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**BEFORE THE
SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES
OF THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES**

**HEARING ON THE FEDERAL ADVISORY COMMITTEE ACT (FACA) OF 2008
APRIL 2, 2008**

Mr. Chairman and Members of the Committee, thank you for inviting me here today to share with you my views on the Federal Advisory Committee Act. I am the University Distinguished Professor of Law and an Associate Dean at the Wake Forest School of Law and a Member Scholar of the Center for Progressive Reform. I have written or co-written numerous articles about the administrative process, including the Federal Advisory Committee Act (FACA), a widely-used law school casebook on administrative law, and a one-volume student treatise on administrative law.

The public's confidence in and respect for our government is directly influenced by the transparency and sunshine provisions that good government laws like FACA can provide. Unfortunately, since its creation in 1972, the courts have opened loopholes in FACA's coverage and federal agencies have whittled away at its open government mandates. Congress should arrest these trends now before we witness more stories of secret, biased, or unaccountable advisory committees influencing national energy policy, food safety standards, or environmental protection requirements. As this testimony will detail, the Executive Branch has violated the spirit, if not the letter, of FACA and damaged the credibility of the agencies and career staff that endeavor to protect all Americans.

Congressional action is required to rectify three problems with the current operation of FACA. Legislation is necessary to (1) close the loopholes in FACA's coverage; (2) promote better transparency in the advisory committee process; and (3) improve the screening process for conflicts of interest.

CLOSING LOOPHOLES

The Contractor Loophole

Thanks to judicial decisions of the D.C. Court of Appeals agencies can easily avoid FACA through a contractor loophole. Under this loophole, agencies avoid the statute by hiring private contractors to organize and operate an advisory committee. Across the government, decisions about public health, environmental protection, and other important matters of public policy are being influenced by advisory groups organized by private organizations that are not subject to FACA's basic disclosure and conflicts of interest requirements.

The loophole was created in a case in which the Food and Drug Administration (FDA) hired the Federation of America Societies for Experimental Biology (FASEB), a federation of major biomedical research organizations, to organize an advisory panel of scientific experts to advise it on issues relating to the safety of foods and cosmetics.¹ Although FDA had hired the FASEB to establish a peer review panel, the D.C. Circuit Court held that the panel had not been "established" by FDA, but by the FASEB. Further, although the advice of the panel had been used by FDA, the agency nevertheless had not "utilize[d]" the panel because the agency had not exerted significant influence over the committee's formation.²

The D.C. Circuit reached a similar result nearly a decade later in *Byrd v. United States EPA*,³ holding that a peer review panel convened by an Environmental Protection Agency (EPA) contractor, the Eastern Research Group (ERG), was not a FACA advisory committee.⁴ This time around, however, EPA had had far more involvement in the formation and deliberation of the committee than FDA had concerning the FASEB panel. EPA had hired ERG to provide a peer review of a report on the carcinogenic effects of benzene. Under the contract, the EPA determined the issues for the panel to evaluate; proposed potential members of the panel and expressed its approval of the persons chosen by ERG; held a teleconference with ERG and the selected panelists, instructed them as to the nature of their duties; and sent EPA employees to attend and participate in the meeting.⁵ In the court's view, none of these activities was sufficient to trigger the application of FACA. The court interpreted prior cases as holding that participation by an agency, or even an agency's "significant influence" over a committee's deliberations, does not qualify as sufficient management and control such that the committee is "utilized" by the agency under FACA.⁶

These cases rest on a mechanistic application of the Supreme Court's definition of the words "establish" and "utilize" as they are used in FACA.⁷ In the *Public Citizen* case,⁸ the Court was concerned that FACA not be extended to every occasion when the federal government asked an outside organization for advice concerning potential judicial nominees. The Court offered two

¹ See *Food Chemical News v. Young*, 900 F.2d 328, 329-30 (D.C. Cir. 1990), cert. denied, 498 U.S. 846 (1990).

