



WHAT THE *FACA*:

*A Tribal Legislative Fix to the Federal
Advisory Committee Act*

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Session Agenda

- What is a TAC?
- FACA as a barrier to TACs
- A Tribal Perspective to Navigating FACA
- Overview of FACA, UMRA, and its current application
- How do we fix it?



What is a TAC?

- Tribal Advisory Committees were established to enhance the government-to-government relationship, honor federal trust responsibilities and obligations to Tribes and American Indian and Alaska Native people, and increase understanding between federally recognized Tribes and federal agencies.
- There are over 15 TACs under the U.S. Department of Health and Human Services



Purpose of TACs?

- To seek consensus, exchange views, share information, provide advice and recommendations; or facilitate any other interaction related to intergovernmental responsibilities or administration of agency programs.



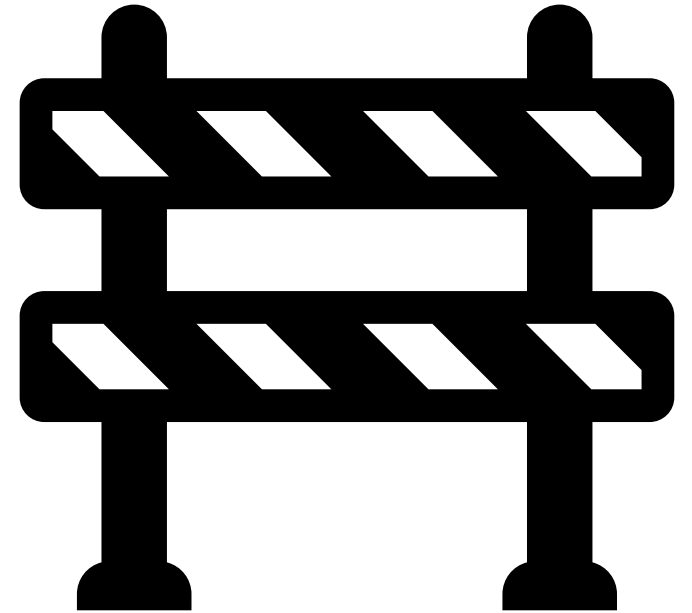


GENERAL TAC FUNCTIONS

- Identify evolving issues and barriers to access, coverage and delivery of services to AI/ANs, related to agency programs;
- Propose clarifications and other recommendations and solutions to address issues raised at Tribal, regional and national levels;
- Serve as a forum for Tribes and agency to discuss these issues and proposals for changes to agency regulations, policies and procedures;
- Identify priorities and provide advice on appropriate strategies for Tribal consultation on issues at the Tribal, regional and/or national levels;
- Ensure that pertinent issues are brought to the attention of Indian Tribes in a timely manner, so that timely Tribal feedback can be obtained;
- Coordinate on Tribal consultation initiatives.

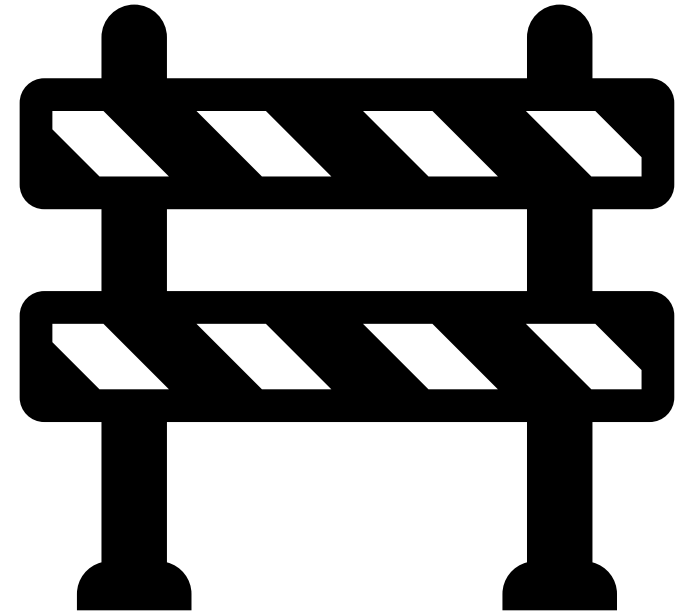
A Barrier Called FACA!

