CONSTITUTIONAL LITIGATION: Introductory packet

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in Northeastern University School of Law

TENTATIVE SYLLABUS

CONSTITUTIONAL LITIGATION FALL 2010

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Remember-Because of time constraints, you must attend the first meeting to take this course. We will begin by determining class members, then discuss the organization and goals of the course and then proceed to the assignments

TO BEGIN: PICK UP PACKET ONE AND SYLLABUS ACROSS FROM ROOM 42CG. IF THERE IS A SECOND PACKET SHOULD YOU WILL BE NOTIFIED.

CLASS I: INTRODUCTION TO CON LIT.

a. Reading: Make sure you read the overview of the course and also Amsterdam," An example of Strategic Thinking"; do the First Introductory Assignment, read Public Citizen.

b. Lecture: WHAT THIS COURSE IS ALL ABOUT, INCLUDING INFORMATION ABOUT Case selection/documents/interviews/oral report and paper/consultants, etc.

c. Film: An overview of the Supreme Court

d. Introduction to jurisdiction and certiorari practice (if we have time)

CLASS II: JURISDICTION AND CERTIORARI PRACTICE CONTINUED

a. Do the second assignment

b. Readings for class two will be announced in class one.

c. But do skim: Flemings v. Chaffee and the Spector cert petitions in Packet two

d. Discussion: a theory of certiorari behavior

e. Lecture: the Brief in Opposition

CLASS III: MORE ON STRATEGIC LAWYERING

a. A. "typical" case where lawyer/client choices make a difference. Read the Case of the Spurious

Spuds in Packet Two and answer any Roman numerated questions in the text.

b. The presentation of "facts." Exercise will be handed out.

c. The story of how a state lost an issue but won the litigation war

d. Excerpt from The Staircase

CLASS IV: THE COURT AND LAWYERING FOR SOCIAL CHANGE

a. Openings (handout will be distributed)

b. Interlude: Orders of the Court

c. Meltsner on impact litigation, in materials

d. Discussion: Role in a democracy

e. Lecture: Amicus briefs; readings TBA

CLASS V: DEPENDS ON STUDENT REPORT SCHEDULE

a. LAWRENCE V. TEXAS. An exploration of the variables involved in Supreme Court lawmaking. (Materials will be distributed.)

c. Oral advocacy in the courts

d. Readings TBA

CLASS VI: Content TBA as well as Individual conferences schedule

SYLLABUS SUBJECT TO CHANGE.

CONSTITUTIONAL LITIGATION WILL BE TAUGHT IN THE FALL QUARTER

NB—ONLY STUDENTS WHO ATTEND THE FIRST CLASS MEETING ARE ELIGIBLE TO TAKE THIS COURSE

OVERVIEW OF THE COURSE

The course will be divided in two parts. During Part I, roughly the first half of the quarter, we will look at several problems and cases in some detail through the eyes of the lawyers litigating them. Our goal will be to identify common institutional, strategic and tactical issues that confront those wishing to litigate constitutional questions. We will also spend some time considering the jurisdiction and workings of the United States Supreme Court.

During Part II, each student will give an oral report on the case he or she has chosen to study. No less than one week prior to each report, a student should assign or distribute those cases, or other materials, which he or she wishes the group to read in order to prepare for the report. The presenting student should provide the rest of the class with a short list of questions, the answers to which will be the focus of discussion. Oral reports (and discussions) should take no more than one to one and a half hours.

The report (and final paper) should be a critique of the way in which several of the constitutional and other issues, latent or patent in a legal controversy, were diagnosed and treated by the lawyers and parties. Choose issues of significance that interest you; do not attempt to cover everything - you don't have the time. Basic materials for the report and the paper will be the record and briefs in the case forming the subject of the study, together with related cases and whatever other sources, including interviews, which may be enlightening. The starting point of the case study must be the purpose and aims of the parties. If a criminal case, is the individual defendant the government's true quarry, or is he merely the guinea pig in a big experiment? Is

the defendant only trying to stay out of jail or does he also want to change the law? If a civil suit, what are the ultimate stakes? Why were particular issues framed as they were? Why was litigation the course chosen? Why were certain parties sued and a particular court selected? Such factors must be borne in mind in observing whether the parties and their lawyers spotted, overlooked, played down, or magnified the constitutional issues involved in the controversy.

As a rule, the pleadings will be of great if not crucial significance in identifying these and related questions. For example, was the indictment or complaint so framed as to present or avoid the constitutional issues in the manner most advantageous to the moving party? Was the forum shrewdly chosen? Were there procedural alternative that were overlooked or not wisely evaluated? How did the defendant react in his plea, answer, cross-action or motions, as the case may be, to highlight or mute the constitutional issues? You will be asked to trace the handling of the constitutional and related legal issues through the course of the litigation, from the pre-trial stage to ultimate appellate presentation. Note, however, that given the limited time available you must deal concisely with chronology. Also, let me reiterate that you will not have time to deal with all the strategic and tactical decisions that relate to litigation of the constitutional issues. You will have to limit the number of questions considered and focus on the factors you regard as most significant. By no means ignore the substantive legal problems, but go into them only as deeply as is necessary to illuminate the strategic and tactical questions of advocacy on *which you have* chosen to focus. To use reporting time effectively, you will have to assume seminar members are familiar with the cases and other materials you have assigned.

