

FIXING FACA: THE CASE FOR EXEMPTING PRESIDENTIAL ADVISORY COMMITTEES FROM JUDICIAL REVIEW UNDER THE FEDERAL ADVISORY COMMITTEE ACT

Michael J. Mongan*

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INTRODUCTION

The D.C. Circuit's *In re Cheney*¹ decision, announced this May, was popularly viewed as the capstone on a bitter, five-year political catfight over

* J.D. Candidate, Stanford Law School, 2006; B.A., Stanford University, 2001 (Political Science). I would like to dedicate this note to my grandfather, Martin Mongan. Special thanks to Alan Morrison for his assistance in developing this topic and for his patient counseling and thoughtful advice throughout the writing and editing process. Thanks also to the following people for their support—technical, editorial, and otherwise: Suzanna Brickman, Soo-Jean Chi, Morgia Dampf, Alex Han, John Mongan, M. Lou Mongan, Thomas Mongan, and Jonathan Stein.

1. 406 F.3d 723 (D.C. Cir. 2005).

government secrecy and the Bush Administration's energy policy.² But the decision also revealed something else: a federal open-government law that is broken and badly needs fixing.

Congress passed the Federal Advisory Committee Act (FACA)³ in 1972 to regulate the ad hoc commissions and panels that periodically issue advice and recommendations to our federal government. The Act's goals were admirable enough. Prior to FACA, the advisory committee system was horribly inefficient, and the committees themselves were largely unaccountable to the public. The Act included a handful of commonsense regulations, intended to instill a modicum of economy, ideological balance, and openness into the advisory committee process. But unlike most open-government laws, which exempt the President, Congress drafted FACA to apply to the President in full force. This legislative choice was made prior to the dénouement of the Watergate scandal—and, thus, prior to the Supreme Court's watershed separation-of-powers decisions in *United States v. Nixon*⁴ and *Nixon v. Administrator of General Services*,⁵ which instructed that Congress may violate the Constitution by disrupting the President's constitutionally assigned functions.

And therein lies FACA's flaw: In cases like *Cheney*, involving presidential advisory committees, the modern separation-of-powers doctrine permits the government to argue that the application of certain FACA provisions is unconstitutional. Eager to avoid this complicated constitutional issue, courts have narrowed, twisted, and contorted the Act in order to hold that it does not apply in these cases. These decisions achieve their intended short-term result of dodging the constitutional questions. But they also establish sweeping precedents that limit FACA's reach *outside* the presidential context—a realm where the vast majority of federal advisory committees exist and where applying FACA does not raise any separation-of-powers issues. In short, by trying to do too much, Congress did too little; by including presidential advisory committees in FACA, it unwittingly initiated the weakening of the Act through a gradual process of judicial erosion.

This Note surveys the history of FACA and the constitutional conflicts it provokes and recommends that Congress fix the Act by exempting presidential advisory committees from judicial review. Part I describes the evolution of efforts to regulate advisory committees over the past two centuries, which led to FACA's enactment in 1972. It demonstrates that in passing FACA, Congress was motivated almost entirely by practical policy considerations, but it did not

2. See, e.g., Charlie Savage, *Court Backs Cheney on Energy Meetings*, BOSTON GLOBE, May 11, 2005, at A3; David Stout, *Appeals Court Backs Cheney in Secrecy Case*, N.Y. TIMES, May 11, 2005, at A1.

3. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 §§ 1-15 (2005)).

4. 418 U.S. 683 (1974).

5. 433 U.S. 425 (1977).

consider separation-of-powers issues at all. Part II details the most prominent cases involving presidential advisory committees, which illustrate how Congress's decision to include these committees within FACA's reach has indirectly weakened the Act. Part III looks to other open-government laws—the Freedom of Information Act and the Federal and Presidential Records Acts—as potential models for reform. Finally, Part IV urges Congress to fix FACA by exempting presidential advisory committees from judicial review.

I. THE BIRTH OF FACA

Starting with George Washington, Presidents have relied on advisory committees for information and guidance.⁶ In the nineteenth century, Presidents used these groups sparingly, usually in response to unexpected crises such as the Whiskey Rebellion.⁷ Modern Presidents employ advisory committees far more frequently to tackle problems as broad as physical fitness and bioethics.⁸ These committees are generally temporary, ad hoc groups, created by the President or by Congress⁹ and are charged with advising the President on a particular issue.¹⁰ Their membership is usually appointed by the President himself and includes at least one nongovernment member.¹¹ Recent high-profile examples include two committees created in the aftermath of the September 11, 2001, terrorist attacks: the much-publicized “9-11 Commission” (formally known as the National Commission on Terrorist Attacks Upon the

6. See DAVID FLITNER, JR., *THE POLITICS OF PRESIDENTIAL COMMISSIONS* 7-8 (1986) (describing early examples of presidential commissions during the Washington, Van Buren, and Tyler Administrations); Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 *YALE L.J.* 51, 54 (1994) (“From George Washington to Bill Clinton, Presidents have appointed . . . informal observers or advisers . . . to offer their views and assistance on particular matters.”); Andrea L. Wolff, Comment, *The Federal Advisory Committee Act and the Executive Privilege: Resolving the Separation of Powers Issue*, 5 *SETON HALL CONST. L.J.* 1023, 1025 (1995) (“The use of advisory committees dates back to the [1790s] when George Washington formed a cabinet and convened committees.”). By most accounts, the modern presidential advisory committee emerged during the administration of Theodore Roosevelt. See FLITNER, *supra*, at 10; THOMAS R. WOLANIN, *PRESIDENTIAL ADVISORY COMMISSIONS* 5 (1975). Roosevelt used advisory committees “to confront issues of national relevance,” WOLANIN, *supra*, at 14—primarily environmental and resource-based issues such as inland waterways and public lands, *id.* at 10-11.

7. See FLITNER, *supra* note 6, at 7-8.

8. See FACA Database, <http://www.fido.gov/facadatabase/> (last visited Nov. 16, 2005).

9. WOLANIN, *supra* note 6, at 62. Occasionally, advisory committees are created by a nongovernment entity but used or “utilized” by the government. See 5 U.S.C. app. 2 § 3(2) (2005). Identifying this type of committee is no simple task, given the current law. See *infra* Part II.A.

10. See 5 U.S.C. app. 2 § 3(2).

11. See *id.*

United States)¹² and the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction.¹³ Significantly, presidential advisory committees are a small subset of a much larger group of federal advisory committees, most of which advise agencies or departments but not the President.¹⁴

To some extent, advisory committees are a natural outgrowth of the President's constitutional obligations to report information and make recommendations to Congress.¹⁵ Beyond this constitutional mandate, advisory committees serve a host of other key functions. Most importantly, they act as policy analysts, investigating a problem and recommending that the President adopt a particular solution.¹⁶ Advisory committees also market existing policy proposals to the greater public¹⁷ or raise public awareness of issues or problems that are not yet ripe for government action.¹⁸ Other committees respond to a

12. See National Commission on Terrorist Attacks Upon the United States Home Page, <http://www.9-11commission.gov> (last visited Nov. 16, 2005).

13. See *infra* note 19.

14. See 5 U.S.C. app. 2 § 3(2), (4).

15. See U.S. CONST. art. II, § 3 (requiring the President to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient"); see also Bybee, *supra* note 6, at 104. When asked by Congress to explain "under what authority" he created a commission to investigate the New York customhouse, see *infra* text accompanying note 24, President Tyler responded that his authority rested, in part, on the State of the Union and Recommendations Clauses. See Bybee, *supra* note 6, at 62.