- In recent years, HHS and DOI agencies have cited Federal Advisory Committee Act and the intergovernmental communication exception to FACA enacted under Section 204(a) of the Unfunded Mandates Reform Act (UMRA), to severely limit how tribes and tribal organizations are permitted to interact with and consult with certain HHS agencies.



A Barrier Called FACA!

- Restricts free interchange of ideas and information
- Limits Technical Assistance
- Violates Tribal self-determination
- Creates disparities in the Government-to-Government Relationship



A Tribal Perspective to FACA

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Overview of FACA

The Federal Advisory Committee Act, 5 U.S.C. § 1001, et seq., imposes numerous transparency, procedural, organizational, and record requirements on federal advisory committees

The Unfunded Mandates Reform Act, 2 U.S.C. § 1531, et seq., includes an exemption for certain intergovernmental communications held between Federal officials and elected officers of State, local, and tribal governments

Early guidance from the Office of Management and Budget (OMB) argued for a broad interpretation of the UMRA exception, and affirmed that FACA only applies to advisory committees established and controlled by agencies

The Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA), 5 U.S.C. § 1001, et seq., was enacted as Pub. L. 92-463 (Oct. 6, 1972)

FACA establishes standards and uniform procedures governing the establishment, operation, administration, and duration of advisory committees “established” or “utilized” by the President and Executive Agencies for furnishing expert advice, ideas, and diverse opinions to the Federal Government

The Act provides that the function of advisory committees should be advisory only

The Federal Advisory Committee Act

FACA imposes numerous transparency, procedural, organizational, and record requirements on federal advisory committees

- No advisory committee shall meet or take any action until an advisory committee charter has been filed “with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and House of Representatives having legislative jurisdiction of such agency”
- Each advisory committee meeting shall be open to the public
- Timely notice of each meeting shall be published in the Federal Register
- The records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other document which were made available to, or prepared for or by each advisory committee, shall be available for public inspection and copying

The Federal Advisory Committee Act

Additional requirements include:

- Advisory committees must be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee
- All matters considered by an advisory committee should be determined by the Federal agency establishing or utilizing the committee
- There shall be designated an officer or employee of the Federal Government to chair or attend each meeting
 - No advisory committee shall conduct any meeting in the absence of that officer or employee
 - No advisory committee shall hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government

The Federal Advisory Committee Act

The D.C. Circuit looks to several factors in determining whether a group constitutes an “advisory committee” subject to FACA, including facts related to its organization, structure, and operation

- *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 , 913–14 (D.C. Cir. 1993) (in order to implicate FACA, an executive agency must “create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose”)
- *Citizens for Responsibility and Ethics in Washington v. Leavitt*, 577 F.Supp.2d 427 (D.D.C. 2008) (no advisory committee where membership in expert groups was not fixed, there were only two group meetings, and experts conveyed their opinions regarding their individual areas of expertise with no attempt to achieve consensus)

The Federal Advisory Committee Act

The D.C. Circuit has found that an advisory committee is not “established” by a federal agency where the agency does not itself select the committee’s members

- *Byrd v. U.S. Evtl. Prot. Agency*, 174 F.3d 239, 246 (D.C. Cir. 1999)
- *But see Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 431 (D.C. Cir. 1997) (even if a non-governmental agency forms an advisory committee, that committee will still fall under FACA if the organization forming it is “quasi-public”)

Similarly, the D.C. Circuit has held that “utilized” is a “stringent standard denoting something along the lines of actual management or control of the advisory committee”