Where courses of action other than those followed by the parties are discussed, be as specific as possible - frame the question or state the point much as you would if you were actually conducting the litigation. However, don't scratch around for alternatives at the expense of other

aspects of the study- after all, the lawyers for the parties may have known their business.

A significant aspect of the process of litigating constitutional issues is oral persuasion - of judges, administrators, one's adversary (when there are issues susceptible to negotiation) and the public at large. The content of a solid constitutional argument may appear even more forceful if it is presented in an organized, concise and lively manner. Part of the learning agenda of the course is to give each student an opportunity for the development of oral communication skills. In order to facilitate work on these issues, each member of the course will meet with me for at least one-half hour prior to the oral report at which time we will discuss the organization and structure of his or her presentation. Make an appointment at your convenience. Additionally, each member of the course will choose a partner whose role is to be a communications consultant for the student prior to his or her presentation and to assist the student in considering how best to use the one to one and one-half hours available for reporting. The manner in which a partnership chooses to prepare is up to its members. You can meet as often or as little as you like, but as a partnership you must consider the following question: how can we use the availability of a colleague to assist in the preparation of the oral presentation? A small portion of time available for each paper may be devoted to discussion of the manner in which the reporting student and his or her consultant approached this task.

The oral report should be thought of as a work in progress and you should feel free to use the seminal as a way to clarify your hypotheses and to obtain useful feedback. The paper QUALIFIES FOR WRITING CREDIT and should build on what you have learned in the oral presentation as well as on suggested research.

CONSTITUTION LITIGATION

FIRST ASSIGNMENT

Prof. Michael Meltsner

For our first assignment, think back over the cases you've read in previous classes or those you've learned about while on coop or even read or heard about from the media to respond to the following assignment:

Be prepared to describe briefly at our first meeting a strategy or tactic employed by a litigator to increase his or her client's chances of success in court. Give a very short report on the setting, identify the strategy or tactic and tell if you know whether it was successful.

You needn't know the full story of the case you are relying on and you needn't hand in your answer.

Remember that because of the shortness of the quarter, it is necessary to attend the first class in order to register for this course.

The syllabus for this course is available outside Room 36 Cargill.

"An Example of Strategic Thinking," (From, Liebman), Federal Habeas Corpus Practice and Procedure (1988)

FOREWORD

Too often, federal habeas corpus is a beguiling dream of freedom to prisoners, a procedural nightmare to them and their lawyers.

By expanding the reach of the writ and of the constitutional guarantees that it enforces, Earl Warren's Supreme Court made it a vital, functioning part of the administration of justice in state criminal cases. In counteraction, the Burger and Rehnquist Courts have expanded and elaborated doctrines such as *exhaustion* and *procedural default* that impede the habeas petitioner's path to an adjudication on the merits. The treasure at the heart of the labyrinth is still there for some petitioners, but the mazes that have to be threaded to get at it are now exceedingly tortuous.

Professor James Liebman's book provides a masterful guide. Encyclopedic in its coverage of the procedural issues that an applicant for federal habeas corpus may encounter, it analyzes the issues incisively, warns of pitfalls to be avoided, and suggests particularly creative ways to get around some of the worst of them.

Jim Liebman learned his trade as a practicing litigator, a lawyer for death-row inmates. He knows the tricky problems of federal habeas practice from experience. Since becoming a law teacher, he has no longer had to spend the hours between midnight and 8:00 a.m. preparing emergency applications for stays of execution, and has put the time to good use systematizing and deepening his study of the habeas field. The result, this volume, exhibits an extraordinary combination of the best features of an academic treatise and a practitioner's manual.

It will richly reward reading through, if you have the time. Its pages contain some of the most trenchant systematic analysis of procedural issues in postconviction litigation you can find anywhere. But it is also written and organized so that, if you have a particular problem and know what it is, you can find the best available answer to the problem quickly by going directly to the sections that deal with that problem. Even more important, its excellent organization will help you to identify the problems that you have but do not know about or do not know the doctrinal name for, and to avoid trouble instead of having to dig yourself out of trouble after it arises.

* * *

If you have read this far, you probably did not start with my own presumption that the forewords to most books are not worth reading. I'll keep this one short and honor the genius of Jim's book by trying to make the foreword useful. I want to offer a couple of suggestions about ways for petitioners' lawyers to increase their chances of securing federal habeas relief in the face of a federal judiciary that is increasingly unsympathetic to criminal convicts and their claims.

