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The Unfulfilled Promise of the Federal Advisory Committee Act: Ensuring the Transparency of Citizen Advisory Committees Utilized by Federal Agencies

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The Federal Advisory Committee Act (FACA) was passed into law in 1972 to provide guarantees of transparency, balance, and efficiency when the president, a federal officer, or a federal agency uses a committee of private citizens that functions in an advisory capacity. Since the passage of FACA, several court decisions have drastically limited the scope of FACA's applicability through overly narrow statutory construction of its language and consequently excluded specific committees that report to the president without addressing questions regarding the separation of powers. Unfortunately, these narrow interpretations apply broadly to all relevant committees allowing for the easy creation of FACA-exempt advisory committees so long as their members include contractors, non-voting members, or because it is a subcommittee of an advisory committee that generates a final report. This article explains those crucial decisions and the loopholes created to show how they undermine FACA's purpose by limiting its applicability across all committees utilized by federal agencies allowing the courts to dodge the constitutional separation of powers question which only applies to the small minority of committees directly utilized by the president. Because the harm done to FACA was inflicted by judicial interpretation of the statute, it can be remedied through congressional action. Congress should amend the Act and untangle these judicial contortions through amendments to section three that make explicit the broad and inclusive meaning of the terms comprising the definition of "federal advisory committee," which courts have misconstrued. Such amendments would close the loopholes, return FACA's applicability to its intended scope, and compel federal courts to address the separation of powers issue they have thus far avoided.

The Federal Advisory Committee Act (FACA) was passed into law in 1972 to expand guarantees of transparency in the U.S. governmental decision-making process.

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Specifically, this legislation was designed to assure balance, transparency, and efficiency whenever the president, a federal officer, or a federal agency called upon groups of private citizens to serve in an advisory capacity. This tradition of commissioning American citizens who have specific expertise to guide the government's decision-making process has a long history. Historians trace the first use of a federal advisory committee to President George Washington who, in 1794, relied upon an ad hoc group of commissioners to investigate the Whiskey Rebellion (Ginsberg, 2009). Since that time the U.S. government has continued to draw upon citizen advisors to make recommendations and draft reports for countless purposes.

Advisory committees operated with full freedom and autonomy until 1842 when the accountability and compensation of advisory groups came under federal scrutiny. That year, Congress passed the first statute to regulate citizen advisory committees, which limited the government's authority to pay them and fund their operations (5 Stat. 533, 1842). In 1909, Congress enacted further funding restrictions limiting the power of public officials to appropriate federal funds for citizen advisors without statutory authorization. Additionally, the bill prevented federal employees from being assigned to tasks by an advisory body that had not been commissioned by statute (35 Stat. 1027, 1909).

By the early 1970s there was still no law on the books adequately defining the duties and responsibilities of citizen groups in an advisory capacity to the federal government. Even though there was a consensus that the role of citizen advisory groups was necessary and valuable, an authoritative definition of the limitations and obligations of an advisory committee during its term of service was missing. In the absence of clear statutory guidance regarding the use of advisory bodies by the federal government, the ever-present danger that such activities would be wasteful or predisposed to findings for the benefit of partisan or corporate interests has been cause for concern (Shapiro, 2008).

In 1972 Congress passed the Federal Advisory Committee Act (FACA) to alleviate those worries (Pub. L 92–463; 86 Stat. 770; 5 USC app. FACA). The main purpose of FACA (5 USC app. FACA) was to expand the federal transparency guarantees to private citizen advisory bodies, which are utilized regularly and relied upon heavily by the president, federal officers, and federal agencies. The purpose of the Act

was three-fold, going beyond transparency alone. It also sought to ensure ideological balance on federal advisory committees so advice would not be biased, and all stakeholders would be represented. Additionally, the law also sought to reduce waste and increase efficiency of advisory committees, underscoring the three-fold purpose of FACA -- balance, transparency, and efficiency.

Advisory bodies of private citizens are not covered by other federal transparency laws, and are subject to this one. The flagship federal transparency statute, the Freedom of Information Act (FOIA; 5 USC 552) does not apply to advisory committees because FOIA is only applicable to "agency records" (5 USC 552 (a)(2)(D)) and advisory committee records are not considered "agency records" under its terms. In the case of *presidential* advisory committees FOIA is inapplicable for a second reason, the president is exempt from FOIA (*Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980). As a result, without the FACA statute and its applicability to any given advisory committee, that committee's membership, operations, meetings, records, advice, and even its very existence may be concealed from the public.

FACA does not apply to every advisory body serving throughout the U.S. government, but it is applicable to those falling within the meaning of "advisory committee" as defined in the section three of the Act, and as interpreted by federal courts. Unfortunately, ever since the federal courts were first asked to construct the meaning of the term "advisory committee," their rulings have been steadily and, as we argue here, unnecessarily eroding the scope of FACAs applicability.

The scope of FACAs applicability and the scope of this Article; §3.

FACA provides strict requirements for openness in the creation, operation, organization, record keeping, oversight, and even ideological composition of federal advisory committees. However, this analysis focuses on the scope of FACA's applicability, which is set out in the language of section three of the Statute (5 USC app. 3 FACA). The scope of a statute's applicability is the line separating who/what is subject to its mandates, from who/what is exempt from those mandates. In the case of FACA, which advisory committees are, or are not subject to its substantive requirements is essential. Applicability is an a priori question relative to FACA's substantive

requirements. It must be answered in the affirmative *before* considering any question regarding a committee's obligations under the law, because applicability dictates whether any given committee is, or is not, subject to FACA at all. The many substantive requirements it places on federal advisory committees in service of its three-fold purpose, and the caselaw dealing with those requirements are beyond the scope of this work. The analysis here is focused on the *prior* question—the scope of FACA's applicability, and more specifically, the general applicability of the Act under §3. Most applicability questions for federal or presidential advisory committees can be answered with a determination of whether it falls within the meaning of FACA's statutory definition of "advisory committee," as interpreted by federal courts.[2] As a result, this analysis is properly limited to FACA's third section and corresponding federal court decisions that construct narrow meanings for the words in the statutory definition of "advisory committee" (5 USC § 3(2) FACA).

A basic knowledge of FACA's requirements does provide some context for the facts giving rise to the pertinent cases, and the following section provides a brief overview of its balance, transparency, and efficiency requirements, as well as the provisions for oversight and administration. The next part is structured to model the structure of the statute. Each section of is presented in order, by section number, followed by a brief description of that section's purpose and main functions.

The Substantive Requirements of FACA

As is the case with most federal statutes, the front matter includes the short title and the purpose of the Act, in sections one and two respectively (5 USC app. 3(1) & 3(2) FACA). Section three of the Act, definitions, is the section most central to this article

[2] *See* 5 USC app. § 4 FACA for an applicability determination unrelated to section three, rather, on section four's exemption of *specific* named agencies. The scope of FACA's *general* applicability can't be narrowed by exemption of a few named agencies, so § 4 isn't relevant to this Paper's analysis of how courts severely limited FACA's applicability across the board by overly narrow interpretations of section three.

because it contains the definition of advisory committee, which as discussed below determines to what committees FACA does or does not apply (5 USC app. 3(3) FACA). Although section four is titled "applicability," it isn't relevant to this analysis because it simply enumerates certain exemptions such as the Central Intelligence Agency (CIA), the Office of the Director of National Intelligence (DNI), and the Federal Reserve System (FRS; "the Fed") (5 USC app. 3(4) FACA).