- *Wash. Legal Found v. U.S. Sentencing Comm’n*, 17 F.3d 1446, 1451–52 (D.C. Cir. 1994)

The Federal Advisory Committee Act

If an advisory committee subject to FACA fails to adhere to the Act's requirements, a court may invalidate agency action relying on the committee's work product

- *Idaho Wool Growers Ass'n v. Schafer*, 637 F.Supp.2d 868, 889 (D. Idaho 2009) (ordering the Forest Service not to rely on a panel's findings and conclusions with respect to any future agency decisions where panel did not follow FACA's framework)
- *NAACP Legal Def. & Educ. Fund, Inc. v. Barr*, 496 F.Supp.3d 116, 130 (D.D.C. 2020) (ordering the Department of Justice to refrain from publishing any report produced by commission until FACA's requirements were satisfied)
- *Western Org. of Resource Councils v. Bernhardt*, 412 F.Supp.3d 1227 (D. Mont. 2019) (enjoining the Department of the Interior from relying on committee recommendations or work product going forward, where committee was improperly established under FACA)

The Unfunded Mandates Reform Act Exemption from FACA

Subsection 204(a) of the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. § 1534(a), requires each Federal agency to “develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates”

Subsection 204(b), 2 U.S.C. § 1534(b), provides that FACA shall not apply to actions in support of intergovernmental communications where—

(1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and

(2) such meetings are solely for the purposes of exchanging views, information, or advice relating to management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration

The Unfunded Mandates Reform Act Exemption from FACA

Subsection 204(c), 2 U.S.C. § 1534(c), requires the President to issue guidelines and instructions to Federal agencies for appropriate implementation of subsections 204(a) and (b)

The Office of Management and Budget (OMB) issued Memorandum 95-20 (September 21, 1995) as guidance to Federal agencies.

The OMB Memorandum, as an introduction to the “Process for Intergovernmental Consultation” section, states:

- It is important that this intergovernmental consultation process not only achieves meaningful input, but also builds a better understanding among Federal, State, local, and tribal governments. As described in Part II, below, *the process required by the Federal Advisory Committee Act is not to act as a hindrance to full and effective intergovernmental consultation* (emphasis added)

The Unfunded Mandates Reform Act Exemption from FACA

The OMB Memorandum explains that the scope of meetings covered by the exemption should be “construed broadly” to include any meetings called for any purpose relating to intergovernmental responsibilities or administration

Communication with not just elected Heads of Government and their designees is supported by the Senate Report, which explains that Federal agencies “should confer with elected officials and their designated representatives, *as well as with* program and financial officials because program officials clearly are able to offer information and guidance to their Federal counterparts on the likely effectiveness of an Federal regulatory proposal, while financial officials can offer important perspectives on their government’s ability to pay for the mandate”

- Senate Report No. 104-1 (Government Affairs Committee), 104 Cong., 2d Sess., January 11, 1995 at 18; Reprinted in 1995 U.S. Code Cong. & Admin. News at 21 (emphasis added)

The Unfunded Mandates Reform Act Exemption from FACA

A recent decision from the D.C. federal district court, however, has pushed back on the OMB Memorandum's broad construction and found that the Memorandum lacks the force of law. *NAACP Legal Defense & Educational Fund, Inc. v. Barr*, 496 F.Supp.3d 116, 138–40 (D.D.C. 2020)

- The court found that the commission's meetings exceeded the UMRA exemption by "includ[ing] discussions unrelated to the implementation of existing federal programs"
- The court found that the commission's purpose was too broad to fit under the UMRA exemption
- The Court also found that the OMB Memorandum does not have the force of law, and that, accordingly, the Memorandum had been improperly afforded *Chevron* deference in a 2001 decision from the District of Wyoming
 - *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 179 F.Supp.2d 1279 (2001)

Does FACA or the UMRA Exception Apply?

FACA only applies if the United States establishes or utilizes an advisory committee.

