Advisory Commission on Intergovernmental Relations for a thorough review and cataloging of all applicable federal, state, local and Native American tribal laws, regulations, and ordinances that pertain to gambling in the United States; and the National Research Council of the National Academy of Sciences to assist NGISC in its studies. We did not review these two contracts.

including two former United States attorneys general, to identify individual attorneys or law firms that would meet her criteria. Secondly, she said that she and others contacted about 8 to 10 of the referrals she received to determine whether they met her criteria, ascertain their interest and availability, and inquire about their fees. However, the Chair said that contacts with these individuals and firms were not documented, and she did not write down the names of the individuals she contacted.

The Chair said that she selected the law firm of McGuire, Woods, Battle & Boothe, L.L.P. to represent NGISC because (1) the principal attorney who would serve as NGISC's General Counsel was a former, high-level Department of Justice official; (2) the law firm had a variety of legal expertise; (3) and the attorney's hourly fees were the lowest of the individuals and firms contacted. The only documentation we were provided relating to the selection process was an October 29, 1997, letter from the Chair to NGISC Commissioners stating she had considered "a number of former high-level Justice Department and congressional attorneys," and that the individual she selected to represent NGISC was "uniquely qualified" with a reference to an attached resume.

We have no reason to question the selection process that the Chair said she followed. However, the lack of documentation showing the individuals and firms contacted and the information the Chair relied on to make the selection left no written record that could be used to verify that this process was followed or assess the details of the selection process.

Contract for Research Consulting Services

With regard to NGISC's \$48,000 contract for research consulting services, NGISC staff informed us that the Chair of the Research Subcommittee was tasked with finding a research consultant for NGISC. As documented in a letter to NGISC's Chair dated October 8, 1997, the Chair of the Research Subcommittee identified at least eight researchers with experience in the gambling field. The Chair of the Research Subcommittee determined that because of existing obligations, disinterest in being a principal research consultant, or lack of impartiality, only one of the individuals under consideration would fit what the subcommittee was looking for in the principal research consultant. The Research Subcommittee Chair concluded that this individual was also uniquely qualified since he was the research director of the NGISC predecessor commission in the 1970s and had served as the Executive Director of a task force that studied gambling in the state of Maryland in 1995. Therefore, the Research Subcommittee Chair urged NGISC's Chair to enter into a sole-source agreement with this individual, which NGISC did. We found no basis to question NGISC's

determination that the person selected was uniquely qualified to perform the contract.

Contract for a National Survey and Creation of a Database

With regard to the third contract for conducting a national survey and creating a database (total amount of contract \$1,244,150), documentation maintained by NGISC showed that it made a reasonable effort to obtain competition for these services. Through a consultant, NGISC identified—over the phone and by E-mail—eight firms it believed were qualified to perform the work. A December 10, 1997, memo to the file from NGISC’s Research Director indicated that the eight firms could perform the survey and database work without subcontracting; and, due to the pressing time constraints of NGISC, the Research Director and the Principal Research Consultant determined that it was in NGISC’s best interest to send the request for proposals (RFP) to these eight firms.¹⁴

The RFP contained the contract requirements and a section on how the proposals were to be evaluated. Representatives from the firms were invited to attend a mandatory preproposal conference and, according to the minutes from this conference, representatives from three firms attended. Two of the three firms submitted proposals, and NGISC reviewers evaluated the offerors’ technical and price proposals. Because documentation showed that several firms were solicited and given the opportunity to compete for the requirement and the responding firms’ technical and price proposals were evaluated and compared, we believe that NGISC made a reasonable effort to obtain competition for these services.

NGISC Contracted for Legal Counsel

Why did the NGISC contract for legal counsel instead of using government legal support?

Although NGISC tried to obtain guidance and assistance on legal issues from GSA, OLC, and the Office of Government Ethics (OGE), NGISC contracted for legal counsel because it did not obtain the necessary legal advice and assistance from these agencies and found it impractical to hire an attorney with sufficient expertise.

GSA offers legal counsel to government commissions on issues that relate to certain aspects of their operations, such as by providing procurement

¹⁴ NGISC has a limited life and is required to prepare a report no later than 2 years after the date on which NGISC first met. Section 4(b) of P. L. 104-169, 18 U.S.C. section 1955 note. Therefore, NGISC was operating under time constraints to comply with the statutory time frame for issuing the report.

advice. In October 1997, GSA officials suggested that NGISC retain the services of an attorney to provide guidance on issues that GSA attorneys said they did not have the expertise to handle, such as developing bylaws and rendering advice on the applicability of ethics laws. GSA advised NGISC's Chair that legal services could be obtained in three ways: (1) by hiring an attorney to be a member of the staff on a full-time basis, (2) by hiring an attorney as a consultant where an employer/employee relationship is established, or (3) by hiring an attorney on an independent contractor basis where no employer/employee relationship is created.

In addition to seeking guidance and services from GSA, NGISC had also sought assistance from the Department of Justice and OGE. In an August 13, 1997, letter from OLC to NGISC's Chair, OLC wrote that since it viewed NGISC as not being in the executive branch, OLC could not give legal opinions to NGISC. On August 18, 1997, OGE indicated that since its statutory responsibilities do not extend to legislative branch entities, OGE was unable to provide authoritative advice as to how government ethics laws might apply to specific situations involving NGISC employees.

NGISC's Chair said she tried to hire an NGISC executive director that could also serve as general counsel, but it was difficult to find an individual practicing as an attorney with the requisite experience who was willing to give up a law firm salary for a 2-year position. The Chair said that since GSA, OGE, and the Department of Justice's OLC indicated that they would not provide legal opinions at all or in the areas needed, she turned to the private sector for legal counsel.

NGISC Contractor Interference

Did NGISC attempt to interfere in an inappropriate way with the work of one of its contractors?

The NGISC Act specified that NAS-NRC would receive a contract for assistance in conducting certain studies required by NGISC to complete its work. NGISC awarded a contract to NAS-NRC for \$620,000. We inquired as to whether NGISC attempted to interfere with the NAS-NRC contractor in its scope of work, as was alleged to your office.