Sections five and six set out the responsibility for oversight of advisory committees by Congress (5 USC app. 3(5)(a) FACA) and guidelines for creation of advisory committees by Congress, the president, federal officials, and federal agencies (5 USC app. 3(5)(b) FACA) and presidential reporting to Congress (5 USC app. 3(6) FACA). Section seven establishes a department within the General Services Administration (GSA) called the Committee Management Secretariat prescribing administrative regulations for, and conducting an annual review of, all federal advisory committees (5 USC app. 3(7) FACA). Section eight created a position within each federal agency called the Committee Management Officer that is responsible for overseeing that agency's advisory committees as well as maintaining reports and records for those committees (5 USC app. 3(8) FACA). Section nine requires publication in the Federal Register of an advisory committee's name, purpose, scope of activities, duties, term of service, establishing agency, and estimated number and frequency of meetings prior to any advisory committee meeting or taking any action (5 USC app. 3(9) FACA).

Section ten is central to FACA's transparency guarantees. It contains provisions requiring published notice of meetings to be open to the public. It also requires detailed minutes of each meeting be kept, including a list of all members present. Perhaps most importantly, it specifies all documents utilized or produced by the committee should be made available for public inspection and copying (5 USC app. 3(10) FACA). Section eleven is closely related and requires agencies to provide copies of meeting transcripts at printing cost to any interested person (5 USC app. 3(11) FACA).

Section twelve furthers FACA's efficiency goals by requiring complete fiscal records for every committee be kept by the utilizing agency, or for presidential advisory committees the General Services Administration (GSA) and audited by the Comptroller

General (5 USC app. 3(12) FACA). Section thirteen specifies eight copies of every report issued by an advisory committee and corresponding background documents be kept and made available for public inspection by the Library of Congress (5 USC app. 3(13) FACA). Section fourteen sets a two-year term for most advisory committees at the end of which they must either terminate or be renewed (5 USC app. 3(14) FACA).

Section fifteen creates requirements particular to the National Academy of Sciences (NAS), including ones for ideological balance and conflict of interest restrictions for committees, as well as protection from other agencies using NAS reports, except under certain conditions (5 USC app. 3(11) FACA). Section sixteen is the final section and, as with most federal statutes, it is simply the effective date (5 USC app. 3(16) FACA).

Evidence of FACA's Reduced Efficacy and Resulting Harm to the Public Interest

Before an exhaustive analysis of the federal courts' judicial hamstringing of FACA, it is worth asking whether it even matters. There are two dimensions of severity to consider in deciding whether narrowing the scope of FACA's applicability is material or not. The two dimensions to consider are 1) *function severity* and 2) *effect severity*. First, how severely do the loopholes interfere with FACA's functioning—is the hamstring a marginal impairment or severely crippling? Second, how severe are the negative effects attributable to FACA's dysfunction—is the impact causing harm or preventing good? Logically, both would need to be at least somewhat severe before the judicial distortions mattered in any meaningful way.

If FACA still works and is achieving its goals, despite the narrowed scope, what does it matter? If FACA is broken (i.e., applicable to so few committees it's unable to fulfill its purpose) but advisory committees are still serving the public interest regardless, does it matter? Logically, if either 1) the loopholes have little or no consequence on FACA's functioning, or 2) the public interest is not harmed by a dysfunctional FACA, then why waste time and attention? Also, 3) if then FACA never worked well in the first place, a statutory fix closing the loopholes wouldn't remedy any harms to the public interest. If evidence exists to contradict these three possibilities, it would then validate our major assumptions: FACA is broken, which harms the public interest, and particular rulings broke it, that legislation can fix it. So, this section presents evidence that 1) FACA

is actually unable to fulfill its purpose; 2) this circumstance results in specific harm to the public interest; 3) FACA worked well before the courts neutered it.

Research suggests that FACA was successful in reducing corporate influence on advisory committees in its early years. A study of executives from two hundred of the largest companies found that in 1973, just after FACA's passage, 72% had an executive on an advisory committee. By 1977, the percentage had fallen to 47.5%, according to Priest, Sylves and Scudder (1984), who argue FACA created greater public awareness of committee membership, which led to the decrease in corporate participation.

Kardy (2000) found that from 1997 to 2000, after almost a decade of court decisions eroding the scope of FACA, only 18% of advisory committee members were corporate executives, while 58% were university professors or researchers at institutes. These data might seem to support a functional FACA continuing to mitigate corporate influence, but a closer inspection is revealing. Some advisory committees are more influential than others, and while the professors were spread out in positions and proximity, the executives tended to be concentrated in fewer, more influential advisory committees (Kardy, 2000). He also found that some of the more influential advisory committees had been "captured" by specific industries.

The most enlightening research regarding industry "capture" of highly influential advisory committees was published by Moore et al. (2002), who conducted a network analysis of linkages in the *corporate/nonprofit/government-advisory network* based on 1998 data. The non-governmental data came from the Elite Directors Database which contained names of the directors of the 100 largest Fortune 500 corporations and names for the directors/trustees of the top 109 nonprofit organizations, comprised of the 12 most influential policy think tanks, the 47 largest charities by value of private donations, and the 50 largest foundations by assets (Moore et al., 2002). The advisory committee data came from the FACA Database maintained by the General Services Administration (GSA) and listed names for 37,000 committee members and 1,000 advisory committees. When Moore et al. (2002) ran a simple comparison across both data sets they found that 902 of the 1000 advisory committees did not have a single elite director as a member, meaning elite director advisory committee members were concentrated in less than 10%

of all committees. Over 62% of the 37,000 total advisors were health professionals serving on advisory committees for the Department of Health and Human Services (HHS), where elite directors rarely served. Another 10% of total committee members served on Department of Transportation (DOT) advisory committees, another agency where elite directors seemed to lack interest.

Moore et al. (2002) found, unsurprisingly, that the 98 advisory committees that elite directors did serve on were highly influential, with membership concentrated within Department of Defense (DOD), Department of Energy (DOE), and Federal Communications Commission (FCC) advisory committees. Also, Moore et al. provided direct evidence of industry specific "capture" of some of the most influential advisory committees. For example, chief executive officers (CEOs) of major defense contractors comprised almost all the membership of DOD's Defense Policy Advisory Committee on Trade. The President's National Security Telecommunications Advisory Committee members were mostly CEOs of major telecommunication firms.

Ranking the advisory committees, elite directors, and organizations in the policy-planning network by centrality, which is the number of interlinkages within the network (calculated by centrality scores) affords additional insight into the dense concentration of elite directors on advisory committees within a limited part of the whole federal advisory committee system. Some of these research findings provide direct evidence of the harm FACA suffered over the previous decade (i.e., decade prior to the 1998 data) at the hands of the judicial branch.