If the United States does not establish the committee and appoint its members, then FACA does not apply.

Even if FACA does apply, the UMRA exemption allows more flexibility for consultation with governments, including tribal governments

But the UMRA exemption only applies if FACA applies in the first place

HHS Tribal Consultation Policy

To implement President Clinton's Executive Order 13175 (Nov. 6, 2002), requiring Federal agencies to consult with "tribal officials" in the development of "Federal policies that have tribal implications," HHS adopted a Departmental Tribal Consultation Policy

In 2010, DHHS adopted Addendum 1 to its Tribal Consultation Policy, which governs the establishment of "Joint Federal/Tribal Workgroups and/or Task Forces" to enhance, but not take the place of, tribal consultation

The Addendum explains that joint Federal/tribal workgroups and/or taskforces "offer an enhancement [to tribal consultation] by gathering individuals with extensive knowledge on a particular policy, practice, issue and/or concern to work collaboratively and offer recommendations for consideration by federally recognized Indian tribes and Federal agencies"

HHS Tribal Consultation Policy

The HHS Policy Addendum is clear that these joint Federal/tribal workgroups and task forces “will be [FACA] compliant unless exempt”

- Similarly, under the heading “Participation,” the HHS Policy Addendum provides that “membership of these workgroups shall be in compliance with FACA”

This language assures that, as a matter of HHS policy, joint Federal/tribal workgroups and task forces will be structured so that FACA will apply

This policy decision has major ramifications for HHS consultation with Tribal governments and their representatives

HHS Tribal Consultation Policy

The HHS Policy Addendum imposes additional requirements on tribal governments as a condition for participating in joint Federal/tribal workgroups and task forces under the UMRA exemption

- For example, alternates to the Tribal Leader: (i) must be appointed by written notification to the agency, (ii) are “permitted” to attend a workgroup meeting only when the primary cannot, and (iii) must have the same voting rights as the primary

HHS' FACA and UMRA Exemption FAQs

HHS' Federal Advisory Committee Act FAQs document was originally distributed as a handout on plain stationary with no transmittal document or other indication that it was formally adopted by the HHS or any HHS agency at the Combined Regional Consultation on February 7, 2013

It is unclear what the origin of the FAQs document is, who prepared them, or how they were developed

They have apparently been used, however, to develop protocols for the HHS Secretary's Tribal Advisory Committee (STAC) and some Indian Health Service (IHS) workgroup and task force meetings

The FAQs were apparently updated on March 11, 2019, and have been retitled the "Federal Advisory Committee Act and the UMRA Section 204 Exemption" FAQs

HHS' FACA and UMRA Exemption FAQs

In the FAQs, joint Federal/tribal workgroups and task forces are called “UMRA FACA” committees

According to the FAQs:

- Tribal Leaders cannot sit on a committee as a representative of any entity other than his or her tribe
- Tribal employees, representatives of Washington associations, and special guests of the Tribal Leader may only attend meetings as the designated surrogate of the Tribal Leader

HHS' FACA and UMRA Exemption FAQs

According to the FAQs:

- While members of the public may attend meetings, they must simply watch and not participate in any way
- Technical advisors may only advise a particular workgroup member, and may not sit at the table or speak with other workgroup members
- Technical advisors must give advice in a non-disruptive manner in the form of private counsel to the workgroup member, either communicating discreetly and directly to the member, or away from the group meeting as a whole

HHS' FACA and UMRA Exemption FAQs

The FAQs create an imbalance in government to government discussions between Tribes and the United States

Unlike tribal representatives, federal representatives can bring as many alternates, deputies, technical representatives, and advisors as they like, and all of them can speak and have a seat at the table.

Under the FAQs, tribal representatives may not designate any representative to speak for them without giving up their seat at the table

HHS' FACA and UMRA Exemption FAQs

These conditions are required by the FAQ interpretations of FACA and the UMRA exemption

These HHS policies are designed to ensure that (1) these committees are “established” and “utilized” by the United States so that FACA applies in the first place, so that (2) the conditions of satisfying the UMRA exemptions must be met.