We spoke with NAS-NRC's Director of the Committee on Law and Justice that oversees the NGISC contract. The Director said she worked with NGISC staff and Commissioners and indicated that NGISC was initially confused about how NAS-NRC operated by holding both open and closed meetings. She said NGISC representatives wanted to attend the closed meetings held pertaining to its contract, but NAS-NRC officials explained that NAS-NRC did not allow this.

The Director said that after the policy of attending closed meetings was explained to NGISC, NGISC has not attempted to attend closed meetings or otherwise interfere in NAS-NRC's work.¹⁵

Involvement of Regent University Employees

How were Regent University employees involved in NGISC activities?

Through review of NGISC documents provided to us and interviews with NGISC's Chair and selected NGISC and Regent University staff, we identified six persons, other than the Chair, who were affiliated with Regent University and had some involvement in NGISC's activities. Of these six persons, three served as volunteers for short time periods and one of these individuals became a full-time NGISC employee. The three other individuals were part-time NGISC employees for some period of time. NGISC has employed a total of 28 persons, including the four individuals affiliated with Regent University, that were employed by the NGISC.

Two Regent University employees, who reported to the Chair in her capacity as Dean of the Robertson School of Government, have had involvement in NGISC. Both of these individuals said that they took a leave of absence from Regent University to work at NGISC for a brief period as employees. One individual worked for NGISC for approximately 1 month to assist the Chair in NGISC's establishment and to help plan the first NGISC meeting. The other Regent University employee said he took a leave of absence to assist NGISC as an employee for 5 weeks after the former Executive Director resigned. He served as NGISC's Acting Deputy Director of Operations and assisted in planning meetings. According to NGISC's Chair, she asked these two Regent University employees to assist NGISC on these two occasions on a temporary basis because critical tasks had to be completed correctly and immediately, and she had no other immediate source of help that she could depend on. In addition, these two assisted the Chair in her role as a Dean at Regent University when they were employed by Regent University as her assistants.

Three NGISC employees told us they believed that these two Regent University employees were giving orders affecting NGISC in their roles as employees of Regent University. The two Regent University employees told us that it was not appropriate for them to make decisions relative to NGISC in their roles as assistants to the Chair at Regent University and

¹⁵ NAS is specifically exempt from FACA and is therefore not required to hold open meetings. See section 3(2) of FACA.

that they did not do so. They said that, among other duties, they determined whether the Chair could be scheduled for press conferences, assisted the Chair in connection with NGISC meetings, and relayed information between the Chair and NGISC staff. They said that while they often relayed information between NGISC staff and the Chair regarding decisions, the Chair made the decisions. NGISC's Chair confirmed that the two Regent University employees were not authorized to make decisions on her behalf, and she said that they did not do so. No evidence was provided to us to corroborate the allegations made to your office that these two persons were independently making decisions affecting NGISC in their capacity as assistants to the Dean.

In addition, two individuals who were Regent University graduate students and one Regent University graduate volunteered their services to NGISC for 2 days in August 1997 to assist with meeting preparations. One of these individuals has been employed by NGISC since July 1998. Another Regent University graduate was employed by NGISC for approximately a week and a half in June 1997 to assist in its establishment.

Relocation Costs

Has NGISC paid for relocating any staff?

Our review of NGISC travel vouchers as well as NGISC's staff travel vouchers provided by GSA (GSA processes all travel reimbursement payments for NGISC) found no evidence that relocation payments were paid to NGISC employees since NGISC's inception through November 1998. On May 4, 1998, NGISC's then Research Director wrote to the former Executive Director to ask for support to cover moving expenses for a planned move to the Washington, D.C., area from Richmond, VA. At the time we began our review, the employee had not yet moved, and no relocation payments had been made.

After we discussed this issue with NGISC staff, the Chair told us that the NGISC does not plan to pay for this employee's relocation costs to Washington, D.C., or for any employee relocation costs in the future.

Alternate Work Location

Were NGISC employees allowed to work at a location other than the NGISC office?

You asked us to determine whether the current NGISC Executive Director was allowed to work at a location other than the NGISC office and if he actually worked the hours as scheduled. In response to a request dated November 21, 1997, from NGISC's Administrative Officer, the current Executive Director completed a work schedule of his 40-hour workweek

when he was serving as the Research Director. The work schedule indicated that he planned to work 3 hours at his home on Fridays and 4 hours on the train (commuting between Washington, D.C. and Richmond, VA) per day on Mondays and Tuesdays. The current Executive Director told us that while he served as Research Director between October 1997 and February 1998, he often charged official work time for work he had done at these alternate locations as provided for on his work schedule.

He also said that his supervisor was aware that he was working at alternate work locations and had not raised any objections. Further, he maintained time sheets indicating the number of hours he worked every 2 weeks. These time sheets showed that he accounted for at least 80 hours and that he often worked more than 80 hours every 2 weeks. His time sheets from October 1997 through February 1998 sometimes identified the number of work hours being charged for work at his residence and on the train. He also provided a record of the tasks he performed at the locations other than NGISC's office.

According to NGISC's current Executive Director, his predecessor authorized NGISC's former Deputy Director to begin working on a full-time basis at a location other than NGISC's office starting in the later stages of her pregnancy. According to the NGISC's Administrative Officer, the former Deputy Director was employed by NGISC between November 1997 and January 1999 and reported first to the previous Executive Director and subsequently to the current Executive Director. The Administrative Officer said there was no written work schedule for the former Deputy Director approved by a supervisor, which showed the number of hours she was scheduled to work at home. According to the current Executive Director, the former Deputy Director began working at her home on a full-time basis in October 1998, but she discontinued this arrangement after her first week because she went on maternity leave. The current Executive Director provided a log of the work that the former Deputy Director had done during the time she worked at home and said that she had completed the work she was expected to do outside NGISC's office. In January 1999, NGISC's Administrative Officer told us that no other NGISC employees were or had been authorized to work at locations other than the NGISC office on a continuing basis.