16. See FLITNER, *supra* note 6, at 16 ("Presidential advisory commissions are investigatory bodies, generally without statutory bases, which within a defined purview are directed to seek out all relevant information, sift it, piece it together, arrive at conclusions and, on the basis of their conclusions, make recommendations for legislative and/or social action."); WOLANIN, *supra* note 6, at 13 (noting that well over half of the commissions studied served primarily as policy analysts and that "[t]he stated goal for every presidential commission is to be a policy analyst"). Wolanin lists President Johnson's National Advisory Commission on Health Manpower and his Committee on Urban Housing as prototypical "policy analysis" committees. WOLANIN, *supra* note 6, at 13-14. A contemporary example is the Invasive Species Advisory Committee, established to develop policies aimed at controlling the effects of invasive species on the environment. See Invasive Species Advisory Committee Home Page, <http://www.invasivespecies.gov/council/advisory.shtml> (last visited Nov. 16, 2005).

17. See WOLANIN, *supra* note 6, at 15 (describing "window dressing," or "help[ing] to sell or market a proposal to which the President is already committed," as the second major purpose of presidential advisory committees). Wolanin's example is President Truman's Advisory Commission on Universal Training. *Id.* at 16-17. Prior to creating the Commission, Truman had already advanced a universal military training proposal—and had it rejected by Congress. *Id.* at 17. He noted in his memoirs that the Commission was designed to produce a "report by a group of distinguished and representative Americans [that] would move Congress to action." *Id.* The most prominent contemporary example of this type of committee is President George W. Bush's Commission to Strengthen Social Security. See *infra* text accompanying notes 255-60.

18. See FLITNER, *supra* note 6, at 5 (arguing that "provision of factual bases for future action, education of relevant social and political groups, and general public education" is "the primary function of the social-issue presidential commission"); see also WOLANIN,

crisis: they reassure the public that the President is committed to taking action, even when action itself is not forthcoming.¹⁹ And occasionally, Presidents employ advisory committees as a means of delay²⁰—a precious commodity in Washington, D.C.²¹ The presence of “outsiders” on advisory committees is important to all of these functions: beyond lending crucial expertise and insight that may not be available from the ranks of government officials, a committee can gain substantial credibility from the participation of prominent private citizens.²² In sum, advisory committees are an important tool for the modern President.²³

supra note 6, at 20. Wolanin explains that advisory committees are often created even when “there [is] no short- or intermediate-range prospect of executive or legislative action to deal with the problem at hand.” *Id.* In these situations, “[t]he President’s primary purpose . . . is either to begin a long range support-building effort for solving a problem that is well recognized but on which there is little prospect of immediate action, or to elevate a problem to a prominent position on the national agenda.” *Id.* For example, Wolanin quotes a staff member of President Truman’s Commission on Immigration and Naturalization as saying that “[t]here was no reasonable likelihood that the Congress would take up a lameduck President’s proposals. It was a long range educational effort directed at the people and at the Congress in particular.” *Id.* Many modern advisory committees, such as the President’s Council on the 21st Century Workforce, seem to share a similar long-term educational goal.

19. See FLITNER, *supra* note 6, at 17, 21; WOLANIN, *supra* note 6, at 21. Prominent historical examples of this type of committee are the National Advisory Commission on Civil Disorders (the Kerner Commission), convened by President Johnson following the urban riots of the late 1960s, and the President’s Commission on the Assassination of President Kennedy (the Warren Commission). See WOLANIN, *supra* note 6, at 21-22. A more recent example is the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, created by President George W. Bush after prewar intelligence on Iraq’s nuclear capabilities proved woefully inaccurate. See Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction Home Page, <http://www.wmd.gov> (last visited Oct. 28, 2005). Indeed, this function of committees is so prevalent that it has inspired poetry:

If you’re pestered by critics and hounded by factions
To take some precipitate, positive action,
The proper procedure, to take my advice, is
Appoint a commission and stave off the crisis.

Geoffrey Parsons, *Royal Commission*, PUNCH, Aug. 24, 1955, at 207.

20. See WOLANIN, *supra* note 6, at 22-24. A partisan might contend that President George W. Bush’s Weapons of Mass Destruction Commission—which was created nine months before the 2004 general elections but not scheduled to report until five months *after* the elections—served this purpose as well. See Exec. Order No. 13,328, 69 Fed. Reg. 6,901 (Feb. 6, 2004).

21. The list of purposes in this paragraph is not intended to be exhaustive. Flitner argues that one of the four major purposes of advisory committees is serving as an “efficient organizational tool.” FLITNER, *supra* note 6, at 17. Wolanin lists a number of other purposes, including “restor[ing] congressional and public confidence in an institution or process . . . that is under a shadow of doubt or being attacked,” “acting as an independent check on the staff work being done within the executive branch,” providing a source for recommendations that could not appropriately come from the President, and placating the persons requesting the commission. See WOLANIN, *supra* note 6, at 24-25.

22. See FLITNER, *supra* note 6, at 47 (noting that prospective advisory committee members often “have some connection with the area under study,” and explaining that

For almost as long as federal advisory committees have existed, Congress has endeavored to regulate them. Early legislative initiatives erected a front-end check on presidential and agency advisory committees by regulating their funding. In 1842, after President Tyler appointed a group of private citizens to investigate allegations of misbehavior at the New York customhouse, Congress responded with legislation that limited the President's ability to fund advisory committees.²⁴ The 1842 Act prohibited the President from "pay[ing] any account or charge whatever, growing out of, or in any way connected with, any commission or inquiry," unless Congress itself specifically appropriated the funds.²⁵ Later, Congress responded to President Theodore Roosevelt's increased use of advisory committees by banning any use of appropriated funds for committees that were not authorized by Congress.²⁶ Then, during World War II, Congress forbade the executive from spending funds on advisory committees that had existed for more than a year.²⁷ All three of these measures remain in effect,²⁸ but because taxpayers do not have standing to sue under this type of law, they are not judicially enforceable.²⁹ And Presidents have largely skirted these laws "by using unrestricted funds allotted to the President, seeking outside funding, or utilizing privately funded groups as advisory committees."³⁰

Congress's funding-oriented initiatives did little to check the proliferation of presidential and agency advisory committees over the course of the mid-twentieth century.³¹ After World War II, as the government regulated more and more areas of American life and the military-industrial complex swelled, the number of advisory committees exploded.³² Many of these committees focused

bringing in well-known private citizens as members "can potentially add prestige, credibility, and visibility to a commission").

23. *But see* FLITNER, *supra* note 6, at 1-2 ("Despite the frequency of their use, however, commissions have suffered criticism and have often been ignored by those who appointed them."). Even when commissions are ultimately marginalized or ignored, however, they may still serve the "reassurance" and "delay" functions described above.

24. Bybee, *supra* note 6, at 61-63.

25. Act of Aug. 26, 1842, ch. 202, § 25, 5 Stat. 533. The Act exempted "courts martial or courts of inquiry in the military or naval service." *Id.*

26. Act of Mar. 4, 1909, ch. 299, § 9, 5 Stat. 1027; *see also* Bybee, *supra* note 6, at 63-67.

27. Independent Offices Appropriation Act of 1945, ch. 286, 58 Stat. 361 (1944) (current version at 31 U.S.C. § 1347 (2005)); *see also* Bybee, *supra* note 6, at 67-69.

28. Bybee, *supra* note 6, at 68.

29. *See generally* 74 AM. JUR. 2D *Taxpayers' Actions* § 6 (2005) (outlining taxpayer standing and lack thereof).

30. *Id.* at 116.

31. *Id.* at 68-69 ("Since the passage of these acts, Congress has generally been inclined to fund presidential commissions. But even when Congress has not been so disposed, 'a determined chief executive can usually find the means of supporting any commission that he feels to be needed.'") (internal citation omitted).