It is no secret that many of the judges appointed by President Reagan, and doubtless those who will be appointed by his successor, were or will be chosen in part because they hold views that make them unreceptive to claims of

constitutional violations in the criminal process. These judges are particularly likely to be averse to claims that, if upheld, may pave the way to relief for any large number of convicts.

The difference between such judges and at least some judges of preceding generations can be explained by various conceptual models. The most idealistic model posits two poles of judicial thinking:

(1) a basic belief that the ordinary criminal procedures established by legislatures and by the habitual practices of prosecutors and trial courts are a fitting norm for measuring the "process that is due" under the due process clause of the federal Constitution; that due process is all a criminal defendant is entitled to (*see, e.g., Strickland v. Washington,* the 1984 Supreme Court decision incorporating the fourteenth amendment into the sixth);* and that the role of courts charged with enforcing constitutional rights is therefore merely to remedy isolated instances of egregious deviation from prevailing procedural norms; and

(2) a basic belief that standards of constitutional justice are not measured by the practices that legislatures, prosecutors and trial courts are prone to accept at any given time; that an important purpose of the Constitution's procedural guarantees in criminal cases was to curb the expectable propensity of all agencies of popular government to deal summarily and harshly with unpopular people, such as most criminal defendants are; and that the role of courts charged with enforcing constitutional rights will therefore often call for invalidating the accepted or "normal" procedures of the times.

Under this conceptualization, more federal judges who hold views closer to the first pole are being appointed today than under previous recent Administrations.

A more cynical model posits that judges are thoroughly result-oriented, that the true polarity is between judges who want to make it easier to punish criminally accused persons and those who want to make it harder. This difference in aims may — although it need not — reflect the judges' differing views as to whether crime or governmental oppression is the greater danger. In any event, more judges of the make-it-easier school are being appointed these days.

For practical purposes, one does not have to choose between the two conceptual models, for the same reason that one does not have to choose between a philosophy that posits a Morally Indifferent Cosmos and one that posits Good, Evil and Sin. Both models explain the observed phenomenon — the existence of human misery — equally well. However you look at it, the bald fact is that habeas petitioners' lawyers now and in the near future are facing an increasing lot of judges who will powerfully want to avoid making any rulings that they think may open the door to "general gaol delivery."

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* I won't encumber this foreword with citations. All cases I mention are cited by Professor Liebman or in my book which Professor Liebman cites in footnote 1 of Appendix C, and they can be found in the Table of Authorities of one book or the other.

Thus, winning a habeas case for the petitioner becomes more and more a matter of developing a bolt-hole theory of the case: a narrow argument through which your individual client can be slipped away to freedom, with a door somewhere in the passageway that can be slammed shut in the faces of all other prisoners seeking to follow.* With many judges, it is at least as important for the petitioner's counsel to construct the door solidly as to construct the passageway solidly. Unless the judge is satisfied that s/he can give relief *in this case* with no (or very little) prospect that other accused or convicted persons will escape punishment, the judge will simply not rule in your favor.

This reality requires that petitioners' lawyers be especially meticulous and creative in thinking through the possible interactions between the various doctrines governing federal habeas corpus procedure — the subject of the present book — and the various possible formulations of their clients' substantive constitutional claims. Frequently, it is possible to use the interaction as a way of narrowing the bolt-hole and thereby increasing one's chances of pulling one's client through.

Two recent examples make the point:

In *Amadeo v. Zant*, a condemned inmate's attorneys discovered after trial that his grand and petit juries had been selected through procedures designed to minimize the number of blacks and women permitted to serve. Instructions as to how to do this had been clandestinely conveyed by the prosecutor to the jury commissioners, in such a manner as to permit the inference that the prosecutor and the commissioners had connived in a scheme not only to keep blacks and women off juries but to conceal factual information that would have enabled defendants to challenge the practice. On these facts, federal constitutional claims for postconviction relief could be asserted on either or both of two theories. The prosecutor's deliberate concealment of information needed to support an important defensive contention could be attacked as a violation of due process under the *Napue/Giglio/Brady* doctrine. Alternatively, the substantive constitutional claim could be couched as a violation of the defendant's sixth and fourteenth amendment rights against the systematic exclusion of blacks and women from his juries, and the prosecutor's concealment could be treated as "cause" for entertaining the systematic-exclusion claim on federal habeas corpus despite the defendant's failure to challenge the jury before trial, under the "cause and prejudice" doctrine of *Wainwright v. Sykes* (section 24.5 herein). The latter formulation had the advantage of requiring virtually no extension of existing legal doctrines in defendants' favor, plus the benefit that the judges most likely to resist such extensions are also likely to believe that systematic-exclusion practices are ancient history and

* This foreword is not the place for me to make my apologies to my fellow law reform advocates of the 60's and 70's for my apparent recusancy, or to attempt the justifications that can be offered to younger lawyers and law students for following a career in litigation despite the fact that, for the most part, law reform through litigation is dead for a generation to come. My present assignment calls for dealing with these important matters as briefly and unfairly as Samuel Johnson dealt with the philosopher who had written that he accepted the Universe. Said Johnson: "He'd better."

that the enforcement of challenges to them has relatively little "general gaol delivery" potential nowadays. Making *both* claims together had the added virtue, once the case reached an appellate court, that judges of this mind were more likely to vote for the defendant on the systematic-exclusion claim if, by doing so, they could avoid reaching the prosecutorial-concealment claim and thus the risk that the particularly egregious prosecutorial behavior in *Amadeo* might persuade their colleagues to extend the *Napue* doctrine to give Amadeo relief. Amadeo's lawyers chose to make both claims, and the jury-exclusion claim prevailed in the Supreme Court.