NGISC's Administrative Officer had a written work schedule for the former Research Director, showing the number of hours to be worked and the locations where the work was to be performed. NGISC's former Executive Director, the former Research Director's supervisor, did not sign the work schedule and said that she had not asked to see the work schedules of

NGISC's staff. The former Executive Director approved a leave request for New Year's week that was a part of the former Research Director's work schedule; but this approval, although on the same page as the work schedule, appeared to relate only to the requested days of leave. According to the former Executive Director, she was aware of the former Research Director's schedule of working at home on Fridays but was not aware that he was counting work done on the train as official work time.¹⁶ The former Executive Director indicated that the former Research Director's work schedule was in place when she began working for NGISC. Further, she said the former Research Director generally completed the assigned work. NGISC's Administrative Officer said that he did not have written work schedules with supervisory approval for any of its employees.

According to NGISC's Administrative Officer, he did not believe a written agreement for the former Research Director covering work at alternate locations was necessary because the former Research Director was not working at these alternate locations on a full-time basis. The Administrative Officer provided us with a draft of such an agreement for the former Deputy Director, but he said she discontinued working at her residence before the agreement was completed. Further, NGISC's time and attendance process did not require its supervisor to approve employees' official time sheets. NGISC's process provided for each employee to complete an internal time and attendance form showing his or her work time and provide this internal form to the Administrative Officer, who was to then prepare the official time sheets and sign them before transmitting them to GSA. The Administrative Officer said that the former Executive Director and the former Deputy Director would sometimes review the time sheets, but that was not done routinely.

We found no evidence that the two NGISC employees who were authorized to work at locations other than NGISC's office did not work the hours scheduled or did not accomplish the work they were expected to complete. However, there appears to be a misunderstanding concerning the approval of the former Research Director's work while commuting on the train. In addition, according to the NGISC's Administrative Officer, NGISC did not have employee work schedules or time sheets approved by their supervisor.

¹⁶ In connection with executive branch employees, we have stated that they may not be compensated for work done while commuting. See B-261729, April 1, 1996. However, NGISC is not subject to the rules governing executive branch agencies.

We are not aware of any specific policy that applies to legislative branch entities like NGISC regarding work at a location other than an employee's official workstation on a regular basis. Nonetheless, the circumstances described above indicate that when employees at an entity such as NGISC want to work regularly at alternate work locations, there should be documentation of advance supervisory approval and a mechanism for ensuring that the employees worked as scheduled. Without such controls, the entity is vulnerable to misunderstandings and other potential problems that could arise with employees who work at alternate work locations.

We discussed the vulnerabilities associated with NGISC's time and attendance process with the current Executive Director. The Chair and current Executive Director have agreed to require each NGISC staff member to have a work schedule approved by the Executive Director and to require that each employee's time sheet be approved by the Executive Director. They also said that with very limited exceptions, all work would be conducted at NGISC's office in the future.

Agency Comments

We requested comments on a draft of this report from the Chair of NGISC and the Administrator of GSA. On February 24, 1999, GSA notified us orally that the Deputy Associate Administrator, Office of Governmentwide Policy, Committee Management Secretariat, had reviewed our draft report and had no comments on it.

On March 4, 1999, we received written comments on our draft report from NGISC. These comments are reprinted in appendix III. NGISC's Chair indicated that she had no comments but provided the comments of NGISC's outside legal counsel regarding our opinion on the applicability of FACA.

NGISC's outside counsel asked that we reconsider our conclusion that NGISC is subject to FACA for two reasons. First, the outside counsel said that our analysis distinguishing OLC's opinion in Native Hawaiians was unpersuasive. Second, the outside counsel stated that application of FACA to NGISC would impose a "responsibility on the President to act on the recommendations of the Commission which is beyond the scope of the National Gambling Impact Study Commission Act." In this regard, the outside counsel stated that (1) there is no requirement in the NGISC's Act for the President or other recipients of NGISC's report to take action on the report, but that (2) under section 6(b) of FACA, the President would be required to provide Congress with a report stating either his proposals for action or reasons for inaction with respect to recommendations made to him.

With respect to the outside counsel's first point, we continue to believe that there are fundamental differences between the authorizing legislation that was at issue in the Native Hawaiians opinion and the language and history of the NGISC Act. As described in detail in appendix II, the legislation authorizing the Native Hawaiians Study Commission and its legislative history established that the Native Hawaiians Study Commission was created to provide advice and recommendations to the Congress and not to the President; thus, it was not subject to FACA. In contrast, the NGISC Act requires NGISC to provide the President, the Congress, and the other specified recipients with a report on its findings and conclusions and any recommendations it has developed. Neither the language nor the legislative history of the NGISC Act supports a conclusion that NGISC's work was intended to be directed solely to the Congress and not to the President as well.

With respect to the outside counsel's second point, we do not agree that the absence of a requirement in the NGISC Act for the President to act on any recommendations made by NGISC affects the applicability of FACA. FACA applies to any commission established by statute "in the interest of obtaining advice or recommendations" for the President or the executive branch; there is no further stipulation that, for FACA to apply, the recipient must be required to act on the advice or recommendations received.¹⁷ To the contrary, section 6(b) of FACA only requires the President or his delegate to provide the Congress with a follow-up report on his plans for acting (or reasons for not acting) on recommendations made to him by an advisory committee.

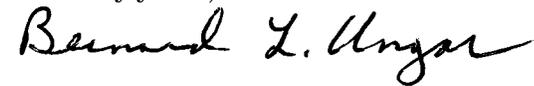
As agreed with your staff, unless you announce its contents earlier, we plan no further distribution of this report until 7 days from the date of this letter. At that time, we will send copies to Senator Fred Thompson, Chairman, and Senator Joseph I. Lieberman, Ranking Minority Member, Senate Committee on Governmental Affairs; Representative Dan Burton, Chairman, and Representative Henry A. Waxman, Ranking Minority Member, House Committee on Government Reform. We are also sending copies of this report to Representative Frank Wolf; Ms. Kay James, NGISC's Chair; The Honorable David Barram, Administrator of GSA; and

¹⁷ Other statutes creating advisory committees that have reporting responsibilities to the President and the Congress and have been designated by GSA as advisory committees to the President do not require the President to respond to recommendations. See, for example, P. L. 101-549, 104 Stat. 2399, 2574 (1990)(establishing the Risk Assessment and Management Commission); P. L. 103-394, 108 Stat. 4106, 4147 (1994)(National Bankruptcy Review Commission); and P. L. 102-325, 106 Stat. 448, 827 (1992)(National Commission on the Cost of Higher Education).

other interested parties. Copies also will be made available to others upon request.