² See *id.* at 333.

³ 174 F.3d 239 (D.C. Cir 1999), cert. denied, 529 U.S. 1018 (2000).

⁴ See *id.* at 245-48.

⁵ See *id.* at 241-42.

⁶ *Id.* at 246.

⁷ 5 U.S.C. app. II §§3(2)(B)-(C).

⁸ 491 U.S. 440 (1989).

reasons why it was not Congress's intention to apply FACA to organizations like the ABA or the NAACP when they offered advice to the President. Neither reason applies when an agency hires a private contractor to form an advisory committee.

The first reason was that FACA requires a government official to be in charge of each advisory committee, and the Court could not believe that Congress intended to intrude on the operations of private groups, such as the ABA, to this extent.⁹ The situation, however, is entirely different when an agency hires a private contractor to form an advisory committee. Since there is extensive regulation of private contractors by the federal government, it is highly unlikely that Congress would have been concerned that FACA might intrude on how a contractor operates an advisory committee.

The Court also justified its interpretation on the ground that the application of FACA to the ABA would unduly infringe on the President's Article II power to nominate federal judges and thereby violate the doctrine of separation of powers.¹⁰ There is no similar constitutional concern if FACA applies to private contractors who are hired to form an advisory committee by a government agency.

The reason for the hostility of the D.C. Circuit to FACA is not apparent from its decisions in *Food Chemical News* and *Byrd*. What is clear is that these judges gave no serious consideration to the public's interest in executive branch transparency and the important role that FACA can play in increasing governmental accountability.

The "Strict Management" Loophole

Agencies have latched on to another part of the *Public Citizen* decision that says FACA only applies to advisory groups that are so closely tied to an agency as to be "amenable to [] strict management by agency officials"¹¹

A recent lawsuit filed by the Natural Resources Defense Council (NRDC) illustrates the exploitation of this loophole. The lawsuit brought to light the EPA's practice of holding secret meetings with pesticide manufacturers as it considered the re-registration of their pesticides. The NRDC's complaint alleges that EPA established and utilized two advisory groups composed of EPA employees and representatives from Syngenta who were charged with (1) developing an "ecological level of concern" that represented the "magnitude and duration of exposure of aquatic plants to atrazine that potentially adversely affect aquatic communities and/or ecosystems;" and (2) "designing a monitoring program that could answer [several] management questions" about ecological monitoring of atrazine.¹²

EPA claims that the groups are not covered by FACA because the decision to begin meeting as "workgroups" was made jointly with Syngenta, the "[m]eetings were held by joint agreement,"

⁹ See *id.*, at 452-53.

¹⁰ See *id.* at 466-67.

¹¹ See *id.* at 457-58.

¹² Complaint, *NRDC v. Johnson*, Case No. I:05CV00340, 19-20 (D.D.C.) (document on file with the Center for Progressive Reform).

“[a]gendas for the meetings were developed jointly by EPA and Syngenta,” “[n]either of the subgroups had a formal structure,” “EPA exerted no control over who participated for Syngenta, and did not pay their salaries, fees, or travel expenses,” and “[t]he meetings of the subgroups resembled negotiations rather than attempts to build consensus.”¹³

EPA’s arguments seem to be aimed at establishing the idea that the agency did not have enough control over the advisory groups for a court to say that they “established” or “utilized” the group as the Supreme Court defined those terms in *Public Citizen*. If agencies can avoid FACA by the simple expedient of letting a regulated entity appoint the committee members and share joint control of the agenda, the idea of balanced and accountable advisory committees goes out the window.

The Nonvoting Participant Loophole

The outcome of the FACA litigation over the Cheney energy task force has led to a third loophole. Under this loophole, outsiders can take an active role in government committees, including attending meetings, providing information, offering advice, and possibly participating in committee deliberations, without the committee becoming subject to FACA.