Ford v. Wainwright presented a powerful record that a condemned inmate had become insane after his conviction. The Governor of Florida proposed to execute him anyway, rejecting his lawyers' evidence of his insanity after executive proceedings that had none of the attributes of a fair hearing. Here too the constitutional claim might have been cast in either or both of two ways: (1) as an argument that due process requires fair procedures for determining the sanity of a condemned inmate who asserts that s/he is mentally incompetent to be executed (even if the right not to be executed while mentally incompetent is purely a matter of state law); and (2) as an argument that there is a substantive eighth and fourteenth amendment right not to be executed while insane; that a federal habeas corpus court is obliged by *Townsend v. Sain* and 28 U.S.C. § 2254(d) to make an independent determination of sanity for this purpose unless the State employs full and fair procedures to determine the facts bearing upon a death-row inmate's mental competency (*see* sections 20.3, 28.1-28.2 herein); and that the Florida Governor's procedures in *Ford* were neither full nor fair. Here, however, the decision whether to make both forms of argument was quite complicated. Among other concerns, there was a risk that the first argument, while easier to win because narrower in its implications for other cases, would commend itself to the courts as a compromise but leave Ford exposed to execution after a second Governor's hearing, employing improved procedures, produced the same predictable determination by partisan state officials that Ford was mentally sound as a bell. Ford's lawyers did eventually choose to make both arguments but refined them to emphasize that a competency hearing conducted by partisan executive officials could not meet either due process requirements or the *Townsend*-§ 2254 standards requiring federal habeas corpus courts to defer to state factfinding made pursuant to "full and fair" hearing procedures. In this form, the second constitutional argument was probably narrower in its implications than the first, and it prevailed in the Supreme Court.

The necessity for presenting one's case so as to minimize the potential precedential effect of winning it calls for a positive attitude toward such doctrines as exhaustion (sections 5.1-5.3, 23.1 herein), procedural default (sections 9.4, 24.1-24.6 herein) and delay (section 23.2 herein). Instead of viewing them solely as obstacles to be overcome, petitioners' counsel should also look at them as devices for persuading a judge that s/he can give counsel's client relief without much risk that other inmates will get it too. For example, in *Hankerson v. North Carolina,* the Supreme Court was willing to invalidate a long-settled state procedure in part because it was convinced, and could sug-

gest in its opinion, that procedural-default rules and other relief-avoidance doctrines would enable the courts to deny most prisoners the benefit of the favorable ruling that Hankerson won. When counsel is representing a client with a constitutional claim that was unmistakably well preserved in the prior state-court proceedings, s/he will often do well to find out (by talking with public-defender attorneys and other knowledgeable criminal practitioners, as well as by reading the state reports) whether the same claim and indistinguishably similar claims have been made frequently or rarely by other criminal defendants, so as to be able to tell a federal habeas corpus judge who asks about the implications of counsel's contention that "so far as I have been able to find out, Your Honor, this is the only case [*or* only one of three cases] ever to raise the claim in the state courts, and of course it is not the sort of claim that would be available to inmates who had not raised it in the state courts." This point should be coupled, of course, with the argument that counsel's case is as unique on its facts as counsel can honestly portray it as being, so that the precedential implications of a favorable decision on the merits would be very scant in any event.

Counsel should also consider the possibility of casting his or her constitutional argument itself in terms that build procedural bars into the substantive right which s/he is claiming. For example, in *Estelle v. Williams*, the Supreme Court held that a defendant who requests to be tried in civilian clothes rather than in jail garb has a constitutional right to the honoring of this request. Instead of treating the failure to make a request as a ground for procedural default, the Court treated a request as the precondition of attachment of the constitutional right. Couching a client's constitutional claims in such a form is particularly important where the doctrines of exhaustion, procedural default, and delay would *not* bar other criminal defendants from making the same or indistinguishably similar claims in federal habeas corpus despite their failure to preserve them in the state courts. Professor Liebman's explications of the doctrines should be consulted for this purpose as well as for their more obvious utility in salvaging a client's ill-preserved claims.

* * *

I recognize that much of what I have written here is painfully redolent of the old military tale. The Lieutenant bangs into the Colonel's office shouting, "Colonel! Colonel! We have got a helluva problem on our hands." The Colonel snaps back: "In this army, Lieutenant, we do not have problems. We have only opportunities." The Lieutenant: "Yes, Sir! And, oh boy, have we got one helluva magnificent opportunity right now."