Major contributors to this report are listed in appendix IV. Please contact me on (202) 512-8387 if you have any questions about this report.

Sincerely yours,



Bernard L. Ungar
Director, Government Business
Operations Issues

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Abbreviations

FACA	Federal Advisory Committee Act
FOIA	Freedom of Information Act
GISA	Government in Sunshine Act
GSA	General Services Administration
HHS	Department of Health and Human Services
NEC	National Economic Commission
NGISC	National Gambling Impact Study Commission
NHSC	Native Hawaiians Study Commission
OGE	Office of Government Ethics
OLC	Department of Justice's Office of Legal Counsel
RFP	request for proposal

Scope and Methodology

Scope and Methodology for Reviewing Selected Operational Practices

The scope of our work was limited to the review of selected operational practices of the National Gambling Impact Study Commission (NGISC). We did not attempt to review NGISC's work in regard to its comprehensive legal and factual study of the social and economic impacts of gambling.

(1) To determine if NGISC is subject to the Federal Advisory Committee Act (FACA) and if three specific meetings were in compliance with FACA, we reviewed the opinion prepared by NGISC's outside legal counsel and information submitted by an NGISC commissioner on the applicability of FACA. We prepared our own legal opinion on the applicability of FACA based on a review of the legislation that established NGISC, FACA, and relevant opinions on FACA. We spoke with officials from the General Services Administration (GSA) and NGISC on the applicability of FACA and obtained documentation on FACA related issues, such as authorization to close meetings and designation of a federal officer, and specifics regarding the three meetings.

(2) To determine NGISC's process for awarding major contracts, we reviewed the three largest contracts it awarded, excluding the two required by NGISC's enabling legislation. We limited our review to determining how NGISC chose the contractors, i.e., whether competition was sought and if not, whether reasonable justification existed for not doing so. We reviewed NGISC's contract files and other documents that included information on the selection processes used. We also interviewed NGISC's Administrative Officer, Chair, and Executive Director.

(3) To determine why NGISC contracted for legal counsel instead of using government legal counsel, we interviewed GSA and NGISC officials and reviewed correspondence between NGISC and GSA, the Department of Justice's Office of Legal Counsel (OLC), and the Office of Government Ethics (OGE).

(4) To determine if NGISC interfered in the work of the National Academy of Science's National Research Council (NAS-NRC) contractor, we spoke with the NAS-NRC director of the committee who oversaw the NGISC contract.

(5) To determine how Regent University employees were involved in NGISC activities, we interviewed NGISC employees, the Chair, and two Regent University employees. We also looked at the roles of employees at NGISC.

(6) To determine if NGISC had paid for relocating any staff, we interviewed NGISC employees, the Chair, and GSA officials. In addition, we reviewed copies of all travel vouchers that had been processed and filed at NGISC since its inception to November 1998 and copies of NGISC staff travel vouchers processed through GSA. We also reviewed a May 1998 memo requesting the payment of the current Executive Director's relocation costs.

(7) To determine if NGISC employees were allowed to work at locations other than the NGISC office in Washington, D.C., we interviewed NGISC employees, the NGISC Chair, and reviewed the current Executive Director's and the former Deputy Director's work schedules and time sheets.

In general, we reviewed NGISC's enabling legislation and the applicability of laws, such as the Competition in Contracting Act of 1984, FACA, and title 5 U.S.C. We reviewed correspondence from the Department of Justice's OLC addressing whether NGISC is in the legislative branch, and whether it is subject to 18 U.S.C. 208, a criminal conflict of interest statute. We also reviewed correspondence from OGE to NGISC concerning the applicability of ethics laws to NGISC.

We did our audit work from October 1998 through February 1999 in Washington, D.C., and in Virginia Beach, VA, in accordance with generally accepted government auditing standards.

GAO Legal Opinion on the Applicability of FACA

Introduction

FACA, 5 U.S.C. app. 2 sections 1-16, imposes certain requirements on advisory committees to the President and federal agencies. FACA's definition of an advisory committee includes, in relevant part, any commission that is established by statute, the President, or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. app. 2, section 3(2).

As discussed below, GSA concluded that the Commission is an advisory committee to the President and is therefore subject to FACA. The Commission's outside counsel reached a contrary conclusion primarily based on the view that the Commission was not established for the purpose of providing advice to the President, but rather to study the impact of gambling in order to advise Congress and state and tribal governments. Based on our review of the NGISC Act, P. L. No. 104-169, 110 Stat. 1482 (1996) and its legislative history, we conclude that NGISC is an advisory committee under FACA because it was established in the interest of obtaining advice or recommendations for the President. The language of the NGISC Act clearly designates the President as a recipient of the Commission's work results, and there is nothing in the legislative history to suggest that NGISC's work was intended to be directed to the Congress to the exclusion of the President or that FACA was not intended to apply.

Background

The NGISC Act provided for the creation of a nine-member commission with three members each appointed by the President, the Speaker of the House of Representatives, and the Majority Leader of the Senate (NGISC Act section 3). Section 4 of the act directs the Commission to conduct a comprehensive legal and factual study of the social and economic impacts of gambling. This study is to include a review of specific topics, such as existing federal, state, local, and tribal policies with respect to the legalization or prohibition of gambling; an assessment of the relationship between gambling and levels of crime; and an assessment of the interstate and international effects of gambling by electronic means.

The NGISC Act requires the Commission to report on the results of its work no later than 2 years after the date of the Commission's first meeting.¹ Specifically, section 4(b) of the act provides in relevant part:

"(b) REPORT—No later than 2 years after the date on which the Commission first meets, the Commission shall submit to the President, the Congress, State Governors, and Native

¹The Commission held its first meeting on June 20, 1997.

Appendix II
GAO Legal Opinion on the Applicability of FACA

American tribal governments a comprehensive report of the Commission's findings and conclusions, together with any recommendations of the Commission."