Ranking people, specifically the eight most central elite directors in the policy-planning network, cumulatively held 20 seats on boards of Fortune 100 companies, 20 seats on federal advisory committees, seven seats on boards of the twelve most influential think tanks, and nine other nonprofit board seats. The eight most central elite directors accounted for 36 nongovernmental and 20 governmental seats between them (Moore et al., 2003). Holding seats on multiple boards and multiple advisory committees is common among elite directors, who often sit together on the same multiple corporate boards and the same multiple federal advisory committees. For example, Kenneth Lay (CEO during Enron's 2001 downfall) and John Sawhill (Pacific Gas & Electric) are both

elite directors in the corporate energy sector who served together on two Department of Energy advisory committees (respectively fourth and seventh most central) the National Petroleum Council and the Council for Sustainable Development (Moore et al., 2002).

In reviewing the advisory committees, specifically the fifteen most central advisory committees, it is readily apparent they were teaming with elite directors. These fifteen top advisory committees cumulatively had 98 seats held by committee members that are elite directors. Among the elite directors serving as committee members on the top three most central advisory committees, more than half of them had membership on two or more advisory committees; for most of them, their other memberships were also on top fifteen committees (Moore et al., 2002). There were five federal advisory committees with over ten elite directors serving as members, and they were the top five most elite-heavy committees.

There appears to be a substantial correlation between elite-heaviness and centrality, given that the committees ranked 1, 2, 3, 4, and 5 in elite-heaviness (Moore et al., 2003), are also ranked 1, 2, 3, 4, and 5 in centrality (Moore et al., 2002). The most central federal advisory committee was the FCC's Network Reliability and Interoperability Council, which had a membership that was half comprised of elite directors, most of them industry specific, who hold 13 of its 26 appointments (Moore et al., 2003). The second ranked federal advisory committee was another telecommunications committee, but the National Security Telecommunications Advisory Committee advises the DOD rather than the FCC, and had elite directors in 10 of its 26 seats (Moore et al.). The third most central committee was the President's Export Council advising the Department of Commerce, which showed elite directors holding 12 of its 28 appointments. The fourth ranked committee was the DOE's National Petroleum Council, which had more members than any other committee that were elite directors, represent over half of the membership taking 19 of 30 seats, the most of any committee.

Ranking all the organizations in the network, specifically ranking the top fifteen organizations by centrality, is not as directly relevant to determining how FACA is fairing, but it does provide insights into federal advisory committees. Our first insight regards

how some advisory committees were counted as the most influential organizations in the network. Since they are organizations, the advisory committees were also ranked as part of this analysis, and the four most central advisory committees each earned a spot on the overall list of top fifteen organizations (Moore et al., 2002). This position means the committees themselves are extremely important parts of the policy-planning network. Only corporations, which occupied five spots in the top fifteen, were better represented. With four advisory committees ranked in the top fifteen organizations, advisory committees were the second most represented type of organization. Two telecommunications advisory committees were in fact the most central committees, even more so than Exxon Mobil (Moore et al., 2002). Think tanks occupied three spots in the top fifteen and were the third most represented type of organization. One of those three think tanks, the Committee for Economic Development (CED), was ranked number one. CED's centrality leads directly to the second item of interest.

What these rankings offer is unique to CED -- a top-ranking position alone isn't of much interest -- but CED stands out because it was not simply the most influential organization in the network, it was the most influential *by far*. The distance between CED and other participants in terms of centrality was startling. CED held *massive* influence within the policy-planning network. For example, no other organization came close to CED's level of influence on the top advisory committees holding seats on twelve of the top fifteen most central advisory committees (Moore et al., 2002) Some top fifteen committees appointed more than one CED director to fill more than one seat, *and* some CED directors were appointed to two or more advisory committees in the top fifteen, making the CED *incredibly* influential, in the most literal sense of the word.

Specific context for this stunning dominance might make it even harder to believe, but it surely makes it easier to appreciate. The top-ranked CED was more than thirty-eight (38) times more influential than the second-ranked organization. The second-place organization's centrality score was a high score, high enough to best 305 of 306 other organizations. Its score was 3.66. The first-place centrality score was 140.81, CED's score (Moore et al., 2002). Overall, the social scientific research discussed above provides strong support for our argument that at the time these data were collected (1998 & 1997-

2000) FACA already had been crippled by a decade of hostile jurisprudence. One part of FACA's three-fold purpose (balance, transparency, efficiency) is to ensure ideological and stakeholder balance in composition of federal advisory committee membership.

The findings discussed above demonstrate unequivocally that as of the late 1990s FACA was failing to perform its balancing function. The observation that elite directors are absent throughout almost 90% of the advisory committee system but are highly over-represented in the 10% of influential advisory committees central to their interests, is strong evidence for our claim FACA is no longer able to ensure ideological balance on advisory committees. Given that research findings show the nearly complete "capture" of the top tier of industry-influencing federal advisory committees, it confirms our contention of blindness to the public interest, which FACA's provisions were meant to prevent. Policy advice resulting from balancing the diverse ideologies of stakeholders, each motivated by different goals serves the public interest, while policy advice derived from a single perspective with a profit-motive does not. These data show after a decade of judicial decisions essentially serving as roadmaps for evading FACA requirements, the law was thus unable to fulfill one of its three core functions, ideological balance.

We argue that the primary harm done to FACA was inflicted by judicial interpretation of the statute, construed principally in order to dodge a constitutional separation of powers question. The injury can and should be remedied through congressional action, amending section three of FACA, explicitly redefining the meaning of the terms used to define "advisory committee." Making a broad and inclusive interpretation explicit in the Statute would to un-cramp the judicial contortions. Congressional action certainly would cure the ills created by court decisions that sidestepped the constitutional thicket by simply applying statutory reconstruction. Of course, this solution still leaves the judiciary free to rule on any constitutional questions arising in future cases after the statute is amended. In fact, it would force it to do as much. In order for us to implement this solution, certain terms need to be defined more broadly, and clarity given the factual circumstances those broad definitions should be inclusive of. Gaining the understanding necessary to secure these loopholes requires reviewing the cases in which federal courts created them.

Each of the following decisions, individually narrowed the scope of FACA's applicability significantly, but over time they cumulatively combined to devastating effect. Together they sidelined FACA by providing a robust roadmap of loopholes easily used to circumvent the Act. One of the earliest of the FACA applicability cases began the process for more than a decade of eroding FACA's bulwark. It became the archetypal applicability case, so we consider first *Public Citizen v. United States Department of Justice* (491 U.S. 440, 1989).

The Archetype for Narrowing the Scope of FACAs Applicability

The cause of the courts in narrowing the scope of FACA's applicability can be contextualized historically by explaining the issue in terms of its relationships to long-standing traditions in both the legislative and judicial branches. Specifically, Congress's departure from a tradition it probably shouldn't have abandoned, and the Supreme Court not departing from a tradition it probably should have left behind. First, Congress has traditionally exempted the president from transparency requirements such as the Freedom of Information Act (FOIA) and the Presidential Records Act. It did not, however, take that tack with FACA (Mongan, 2005). The impact of this turn is relatively straightforward because the purpose of the exemption is to avoid constitutional separation of powers challenges based on the law's application to committees reporting directly to the president, claiming Congress cannot place such restrictions on the president's constitutional prerogative to consult with whomever he desires; however he desires. The expected result for not exempting the president is that this type of constitutional challenge will result from the Act's application to *presidential* advisory committees. The second issue is the more difficult to apprehend because it has to do with an arguably improper application of two jurisprudential canons of statutory construction, the *plain meaning rule* and the *doctrine of constitutional avoidance*. Understanding these issues requires some knowledge of how federal courts decide constitutional challenges.