The federal judiciary is coming increasingly to offer habeas petitioners' counsel a magnificent opportunity. With Professor Liebman's brilliant guidance, you will sometimes be able to grasp it.

Anthony G. Amsterdam

December 5, 1988

LEXSEE 109 s ct 2558

PUBLIC CITIZEN v. UNITED STATES DEPARTMENT OF JUSTICE ET AL.

No. 88-429

SUPREME COURT OF THE UNITED STATES

491 U.S. 440; 109 S. Ct. 2558; 1989 U.S. LEXIS 3119; 105 L. Ed. 2d 377; 57 U.S.L.W. 4793

April 17, 1989, Argued
June 21, 1989, Decided *

* Together with No. 88-494, *Washington Legal Foundation* v. *United States Department of Justice et al.*, also on appeal from the same court.

JUDGES:

Brennan, J., delivered the opinion of the Court, in which [***7] White, Marshall, Blackmun, and Stevens, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment, in which Rehnquist, C. J., and O'Connor, J., joined, post, p. 467. Scalia, J., took no part in the consideration or decision of the cases.

OPINIONBY:

BRENNAN

OPINION:

[*443] [**2561] JUSTICE BRENNAN delivered the opinion of the Court.

The Department of Justice regularly seeks advice from the American Bar Association's Standing Committee on Federal Judiciary regarding potential nominees for federal judgeships. The question before us is whether the Federal Advisory Committee Act (FACA), 86 Stat. 770, as amended, *5 U. S. C. App.* § *1 et seq.* (1982 ed. and Supp. V), applies to these consultations and, if it does, whether its application interferes unconstitutionally with the President's prerogative under Article II to nominate and appoint officers of the United States; violates the doctrine of separation of powers; or unduly infringes the First Amendment right of members of the American Bar Association to freedom of association and expression. We hold that FACA does not apply to this special advisory relationship. We therefore do not reach [***8] the constitutional questions presented.

I

A

The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" Supreme Court Justices and, as established by Congress, other federal judges. Art. II, § 2, cl. 2. Since 1952 the Presidents [illegible]

of Justice, has requested advice from the American Bar Association's Standing Committee on Federal Judiciary (ABA Committee) in making such nominations.

The American Bar Association is a private voluntary professional association of approximately 343,000 attorneys. It has several working committees, among them the advisory body whose work is at issue here. The ABA Committee consists of 14 persons belonging to, and chosen by, the American Bar Association. Each of the 12 federal judicial Circuits (not including the Federal Circuit) has one representative on the ABA Committee, except for the Ninth Circuit, which has [*444] two; in addition, one member is chosen at large. The ABA Committee receives no federal funds. It does not recommend persons for appointment to the federal bench of its own initiative.

Prior to announcing the names of nominees for judgeships [***9] on the courts of appeals, the district courts, or the Court of International Trade, the President, acting through the Department of Justice, routinely requests a potential nominee to complete a questionnaire drawn up by the ABA Committee and to submit it to the Assistant Attorney General for the Office of Legal Policy, to the chair of the ABA Committee, and to the committee member (usually the representative of the relevant judicial Circuit) charged with investigating the nominee. See American Bar Association Standing Committee on Federal Judiciary, What It Is and How It Works (1983), reprinted in App. 43-49; Brief for Federal Appellee 2. n1 The potential nominee's answers [**2562] and the referral of his or her name to the ABA Committee are kept confidential. The committee member conducting the investigation then reviews the legal writings of the potential nominee, interviews judges, legal scholars, and other attorneys regarding the potential nominee's qualifications, and discusses the matter confidentially with representatives of various professional organizations and other groups. The committee member also interviews the potential nominee, sometimes with other committee members [***10] in attendance.

n1 The Justice Department does not ordinarily furnish the names of potential Supreme Court nominees to the ABA Committee for evaluation prior to their nomination, although in some instances the President has done so. See Brief for Federal Appellee 4-5.

Following the initial investigation, the committee representative prepares for the chair an informal written report describing the potential nominee's background, summarizing all interviews, assessing the candidate's ble ratings: "exceptionally well qualified," "well qualified," "qualified," or "not qualified." n2 [*445] The chair then makes a confidential informal report to the Attorney General's Office. The chair's report discloses the substance of the committee representative's report to the chair, without revealing the identity of persons who were interviewed, and indicates the evaluation the potential nominee is likely to receive if the Department of Justice requests a formal report.

n2 The ratings now used in connection with Supreme Court nominees are "well qualified," "not opposed," and "not qualified." See American Bar Association Standing Committee on Federal Judiciary, What It Is and How It Works (1983), reprinted in App. 50.