Because NGISC is required to report to the President as well as the Congress and state and tribal officials, GSA determined that the Commission is advisory to the President and is subject to FACA.² At GSA's request, on June 15, 1997, the Commission filed a charter with GSA stating that: "The Commission is subject to the standards and requirements of the Federal Advisory Committee Act (FACA, as amended), with respect to meetings, hearings, and the availability of Commission records, and other matters."³ On October 31, 1997, the Commission unanimously adopted operating rules, that included the statement that NGISC "is an independent legislative commission which will, in general, conduct its activities in accordance with the standards and requirements of the FACA, the Freedom of Information Act (FOIA), and the Government in the Sunshine Act (GISA)"⁴

Subsequently, the Commission requested an opinion from its outside counsel concerning FACA's applicability to the Commission. The opinion, issued on February 26, 1998, concluded that the Commission is not subject to FACA for several reasons that are discussed in more depth below. Essentially, the opinion maintained that the Commission was not established for the purpose of providing advice to the President or an executive agency, but rather to study the impact of gambling in order to advise Congress, the states, and tribal governments. In this connection, the outside counsel relied on a 1982 opinion issued by OLC, in which OLC

²GSA found the Commission to be exempt from a number of other laws (e.g., procurement laws, provisions of title 5, U.S.C.) based on advice that NGISC is in the legislative branch. Specifically, the Justice Department's Office of Legal Counsel (OLC) concluded in effect that NGISC is a legislative branch entity because of its structure and the fact that it performs only information-gathering and advisory functions. See OLC's letter of August 13, 1997, to the Chairman of NGISC. Office of Personnel Management, OGE, and Office of Management and Budget also characterized NGISC as a legislative branch entity.

³According to an October 22, 1998, letter from the Chair of the Commission to GSA, the Commission had been informed that "we had to file a charter and that it had to contain specific language concerning FACA before GSA would arrange for an account to be opened with the Department of the Treasury or allow us to conduct our first meeting."

⁴By memorandum of October 30, 1997, Commissioner Loescher had concluded that FACA "may not apply" to the Commission. The basic premise of the October 30, 1997, memorandum was that NGISC was formed primarily to advise Congress and state and local governments, not the President, and therefore is not within FACA's definition of an "advisory committee" established in the interest of obtaining advice or recommendations for the President. The memorandum noted that "[I]f FACA does not apply, its objectives can be still achieved through the adoption of Commission rules. The Commission operations would be more efficient without the rigid constraints of FACA, particularly in the issue of closed meetings."

concluded that FACA was inapplicable to the Native Hawaiians Study Commission (NHSC). See Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission (hereinafter Native Hawaiians), 6 Op. Off. Legal Counsel 39 (1982). In Native Hawaiians, OLC found that although the NHSC was required to furnish the President with a copy of its final report, the text of NHSC’s authorizing legislation and its legislative history established that the commission was created to provide advice and recommendations to the Congress and not to the President.

As additional support for its conclusion that FACA does not apply to NGISC, the outside counsel’s opinion pointed to (1) a provision in the NGISC Act that it viewed as being duplicative of the requirements of FACA; (2) the absence of a requirement in the NGISC Act that the executive branch utilize the commission’s work product; and (3) the fact that neither funding for, nor management of the study comes from the executive branch. However, the opinion concluded with the caveat that since “no controlling authority on this issue exists . . . a court therefore could reach a contrary conclusion.”⁵

GSA continues to view NGISC as an advisory committee subject to FACA.⁶ In an October 9, 1998, letter responding to a request from Senator Bryan, GSA stated that “[o]ur review of . . . the statute creating the NGISC, its legislative history, and [the outside counsel’s] opinion does not alter our conclusion that FACA is applicable to the Commission.”

Applicable Legal Framework

FACA establishes requirements pertaining to the creation, operation, duration, and review of covered advisory committees. It imposes certain obligations on advisory committees, requiring them to file charters, publish notice of their meetings, open their meetings to the public, and make their minutes and other committee records publicly available. Whether a particular group is subject to FACA’s requirements depends on whether it is an advisory committee within the meaning of section 3(2) of FACA, which provides that

“(2) The term ‘advisory committee’ means 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

⁵The outside counsel’s opinion refers to two court cases discussed below, but states that neither definitively resolves the issue of FACA’s applicability to the NGISC.

⁶GSA listed NGISC as a presidential advisory committee in its Twenty-sixth Annual Report on Federal Advisory Committees covering fiscal year 1997.

(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. . . .”

The above-quoted definition is broadly worded and in relevant part includes any commission that is established by statute in the interest of obtaining advice or recommendations for the President or one or more agencies. The definition does not cover commissions that are established solely to advise the Congress.⁷ However, as discussed below, a committee can be established in the interest of advising the executive branch, and thus subject to FACA, even though part of the purpose of the committee is to report to the Congress. California Forestry Ass’n v. United States Forest Service, 102 F.3d 609 (D.C. Cir. 1996).

As the NGISC outside counsel’s opinion notes, there are no court cases specifically addressing the issue of FACA’s applicability to NGISC. However, two court cases cited in the opinion have examined FACA’s applicability to committees serving more than one purpose and apply an analytical framework that is useful in examining the status of NGISC.

In Sofamor Danek Group v. Gaus, 61 F.3d 929 (D.C. Cir. 1995), the Agency for Health Care Policy and Research had convened a “Low Back Panel” under its statutory authority to use panels to develop clinical practice guidelines for private health care professionals. A medical device manufacturer challenged the guidelines developed by the panel, contending that the panel was an advisory committee under FACA but had not followed its requirements. The manufacturer contended that, although one purpose of the panel was to provide advice to private health care professionals, an additional purpose, which was reflected in the panel’s authorizing legislation and legislative history was to obtain advice for the Department of Health and Human Services (HHS) to use in formulating Medicare reimbursement policy. The court rejected the plaintiff’s argument, finding that the intended recipient of the panel’s work was clear from the face of the statute:

⁷ See Native Hawaiians, 6 Op. Off. Legal Counsel at 40. Earlier versions of the bills that resulted in FACA included advisory committees established or organized to advise and make recommendations to the Congress, but these references were deleted before final passage.

“Congress expressly stated the purpose for the establishment of the panels—improving health care by developing, reviewing, and updating guidelines for use by clinical health care practitioners. In light of that express purpose, the court will not lightly infer any other purpose, such as reducing health care costs by giving advice to the Secretary regarding Medicare reimbursement policy . . . Although [HHS] may consult [the guidelines] when setting Medicare reimbursement policy, and Congress may have intended that [the agency] do so, it does not follow that Congress’ purpose in authorizing the panels . . . was to provide advice or recommendations to [the agency].” 61 F.3d at 935-36.