Shortly after taking office in 2000, President Bush established the National Energy Policy Development Group, chaired by Vice President Cheney, to recommend a national energy plan. The task force, composed of federal officials, apparently met with various energy producers and trade associations but made no effort to meet with environmental or other public interest groups.

Judicial Watch and the Sierra Club sued the government, claiming that FACA applied to the task force. Judicial Watch based its argument that FACA applied to the Task Force on an earlier decision of the D.C. Circuit holding that FACA applied when private parties regularly attend and fully participate in government-run committee meetings so as to constitute “de-facto” members of the committee.¹⁴ The D.C. Circuit reversed its prior interpretation of FACA holding that the participation of private individuals in a committee whose members are government employees does not come within the ambit of FACA unless a private person has an official voting role on the committee or, if the committee acts by consensus, a veto over the committee’s decisions.¹⁵ The D.C. Circuit was apparently led to abandon its prior interpretation because an interlocutory Supreme Court opinion indicated sympathy for the White House’s constitutional claim that the application of FACA to the President might violate separation of powers.¹⁶

In its effort to avoid potential constitutional problems, the court created another loophole that applies across the government and not just to committees appointed by the President. The door

¹³ Memorandum in Support of Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment and for Extension of Time, *NRDC v. Johnson*, Case No. I:05CV00340, 12-13 (D.D.C.) (document on file with the Center for Progressive Reform).

¹⁴ See *In re Cheney*, 406 F.3d 723, 729-31 (D.C. Cir. 2005), at 726 (citing *Assoc. of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)).

¹⁵ *Id.* at 728.

¹⁶ See *Cheney v. United States Dist. Court*, 124 S. Ct. 2576 (2004). The Court of Appeals had originally dismissed the separation of powers concerns of the White House on the basis of *United States v. Nixon*, 418 U.S. 683 (1974). See *In re Cheney*, 334 F.3d at 1098-99.

is now open for an agency to invite the extensive involvement of outsiders in governmental committees without triggering FACA, which denies the public any accountability or transparency concerning the advice offered by these outsiders.

The Subcommittee Loophole

Finally, the D.C. Circuit has created a subcommittee loophole. In *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey of Cost Control*,¹⁷ the court addressed the issue of whether task forces created by an advisory committee that itself was subject to FACA were also subject to the act.¹⁸ The advisory committee, known as the Grace Commission, had the job of recommending to the President how to make government operate more efficiently.¹⁹ The thirty-six task forces created by the Commission gathered information, performed studies, and drafted reports and recommendations which were submitted to the Executive Committee of the Commission. The subject matter of three of the task forces was domestic feeding programs for low-income persons.²⁰ A coalition of low-income groups and individuals sued to gain access to the records and reports prepared by these committees under FACA.²¹ The D.C. Circuit held that absent evidence that the Executive Committee was merely “rubber stamping the task forces’ recommendations,” FACA did not apply to the task forces.²²

The subcommittee loophole permits an advisory committee to avoid the transparency and balance requirements of FACA by the simple expedient of creating subcommittees to do the real work of the committee. Even if the original committee does not simply rubber stamp the recommendations of a subcommittee, the committee in effect can delegate their work to task forces which are insulated from FACA.

Legislative Repair

The proposed FACA legislation would close three of these loopholes. The proposed legislation redefines an advisory committee as one that is “formed, created, or organized by, or at the request or direction of, an agency or the President.” If properly interpreted by the courts, this language would eliminate the contractor and strict management loopholes. The bill also provides that FACA applies to “each advisory committee, including any sub-committee or subgroup thereof, except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise,” which addresses the subcommittee loophole.

Unfortunately, the proposed legislation does not appear to address the nonvoting participant loophole. Although this loophole is of fairly recent origin, and therefore may not have been exploited by agencies to the same extent as the other loopholes, this practice may change if Congress closes off the other loopholes. Moreover, it is uncertain the extent to which this loophole may have already been used by agencies.