[***11]

If the Justice Department does request a formal report, the committee representative prepares a draft and sends copies to other members of the ABA Committee, together with relevant materials. A vote is then taken and a final report approved. The ABA Committee conveys its rating — though not its final report — in confidence to the Department of Justice, accompanied by a statement whether its rating was supported by all committee members, or whether it only commanded a majority or substantial majority of the ABA Committee. After considering the rating and other information the President and his advisers have assembled, including a report by the Federal Bureau of Investigation and additional interviews conducted by the President's judicial selection committee, the President then decides whether to nominate the candidate. If the candidate is in fact nominated, the ABA Committee's rating, but not its report, is made public at the request of the Senate Judiciary Committee. n3

n3 The Senate regularly requests the ABA Committee to rate Supreme Court nominees if the Justice Department has not already sought the ABA Committee's opinion. As with nominees for other federal judgeships, the ABA Committee's rating is made public at confirmation hearings before the Senate Judiciary Committee.

[***12]

B

FACA was born of a desire to assess the need for the "numerous committees, boards, commissions, councils, and similar [*446] groups which have been established to advise officers and agencies in the executive branch of the Federal Government." § 2(a), as set forth in 5

U. S. C. App. § 2(a). n4 Its purpose was to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and [**2563] cost; and that their work be exclusively advisory in nature. § 2(b).

n4 Federal advisory committees are legion. During fiscal year 1988, 58 federal departments sponsored 1,020 advisory committees. General Services Administration, Seventeenth Annual Report of the President on Federal Advisory Committees 1 (1988). Over 3,500 meetings were held, and close to 1,000 reports were issued. *Ibid.* Costs for fiscal year 1988 totaled over $92 million, roughly half of which was spent on federal staff support. *Id.*, at 3.

[***13]

To attain these objectives, FACA directs the Director of the Office of Management and Budget and agency heads to establish various administrative guidelines and management controls for advisory committees. It also imposes a number of requirements on advisory groups. For example, FACA requires that each advisory committee file a charter, § 9(c), and keep detailed minutes of its meetings. § 10(c). Those meetings must be chaired or attended by an officer or employee of the Federal Government who is authorized to adjourn any meeting when he or she deems its adjournment in the public interest. § 10(e). FACA also requires advisory committees to provide advance notice of their meetings and to open them to the public, § 10(a), unless the President or the agency head to which an advisory committee reports determines that it may be closed to the public in accordance with the Government in the Sunshine Act, *5 U. S. C.* § *552b*(c). § 10(d). In addition, FACA stipulates that advisory committee minutes, records, and reports be made available [*447] to the public, provided they do not fall within one of the Freedom of Information Act's exemptions, [***14] see *5 U. S. C.* § *552*, and the Government does not choose to withhold them. § 10(b). Advisory committees established by legislation or created by the President or other federal officials must also be "fairly balanced in terms of the points of view represented and the functions" they perform. §§ 5(b)(2), (c). Their existence is limited to two years, unless specifically exempted by the entity establishing them. § 14(a)(1).

C

In October 1986, appellant Washington Legal Foundation (WLF) brought suit against the Department of Justice after the ABA Committee refused WLF's request for the names of potential judicial nominees it was considering and for the ABA Committee's reports and minutes of its meetings. n5 WLF asked the District Court for the District of Columbia to declare the ABA Committee an "advisory committee" as FACA defines that term. WLF further sought an injunction ordering the Justice Department to cease utilizing the ABA Committee as an advisory committee until it complied with FACA. In particular, WLF contended that the ABA Committee must file a charter, afford notice of its meetings, open those meetings to the public, and make [***15] its minutes, records, and reports available for public inspection and copying. See WLF Complaint, App. 5-11. The Justice Department moved to dismiss, arguing that the ABA Committee did not fall within FACA's definition of "advisory committee" [*448] and that, if it did, FACA would violate the constitutional doctrine of separation of powers.

Appellant Public Citizen then moved successfully to intervene as a party plaintiff. Like WLF, Public [***16] Citizen requested a declaration that the Justice Department's utilization of the ABA Committee is covered by FACA and an order enjoining the Justice Department to comply with FACA's requirements.

The District Court dismissed the action following oral argument. *691 F. Supp. 483 (1988).* The court held that the Justice Department's use of the ABA Committee is subject to FACA's strictures, but that "FACA cannot constitutionally be applied to the ABA Committee because to do so would violate the express separation of nomination and consent powers set forth in Article II of the Constitution and because no overriding congressional interest in applying FACA to the ABA Committee has been demonstrated." *Id., at 486.* Congress' role in choosing judges "is limited to [**2564] the Senate's advice and consent function," the court concluded; "the purposes of FACA are served through the public confir-

mation process and any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality and freedom of consultation in selecting judicial nominees." *Id., at 496.* We noted [***17] probable jurisdiction, *488 U.S. 979 (1988),* and now affirm on statutory grounds, making consideration of the relevant constitutional issues unnecessary.

III

Section 3(2) of FACA, as set forth in *5 U. S. C. App.* § 3(2), defines "advisory committee" as follows:

"For the purpose of this Act —

...