Because the panel’s authorizing legislation expressly designated the intended beneficiaries of its guidelines, the court stated that HHS’s “subsequent and optional use” of the guidelines in administering Medicare policy would not render the panel an advisory committee subject to FACA.

In California Forestry Ass’n v. United States Forest Service, 102 F.3d 609, the Forest Service unsuccessfully argued, based on Sofamor Danek, that it was only an incidental recipient of a research panel study that was being prepared for submission to the Congress. The concept for the panel originated in a provision of an appropriations act that allocated funds to be used for forest research and conference report language explaining that a panel should be convened to study forests of the Sierra Nevada. The Forest Service sought more specific guidance, and it received two letters from multiple members of Congress framing the scope of the study and directing that the study results be submitted to the Congress.

The court in California Forestry distinguished Sofamor Danek, noting that in Sofamor “the statute designated the primary user” of the Low Back Panel whereas, “[h]ere we have no similar statutory directive” (102 F.3d at 613). In the absence of a statutory directive, the court looked to the circumstances surrounding the creation and use of the research panel and found that, among other things, the study results were expected to form an important part of the Forest Service’s long-term plan for ecosystem management. Thus, although the research panel had been created at the behest of and was responsible for reporting to the Congress, the Forest Service was not merely a subsequent and optional user of the study (102 F.3d at 612).

Finally, the core legal authority relied on by NGISC’s outside counsel is OLC’s opinion in Native Hawaiians, cited above. As indicated previously, the outside counsel’s opinion draws parallels between NGISC and NHSC, maintaining that, like NHSC, NGISC is not an advisory committee because it was established to advise the Congress (and others) but not the President or a federal agency. Because the Native Hawaiians opinion is central to the outside counsel’s conclusions and involves an extensive

analysis of FACA's applicability to NHSC, it is summarized in some detail below.

In Native Hawaiians, OLC framed the issue as “[w]hether the Native Hawaiians Study Commission was established to advise the President or federal agencies or solely to advise Congress,” and stated that the answer “must be determined by reference to the Commission’s authorizing act.” Turning to the NHSC’s authorizing legislation, the NHSC Act, OLC noted that the NHSC’s basic mission was to “conduct a study of the culture, needs, and concerns of Native Hawaiians.” The act provided that, after NHSC completed its study, it was to publish a draft report summarizing the study’s findings, solicit comments on the draft from various sources, and prepare a final report with copies to be sent to the President and two congressional committees. Finally (and according to OLC “most importantly”), the NHSC Act required the Commission to “make recommendations to the Congress based on its findings and conclusions [from the study].”

Reviewing the provisions summarized above, OLC noted that the fact that the President was to receive a copy of NHSC’s final report could imply a relationship for the transmittal of advice between NHSC and the President. However, OLC found that several factors weighed against NHSC being considered an advisory body to the President. First, OLC found it significant that the NHSC Act drew a distinction between the NHSC’s final report, which was to contain factual findings, and its recommendations, which were to be made only to the Congress and apparently transmitted separately. Second, OLC stated that, even if the final report could be characterized as advice, it was unclear that such advice was really meant for the President, where (as discussed below) various factors showed that the Commission was created to formulate policy recommendations to the Congress for future legislation. Accordingly, OLC stated that the fact “[t]hat the President is to receive a copy of the study, perhaps simply as a courtesy or for his general information, does not mean the study was intended to advise him.”

The OLC mentioned two additional provisions in the NHSC Act that it viewed as at least indirectly suggesting that NHSC was not established to advise the President. The first provision required NHSC to publish public notice of its hearings, specifying the information to be included, and required NHSC to “take such other actions as it considers necessary to obtain full public participation” in its study. According to OLC, the effect of this provision was to establish a modest open meeting goal for NHSC, and it would have been redundant if FACA’s more prescriptive

requirements had applied to the Commission. OLC also noted that the NHSC Act provided initial funding for NHSC from the contingent fund of the Senate, suggesting that NHSC was closely tied to the Congress.

Although OLC viewed all of these factors as weighing against a conclusion that NHSC was formed to advise the President, it found that they did not resolve the issue conclusively. In OLC's view, the provision requiring NHSC to submit its final report to the President made NHSC's relationship with the President "sufficiently ambiguous" to present a close question requiring resort to the NHSC Act's legislative history.

As described in detail in Native Hawaiians, the NHSC Act's legislative history disclosed numerous indications that NHSC was established specifically for the purpose of advising the Congress. For example, OLC found that, in floor comments, the bill's two sponsors described NHSC as a body to advise the Congress (and referred to possible legislation resulting from the Commission's findings), without any mention of an advisory relationship with the executive branch. Tracing the evolution of the bill, OLC found that two predecessor bills had sought to establish a commission specifically to advise the Congress. One of these bills had been amended in committee to add the requirement that the commission's final report be submitted to the President, but the accompanying committee report did not comment on the change and continued to characterize NHSC as an advisory body to the Congress. Based on these and other "clear indications . . . that the Commission was created to advise the Congress and not the President or federal agencies," OLC concluded that NHSC was not subject to FACA.

Analysis

As recognized by the court cases and OLC opinion discussed above, the starting point for determining whether a commission was established in the interest of obtaining advice or recommendations for the President or an executive agency is the text of the commission's authorizing legislation. If the statutory language clearly identifies the intended recipients of a commission's work results, there is no need to resort to the legislative history or other sources to determine the purposes to be served by the commission (Sofamor Danek). However, if statutory language identifying the intended recipients is ambiguous (or absent), the commission's fundamental purposes must be ascertained through an examination of the legislative history and other relevant sources. See California Forestry Ass'n and Native Hawaiians.

Text of NGISC Act

In this case, the text of the NGISC Act clearly identifies the President as a recipient of NGISC's work results. In this regard, section 4(b) of the act

provides that the Commission “shall submit to the President, the Congress, State Governors, and Native American tribal governments a comprehensive report of the Commission’s findings and conclusions, together with any recommendations of the Commission.”