17. 711 F.2d 1071 (D.C. Cir. 1983).

18. *Id.* at 1072.

19. *Nat'l Anti-Hunger Coal. v. Executive Comm. of the President's Private Sector Survey of Cost Control*, 557 F. Supp. 524, 525 (D.D.C. 1983).

20. *Id.*

21. *Id.* at 1072, 1074.

22. *Id.* at 1075–76, 1075 (internal quotations omitted).

IMPROVING TRANSPARENCY

The large number of federal advisory committees makes it difficult to ensure that agencies are in full compliance with FACA. There are at least 900 committees, boards, commissions, councils, and panels that give advice to federal agencies and the White House, which meet more than 700 times a year and involve some 67,000 members.²³ The existence of agency websites makes it possible to take advantage of public oversight and participation in the administration of FACA that the statute's original drafters could not have envisioned. Agency websites provide accessibility that should be utilized in furtherance of FACA's goal of keeping the public informed about federal advisory committees.

In addition, Congress should require agencies to invite public comment on potential committee members. FACA instructs agency officials to ensure that committees "will not be inappropriately influenced by ... any special interests,"²⁴ and that committees are "fairly balanced in terms of the points of view represented and the functions to be performed by the committee."²⁵ Public participation in the nomination process can assist agency officials in meeting these requirements and provide oversight that these requirements are met. At a minimum, agencies should post on their websites the following information: the agency's screening policies concerning conflicts of interest and bias, biographical sketches of potential committee members including a list of conflicts of interest or potentially disqualifying biases for each, and any determinations that conflict of interest waivers are necessary. All of this information should be publicly accessible prior to a committee's initial meeting, with enough lead time that interested parties can call attention to any inadequacies in the process.

The importance of transparency and public involvement in the committee appointment process cannot be understated, as these factors are preconditions to advisory committees free from conflicted panelists. In recent years, there have been a number of published reports indicating that individuals with conflicts of interest or strong biases have been appointed to advisory committees:

- FDA's Endocrinologic and Metabolic Drugs Advisory Committee included an individual who had financial ties to the manufacturer of Rezulin, who spoke in favor of keeping the drug on the market after reports that it was responsible for at least 31 fatalities. After the drug had been linked to over 90 cases of liver failure, FDA issued a report on its handling of Rezulin's approval process and concluded, among other things, that the advisory committee's membership might not be adequate for addressing issues of risk management.²⁶

²³ Jim Morris & Alejandra Fernández Morera, *Network of 900 Advisory Panels Wields Unseen Power: Concerns raised about secrecy, industry influence and political interference*, March 29, 2007 (Report from the Center for Public Integrity), available at <http://www.publicintegrity.org/shadow/report.aspx?aid=821>.

²⁴ 5 U.S.C. app. II §§5(b)(3), (c).

²⁵ *Id.* at §5(b)(2).

²⁶ Elizabeth R. Glodé, *Advising Under the Influence?: Conflicts of Interest Among FDA Advisory Committee Members*, 57 *FOOD & DRUG L.J.* 293, 308-10 (2002).

- EPA’s 2005 panel tasked with reviewing the adequacy of industry’s voluntary efforts to use additional safeguards in land filling coal combustion waste included three panelists who worked for utilities.²⁷
- In 2004, EPA removed ethylene glycol monobutyl ether (EGBE or 2-butoxyethanol) from the Clean Air Act’s list of Hazardous Air Pollutants. The review panel that validated EPA’s decision included two industry-funded scientists whose studies were the basis for the EPA delisting decision that they were asked to review.²⁸

If enacted, the proposed FACA legislation would substantially increase transparency concerning advisory committees. The legislation would require agencies to post on their websites basic information about each advisory committee, enabling the public to keep track of the existence of such committee, their functions, their membership, and other important information relevant to the advisory committee process, including a transcript or electronic recording of each advisory committee meeting. Although most of this information is currently available if requested by a member of the public, the availability of the information on a website will substantially assist public oversight of the advisory committee process.