32. *See id.* at 61, 70-72; Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 458-59 (1997).

on business and economic matters and were composed largely of representatives from the very same industries they were studying.³³ This state of affairs prompted antitrust and conflict-of-interest concerns and a renewed interest in regulation.³⁴ Congressional hearings in 1957 cast a dim light on the state of the advisory committee system, revealing that “many existing advisory committees were not subject to any formal control during their creation, organization, or operation, and some had been formed without specific statutory authorization”³⁵ and that “many of these committees met without agendas and failed to keep records of their deliberations. Some also kept their existence concealed from public scrutiny, allowing internal conflicts of interest as well as domination by special interests to go unrecognized.”³⁶

Although Congress’s scrutiny of advisory committees during the 1950s never bore legislative fruit,³⁷ it seems to have encouraged self-regulation by the executive branch—which, in turn, laid the foundation for FACA. Throughout the 1950s, the Department of Justice had instructed executive branch officials about proper use of advisory committees.³⁸ These guidelines urged agencies to obtain congressional authorization before creating advisory committees and to ensure that the committees followed an agenda, kept full records, and remained purely advisory.³⁹ But the guidelines were not binding, and agencies often ignored them.⁴⁰ In the wake of the 1957 hearings, the Bureau of the Budget adopted many of these guidelines in a 1959 directive.⁴¹ Then, in 1962, President Kennedy issued Executive Order No. 11,007,⁴² which largely followed the Department of Justice guidelines.⁴³ Significantly, however, *none* of these executive branch initiatives extended to presidential advisory committees.

Kennedy’s executive order may have placated Congress, but this effect was short-lived. In 1969, the House Committee on Government Operations launched a comprehensive study of federal advisory committees.⁴⁴ The next

33. See Bybee, *supra* note 6, at 70.

34. See *id.*; Croley & Funk, *supra* note 32, at 459; Wolff, *supra* note 6, at 1027.

35. Wolff, *supra* note 6, at 1027.

36. *Id.*

37. In 1957, the House passed a bill aimed at regulating federal advisory committees by adopting informal guidelines issued by the Department of Justice, see *infra* text accompanying notes 38-40, and applying them throughout the federal government. See H.R. 7390, 85th Cong. (1st Sess. 1957); H.R. REP. NO. 85-576 (1957); see also Bybee, *supra* note 6, at 71-72. The Eisenhower Administration opposed this legislation, and it did not pass the Senate. Bybee, *supra* note 6, at 72.

38. For a thorough discussion of these guidelines, see Bybee, *supra* note 6, at 70-71.

39. *Id.*

40. Croley & Funk, *supra* note 32, at 459.

41. Bybee, *supra* note 6, at 72.

42. 27 Fed. Reg. 1,875 (Feb. 26, 1962).

43. See Bybee, *supra* note 6, at 72-73.

44. See H.R. REP. NO. 91-1731, at 1 (1970).

year, in a strongly worded report, the Committee denounced Executive Order 11,007 as ineffective because of its limited scope and lax enforcement.⁴⁵ The report painted a somewhat contradictory—but entirely unflattering—portrait of federal advisory committees. On the one hand, the report implied that the network of advisory committees amounted to a frighteningly powerful “fifth arm of the Federal establishment.”⁴⁶ It estimated that upwards of two thousand federal advisory committees existed, operating at an annual cost of around \$75 million;⁴⁷ included in this total were about two hundred presidential advisory committees, costing nearly \$50 million a year.⁴⁸ The report suggested that these committees were populated with favorites and industry insiders⁴⁹ and were subject to little or no review from Congress or the executive branch.⁵⁰ On the other hand, the report characterized many committees as weak and ineffective. It noted that committees were often duplicative,⁵¹ existed in name only,⁵² or issued reports and recommendations that never saw the light of day.⁵³ Based on these findings, the report called for legislation to advance two primary goals: improving representational balance on advisory committees and decreasing their number and cost.⁵⁴

The Committee on Government Operations report sparked legislation in both houses of Congress that quickly converged to become FACA. The legislative history from both chambers reiterated the findings of the 1970 report.⁵⁵ It also highlighted a third goal: increasing transparency and public

45. *Id.* at 8-9. For example, the Committee criticized the executive order for excluding presidential advisory committees and committees established by statute. *Id.* at 9. The Committee also noted that the order “does not provide . . . for executive oversight of the formation, management and use of advisory committees” and that many departments and agencies “do not have an established procedure for achieving compliance with the directives of the executive order.” *Id.* It concluded that, “[a]t best, Executive Order 11007 provides minimum basic management control over only a small portion of the advisory committee mechanism.” *Id.*

46. *Id.* at 5 (internal quotations omitted).

47. *Id.* at 15. This equals about \$365 million in 2004 dollars. See CPI Inflation Calculator, <http://www.bls.gov/cpi/home.htm> (last visited Oct. 28, 2005).

48. H.R. REP. NO. 91-1731, at 10. This equals about \$240 million in 2004 dollars. See CPI Inflation Calculator, *supra* note 47.

49. See H.R. REP. NO. 91-1731, at 18-19.

50. See *id.* at 6-7.

51. *Id.* at 13, 16-17.

52. *Id.* at 16.

53. *Id.* at 4-5, 12.

54. See *id.* at 20-24.

55. See H.R. REP. NO. 92-1017, at 2-3 (1972); S. REP. NO. 92-1098, at 2-3 (1972); 118 CONG. REC. 13, 16297 (1972) (statement of Rep. Brown) (noting that the House bill “include[s] provisions intended to mitigate the dominance of advisory committees by any special interests”); 118 CONG. REC. 23, 30272 (1972) (statement of Sen. Metcalf) (“[T]he legislation provides . . . a housekeeping function in the interests of efficiency and economy in Government . . .”).

accountability in the advisory committee process.⁵⁶

The text of FACA borrows from Executive Order No. 11,007 and reflects Congress's three purposes of efficiency, balance, and openness. It sets forth a sweeping definition of "advisory committee" that includes any group, with one or more public members, created by law or established or "utilized" by an agency or the President.⁵⁷ The Act provides for the elimination of existing committees⁵⁸ and imposes ex ante checks on the creation of new committees.⁵⁹ It requires Congress—but, surprisingly, not the President or federal agencies—to ensure that committees are ideologically balanced and independent.⁶⁰

56. See H.R. REP. NO. 92-1017, at 10 (stating that the House bill imposes a "requirement of openness," which is "designed to assure public access to deliberations of advisory committees"); S. REP. NO. 92-1098, at 14 (describing Section 10 of the Senate bill as "establish[ing] the standard of openness in advisory committee deliberations, and provid[ing] an opportunity for interested parties to present their views and be informed with respect to the subject matter taken up by such committees"); 118 CONG. REC. 23, 30274 (1972) (statement of Sen. Percy) ("The second major element of the bill is its provisions for opening up advisory committees to public scrutiny.").

57. 5 U.S.C. app. 2 § 3 (2005). The Act specifically excludes: the Advisory Commission on Intergovernmental Relations; the Commission on Government Procurement; "any committee which is composed wholly of full-time officers or employees of the Federal Government," § 3(2); "any advisory committee established or utilized by the Central Intelligence Agency . . . or the Federal Reserve System," § 4(b) (internal numbering omitted); and state or local entities, § 4(c).

58. FACA directs Congress to eliminate unnecessary committees, § 5(a), and requires that committees be terminated after two years of existence unless they are affirmatively renewed, § 14.

59. In creating new committees, Congress must consider "whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee." § 5(b). Moreover, the executive branch may only create advisory committees at the direction of the President himself or where an agency head "determine[s] as a matter of formal record [that the committee is] in the public interest in connection with the performance of duties imposed on that agency by law." § 9(a).