There are two different types of challenge to the constitutionality of a statute: facial challenges and as-applied challenges. In a facial challenge, the argument is made the statute is unconstitutional on its face (meaning the statute always violates the Constitution,

inherently, in every possible application regardless of context). In a successful facial challenge, the law is found unconstitutional. The statute does not survive, because it is struck down, for everyone, for all possible applications.

In an as-applied challenge, the argument is made that an otherwise constitutional statute is being applied in a context that makes it unconstitutional, but only for that application and in that context. In a successful as-applied challenge, the law itself is not found unconstitutional, only its application in the specific context. The statute does survive, and can still be applicable in other contexts, only the unconstitutional application is prohibited. Of course, facial challenges result in broad rulings, so avoiding a constitutional ruling makes the most sense as a principle of judicial restraint in challenges of that type. However, when only a specific application of the statute is challenged, as it was in these FACA cases, a constitutional ruling might be much narrower than broadly ruling on the construction of the statute's language.

In *Public Citizen v. United States Department of Justice* (491 U.S. 440, 1989), the Court was asked to decide whether a committee advising the president on potential judicial nominees, was an "advisory committee" under FACA §3(2). The Supreme Court decided that FACA was not applicable to the committee because it was not an "advisory committee" under those terms. A detailed analysis of the Court's decision in *Public Citizen* is presented below, but first it's worth considering the *Public Citizen* decision in its simplest structural form because it became the archetype for major FACA applicability decisions. It is archetypal in terms of this simple three-part structure representing the decision; 1) cause, 2) decision, and 3) effect. Cases that fit the *Public Citizen* archetype will share these three qualities. First, the cause of the rationale for the decision is the Court's effort to avoid ruling on constitutional questions if the case can be adjudicated any other way. This principle is referred to as the Doctrine of Constitutional Avoidance or the Constitutional Avoidance Canon: "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 by which the question may be avoided*" (*Crowell v. Benson*, 285 US 22, 62, 1932 [emphasis added]). The Doctrine of Constitutional Avoidance is well-settled law.

Generally, it is a helpful principle of judicial restraint. However, in some cases it seems to operate more like constitutional avoidance bias, ironically causing the opposite effect, that is, an overly broad decision.

Second, *the decision* leads to an undesirable effect when the Doctrine of Constitutional Avoidance is elevated to become *the* central determinant of the Court's analysis rising above all the countless other often conflicting cannons of statutory construction. When constitutional avoidance operates as a bias, it predisposes the Court toward certain outcomes, particularly ones that are: a) based on a statutory rationale; and b) narrow FACA's applicability.

Third, *the effect*, when courts use convoluted reasoning in service of this bias), is an overly broad decision, which in the case of FACA created large loopholes. As the District Court had done, in *Public Citizen* (491 U.S. 440, 1989) the Supreme Court avoided the constitutional separation of powers question of whether FACA is an unconstitutional Congressional encroachment on the constitutional role of the president. Instead, the decision, which is discussed in greater detail below, ruled FACA did not apply to the committee at issue by narrowly construing the definition of "advisory committee" in section three of the Act. Only *presidential* advisory committees, which are a small portion of all such bodies trigger separation of power concerns. Unfortunately, by ruling that FACA was inapplicable to the committee based on such a narrow statutory interpretation to avoid a ruling based on separation of powers, the Court created a far-reaching precedent that unnecessarily curtailed FACA's applicability well beyond *presidential* advisory committees. The precedents set forth in Public Citizen and its progeny exclude *all* advisory bodies that would be covered by FACA, if the courts had adopted a broad construction more consistent with FACA's purpose (Mongan, 2005).

The majority rationale in *Public Citizen* (491 U.S. 440, 1989) gave rise to a precedent that has produced a perverse result—the erosion of the transparency, balance, and efficiency the law was intended to guarantee. Ever since that misstep, the federal courts have continued closing the blinds on transparency and expanding the precedent set out in *Public Citizen* by continuing to narrowly construe terms that define the scope of FACA's applicability. Hence, the president and executive agencies are easily able to

circumvent the transparency, efficiency, and balance goals of FACA. The legacy of *Public Citizen* has been the creation of even more FACA applicability loopholes, none of which are inherent to the statute. They all result from a contrived construction of its language which facilitated FACA rulings disregarding the separation of powers question. The decision in *Public Citizen*, described in detail below, is a case study in the court's cramped view of FACA's applicability signaling the beginning of the end for its intended purpose.

Public Citizen: The Beginning of the End for FACA

The facts giving rise to *Public Citizen* stem from the Department of Justice's request for advice from an advisory committee on judicial nominees. The Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint" Supreme Court Justices (Art. II, 2). Congress has provided similar statutory requirements for the presidential appointment of lower federal judges, but it is the Justice Dept. that is tasked with providing appropriate recommendations to the president regarding these appointments. In the course of this duty, the agency regularly invites advice from citizen advisors. Beginning in 1952, the Department of Justice began utilizing advice from the American Bar Association's Standing Committee on Federal Judiciary to formulate its recommendations to the President (*Public Citizen*, 491 U.S. 440, 443, 1989).

At the time *Public Citizen* (491 U.S. 440, 1989) was decided, the American Bar Association was a voluntary private professional organization with a membership of about 343,000 lawyers, but sans federal funding. The Standing Committee on the Federal Judiciary ("ABA Judiciary Committee") is an advisory body with 14 members, one member for each of the 12 federal circuits, except for the expansive Ninth Circuit, which has an extra seat, and one additional member who serves at large (*Public Citizen*, 491 U.S. 440, 443-444, 1989)

The rating categories used by the ABA Judiciary Committee measure the potential of U.S. Supreme Court justice nominees. After a nominee's rating is requested by the Department of Justice, the ABA Judiciary Committee conducts a review and assigns a composite rating defined in terms such as "exceptionally well qualified," "well qualified," "qualified," and "not qualified" (*Public Citizen*, 491 U.S. 440, 1989; see

footnote 1 for current categories at the time of decision). Then the ABA Judiciary Committee chair moves to report the rating to the U.S. Attorney General's without tendering the final report or supporting documentation. This judicial rating is conveyed to the President through the Attorney General's office, and in turn the President elects whether to nominate the candidate in question. If the President chooses that nomination, the ABA's rating, without additional comment, is made public through the Senate Judiciary Committee's records as part of the confirmation process (*Public Citizen*, 491 U.S. 440, 444-445, 1989).