The proposed legislation also provides for giving the public a reasonable opportunity to comment on the appointment of each advisory committee member before it is made unless prior public comment is not practicable, in which case the agency must seek public comment after the appointment and justify this delay. Had this provision been in effect, the controversy and public outcry over conflicted committee members discussed previously might have been stanchied. Congress, however, may want to consider establishing a minimum amount of time for public comment, such as 30 days, in order to avoid conflict over what constitutes a reasonable opportunity for comment.

IMPROVING SCREENING FOR CONFLICTS OF INTEREST

As mentioned, FACA instructs agency officials to ensure that committees “will not be inappropriately influenced by ... any special interests.”²⁹ Four problems have developed in implementing this directive.

First, agencies are not required to appointment advisory committee members as special government employees. If committee members are selected as special government employees, they are subject to the same conflicts of interest statute as full-time government employees,³⁰ which means they are required to report financial interests that could create a real or apparent conflict of interest. An agency, however, can also appoint committee members as “representatives,” which means they are chosen to voice the opinion of a specific interest group, such as pesticide formulators or environmental advocates. Because they are chosen to provide a specific viewpoint – often that of an organization that has a financial interest in the committee’s

²⁷ Letter from the Center for Science in the Public Interest, et al. re: Comments on Expansion of RCRA Comparable Fuel Exclusion: Proposed Rule, *available at* http://www.cspinet.org/new/pdf/20070914_epa_comp_fuels_comments.doc (accessed March 26, 2008).

²⁸ *Id.*

²⁹ 5 U.S.C. app. II §§5(b)(3), (c).

³⁰ 5 U.S.C. App. IV (Ethics in Government Act); 18 U.S.C. § 208 (conflicts of interest statute).

deliberations – they are not subject to conflict of interest review. The designation of committee members as “representative,” however, has become a loophole that permits agencies to avoid the conflict of interest requirements in circumstances where a committee does not serve the function of soliciting the viewpoint of special interests.

The loophole exists because agencies have broad discretion in choosing the employment status of advisory committee members, and agencies appear to vary in their approach to these issues. The FDA and EPA tend to employ advisors as SGEs, while GAO found that USDA, the Department of Energy, and the Department of the Interior rely almost exclusively on representatives to fill their advisory committees, even though many of these committees would have been better served by SGEs.³¹ It may be the administrative burden of reviewing SGEs’ conflicts of interest creates an incentive to simply appoint committee members as representatives,³² but the public would be far better served by a policy of excluding committee members who have financial conflicts of interest unless an agency can justify that a committee of “representatives” is necessary.³³

Congress can narrow this loophole by requiring agencies to justify the use of “representative” committee members. As noted, whether this designation is appropriate depends on the function that the advisory committee is to serve.

Second, even if an agency appoints committee members as special government employees, Federal law permits waiver of the financial conflict of interest rules in certain circumstances. Thus, a person can serve on an advisory committee which is subject to FACA if “the need for the individual’s services outweighs the potential for a conflict of interest created by the financial interest involved.”³⁴

Although such waivers might be necessary in certain circumstances, they should not be routinely used. The number of waivers available per committee should therefore be limited to a certain fraction of the total membership and members who receive waivers should be prohibited from voting on the committee’s decisions. These limitations would allow committees to benefit from the conflicted individuals’ expertise while simultaneously minimizing the potential for those individuals to threaten the integrity of the committee’s final decisions.

Third, there is no legal requirement that the government give prompt public notice of such waivers of conflicts of interest. By comparison, Congress has required the National Academy of Sciences (NAS) and the National Academy of Public Administration (NAPA) to give such notice when these organizations undertake to advise the government. FACA permits these two organizations to waive an “unavoidable” conflict of interest, but the waiver must be “promptly and publicly disclosed.”³⁵ The same requirement should apply to governmental advisory committees. The names of individuals who will be granted waivers on each committee, the

³¹ U.S. GOV’T ACCOUNTABILITY OFFICE, *Federal Advisory Committees: Additional Guidance Could Help Ensure Independence and Balance*, GAO-04-328, 20-23 (April 2004).