60. § 5(b)(2)-(3). Although the text of this Section appears to only apply this "balancing" requirement on Congress, it does note that "[t]o the extent they are applicable, the guidelines . . . shall be followed by the President . . . in creating an advisory committee." § 5(c). Thus far, most courts have operated under the assumption that the balance requirement applies in full force to *all* advisory committees. See, e.g., *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 903 (D.C. Cir. 1993) ("Under section 5, an advisory committee established by the President or by legislation must be fairly balanced in terms of the points of view represented.") (internal quotations and citation omitted); *Nat'l Anti-Hunger Coal. v. Executive Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 (D.C. Cir. 1983) ("Each advisory committee's membership, moreover, must be fairly balanced in terms of the points of view represented and the functions to be performed.") (internal quotations and citation omitted). *But see* *Physicians' Educ. Network v. Dep't of Health, Educ. & Welfare*, 653 F.2d 621, 622 (D.C. Cir. 1981) ("One difficulty with relying on [FACA] is that [Congress] did not authorize the establishment of an advisory committee [here]. Only if it had done so would the Advisory Committee Act mandate that the legislation "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented" and "contain appropriate provisions" to guard against "inappropriate[] influence[] by . . . any special

Finally, FACA aims to increase transparency and public access in the advisory committee system. It requires every committee to file a formal charter for congressional and public review⁶¹ and provides for public meetings with timely notice and opportunity for public input,⁶² publicly available minutes,⁶³ transcripts,⁶⁴ and other documents;⁶⁵ and an annual report by the President on the state of the advisory committee system.⁶⁶

Given its threefold purpose in enacting FACA, Congress's decision to extend the Act to presidential advisory committees was unsurprising. After all, no effort to reduce the cost of the advisory committee system would succeed without targeting presidential committees, which consumed roughly two-thirds of all advisory committee dollars at FACA's conception.⁶⁷ And because the most prominent and important advisory committees reported to the President himself,⁶⁸ any attempt to improve ideological balance or increase transparency in the system as a whole would surely ring hollow if it did not include presidential committees. In the words of the House committee report, "[i]t would be contrary to the purpose" of FACA if prominent presidential advisory committees "were to be exempted."⁶⁹

But while Congress's decision to include presidential advisory committees in FACA was grounded in practical policy considerations, it was made without any consideration of whether this situation might unconstitutionally infringe on the powers of the President.⁷⁰ The core structure of FACA descended from the Department of Justice Guidelines and Executive Order 11,007—neither of which was designed to be applied to *presidential* advisory committees. The Act's congressional gestation period occurred between 1969 and 1972, well

interest." It is thus apparent that not all of the safeguards of the Advisory Committee Act were operative . . .") (internal citation omitted).

61. 5 U.S.C. app. 2 § 9(c).

62. § 10(a).

63. § 10(c).

64. § 11.

65. §§ 10(b), 13.

66. § 6(c). After 1998, this annual printed report was replaced by a publicly available Internet database. *See* FACA Database, *supra* note 8.

67. *See supra* text accompanying notes 47-48.

68. For example, the Warren Commission on President Kennedy's assassination and the Kerner Commission on civil disorders, two high-profile committees in the decade preceding FACA's enactment, both reported directly to President Johnson. *See supra* note 19.

69. H.R. REP. NO. 92-1017, at 4. Indeed, the Senate committee report explicitly contemplated a cause of action against the President for certain violations of the Act. S. REP. NO. 92-1098, at 16 ("Section 10(d)(3) provides that any person aggrieved by a determination by the President or the head of an agency under subsection (d) may file an action under section 552(a)(3) of title 5, United States Code.").

70. A review of the relevant committee reports and floor debates from the 92nd Congress did not reveal *any* statements addressing the possibility that FACA might unconstitutionally infringe on the powers of the President.

before the Supreme Court handed down its modern separation-of-powers cases.⁷¹ And President Nixon did not object to the Act or alert Congress to its potential problems. Thus Congress did not consider—and, in all fairness, could not reasonably have predicted—the destructive consequences of its decision to extend FACA to presidential advisory committees.

II. THE PROBLEM

In passing FACA, Congress sought openness, representational balance, and economy throughout the federal advisory committee system. However, by expressly including *presidential* advisory committees, Congress unwittingly laid the groundwork for the Act to be weakened and narrowed by federal courts. The problem arises because, in the presidential context, FACA threatens to violate the principle of separation of powers by interfering with a number of the President's constitutionally assigned powers and obligations. Cognizant of these constitutional difficulties, courts have twisted and contorted the text of FACA in order to find that various entities advising the President are *not* advisory committees under the Act—thus avoiding the constitutional question altogether. Standing by themselves, these decisions are disquieting examples of strained logic and faulty reasoning. Even more troubling, though, is the fact that they extend outside of the presidential context and serve as precedent for narrowing the scope and reducing the effectiveness of FACA generally.

In FACA cases involving presidential committees, the President can almost always advance a strong argument that application of the Act would run afoul of the principle of separation of powers. Separation of powers is an amorphous concept, reflecting the Framers' desire to delicately balance constitutional powers between three separate branches, each possessing largely distinct spheres of authority.⁷² Although “there is no fruitful rule or test that governs decisions relating to separation of powers,”⁷³ and the principle generally “does not yield clear solutions to intra governmental disputes,”⁷⁴ modern Supreme Court decisions do give some form to the concept. In *Nixon v. Administrator of General Services*,⁷⁵ the Court rejected a separation-of-powers challenge to the Presidential Recordings and Materials Preservation Act.⁷⁶ It cautioned that separation of powers does not require “a complete division of authority” or

71. The Court's watershed decisions in *United States v. Nixon*, 418 U.S. 683, and *Nixon v. Administrator of General Services*, 433 U.S. 425, gave considerable substance to the abstract principle of separation of powers but were handed down in 1974 and 1977, respectively.

72. See *Mistretta v. United States*, 488 U.S. 361, 380-82 (1989).

73. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 3.5, at 150 (7th ed. 2000).

74. *Id.* § 3.5, at 149.

75. 433 U.S. 425 (1977).

76. See *infra* text accompanying notes 221-24.

“three airtight departments of government.”⁷⁷ Instead, the doctrine “focuses on the extent to which [a law] prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”⁷⁸

To resist the application of FACA to presidential advisory committees, the government generally argues that the Act unconstitutionally encroaches on the President’s ability to obtain advice and information.⁷⁹ Although the Constitution does not explicitly assign this function to the President alone, Article II *does* authorize the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments”⁸⁰ and “recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient.”⁸¹ Moreover, the Constitution requires the President to report to Congress on the State of the Union⁸² and “take Care that the Laws be faithfully executed.”⁸³ These clauses would be almost meaningless if the President were not also implicitly empowered to seek the advice and information needed to carry them out.⁸⁴ In FACA cases, the government has seized on these textual commitments to argue that, “to fulfill his Executive duties, the President must be able to consult with his advisors and to obtain their candid guidance and expertise.”⁸⁵ This style of argument hints at a grander point: gathering information is the first, crucial step in the presidential policymaking process. The operation of FACA threatens to disturb this process and thereby disrupt a fundamental function that is unquestionably the province of the President—making executive decisions.

It is easy to imagine how applying certain provisions of FACA to presidential advisory committees might disrupt the President’s information-

77. 433 U.S. at 443 (internal quotations and citation omitted).

78. *Id.* (internal citations omitted). In a more recent decision, the Court expanded its guidance on the subject. It noted that it would “not hesitate[] to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.” *Mistretta v. United States*, 488 U.S. 361, 382 (1989). However, the Court would uphold “statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment.” *Id.*

79. *See, e.g.*, Brief for Petitioners at 28-35, *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004) (No. 03-475); Brief for the Respondent at 38-41, *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440 (1989) (Nos. 88-429, 88-494).

80. U.S. CONST. art. II, § 2, cl. 1.

81. *Id.* art II, § 3.

82. *Id.*

83. *Id.*

84. *See* Bybee, *supra* note 6, at 123 (“The power of the President to seek outside advice can be implied from the structure of Article II.”).

85. Brief for Petitioners at 29, *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004) (No. 03-475).

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gathering function; namely, the public scrutiny required by FACA⁸⁶ could make it harder for the President to receive honest, forthright, and accurate advice. Surely the government officials, academics, and industry leaders who populate presidential advisory committees⁸⁷ would be less likely to make unpopular or impolitic statements if they knew that their constituents, colleagues, or stockholders could read a transcript of their comments the next day.⁸⁸ Indeed, potential advisory committee members could be disinclined to serve altogether for the same reason. To be sure, this chilling effect of FACA is not unique to presidential committees, but it is only in this realm that the Act potentially runs afoul of the Constitution by disrupting the President's ability to obtain the advice and information he needs to make fully informed decisions.