"(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 (hereafter in this paragraph referred to as 'committee'), which is —

"(A) established by statute or reorganization plan, or

"(B) established or utilized by the President, or

"(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes [*452] (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government."

[**2566] A

There is no doubt that the Executive makes use of the ABA Committee, and thus "utilizes" it in one common sense of the term. As the District Court recognized, however, "reliance on the plain language of FACA alone is not entirely satisfactory." *691 F. Supp., at 488.* "Utilize" is a woolly verb, its contours left undefined by the statute itself. Read unqualifiedly, it would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice. n8 We are convinced that Congress did not intend that result. A nodding acquaintance with FACA's purposes, [*453] as manifested by its legislative history and as recited in § 2 of the Act, reveals that it cannot have been Congress' intention, for example, [***24] to require the filing of a charter, the presence of a controlling federal official, and detailed minutes any time the President seeks the views of the National Association for the Advancement of Colored People (NAACP) before nominating Commissioners to the Equal Employment Opportunity Commission, or asks the leaders of an American Legion Post he is visiting for the organization's opinion on some aspect of military policy.

[***25]

Nor can Congress have meant — as a straightforward reading of "utilize" would appear to require — that all of FACA's restrictions apply if a President consults with his own political party before picking his Cabinet. It was unmistakably *not* Congress' intention to intrude on a political party's freedom to conduct its affairs as it chooses, [redacted] or its ability to advise elected officials who belong to that party.

Where the literal reading of a statutory term would "compel an odd result," *Green v. Bock Laundry Machine Co., 490 U.S. 504, 509 (1989)*, we must search for other evidence of congressional intent to lend the term its proper scope. [redacted] "The circumstances of the enactment of particular legislation," for example, "may persuade a court that Congress did not intend words of common meaning to have their literal effect." [redacted] the words used, even [redacted] and ordinary, the most reliable, source of [redacted] of any [redacted] indexes of a [redacted] to make a fortress out of the dictionary. [redacted] at to remember that statutes always have some [redacted] object to accomplish, [redacted] sympathetic and imaginative discovery is the surest guide to the [redacted] [***28] *Cabell v. Markham, 148 F. 2d 737, 739* (CA2), aff'd, *326 U.S. 404 (1945)*. [redacted] text for guidance [redacted] proper when the result it appears [redacted] where it seems inconsistent with Congress' [redacted] the plain-meaning [redacted] of experience than a rule of law, and does not preclude [redacted] of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928)* (Holmes, J.). See also *United States v. American Trucking Assns., Inc., 310 U.S. [redacted] 544 (1940)* ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly [redacted] which forbids [redacted] however clear the words may appear on" [redacted] examined).

Consideration of FACA's purposes and origins in determining whether the term "utilized" was meant to apply to the Justice Department's use of the ABA Committee is particularly appropriate here, given the importance we have consistently attached to [***29] interpreting statutes to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction. See *infra*, at 465-467. It is therefore imperative that we consider indicators of congressional intent in addition to the statutory language before concluding that FACA was meant to cover the ABA Committee's provision of advice to the Justice Department in connec-

jtion with judicial nominations.

B

Close attention to FACA's history is helpful, for FACA did not flare on the legislative scene with the suddenness of a meteor. Similar attempts to regulate the Federal Government's use of advisory committees were common during the 20 years preceding FACA's enactment. S[redacted] An understanding of those efforts is essential to ascertain the intended scope of the term "utilize."

In 1950, the Justice Department issued guidelines for the operation of federal advisory committees in order to forestall their facilitation of anticompetitive behavior by bringing industry leaders together with Government approval. See Hearings on WOC's [***30] [Without Compensation Government employees] and Government Advisory [**2568] Groups before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., pt. 1, pp. 586-587 (1955) (reprinting guidelines). Several years later, after the House Committee on Government Operations found that the Justice Department's guidelines were frequently ignored, Representative Fascell sponsored a bill that would have accorded the guidelines legal status. H. R. 7390, 85th Cong., 1st Sess. (1957). Although the bill would have required agencies to report to Congress on their use of advisory committees and would have subjected advisory committees to various controls, it apparently would not have imposed any requirements on private groups, not established by the Federal Government, whose advice was sought by the Executive. See H. R. Rep. No. 576, 85th Cong., 1st Sess., 5-7 (1957); 103 Cong. Rec. 11252 (1957) (remarks of Rep. Fascell and Rep. Vorys).