Unlike the statutory provisions addressed in Native Hawaiians, the NGISC Act does not draw a distinction between the types of work results to be provided to the Congress and the President (i.e., a copy of the report with and without recommendations) or indicate that reporting to the President is intended to be on a less substantive level. Rather, the NGISC Act places the President, the Congress, and the other listed recipients of the Commission’s work on an equal footing by requiring NGISC to provide each recipient with (1) a report on its findings and conclusions and (2) any recommendations it has developed.

While there are no other provisions in the NGISC Act that directly address reporting by the commission or the use of its work results, NGISC’s outside counsel points to certain provisions that it views as creating an inference that FACA does not apply to the commission.⁸ In particular, the outside counsel points to language in section 3(b)(3) of the act, which provides that

“ (3) CONSULTATION REQUIRED.—The President, the Speaker of the House of Representatives, and the Majority Leader of the Senate shall consult among themselves prior to the appointment of the members of the Commission in order to achieve, to the maximum extent possible, fair and equitable representation of various points of view with respect to the matters to be studied by the Commission. . . .”

According to the outside counsel’s opinion, this language duplicates the so-called balance provision of FACA, section 5(b)(2), which requires that advisory committee membership be fairly balanced in terms of the points of view represented and functions to be performed by the committee. Thus, the outside counsel draws an analogy to the statute at issue in Native Hawaiians, which prescribed modest open meeting requirements for NHSC and, in OLC’s view, would have been redundant had FACA applied to NHSC.

In our view, there is a fundamental distinction between the statutory provisions at issue in this case and the “open meeting” requirements that OLC addressed in Native Hawaiians. The balance requirement in the NGISC Act essentially implements FACA’s direction in section 5(b)(2) that

⁸ One of the outside counsel’s arguments, relating to the funding and management of NGISC, is discussed separately below.

“any . . . legislation [establishing an advisory committee] shall require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” In contrast, in Native Hawaiians, the NHSC Act requirements for open meetings were different from those imposed by FACA and thus supported an inference that FACA was not intended to apply.

The outside counsel’s opinion also maintains that an inference of FACA’s inapplicability can be drawn from the fact that the NGISC Act does not require the executive branch to consider or utilize the commission’s work product. However, FACA applies to any advisory committee established by statute in the interest of obtaining advice or recommendations for the executive branch; there is no further stipulation that, for FACA to apply, the recipient must be required to act on the advice or recommendations received. Rather FACA itself provides that within 1 year after a presidential advisory committee’s report is issued, the President or his delegate must report to the Congress his proposals for action or reasons for inaction, with respect to the committee’s recommendations. See FACA section 6(b).

Legislative History

Because the statutory language requiring NGISC to provide its report and recommendations to the President as well as the other listed recipients is clear on its face, there is no need to resort to the legislative history to ascertain the intended recipients of NGISC’s work results (See Sofamor Danek, above). Nevertheless, we reviewed the legislative history of the NGISC Act to determine whether there was anything to suggest that the Congress viewed NGISC as being solely advisory to the Congress or that it otherwise intended for FACA not to apply to NGISC.

The only specific reference to FACA was made during the Senate’s consideration of H.R. 497, the bill that eventually was enacted as the NGISC Act. In this regard, in commenting on the Senate-amended version of H.R. 497, Senator Glenn expressed the view that FACA would apply to the NGISC:

“This commission will be closely watched by many, including those with the power and resources to tie the commission up in costly litigation. It is subject to the Federal Advisory Committee Act [FACA], a statute which requires compliance with open meetings and public access, but also a statute that allows litigation, something we’ve seen a significant amount of in the last several years with various executive branch commissions and taskforces. So I would urge the commission at its first meeting to read FACA and to closely adhere to its requirements.” 142 Cong. Rec. S. 7977 (daily ed. July 17, 1996).

Further, with regard to the intended focus of NGISC’s work results, there is nothing to show that NGISC’s work was intended to be directed to the Congress rather than the President.⁹ Rather, the main debate in both the House and Senate concerned the role of the states versus the federal government in issues relating to gambling.¹⁰ The federal interest in NGISC’s study results was described in broad terms, with little discussion of the specific roles envisioned for the President and Congress.¹¹ However, the original version of H.R. 497 (and S. 704, the companion bill in the Senate) put the President and the Congress on an equal footing in terms of the recommendations to be made by NGISC, providing that

“ [The Commission] shall submit a report to the President and the Congress which shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation and administrative actions as it considers appropriate.” H.R. 497, 104th Cong. § 4(b) (1995); S. 704, 104th Cong. § 4(b) (1995).

The above-quoted language ultimately was changed to add state governors and Native American tribal governments to the list of recipients, resulting in the requirement in section 4(b) of the NGISC Act that the Commission “submit to the President, the Congress, State Governors, and Native American tribal governments a comprehensive report of the Commission’s findings and conclusions, together with any recommendations of the Commission.” However, there is nothing in the legislative history to show that this change was intended to alter the respective roles of the President

⁹ The outside counsel’s opinion acknowledges that the NGISC act’s legislative history is “less conclusive” than that addressed in *Native Hawaiians*: “In *Native Hawaiians*, two sponsors of the bill ‘characterized the commission as an advisory committee to Congress’ Here, there is no such statement by the bill’s sponsors.”

¹⁰ Opponents argued that the bill intruded into the states’ regulatory prerogatives. See, e.g., 142 Cong. Rec. 3643 (1996) (statement of Rep. Vucanovich) (“[W]hen our states are the best ones to be handling this issue, why are we advocating more federal intrusion?”). Proponents countered that the basic purpose of NGISC was to study and not regulate gambling, and that the federal government has a legitimate interest in gambling issues. See, e.g., 142 Cong. Rec. 3645 (1996) (statement of Rep. Wolf) (“This legislation does not outlaw gambling. It does not tax gambling. It does not regulate gambling. It merely recognizes that gambling is spreading through the country like wildfire and it needs a hard look.”)