But tribal advisory committees do not have to be structured so that FACA applies.

Need for a Legislative Fix

Tribal advocates have long sought to establish tribal advisory committees so that FACA does not apply in the first place, but HHS has not agreed to do so

The FACA UMRA limitations on tribal advisory committees have tended to restrict the free interchange of ideas and information that is at the heart of tribal consultation

A legislative fix should be enacted to expressly exempt tribal consultation, and federal-tribal advisory committees, taskforces, and workgroups across all federal agencies, from FACA's coverage

Proposed Legislative Language

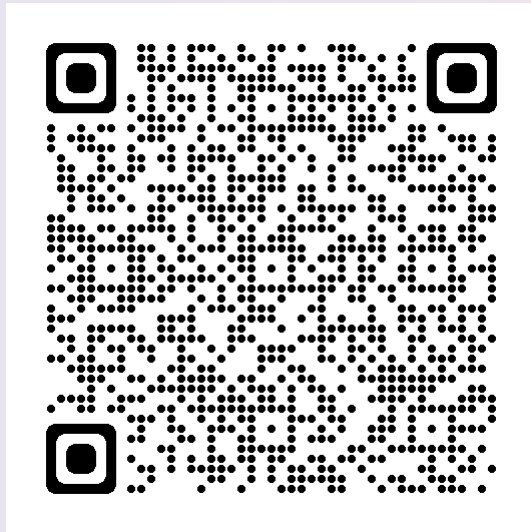
Exemption from the Federal Advisory Committee Act. All federal government-to-government consultation with Indian tribes or tribal organizations, and all federal-tribal advisory committees, task forces, and workgroups under all federal departments, agencies, and commissions, shall not be subject to Sections 1001–1014 of Chapter 5 of the U.S. Code (known as the Federal Advisory Committee Act).

Questions

WORKSHOP SURVEY

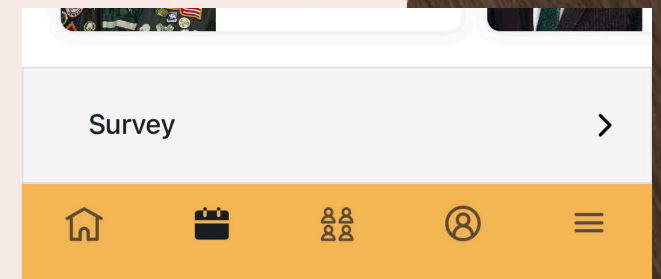
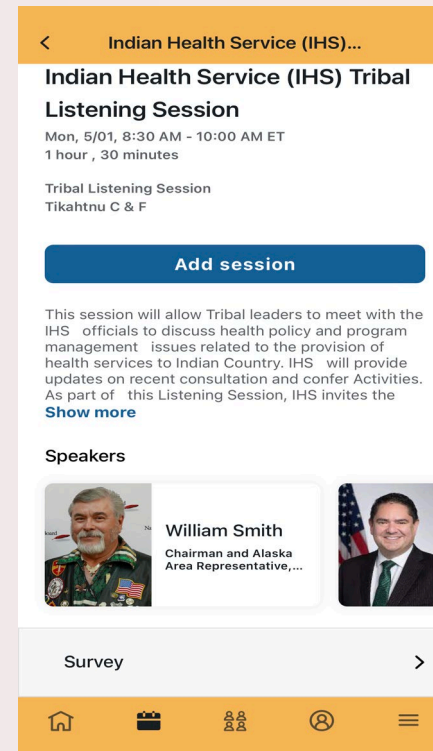
Participants who complete evaluations will be entered into a drawing to win prizes that will be presented at the Closing Plenary Session on Thursday at 3:30 PM.

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