Despite Congress' failure to enact the bill, the Bureau of the Budget issued a directive in 1962 incorporating the bulk of the guidelines. See Perritt & Wilkinson, Open Advisory Committees and the Political Process: The Federal Advisory [***31] Committee Act After Two Years, *63 Geo. L. J. 725, 731 (1975)*. Later that year, President Kennedy issued Executive Order No. 11007, 3 CFR 573 (1959-1963 Comp.), which governed the functioning of advisory committees until FACA's passage. Executive Order No. 11007 is the probable source of the term "utilize" as later employed in FACA. The Order applied to advisory committees "formed by a [*457] department or agency of the Government in the interest of obtaining advice or recommendations," or "not formed by a department or agency, but only during any period when it is being *utilized* by a department advisory committee." § 2(a) (emphasis added). To a large extent, FACA adopted wholesale the provisions of Executive Order No. 11007. For example, like FACA, Executive Order No. 11007 stipulated that no advisory committee be formed or utilized unless authorized by law or determined as a matter of formal record by an agency head to be in the public interest, § 3; that all advisory committee meetings be held in the presence of a Government employee empowered to adjourn the meetings whenever he or she considered [***32] adjournment to be in the public interest, § 6(b); that meetings only occur at the call of, or with the advance approval of, a federal employee, § 6(a); that minutes be kept of the meetings, §§ 6(c), (d); and that committees terminate after two years unless a statute or an agency head decreed otherwise, § 8.

There is no indication, however, that Executive Order No. 11007 was intended to apply to the Justice Department's consultations with the ABA Committee. Neither President Kennedy, who issued the Order, nor President Johnson, nor President Nixon apparently deemed the ABA Committee to be "utilized" by the Department of Justice in the relevant sense of that term. Notwithstanding the ABA Committee's highly visible role in advising the Justice Department regarding potential judicial nominees, and notwithstanding the fact that the Order's requirements were established by the Executive itself rather than Congress, no President or Justice Department official applied them to the ABA Committee. As an entity formed privately, rather than at the Federal Government's prompting, to render confidential advice with respect to the President's constitutionally specified power to nominate [***33] federal judges — an entity in receipt of no federal funds and not amenable to the strict management by [*458] agency officials envisaged by Executive Order No. 11007 — the ABA Committee cannot easily be said to have been "utilized by a department or agency in the same manner as a Government-formed advisory committee." That the Executive apparently did not consider the ABA Committee's activity within the terms of its own Executive Order is therefore unsurprising.

Although FACA's legislative history evinces an intent to widen the scope of Executive Order No. 11007's definition of "advisory committee" by including "Presidential [**2569] advisory committees," which lay beyond the reach of Executive Order No. 11007, n10 see H. R. Rep. No. 91-1731, pp. 9-10 (1970); H. R. Rep. No. 92-1017, p. 4 (1972); S. Rep. No. 92-1098, pp. 3-5, 7 (1972), as well as to augment the restrictions applicable [*459] to advisory committees covered by the statute, there is scant reason to believe that Congress

FACA's principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful [***34] expenditures on them. That purpose could be accomplished, however, without expanding the coverage of Executive Order No. 11007 to include privately organized committees that received no federal funds. Indeed, there is considerable evidence that Congress sought nothing more than stricter compliance with reporting and other requirements — which *were* made more stringent — by advisory committees already covered by the Order and similar treatment of a small class of publicly funded groups created by the President.

In sum, a literalistic reading of § 3(2) would bring the Justice Department's advisory relationship with the ABA Committee within FACA's terms, particularly given FACA's objective of opening many advisory relationships to public scrutiny except in certain narrowly defined situations. n12 A [*464] [**2572] literalistic reading, however, would catch far more groups and consulting arrangements than Congress could conceivably have intended. And the careful review which this interpretive difficulty warrants of earlier efforts to regulate [*465] federal advisory committees and the circumstances surrounding FACA's adoption strongly suggests that FACA's definition of "advisory committee" was not meant to encompass the ABA Committee's relationship with the Justice Department. That relationship [***42] seems not to have been within the contemplation of Executive Order No. 11007. And FACA's legislative history does not display an intent to widen the Order's application to encircle it. Weighing the deliberately inclusive statutory language against other evidence of congressional intent, it seems to us a close question whether FACA should be construed to apply to the ABA Committee, although on the whole we are fairly confident it should not. There is, however, one additional consideration which, in our view, tips the balance decisively against FACA's application.

C

"When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible [*466] by which the question may be avoided." *Crowell v. Benson, 285 U.S. 22, 62 (1932)* (footnote collecting citations omitted). It has long been an axiom of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to [**2573] avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988)*. See also *St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500-501 (1979); Machinists v. Street, 367 U.S. 740, 749-750 (1961)*. This approach, we said [***44] recently, "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Edward J. DeBartolo Corp., supra, at 575*. Our reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government. See *American Foreign Service Assn. v. Garfinkel, 490 U.S. 153, 161 (1989) (per curiam)*. Hence, we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.

That construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties is undeniable. The District Court declared FACA unconstitutional insofar as it applied to those consultations, because it concluded that FACA, so applied, infringed unduly on the President's Article II power to nominate federal judges and violated the doctrine of separation of powers. n13 Whether or not [***45] the court's conclusion [*467] was correct, there is no gainsaying the seriousness of these constitutional challenges.