In 1986, the Washington Legal Foundation (WLF) filed suit against the Department of Justice after the ABA Judiciary Committee refused to disclose its final reports and minutes of its meetings regarding potential nominees. The WLF had previously sued the ABA Judiciary Committee directly, but that case was dismissed on the grounds that the utilizing agency was the proper defendant under the law, rather than the committee itself (*Washington Legal Foundation v. American Bar Assn. Standing Comm. on Federal Judiciary*, 1648 F. Supp. 1353 (DC), 1986).

The WLF then asked the district court to declare the ABA Judiciary Committee an "advisory committee" under FACA, and enjoin the Department of Justice from accepting the ABA Judiciary Committee's advice until it filed a charter, afforded notice of meetings that would be open to the public, and made all its records open and accessible (*Washington Legal Foundation v. United States Department of Justice*, 691 F. Supp. 483, 485, 1988). In response the Department of Justice moved to dismiss the complaint on two separate grounds. First, the ABA Judiciary Committee was not an "advisory committee" under the law. And second, even if it were classified as an advisory committee under FACA, it would represent an impermissible violation of the Constitution in this case, since Congress cannot pass a law requiring the executive branch to disclose privileged information under the separation of powers doctrine. At this point, Public Citizen moved to join as a plaintiff in the lawsuit and succeeded in that aim as it went before the District Court for the District of Columbia (*Washington Legal*, 69 F. Supp. 483, 484, 1988).

The District Court dismissed the case, refusing to enjoin the ABA Judiciary Committee from keeping secret its processes and documents (*Washington Legal*, 691 F. Supp. 483, 496, 1988). The District Court sided with Public Citizen and the WLF by acknowledging that the ABA judiciary was indeed an "advisory committee" under FACA, but the court ultimately agreed with the Department of Justice that it would represent an unconstitutional violation of the separation of powers to use this legislative to prompt the executive branch to surrender advisory documents, and so it dismissed the action. Subsequently, the Supreme Court of the United States assumed jurisdiction and granted certiorari to the petitioners (*Public Citizen v. Department of Justice*, 488 U.S. 979, 1988).

The Supreme Court's decision affirmed the district court's ruling, but did so on different grounds (*Public Citizen*, 491 U.S. 440, 467, 1989). Justice Brennan delivered the majority opinion and was joined by Justices White, Marshall, Blackmun, and Stevens. Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor (Public Citizen, 491 U.S. 440, 468, 1989), reached the same result, but based their decision on the District Court's rationale, that applying FACA to the ABA committee would be an unconstitutional encroachment on the President's constitutional prerogatives (Public Citizen, 491 U.S. 440, 489, 1989). Even though the ABA Judiciary Committee is an advisory committee under FACA, such an application of the law would be an unconstitutional violation of the "appointment clause" of the Constitution that gives the right of nominating judges exclusively to the President (US Const Art II, §2).

The Supreme Court held that the District Court erred in finding the ABA judiciary committee was an "advisory committee" under FACA. The majority decided the appeal on precisely the opposite grounds, that the ABA committee was *not* an advisory committee under FACA. The District Court, after determining the ABA committee was a FACA advisory committee, moved on to the *a posteriori* question regarding the separation of powers. The District Court dismissed the plaintiffs' FACA claims, after deciding that applying FACA to the ABA committee would be an unconstitutional infringement on the President's constitutional role of nominating federal judges. Although the Supreme Court dismissed the appeal, without ever having to address the constitutional separation of powers issue, both decisions agreed the plaintiffs'

claim should be dismissed and despite disagreement on the rationale, the Supreme Court affirmed the District Court's dismissal as a result.

FACA defines an "advisory committee" as:

> (2) *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 (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 [emphasis added]. (5 USC app. 3(2) FACA).

Since all parties agreed that neither the President, nor the Department of Justice, "established" the ABA Judiciary Committee, the central question was whether or not, under §3(2)(B) or §3(2)(C), either one had "utilized" the ABA Judiciary Committee (5 USC app. FACA §3 (2)). The Court began by pointing out that a literal reading of the statute using the commonly understood meaning of "utilized," would produce an absurd result. Such a plain and inclusive reading would make FACA applicable to advice regarding cabinet nominations from the president's own political party, which would be an unconstitutional application of the statute in violation of executive privilege. The Court said, "it cannot have been Congress's intention, for example, to require [application of FACA] ... 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" (Public Citizen, 491 U.S. 440, 453, 1989). The majority found that under existing case law, the Court must search for additional evidence of legislative intent if a plain reading

leads to an absurd result (*Church of the Holy Trinity v. United States*, 143 U.S. 457, 1892).

An exhaustive account of the legislative history of FACA includes not only the legislative history, but the historical context of the law as a codification and expansion of Executive Order No. 11007 (see §III(B) in *Public Citizen*, 491 U.S. 440, 456-465, 1989). The Court acknowledges it is "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" (*Public Citizen*, 491 U.S. 440, 465, 1989). The Court indicated it was "fairly confident" of this result without addressing the separation of powers question, but did use it as a tie-breaker on the "close question" of whether the ABA committee is subject to FACA, upon which it "tipped the scales" (*Public Citizen*, 491 U.S. 440, 465, 1989).

Even though the majority did not rule on the constitutional question, they explicitly stated applying FACA to the ABA Judiciary Committee would interfere with the separation between the exclusive grant of appointment powers to the president and the confirmation powers granted to Congress. The majority acknowledged, even without deciding the separation of powers question, "that construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties is undeniable" (*Public Citizen*, 491 U.S. 440, 466, 1989). It should be noted here it was not merely *dicta* since the majority opinion gave these "constitutional difficulties" weight in two ways: First, it was a tie breaker on the close question of whether the ABA committee is an "advisory committee" under FACA, which it is, and second it produced a (highly suspect) method of determining congressional intent.

Essentially, the majority found the plain meaning of the statute was inclusive of the ABA committee, although it did not prevent them from ruling the exact opposite. The majority *hypothesized* the plain meaning would also make FACA applicable to other organizations the president might ask for advice, such as the NAACP or the president's own political party, which would present some glaring separation of powers issues. Rather than rule on separation of powers as applied in the case before the Court, the majority took these *potential* "constitutional difficulties" as evidence that Congress didn't intend

for the statute to apply to what its plain language clearly indicates. The majority found "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..." (*Public Citizen*, 491 U.S. 440, 453, 1989).

In adopting this cramped meaning of "utilized," the Court excluded *not only* the ABA Judiciary Committee, but also virtually *all* committees an agency "utilized" under this provision, if not established as such, even where no constitutional question was triggered. Application of FACA to most federal advisory committees excluded by such a narrow construction would not trigger the separation of powers issues because only a small percentage of federal advisory committees are *presidential* advisory committees (Moore et al., 2002). The constitutional concerns the Court found to be inherent in applying the Act to the ABA Judiciary Committee, which advises the president, would not touch the majority of advisory committees utilized by federal agencies (Moore et al., 2002) where Congressional oversight is clearly constitutional.