Under certain circumstances, the government can also argue that FACA disrupts a constitutional power or obligation that is *explicitly* vested in the President. For example, in *Public Citizen v. Department of Justice*, discussed below, the committee in question advised the President (through the Department of Justice) on federal judicial appointments.⁸⁹ The Constitution gives the President the sole authority to nominate federal judges,⁹⁰ and congressional interference in this function is viewed as almost per se unconstitutional by some members of the Supreme Court.⁹¹ Presumably, the same constitutional protection would apply if the President convened an advisory committee to assist him in carrying out his constitutional power to pardon criminals⁹² or veto legislation.⁹³

While the President can muster powerful arguments that FACA disrupts his constitutionally assigned functions, the arguments supporting Congress's constitutional authority to regulate presidential advisory committees are less

86. See 5 U.S.C. app. 2 §§ 10-11 (2005).

87. See WOLANIN, *supra* note 6, at 75-81.

88. See Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 925 (D.C. Cir. 1993) (Buckley, J., concurring) (discussing the possibility of applying FACA to President Clinton's health care task force and commenting that "[i]t is hard to imagine conditions better calculated to suppress the 'candid, objective, and even blunt or harsh opinions,' that the President was entitled to receive from the" task force) (internal citation omitted). To be sure, most presidential advisory committees are created with the ultimate goal of producing a public report; so, FACA notwithstanding, committee members can never expect that the viewpoints they express will remain *entirely* confidential. Nonetheless, Judge Buckley's fear that the public disclosure components of FACA may have a chilling effect on presidential advisory committee members is a real one: Members of a closed committee that produces a final report know that the report can be edited and massaged to remove troublesome passages and thus will feel more free to engage in vigorous debate and voice "blunt or harsh" opinions. In contrast, an open-meeting or a public-transcript requirement forces members to censor themselves before they even begin to speak.

89. See *infra* text accompanying note 106.

90. See U.S. CONST. art. II, § 2, cl. 2.

91. See *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 482-89 (1989) (Kennedy, J., concurring).

92. U.S. CONST. art. II, § 2, cl. 1.

93. *Id.* art. I, § 7, cl. 2.

persuasive. The Spending⁹⁴ and Appropriations⁹⁵ Clauses no doubt support the general spending restrictions enacted by Congress prior to FACA, but it is far more difficult to shoehorn FACA's regulation of the day-to-day *procedures* of presidential advisory committees into these textual grants of authority over general fiscal matters.⁹⁶ A more promising alternative is the "elastic" Necessary and Proper Clause.⁹⁷ FACA's requirements undeniably serve the public interest by ensuring that the government receives trustworthy, unbiased information and preventing capture of federal advisory committees by self-interested outsiders; thus the Necessary and Proper Clause establishes at least some constitutional basis for some congressional regulation of advisory committee procedures.⁹⁸ But given the more specific textual commitments of power on the executive side of the balance, it is unclear that this vague constitutional foundation is sufficient to withstand a separation-of-powers challenge.

Thus, as applied to presidential advisory committees, FACA raises troubling separation-of-powers issues.⁹⁹ Under the inquiry established by *Nixon v. Administrator of General Services*, the President has substantial grounds for arguing that the operation of FACA would "disrupt[]" his "constitutionally assigned functions."¹⁰⁰ On the other side of the balance, there is far less authority—textual or otherwise—to suggest that this "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."¹⁰¹ Indeed, a number of courts and judges that have reached the question have found that the application of certain FACA provisions to presidential advisory committees violates the Constitution.¹⁰²

94. *Id.* art. I, § 8, cl. 1.

95. *Id.* art. I, § 9, cl. 7.

96. See Bybee, *supra* note 6, at 114-16.

97. U.S. CONST. art. I, § 8, cl. 18. See generally NOWAK & ROTUNDA, *supra* note 73, §§ 3.1-3.3, at 138-48.

98. Others are more critical of the Necessary and Proper Clause as a constitutional basis for FACA. Judge Bybee writes that "Congress has little basis for regulating the President's outside advisory committees under the Necessary and Proper Clause." Bybee, *supra* note 6, at 120. He argues that while the Clause permits Congress "to enlarge the areas under government control . . . it is a different matter for Congress to enlarge its own power by bringing under its control an area that has traditionally belonged to the President." *Id.* at 118. The government has echoed this argument in court. See, e.g., Brief for Petitioners at 31, *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004) (No. 03-475) ("The Constitution vests no power in Congress to regulate such exclusively Executive functions.").

99. In addition, there is at least some potential for constitutional conflicts related to the doctrine of executive privilege. See *In re Cheney*, 334 F.3d 1096, 1104-05 (D.C. Cir. 2003).

100. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

101. *Id.*

102. For example, the district court in *Public Citizen* was "persuaded . . . that Congress cannot impose FACA in this case because of the specific limitations on the role of the legislature as expressed in Article II and because no overriding congressional interest has been demonstrated that outweighs FACA's intrusion on the nomination power of the President." *Wash. Legal Found. v. U.S. Dep't of Justice*, 691 F. Supp 483, 491-92 (D.D.C.

But courts rarely actually address the question of FACA's constitutionality. The doctrine of constitutional avoidance directs courts to use statutory construction to bypass constitutional issues wherever possible.¹⁰³ In the FACA context, courts generally accomplish this goal by construing the Act narrowly, such that presidential advisory committees fall outside its scope. Too often, these statutory constructions push the limits of the constitutional avoidance doctrine, because they apply to provisions that govern *all* federal advisory committees, not just presidential ones.¹⁰⁴ This expansive application of the doctrine of constitutional avoidance thus establishes precedents that narrow the scope of the Act in all cases, even where there are no constitutional issues to avoid. A handful of examples are illustrative, as explained in the Parts below.

1988). In his concurring opinion when the case reached the Supreme Court, Justice Kennedy agreed: "[I]n my view, the application of FACA in this context would be a plain violation of the Appointments Clause of the Constitution," *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 482 (1989), because it "would constitute a direct and real interference with the President's exclusive responsibility to nominate federal judges," *id.* at 488. Similarly, in *Ass'n of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), the concurring opinion argued that application of FACA to President Clinton's health care reform task force was unconstitutional "[b]ecause none of Congress's purposes in enacting FACA are of a gravity that would justify overriding the Presidential privilege," *id.* at 925 (Buckley, J., concurring).

The fact that *some* of the provisions of FACA are unconstitutional as applied to presidential committees by no means supports the proposition that *all* of FACA is unconstitutional in the presidential context. For example, the requirement that each committee file a charter containing basic information about its objectives, scope, and operations, 5 U.S.C. app. 2 § 9 (2005), seems unlikely to interfere with the President's constitutional functions. *See* Brief for Respondent Sierra Club at 43, *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004) (No. 03-475). Other provisions, including those requiring that committees offer timely notice of meetings, 5 U.S.C. app. 2 § 10(a)(2) (2005), and take detailed minutes, § 10(c), are similarly benign when standing by themselves.

Nevertheless, courts have generally pursued an "all or nothing" approach when considering whether FACA violates the separation-of-powers principle. An example is Justice Kennedy's concurring opinion in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), which treated FACA as a single, inseparable whole. He wrote that "the application of FACA would constitute a direct and real interference with the President's exclusive responsibility to nominate federal judges," *id.* at 488, without specifying which individual provisions of the Act were problematic. His ultimate conclusion that "[t]he mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act," *id.* at 488-89, similarly fails to see the trees for the forest.

103. *See* *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("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."); *see also* *Public Citizen*, 491 U.S. at 465-66 (quoting *Crowell* and citing to other cases for the same proposition).