¹¹ See 142 Cong. Rec. 3645 (1996) (statement of Rep. Wolf) (“It is time for Congress to take a comprehensive look at gambling and its associated problems”); 142 Cong. Rec. 3642 (statement of Rep. Hyde) (“A study of the impact of gambling on our society—focusing on both its positive and negative aspects—will be a helpful tool for policymakers at the Federal, State, and local government levels”); 142 Cong. Rec. S7976 (daily ed. July 17, 1996) (statement of Sen. Glenn) (“Based on its examination . . . the commission will then make appropriate recommendations to policymakers at all levels of government.”)

and the Congress as recipients of the study or that, as the bills evolved, the focus of NGISC became solely legislative.¹²

Other Considerations

Finally, the outside counsel suggested that because NGISC is a legislative branch entity, it was established to advise the Congress and not the President and thus is not subject to FACA.¹³ While a commission's linkage to the legislative branch may, in combination with other factors, indicate that a commission was intended solely to advise the Congress (Native Hawaiians), it is not determinative of an entity's status as an advisory committee. FACA's definition of an advisory committee focuses on whether the committee has an advisory relationship with the President or a federal agency and not on the branch of government in which the committee is located.¹⁴

NGISC's status as a legislative branch entity with responsibilities to the Congress has no bearing on whether it is also responsible for providing advice to the President and is therefore subject to FACA. The Supreme Court, in commenting on the dual obligations of the Comptroller General to the legislative and executive branches, recognized that "[o]bligations to two branches are not . . . impermissible and the presence of such dual obligations does not prevent the characterization of the official with the dual obligations as part of one branch." See Bowsher v. Synar, 478 U.S. 714, 746 (1986) (Stevens, J., concurring in the judgment). In this

¹²In fact, the NGISC Act identifies subjects for review that relate to areas currently under the jurisdiction of executive agencies. For example, the statute requires NGISC to assess "existing enforcement and regulatory practices" that address the relationship between gambling and levels of crime. See NGISC Act section 4(a)(2)(B). The study also is to include a review of Native American tribal policies and practices relating to gambling (NGISC Act section 4(a)(2)(A)); gambling on Indian tribal lands is federally regulated. Under section 4(a)(2)(D) of the act, NGISC is to study the role of advertising in promoting gambling. See 142 Cong. Rec. S7977 (daily ed. July 17, 1996)(statement of Sen. Bryan) ("[T]he federal government, through the Federal Trade Commission, already exercises broad enforcement and regulatory authority over false and deceptive advertisements in general, including those for gaming.")

¹³The outside counsel's opinion draws parallels to Native Hawaiians stating that the "Study Commission primarily exercises legislative duties [and] is not funded through the executive branch . . ." While the outside counsel's opinion states that the NGISC Act authorized the Commission funding through the Advisory Commission on Intergovernmental Relations and the National Academy of Sciences, "neither [of which] fall within the executive branch." Section 9 of the act authorizes appropriations for NGISC in its own right, as well as for the two other specified entities in connection with duties they are to perform under the act. The Commission received its appropriations under the Departments of Commerce, Justice, and State; the Judiciary; and Related Agencies appropriations acts for fiscal years 1997 and 1998.

¹⁴Thus, for example, OLC concluded that the Native Hawaiians Study Commission did not have the requisite advisory relationship with the executive branch, and was outside the reach of FACA, because it had been formed specifically to advise the Congress. In a later opinion on the applicability of the Hatch Act, OLC concluded that NHSC is in the executive branch. See Applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Commission, 6 Op. Off. Legal Counsel 292 (1982).

connection, in 1988, OLC determined that the National Economic Commission (NEC), which was charged with making recommendations to the President and to the Congress regarding methods to reduce the federal deficit, was in effect a legislative branch entity. Letter for Alexander H. Platt, General Counsel, National Economic Commission, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (June 22, 1988). OLC reached this conclusion even though, as OLC noted in a later opinion, NEC's enabling legislation expressly made it subject to FACA. See Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws, 13 Op. Off. Legal Counsel 285, 290 n.11 (1989).

Conclusion

We conclude that NGISC is an advisory committee as defined in section 3(2) of FACA, because it was established in the interest of obtaining advice or recommendations for the President. The language of the NGISC Act clearly designates the President as a recipient of the Commission's work results, and there is nothing in the legislative history of the act to suggest that the focus of the Commission was solely legislative or that the requirements of FACA were intended not to apply.

Comments From the NGISC



NATIONAL GAMBLING IMPACT STUDY COMMISSION
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March 4, 1999

Mr. Bernard L. Ungar
Director
Government Business Operations Issues
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Ungar:

Thank you for the opportunity to review the draft report on the operations of the National Gambling Impact Study Commission, prepared at the request of Senator Richard Bryan.

While responding to this investigation has indeed consumed the limited resources and time of the Commission, I appreciate the professional and considerate manner you and your staff used to complete the report. I do not have any specific comments at this time, but am pleased to note that your report affirms the excellent work being conducted by our staff.

Attached please find comments of our counsel, George Terwilliger, regarding your opinion on the applicability of the Federal Advisory Committee Act. I would appreciate it if you would include these in the report.

Sincerely,

A handwritten signature in black ink, appearing to read "Kay C. James".

Kay C. James
Chairman

Attachment

Appendix III
Comments From the NGISC

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March 4, 1999

Mr. Bernard L. Ungar
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Ungar:

We respectfully suggest that General Accounting Office (GAO) reconsider its conclusion contained in its draft report concerning the applicability of the Federal Advisory Committee Act (FACA) to National Gambling Impact Study Commission (NGISC) because the attempt by GAO to distinguish Native Hawaiian is unpersuasive and because it would result in the imposition of duties on the President not contemplated by the enabling act.

The enabling legislation of the NGISC, the National Gambling Impact Study Act, Pub. L. 104-169 (1996), requires the Commission to submit a report to the President, the Congress, State Governors and Native American tribal governments. Under the statute, the recipients of this report are not required to take any action upon receipt of the report.

Section 6(b) of FACA requires the President to "make a report to Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the report." 5 U.S.C. App. 2 (1998). By determining that the Commission is subject to FACA, GAO has imposed responsibility on the President to act on the recommendations of the Commission which is beyond the scope of the National Gambling Impact Study Commission Act.

Based upon our earlier analysis and considering the practical effect of the GAO's draft report, we respectfully urge GAO to rethink its position in regards to the applicability of FACA to the Commission.

Sincerely,


George J. Terwilliger, III

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