The majority's rationale for the use of *Crowell v. Benson* (285 US 22, 1932) in disregarding the plain meaning of the statute is problematic for three reasons. First, when the question is one in which *Crowell* would require the court to narrowly construct the meaning of the statute to avoid as-applied constitutional concerns, as it is here, it is circular reasoning to unnecessarily weigh the constitutional question anyway, as a factor (even a "tie-breaker") in whether the constitutional issue should be decided. As Justice Kennedy directly stated in his concurring opinion, which was joined by Chief Justice Rehnquist and Justice O'Connor, "the utter circularity of this approach explains why it has never been our rule" (*Public Citizen*, 491 U.S. 440, 481, 1989) (Kennedy, J. concurring in the judgement).

Second, reasoning that because the lawmakers' intent would be unconstitutional under the plain meaning of the statute, so they could not actually have intended its plain meaning—therefore it is proper to construct a different, less constitutionally problematic meaning is the height of circularity. Additionally, the absolute silliness of the premise of this circular argument should be readily apparent. Congress can never intend to write a

statute that encroaches unconstitutionally on the separate powers of the executive, because it's impossible for Congress to intend such a meaning.

This claim is made even more fanciful by the fact that this interpretation *does not impute any intent to Congress regarding constitutionality*, only Congress's intended meaning of the language in the bill. Later, if a court determines the statute's plain meaning would be unconstitutional, then it retroactively imputes to Congress the intent to have meant the constitutional meaning the court constructed rather than the plain meaning. As the minority's concurrence makes clear, this interpretation is so far-fetched that it would make the entire concept of judicial review unnecessary because "whenever the application of a statute would have *potential* inconsistency with the Constitution, we could merely opine that the statute did not cover the conduct in question because it would be discomforting or even absurd to think that Congress intended *to act in an unconstitutional manner* (*Public Citizen*, 491 U.S. 440, 481, 1989) (Kennedy, J. concurring in the judgement [emphasis added]).

Third, the weighing of *potential* rather than actual constitutional objections in order to decide an issue through statutory construction under *Crowell v. Benson* (285 US 22, 1932; as suggested by use of *potential* in the preceding quote, referring to the majority's use of hypothetical applications to the NAACP and the president's political party discussed above), will likely lead to an improper broad precedent based on an overly narrow construction of the statute's general applicability (because *Crowell* demands an exclusionary construction). The concurrence goes even farther, suggesting that rulings based on *potential* violations amount to the Court issuing an unconstitutional advisory opinion. Federal courts are not allowed to issue advisory opinions because the cases-and-controversies requirement of the US Constitution limits their jurisdiction to questions arising out of real disputes involving actual parties (Art. III, Sec. 2). The concurring justices predicted this type of advisory opinion under the guise of *Crowell* would have a chilling effect on future legislative action, arguing that *Crowell* should

> "not be given too broad a scope lest a whole new range of Government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it. The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for

> ignoring the plain meaning of the statute" (*Crowell v Benson*, 285 US 22, 1932 [emphasis added]).

As one would expect, the majority's reliance on *Holy Trinity* and *Croswell* as a justification for disregarding the plain meaning of the statute in *Public Citizen* did indeed, for the three reasons above, lead to an overly narrow construction of key terms that unnecessarily excludes advisory bodies from the law's transparency requirements.

Justices Kennedy, O'Connor, and the Chief Justice concurred only in the judgement, not at all with the reasoning, stopping just short of ridiculing the majority's rationale (*Public Citizen*, 491 U.S. at 467, 1989) (Kennedy, J., concurring in the judgement). According to the concurring Justices, not only was the majority flawed in departing from a plain reading of the statute, but even the majority's analysis of legislative history also fell short. The concurring justices would have ruled that the ABA Judiciary Committee is a FACA "advisory committee" that is "utilized" by the Department of Justice, under the plain language of the statute (*Public Citizen*, 491 U.S. 440, 467, 1989) (Kennedy, J., concurring in the judgment). This disagreement over the standards for use of plain language versus legislative intent in constructing statutory meaning is due, in large part, to the fact that the concurring justices disagreed with the majority's use of *Holy Trinity* (143 U.S. 457, 1892), which the majority's analysis rested upon to justify its statutory construction based on analysis of the Act's legislative history. Even beyond construction according to the ordinary meaning, the concurring justices argued that a narrower construction based on legislative intent rather than plain meaning would still find the ABA Judiciary Committee to be an advisory committee "utilized" by the Department of Justice under FACA. Additionally, the concurring opinion argued that the currently promulgated GSA regulations defining the scope of FACAs applicability should be a factor in determining legislative intent, rather than looking exclusively to legislative history as the principal indicative of intent. (*Public Citizen*, 491 U.S. 440, 477-478). Justice Kennedy argued that, according to the GSA regulations, not only would the hypothetical absurd applications given by the majority be excluded, but so would the ABA members of the judiciary. Although he conceded the majority was correct in asserting some *hypothetical* applications of plain language would lead to an unintended

result, Kennedy concluded the majority had not shown the facts of *this* case produced an absurd outcome, and further contended that the majority made "only a passing effort to show that it would be absurd to apply the term "utilize" to the ABA Committee according to its commonsense meaning" (*Public Citizen*, 491 U.S. 440, 471, 1989).

The Contractor Loophole (D.C. Circuit): *Food Chemical News*

In *Food Chemicals News v. Young* (900 F.2d 328, 1990), the Circuit Court of Appeals for the District of Columbia was asked to decide if a scientific group hired to do a peer review for the United States Food and Drug Administration (FDA) was an "advisory committee" under FACA. The appellate court held the scientific peer review committee was not a FACA committee since it operated independently as a contractor. Thus, the ruling in *Food Chemicals News* gave rise to the contractor loophole that forms another gap in FACA's teeth.

In 1988, the Federation of America Societies for Experimental Biology (FASEB) was awarded a general contract by the FDA to provide objective, expert advice to the FDA's Center for Food Safety and Applied Nutrition. FASEB is an umbrella organization for many professional bio-medical organizations such as the American Physiological Society, the American Society for Biochemistry and Molecular Biology, the American Society for Pharmacology and Experimental Therapeutics, the American Association of Pathologists, the American Institute of Nutrition, the American Association of Immunologists, and the American Society for Cell Biology. Under the terms of the standing contract with FDA, FASEB was responsible for fulfilling "task orders" given by FDA.

"Task order no. 3" required FASEB to assemble a panel of experts to advise it on what important food safety issues would become most important over the next decade (*Food Chemicals News*, 900 F.2d 328, 1990). Pursuant to the terms of this task order FASEB selected a panel and scheduled its first meeting in January 1989. While a portion of the agenda was set to be open to the public, some of the meeting also was to be closed. Just prior to the meeting, the plaintiffs: Food Chemicals News, the Public Citizen Health Research Group, and the Center for Science in the Public Interest, brought forth the petition to have the District Court for the District of Columbia require the FASEB

Committee to comply with the open meeting requirements of FACA (*Food Chemicals News v. Young*, 709 F. Supp. 5, 1989). The district court agreed with the reasoning that the FASEB peer review panel was properly classified as a FACA advisory committee (*Food Chemical News*, 709 F. Supp. 5, 1989), but the court of appeals disagreed (*Food Chemicals News v. Young*, 900 F.2d 328, 1990).