³² *Id.* at 20.

³³ See generally, Sidney A. Shapiro and Rena I. Steinzor, *The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 L. & CONTEMP. PROBS. 99 (2006).

³⁴ 18 U.S.C. §208(b)(3).

³⁵ 5 U.S.C. app. II §15(b)(1).

interests that give rise to the need for a waiver, and the agency's justification for granting a waiver should be posted on the agency's website prior to the committee's first meeting (or first meeting with the person as a member). This should be done with enough lead time to give interested parties the opportunity to provide comments to the agency.

The final problem is that each agency has its own criteria for determining when potential committee members have a conflict of interest, and it is not apparent that these criteria are sufficient to prevent conflicts of interest. Congress should therefore require the Administrator of the General Services Administration, in consultation with the Director of the Office of Government Ethics, to promulgate regulations that ensure uniform and sufficient protection against conflicts of interest in the advisory committee process.

Moreover, Congress should require that regulations defining conflicts of interest should be as inclusive as possible. Delineating the conflicts of interest relevant to a particular committee is not a simple task, especially given the broad array of federal advisory committees. Nevertheless, there is one overarching concern that applies across the board: the process should be designed to uncover all interests that could potentially affect a committee member's objectivity in reviewing the issues before the committee. Those interests are not necessarily financial, or currently held by the potential committee member, or even held by the potential member herself. Looking at such a broad spectrum is the best way to get a full picture of an individual's interests and discern whether a person might be swayed in her or his decision making.

Proposed FACA legislation responds to these concerns. As mentioned earlier, the legislation increases the transparency of the advisory committee process by requiring agencies to make available to the public of their websites information about the advisory committee process. This information includes whether a member is designated as a special government employee or representative, which will permit the public to monitor agencies' use of representatives on advisory committees. The legislation also requires agencies to reveal any conflict of interest relevant to the functions of the committee, which will permit the public to monitor agencies' use of the waiver process.

In addition, the legislation requires the Administrator of the General Services Administration, in consultation with the Director of the Office of Government Ethics, to promulgate regulations defining conflict of interest and to issue guidance to agencies on procedures and best practices for ensuring that advisory committees provide independent advice and expertise. While this is an important step in improving conflict of interest protections, Congress should direct the Administrator that the regulations should require agencies to justify the use of representatives on advisory committees, establish presumptive limitations on the number of waivers available per committee, and adopt a definition of conflict of interest that is designed to uncover all interests that could potentially affect a committee member's objectivity in reviewing the issues before the committee.

SUMMARY AND CONCLUSION

Thirty-six years after its creation, FACA is a prime example of a good-government law that has failed to achieve its goals because of judicial missteps and administrative efforts to avoid accountability. Congress can address these problems with a few key changes to the law:

- Close the judicially-created loopholes that enable federal agencies to skirt the statute's open government mandates by:
 - Contracting with private entities to do advisory committee work;
 - Exempting
 - committees that are not under the "strict control" of agency;
 - committees that have the substantial involvement of private persons who are non-voting members;
 - subcommittees appointed by advisory committees.
- Improve transparency in the advisory committee appointment process by posting all relevant information about the advisory committee process on an agency's website prior to the committee's first meeting and giving the public an opportunity to comment on the appointment of committee members.
- Mandate the establishment of government-wide conflict of interest regulations for advisory committees that require agencies to justify the use of representatives on advisory committees, establish presumptive limitations on the number of conflict of interest waivers available per committee, and adopt a definition of conflict of interest that is designed to uncover all interests that could potentially affect a committee member's objectivity in reviewing the issues before the committee.

Thank you for the opportunity to testify.