104. *See infra* text accompanying notes 105-202. The doctrine does not permit courts to adopt constructions that are not "fairly possible," *Crowell*, 285 U.S. at 62, or that are "plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

A. *Public Citizen v. United States Department of Justice and Its Progeny*

The prime example of FACA's flaw is *Public Citizen v. United States Department of Justice*.¹⁰⁵ There, the Supreme Court was asked to apply FACA to the American Bar Association's (ABA) Standing Committee on Federal Judiciary, which regularly evaluated the qualifications of potential judicial nominees and reported its findings to the President through the Department of Justice.¹⁰⁶ The Justice Department advanced two theories for why FACA did not apply: First, it reasoned that the Committee did not qualify as an "advisory committee" as defined by the Act.¹⁰⁷ Second, it argued that applying FACA in this context would amount to an unconstitutional violation of the separation-of-powers doctrine.¹⁰⁸

Unwilling to address the constitutional question, the *Public Citizen* Court responded with a positively acrobatic opinion, explaining why the ABA Committee was not an advisory committee under FACA. For FACA to apply, a committee must either be "established or utilized by the President" or an agency.¹⁰⁹ Neither party contended that the ABA Committee was "established" by the President or the Justice Department.¹¹⁰ So the Court's analysis turned on whether the word "utilized" captured the relationship between the government and the ABA Committee.¹¹¹ Under the dictionary definition of the word—"to make practical and effective use of"¹¹²—this would have been a straightforward inquiry: the President made use of the Committee's advice every time he decided whether to nominate a judicial candidate.¹¹³ But the Court refused to employ this "common sense" meaning of the term.¹¹⁴ Instead, it culled selectively from the legislative history of FACA, and the executive branch regulations and executive orders that preceded it, to support a much

105. 491 U.S. 440 (1989).

106. *Id.* at 443-45.

107. *Id.* at 447.

108. *Id.* at 448.

109. 5 U.S.C. app. 2 § 3(2) (2005).

110. *Pub. Citizen*, 491 U.S. at 452.

111. *Id.*

112. THE NEW OXFORD DICTIONARY OF ENGLISH 2040 (1998).

113. *See Pub. Citizen*, 491 U.S. at 445.

114. *Id.* at 452. The Court argued that "'[u]tilize' is a woolly verb, its contours left undefined by the statute itself." *Id.* It rationalized its rejection of the common understanding of the word by suggesting that "[a] literalistic reading [of 'utilize'] would catch far more groups and consulting arrangements than Congress could conceivably have intended." *Id.* at 463-64. It reasoned that the Act would apply even if the President casually "seeks the views of the National Association for the Advancement of Colored People, . . . asks the leaders of an American Legion Post he is visiting for the organization's opinion," or "consults with his own political party before picking his Cabinet." *Id.* at 453. *But see* Bybee, *supra* note 6, at 84 ("There are considerable reasons why the NAACP and the American Legion should be treated differently from the ABA Standing Committee.").

narrower reading of the word.¹¹⁵ Ultimately, the Court found that when Congress wrote “utilized,” it had intended to say “that FACAs applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences ‘for’ public agencies as well as ‘by’ such agencies themselves.”¹¹⁶

Even Justice Brennan, the author of the majority opinion, seemed somewhat uncomfortable with this strained reading of “utilized.” Perhaps because of this, he equivocated, conceding near the end of his opinion that “it seems to us a close question whether FACAs should be construed to apply to the ABA Committee.”¹¹⁷ But Brennan then sought to bolster his argument by invoking the specter of constitutional conflict. He admitted “[t]hat construing FACAs to apply to the . . . ABA Committee would present formidable constitutional difficulties.”¹¹⁸ After reviewing the doctrine of constitutional avoidance,¹¹⁹ he concluded his opinion by noting that “[o]ur unwillingness to resolve important constitutional questions unnecessarily thus solidifies our conviction that FACAs is inapplicable.”¹²⁰ This admission left little doubt that the decision was almost wholly informed by the doctrine of constitutional avoidance—and not by a desire to interpret the statute in a manner faithful to Congress’s intent.

Justice Brennan’s obvious self-consciousness about the logic of *Public Citizen* was warranted: judicial and scholarly treatments have criticized it sharply. Justice Kennedy’s concurrence—which was joined by Chief Justice Rehnquist and Justice O’Connor—was openly hostile to the majority’s logic: “I cannot go along with the unhealthy process of amending the statute by judicial interpretation. Where the language of a statute is clear in its application, the normal rule is that we are bound by it.”¹²¹ A subsequent lower court decision described the *Public Citizen* opinion as one of “adroit semantics and near-clairvoyant discernment of legislative intent.”¹²² And the leading scholarly

115. See *Pub. Citizen*, 491 U.S. at 455-65. The “extraordinary leaps” taken by the *Public Citizen* majority are already described in considerable detail elsewhere, see, e.g., Bybee, *supra* note 6, at 81-92, and will not be examined in depth here.

116. *Pub. Citizen*, 491 U.S. at 462.

117. *Id.* at 465.

118. *Id.* at 466.

119. See *id.* at 465-66.

120. *Id.* at 467.

121. *Id.* at 470 (Kennedy, J., concurring). Justice Kennedy also noted that he found “the Court’s treatment of the legislative history one sided and offer[ed] a few observations on the difficulties of perceiving the true contours of a spirit.” *Id.* at 474. He would have reached the constitutional question and found the application of FACAs in this context to be a violation of the separation of powers. *Id.* at 482-89. Interestingly, Justice Scalia took no part in the *Public Citizen* decision. *Id.* at 442. Presumably, this was because years earlier, in his position as Assistant Attorney General, he authored a memorandum questioning whether FACAs was constitutional. See Bybee, *supra* note 6, at 78.

122. *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1014 (D.D.C. 1994). This

work on this subject is similarly harsh, characterizing the decision as one of “extraordinary leap[s]”¹²³ and concluding that “[f]or its efforts at divining Congress’ intent from the legislative history, the Court demonstrated that it indeed possessed nothing more than a nodding acquaintance with FACA’s purposes. In the end, the Court made a shambles of the Act, quite unnecessarily.”¹²⁴

The real harm of *Public Citizen*, however, lies not in its flawed reasoning but in the precedent it set for future FACA cases. By rejecting the commonsense definition of “utilized” in favor of a narrower meaning, the Court weakened the Act by constricting its scope in *all* FACA cases—even those that did not involve presidential advisory committees.¹²⁵ Subsequent decisions indicate that lower courts have blindly applied the *Public Citizen* definition of “utilized” to all types of federal advisory committees.¹²⁶

In *Food Chemical News v. Young*,¹²⁷ the D.C. Circuit considered whether FACA applied to a panel of experts that provided advice to the Food and Drug Administration (FDA) about food and cosmetic safety. The group was established by a private contractor, pursuant to its agreement with the FDA.¹²⁸ The district court, writing *before* the *Public Citizen* decision, found the group to be a federal advisory committee because it was “utilized” by the FDA.¹²⁹ It reasoned that the contractor’s ultimate report to the FDA would be “in all material respects, a report of the Expert Panel” itself, and “the opinions expressed therein will be those of the Expert Panel and not” the contractor.¹³⁰ Because the FDA thereby “utilized” the opinions of the panel, it qualified as a federal advisory committee.¹³¹ The D.C. Circuit, writing *after Public Citizen*

decision is discussed in greater detail below. *See infra* text accompanying notes 193-202.

123. Bybee, *supra* note 6, at 86.

124. *Id.* at 93 (internal quotations and citation omitted); *see also* Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 906 (D.C. Cir. 1993) (“The Court adopted, we think it is fair to say, an extremely strained construction of the word ‘utilized’ in order to avoid the constitutional question.”); Michelle Nuskiewicz, Note, *Twenty Years of the Federal Advisory Committee Act: It’s Time for Some Changes*, 65 S. CAL. L. REV. 957, 979 (1991) (“[T]he Court did nothing to develop an interpretive definition of the term ‘utilized’ to guide future courts and litigants in how to apply FACA. . . . Tragically, the Court’s limited holding . . . adds little to an already small body of law that concerns the definition of a federal advisory committee.”).