The decision reached in *Food Chemicals News v. Young* (900 F.2d 328, 1990) cited *Public Citizen* (491 U.S. 440, 1989) and held the FASEB peer review panel was not a FACA advisory committee. Since FASEB "established" and "utilized" the peer review panel to fulfill the terms of its contract via "work order no. 3," and because FASEB (the private contractor) established and utilized the committee, and not FDA (the agency), the peer review panel fell outside FACA's scope. FACA is applicable to committees established or utilized *by a federal agency* (5 USC app. 3(2)(c)). However, this case held if the agency hires a contractor, who then utilizes the committee, then the committee is not subject to FACA. *Food Chemicals News* thus tapered FACA's reach, and it opened a glaring loophole, the contractor loophole.

The Contractor Loophole (US Supreme Court): *Byrd v. EPA*

In *Byrd v. U.S. Environmental Protection Agency* (174 F.3d 239, 1999), the US Court of Appeals for the District of Columbia was asked to decide whether a private contractor used by the Environmental Protection Agency (EPA) to conduct a peer review of its interim Benzene report was in fact a FACA "advisory committee," and decided that because it operated as a subcontractor, independent of EPA control, it too was beyond the law's provisions. This decision reconfirmed the contractor loophole that first cracked open in the *Food Chemicals News* case.

The EPA in 1985 drafted a report on the cancer-causing effects of Benzene. More than a decade later, the EPA in 1996 prepared a draft update of this report. Before finalizing the update for release, the EPA hired a private environmental consultant, ERG, to peer review the draft. Under the terms of the contract, ERG was required to choose a panel of qualified experts, organize public meetings, and compile a report for the EPA summarizing the findings. ERG was also supposed to receive a fixed sum from EPA, and

was responsible for compensating the panel members. EPA was allowed under the terms of the agreement to specify the issues the panel should evaluate, as well as add certain written comments to the consultant's draft report (*Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239, 241, 1999).

The environmental agency provided ERG with a list of 24 scientists it felt were qualified experts. The consultant group also selected four panelists from the EPA list and added two of its own experts. The EPA made no objection to ERG's selections. After the panel was selected, EPA held a teleconference and instructed the panel members to prepare pre-meeting notes addressing the issues that the EPA had specified. The panel members did so, and circulated them among themselves and the EPA. The EPA gave notice of the panel's public meeting in the Federal Register (*Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239, 241-242, 1999).

The meeting took place as scheduled and was run entirely by ERG personnel. In attendance was Daniel M. Byrd, a private environmental consultant. Byrd was allowed to participate in the meeting and twice expressed his opinion to the committee. However, Byrd had sought access to the pre-meeting notes three times prior to the meeting and was denied each time (*Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239, 242, 1999). Byrd filed suit one month after the meeting, asking the court to rule that the panel was an "advisory committee," and enjoin the EPA from using the report. Three months after the suit was filed, the EPA provided Byrd with the pre-meeting notes in response to the Freedom of Information Act (FOIA) request submitted by his counsel (*Byrd*, 174 F.3d 239, 242, 1999).

The appellate court ruled against Byrd, and held that ERG, as a contractor, was not subject to FACA (*Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239, 1999). Relying on the authority of both *Public Citizen*, and *Food Chemicals News*, the ruling held that an advisory committee is not "utilized" under the meaning of FACA (5 USC app. 3(C)), unless the contractor is subject to "actual management and control" of the President or an agency. Even though this decision found that the EPA could have exercised such control according to the terms of the ERG contract, it chose not to do so. As a result, the court held that its "decision is based on what EPA in fact did, rather than

on what it could have done under its contract with ERG..." (*Byrd*, 174 F.3d 239, 247, 1999). The decision concluded that EPA's actions regarding the benzene panel did not constitute "actual management and control" (*Byrd*, 174 F.3d 239, 248, 1999).

In addition, Judge Williams filed a separate opinion concurring regarding jurisdiction and dissenting on the merits (*Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239, 248, 1999) (Williams, S., concurring in part and dissenting in part). Judge Williams also agreed with other issues that were a priori to the merits of this case, but on the central question of whether FACA should be applied to ERG, Judge Williams's opinion is a dissent unequivocally stating that FACA's terms of openness should be construed to apply to ERG (*Byrd*, 174 F.3d 239, 1999). In this judge's opinion, the majority erred in not considering the veto power granted to the EPA over the committee selection. His rationale in this dissent zeroed in on EPA's veto power, which was key because it acts as a form of control by its very existence to curtail the transparency. Judge Williams argued that ERG would have been constrained in its choices simply by the knowledge that EPA *could* choose to exercise veto power. Williams posited that ignoring the fact that veto power is the control even absent its meaningful exercise "seems akin to believing that the President takes no account of Senators' opinions when he nominates federal judges" (*Byrd*, 174 F.3d 239, 251, 1999).

The Subcommittee Loophole: *National Anti-Hunger Coalition*

In *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control* (711 F.2d. 1071, 1983), the Court of Appeals for the District of Columbia was asked to decide if the individual working subcommittees of a presidential task force conducting a large study on reducing government waste were subject to FACA. In *National Anti-Hunger Coalition*, the Court held that the subcommittees were not subject to this act simply because the parent committee would be, and with that, created the subcommittee loophole. The executive committee of the President's Private Sector Survey on Cost Control, known as the "Grace Commission," was organized to help conduct a government wide survey on increasing efficiency. All parties agreed in this instance that the full Executive Committee was subject to FACA. However, the survey was designed as a four-stage process (*National Anti-Hunger*

Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524, 1983). In the first stage, 36 task forces created by the Grace Commission were asked to gather information and make a report of recommendations to the Commission. Most of the work had been in stage one when this litigation began. In the second stage, the Task Forces' draft reports were submitted to the management office for review and revision. In the third stage, the draft reports were presented to the 32-member subcommittee of the Executive Committee that were responsible for making the final recommendations. All parties agreed this subcommittee also was subject to FACA. In the fourth stage the Executive Committee ratified a comprehensive report containing recommendations from all the task force areas.

Since both parties agreed that the committees responsible for stages three and four were subject to FACA, the question centered on the earlier steps in the process. Was the work of the Task Forces in stage one subject to the law's provisions? Three of the Task Forces were asked to study food assistance programs for low-income persons. Several advocacy groups sued under FACA requesting access to these Task Forces' records and reports. The District Court, in *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control* (557 F. Supp. 524, 530, 1983), ruled that FACA did not apply to the work of the Task Forces in stage one. On appeal, the Circuit Court of Appeals for the District of Columbia affirmed the ruling (*National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d. 1071, 1983).

In *National Anti-Hunger Coalition* (711 F.2d. 1071, 1983), Judge Edwards delivered the unanimous opinion of the three-judge appellate panel. The Court held that since new evidence of fact could not be introduced on appeal, and the District Court found that the task forces did "not provide advice directly to the President or any agency" (*National Anti-Hunger Coalition*, 557 F. Supp. 524, 529, 1983), that FACA did not apply to the task forces. The court acknowledged that the decision might be different had the evidence shown the work of the committees was transmitted directly to an agency before review by the parent FACA committee, or that there was no substantial review by parent committee ("rubber stamping"; *National Anti-Hunger Coalition* (711 F.2d. 1071, 1075,

1983). However, based on the evidence in the record, the review by the parent FACA committee prior to transmission of the advice to an agency insulates the task forces from FACA. This ruling in *National Anti-Hunger Coalition* formed the basis for the subcommittee loophole.