125. *Public Citizen* did not limit its definition of “utilized” to the presidential advisory context.

126. *See generally* Croley & Funk, *supra* note 32, at 478-81 (“Cases subsequent to *Public Citizen* suggest that the Supreme Court’s narrow reading of ‘utilized’ will indeed be applied to independent groups providing advice to agencies.”).

127. 900 F.2d 328 (D.C. Cir. 1990).

128. *Id.* at 329-30.

129. *Food Chem. News v. Young*, 709 F. Supp. 5, 7 (D.D.C. 1989). The district court also found that the group was “established by” the FDA because the agreement essentially mandated the group’s creation. *Id.* at 7-8.

130. *Id.* at 8.

131. *See id.* at 9.

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was decided, took a different view. Then-Judge Ruth Bader Ginsburg rejected the argument that *Public Citizen* “carv[ed] out only a ‘narrow exception’ to FACA’s ‘broadly crafted’ definition of ‘advisory committee.’”¹³² Instead, she read *Public Citizen* to extend the definition of “utilized” committees only as far as “a group organized by a nongovernmental entity but nonetheless so ‘closely tied’ to an agency as to be amenable to ‘strict management by agency officials.’”¹³³ Since the contractor itself—and not the FDA—created and controlled the expert panel, it was not “utilized” by an agency and was therefore not subject to FACA.¹³⁴

The D.C. Circuit confronted a similar fact pattern in *Byrd v. United States Environmental Protection Agency*.¹³⁵ There, the Environmental Protection Agency (EPA) launched an external peer-review process before releasing a report on the effects of benzene.¹³⁶ It directed a contractor to establish a peer-review panel—and required that two-thirds of the panel members come from a preapproved list.¹³⁷ After discussing the benzene proposal at a public meeting, the panel issued a final report to the EPA.¹³⁸ The court was unmoved by the extent of the EPA’s involvement in the panel: it held that because the agency did not “actual[ly] manage[] and control” the panel and had not itself prepared the panel’s report, it had not “utilized” it.¹³⁹

Public Citizen’s restrictive “utilized” definition also allowed the D.C. Circuit to hold that an advisory group on environmental sanctions fell outside FACA in *Washington Legal Foundation v. United States Sentencing Commission*.¹⁴⁰ Although the group reported directly to the United States Sentencing Commission (an independent agency within the judicial branch),¹⁴¹ it was arguably “utilized” by the Department of Justice, which ultimately enforced the Federal Sentencing Guidelines and had two of its employees on the advisory group.¹⁴² The court dismissed this argument because “[t]he word ‘utilized’ in FACA requires more than [Washington Legal Foundation] has alleged. It is a stringent standard, denoting something along the lines of actual

132. *Food Chem. News*, 900 F.2d at 332 (internal citation omitted).

133. *Id.* at 333 (internal citation omitted).

134. *Id.* The D.C. Circuit opinion also rejected the district court’s finding that the group was “established by” the FDA. It read *Public Citizen* as directing that “‘established’ indicates ‘a Government-formed advisory committee.’” *Id.* at 332. The expert panel did not fit that description because it was formed by the private contractor, at the direction of the FDA, but not by the FDA. *Id.* at 333.

135. 174 F.3d 239 (D.C. Cir. 1999).

136. *Id.* at 241.

137. *Id.*

138. *Id.* at 242.

139. *Id.* at 247-48 (internal quotations omitted).

140. 17 F.3d 1446 (D.C. Cir. 1994).

141. *Id.*

142. *Id.* at 1451.

management or control of the advisory committee.”¹⁴³ Although the court conceded that the Department of Justice was heavily involved in the operations of the group,¹⁴⁴ the relationship was insufficient to satisfy this “stringent standard.”¹⁴⁵

The *Public Citizen* precedent frequently permits the government to prevail on summary judgment motions in FACA cases. In the early nineties, the Department of Health and Human Services relied on the findings of committees within the American Medical Association (AMA) to devise Medicare payment schedules for physicians.¹⁴⁶ In at least one instance, the Department “adopted” the recommendations of an AMA panel “in their entirety, unchanged.”¹⁴⁷ Still, the reviewing court held that because plaintiffs could not demonstrate that the Department had actual management or control of the AMA committees, they were not “utilized.”¹⁴⁸ More recently, the EPA beat back a FACA challenge regarding an industry task force that provided it with data to assist in pesticide registration decisions.¹⁴⁹ The court acknowledged that this task force had a recurring “relationship” with the EPA: it “frequently” obtained “feedback on its developing methodology for meeting [EPA] data requirements”; EPA staff attended some of its meetings; and the two entities “corresponded regularly.”¹⁵⁰ But despite these facts—and despite evidence that the EPA relied on the task force’s data—the court held that the EPA did not “utilize” the task force.¹⁵¹

In sum, the *Public Citizen* opinion, which resulted from Congress’s decision to include presidential advisory committees in FACA, had far-reaching and deleterious effects on the Act. To avoid applying the statute to a single presidential advisory committee, the Supreme Court construed the Act in a way that narrowed its scope with respect to hundreds of agency-level committees, present and future, that can stake no claim to any of the constitutional arguments offered by the government in *Public Citizen*.

B. In re Cheney

The recent legal imbroglio over Vice President Cheney’s energy task force—punctuated by the D.C. Circuit’s May 2005 en banc decision in favor of the government—is more evidence of FACA’s inherently flawed structure. The case centered around whether the National Energy Policy Development Group,

143. *Id.* at 1450.

144. *See id.* at 1451.

145. *Id.* at 1450.

146. *Am. Soc’y of Dermatology v. Shalala*, 962 F. Supp. 141, 144-45 (D.D.C. 1996).

147. *Id.* at 144.

148. *Id.* at 147.

149. *Wash. Toxics Coal. v. EPA*, No. C04-0113C, 2004 WL 3203973 (W.D. Wash. Aug. 12, 2004).

150. *Id.* at *2.

151. *Id.* at *7.

headed by the Vice President in 2001, was an advisory committee under FACA. Cheney and his codefendants contended that the group's membership was limited to government officials, and therefore it was exempt from the Act.¹⁵² But the plaintiffs, various public interest groups, argued that certain lobbyist outsiders were so intimately involved in the Energy Policy Development Group's activities that they amounted to de facto members, bringing the group within FACA's scope.¹⁵³ In making this argument, the plaintiffs relied on existing precedent from the D.C. Circuit, which established that an individual who is not officially a member of an advisory committee may nonetheless qualify as a "de facto" member.¹⁵⁴

After the district court ordered broad discovery,¹⁵⁵ the government asked the D.C. Circuit to issue a writ of mandamus halting the discovery, arguing that such a probing inquiry would violate the principle of separation of powers.¹⁵⁶ The circuit panel declined, finding that it lacked appellate jurisdiction over this interlocutory order,¹⁵⁷ and the Supreme Court granted certiorari¹⁵⁸ to decide whether the discovery was constitutional and whether the court of appeals had jurisdiction to halt it.¹⁵⁹

The Supreme Court's decision in *Cheney v. United States District Court for the District of Columbia*¹⁶⁰ was notable primarily for what it did *not* do. It did not resolve the constitutional question that it expressly granted certiorari on; nor did it flesh out the hazy doctrines surrounding executive privilege and

152. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 24-25 (D.D.C. 2002).

153. *Id.* at 25.