The Nonvoting Participant Loophole: *In Re Cheney*

In *Cheney v U.S. District Court for the District of Columbia* (542 U.S. 367, 2004), the Supreme Court was asked to decide whether FACA could constitutionally apply to the National Energy Policy Development Group (NEPDG), a task force created by President George W. Bush to advise him on a comprehensive energy policy. *Cheney* was highly technical and turned on the question of the authority of a federal court of appeals to issue mandamus to stop discovery in a district court. The Supreme Court ruled 7-2 that the court of appeals had the authority, and so remanded the case to the Court of Appeals for the District of Columbia to reconsider the case. In deciding the matter on remand, the Court of Appeals created what is known as the "non-voting participant loophole" (see *In Re Cheney*, 406 F.3d 723, 2005).

As one of his first official acts, just days after being sworn in, President Bush established the National Energy Policy Development Group (NEPDG). NEPDG was tasked with creating a "a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future" (*Cheney*, 542 U.S. 367, 367, 2004). NEPDG was formed entirely of agency heads and other federal employees. Over a five-month period the task force met with various corporate energy interests in "stakeholder meetings," but made little effort to include public interest or environmental groups (Shapiro, 2008). After five months NEPDG issued its final report and disbanded, ceasing all operations. At that point, Judicial Watch and the Sierra Club sued under FACA (*Judicial Watch, Inc. v. National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 2004).

In *In Re Cheney* (334 F.3d 1096, 2003), Judicial Watch and the Sierra Club relied on a precedent set by the D.C. Circuit Court of *Appeals in Assoc. of American Physicians & Surgeons, Inc. v. Clinton* (997 F.2d 898, 1993). In *Surgeons, Inc.*, the Court held that lobbyist, industry executives, and other non-federal employees who were influential on

the outcome of an advisory committee's recommendations were acting as *de facto* members of the committee (*Surgeons, Inc.*, 997 F.2d 898, 1993). In *In Re Cheney*, the petitioners were arguing that the industry insiders participating in the "stakeholder meetings" were *de facto* members under *Surgeons, Inc.* and so their involvement should be subject to FACA requirements. Although the petitioners' argument prevailed in the District Court and the Court of Appeals, after this case had gone all the way to the Supreme Court on interlocutory appeal of the mandamus issue discussed above, it was returned to the D.C. Circuit, which reversed *Surgeons, Inc.* and held that nonvoting members without veto power are not subject to FACA (406 F.3d 723, 2005).

Judge Randolph, writing for the majority, stated the central question of *In Re Cheney* concisely. "Application of FACA depends on who is a member of a committee and who is not. On that subject, FACA is silent" (406 F.3d 723, 726, 2005). The court decided the meaning of the statute must be constructed as narrowly as possible, since there is a separation of powers issue at the heart of the secrecy claim. In so doing, the Court opened the nonvoting participant loophole, holding that committee members are only those who have "a vote in or, if the committee acts by consensus, a veto over the committee's decisions" (406 F.3d 723, 726, 2005).

The Federal Advisory Committee Act (FACA) Amendments of 2017

The solution to the problems created by these court decisions lies in a bill to amend FACA first introduced in the House of Representatives by Rep. William Clay (D-MO) in 2008 (H.R. 5687, 110th Congress, 2008). This article advocates the language in a more recent version of Rep. Clay's bill, The Federal Advisory Committee Act Amendments of 2017 (H.R. 70, 115th Congress, 2017). Because these loopholes all arise from judicial construction of statutory meaning, Congress can remedy the situation by clarifying the meaning of the statute. The bill specifically fixes the non-voting member loophole created by *In re Cheney* (406 F.3d 723, 2005) by explicitly stating that any person "shall be regarded as a member of a committee if the individual regularly attends and participates in committee meetings as if the individual were a member, *even if the individual does not have the right to vote or veto* the advice or recommendations of the advisory committee" (H.R. 70. 115th Congress. § 3(a), 2017 [emphasis added]). The bill

specifically fixes the subcommittee loophole created by National Anti-Hunger Coalition (711 F.2d. 1071, 1983) by clearly defining the scope of the statute: "this Act shall apply to each advisory committee, *including any subcommittee or subgroup* thereof" (H.R. 70. 115th Congress. § 3(b), 2017 [emphasis added]). It closes the contractor loophole created by Food Chemicals News (709 F. Supp. 5, 1989) and Byrd (174 F.3d 239,1999) by specifically clarifying how an advisory committee "is considered to be established by an agency, agencies, or the President if it is formed, created, or organized under contract, other transactional authority, cooperative agreement, grant, or otherwise at the request or direction of an agency, agencies, or the President" (H.R. 70. 115th Congress. § 3(c), 2017[emphasis added]). Similar bills have been introduced in every session of Congress since the 110th Congress, during the second half of President George W. Bush's last term (H.R. 5687. 110th Congress. 2008; H.R. 1320. 111th Congress. 2010; H.R. 3124. 112th Congress. 2011; H.R. 1104. 113th Congress. 2013, H.R. 2347. 114th Congress. 2016; H.R. 70. 115th Congress. 2017). The bill has passed the house five times during that period, three times in the House of Representatives with a Democratic majority and twice with a Republican majority (H.R. 5687. 110th Congress. 2008; H.R. 1320. 111th Congress. 2010; H.R. 1608. 1156h Congress. 2019; H.R. 1930. 117th Congress. 2021).

Conclusion

Any law seeking to afford access and balance to the influential communications of federal advisory committees must have as its primary emphasis not simply the imperative of openness, citizen involvement, and public reporting, but that its advice and recommendations be formulated with the public interest in mind. The federal advisory committees at work in the nation's capital affect the decisions of 50 or more federal agencies, and their use of public revenue assigns sums of taxpayer revenue to tasks that should be to the national good. Does FACA now work to aid the bureaucracy with recommendations unsullied by corporate and special interests? We have given good reasons here to doubt it.

The sunshine spirit guiding FACA was to ensure federal advisory committees were impartial, open, and responsive to public interests and its provisions were designed so that GSA officials could affect compliance. Unfortunately, judicial decisions have not

always helped that process. Because FACA was an attempt to curtail the eroding damage of decision-making by good ol' boy connections without regard to the public's insight or knowledge, it is key that such committees must be composed of members with critical expertise, but also with a diverse range of ideologies and interest in the outcome, and this goal has not been well served in the courts.

If Congress moves in the direction we advocate, then FACA's database can better disclose to the public, the work of the federal agencies advised by experts with corporate ties in terms of their recommendations and actions taken. Decisions by the federal courts over the past 30 years have consistently limited the scope of FACA's transparency guarantees. For more than five years there has been a congressional solution waiting to be implemented. This issue should be of concern to communication law scholars and general practitioners in law and policy alike. Without transparent access to the workings of government, neither academics nor citizens can do their work to improve democracy. Congress should pass the FACA amendments of 2017 to resolve these loopholes and restore the law to its proper scope.

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