154. This rule came from *Ass'n of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993). In considering whether the large working group assembled by the Clinton Administration to facilitate development of its health care plan qualified as a FACA advisory committee, the D.C. Circuit opined that outside "consultants" who regularly attended meetings might qualify as members—thus bringing the group under FACA. *Id.* at 915. The court explained that "[w]hen an advisory committee of wholly government officials brings in a 'consultant' for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee," adding that "[w]e are confident that Congress did not intend FACA to extend to episodic meetings between government officials and a consultant." *Id.* However,

a consultant may still be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a "consultant" regularly attends and fully participates in working group meetings as if he were a "member," he should be regarded as a member.

Id. (emphasis added).

155. *Judicial Watch, Inc.*, 219 F. Supp. 2d at 56.

156. See *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003).

157. *Id.*

158. See *In re Cheney*, 540 U.S. 1088 (2003).

159. See Petition for Writ of Certiorari at I, *In re Cheney*, 540 U.S. 1088 (2003) (No. 03-475).

160. 542 U.S. 367 (2004).

the status of the vice presidency.¹⁶¹ And, importantly, it did not provide any guidance to the lower courts on whether, and when, an individual might qualify as a “de facto member” of a federal advisory committee.¹⁶² The Court’s ultimate conclusion was a meek one. It merely noted that the D.C. Circuit was wrong to assume “that the assertion of executive privilege [was] a necessary precondition” for a writ of mandamus on separation-of-powers grounds, and remanded for further proceedings.¹⁶³ As Professor Vikram Amar quipped, “in some ways it was fully in keeping with [the 2003] term’s big theme—deciding not to decide.”¹⁶⁴

So why did the Supreme Court take the case at all? The text offers an obvious answer: the decision was really a vehicle for the Justices to lecture their brethren in the lower courts about the importance of the constitutional issues involved. The Court devoted no fewer than eleven pages¹⁶⁵ to this broken-record lecture on the “weighty separation-of-powers objections raised in this case”:¹⁶⁶

These separation-of-powers considerations should inform a court of appeals’ evaluation of a mandamus petition involving the President or the Vice President. . . .¹⁶⁷

. . . This is not a routine discovery dispute. . . . The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives. . . .¹⁶⁸

. . . [T]he high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery, and . . . the Executive’s constitutional responsibilities and status are factors counseling judicial deference and restraint[s] in the conduct of litigation against it. . . .¹⁶⁹

. . . These occasions for constitutional confrontations between the two branches should be avoided whenever possible. . . .¹⁷⁰

. . . [A]ll courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings.¹⁷¹

161. See *id.*; see also Vikram David Amar, *The Cheney Decision—A Missed Chance To Straighten Out Some Muddled Issues*, 2004 CATO SUP. CT. REV. 185, 185 (2004) (“[T]he Court’s opinion in *Cheney* represents a missed opportunity for the Court to educate and clarify on two confusing subjects: so-called executive privileges and immunities, and the complex office of the vice presidency.”).

162. See *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004).

163. *Id.* at 391.

164. Amar, *supra* note 161, at 185.

165. See 542 U.S. at 381-91.

166. *Id.* at 391.

167. *Id.* at 382.

168. *Id.* at 385.

169. *Id.* (internal quotations and citations omitted).

170. *Id.* at 389-90 (internal quotations and citation omitted).

171. *Id.* at 391.

Even a dense reader could not possibly miss the Court's point.

On remand, the D.C. Circuit issued a decision that heeded the Supreme Court's stern constitutional warnings—but, in doing so, eviscerated the existing definition of advisory committee member in a way that narrows the scope of FACA considerably.¹⁷² The unanimous en banc court began its brief analysis by noting that “[i]n light of the severe separation-of-powers problems in applying FACA on the basis that private parties participated in, or influenced, or were otherwise involved with a committee in the Executive Office of the President, we must construe the statute strictly.”¹⁷³ With this goal in mind, the court overruled its own doctrine on de facto membership and quickly created an entirely new rule on membership that is devoid of precedent or foundation in either the text or the spirit of the Act: “[A] committee is composed wholly of federal officials if the President has given no one other than a federal official a vote in or, if the committee acts by consensus, a veto over the committee's decisions.”¹⁷⁴ Applying its new rule on membership to the energy task force, the court took the government at its word that no nonfederal employees had a vote or a veto, and thus found that the group was not an advisory committee under FACA.¹⁷⁵

The D.C. Circuit's resolution of *Cheney* is troubling on several levels. First, it relies on strained reasoning which is at odds with the historical record. The court rests its conclusion on the argument that, because congressional aides are not considered “members” of congressional committees, then, by analogy,

172. *See In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005).

173. *Id.* at 728. The court did not expand on the exact nature of these separation-of-powers problems. But it did suggest that in addition to FACA's disclosure provisions, the requirements for charters, public meetings, detailed minutes of meetings, and balanced membership were also constitutionally problematic in the presidential advisory committee context. *See id.*

174. *Id.* Lacking any textual or historical support for this conclusion, the court rested its decision on a single argument. It explained that “Congress could not have meant that participation in committee meetings or activities, even influential participation, would be enough to make someone a member of the committee,” because

[w]hen congressional committees hold hearings, it is commonplace for the Senate or House members of the committee to bring aides with them. The same is true when high-ranking Executive Branch officials serving on committees attend committee meetings. They, too, commonly bring aides with them. An aide might exert great influence, but no one would say that the aide was, therefore, a member of the committee. The situation is comparable if an individual, not employed by the federal government, attends meetings or participates in the activities of a Presidential committee whose official membership consists only of federal officials. The outsider might make an important presentation, he might be persuasive, the information he provides might affect the committee's judgment. But having neither a vote nor a veto over the advice the committee renders to the President, he is no more a member of the committee than the aides who accompany Congressmen or cabinet officers to committee meetings.

Id. This statement was made in spite of the court's earlier position that whether an individual exercised decisionmaking authority was irrelevant to the question of whether she was a “member” of an advisory committee. *See supra* note 154.

175. *Cheney*, 406 F.3d at 729-31.

lobbyists or other private individuals who participate in the meetings of an executive branch advisory committee but do not hold a vote or a veto occupy a similar nonmember status.¹⁷⁶ But this analogy is inapposite. Congressional aides are themselves government employees, act only as agents of congressional committee members, and do not advocate for their own self-interest. The lobbyists at issue in *Cheney* were not government employees, did not act as agents of the official members of the task force, and presumably acted entirely in their own self-interest. Moreover, the legislative history—not to mention the text—of FACA reveals no congressional intent to cabin the definition of “member” so narrowly. To the contrary, the Senate report explains that groups composed wholly of government employees were excluded from the Act because “it was felt that the main problems of proliferation, confusion and operational abuse lay with those advisory committees whose membership in whole or in part comes from the public sector.”¹⁷⁷ These words show that Congress intended FACA to cover all situations where outsiders participate in and influence advisory committee deliberations—regardless of whether those outsiders hold a formal vote or veto.

Second, the *Cheney* decision’s narrow definition of “membership”—which obliterates the de facto member doctrine¹⁷⁸—narrows the scope of FACA as it applies to all advisory committees, not just presidential ones.¹⁷⁹ After *Cheney*, the government may easily dodge the requirements of FACA wherever it sees fit, merely by ensuring that all nongovernment participants are stripped of a formal vote or veto. An advisory group composed of three official government members, but whose closed meetings are regularly attended by three dozen vocal representatives of various special interests, will fall outside of the Act, so long as only the formal members ultimately assent to the group’s final report. Indeed, under this same scenario, the outsider participants could even research, write, and revise the group’s report, in full compliance with FACA, so long as they do not formally vote to approve it. Congress could not have intended such a bizarre result.

Cheney, like *Public Citizen*, was a results-oriented decision, driven from start to finish by the desire to obey the Supreme Court’s directive and avoid the constitutional issue. Ultimately, in order to respect the constitutional principle that “the *President* must be free to seek confidential information from many

176. *Id.* at 728.

177. S. REP. NO. 92-1098, at 7-8 (1972) (emphasis added).

178. *See supra* note 154.

179. To be sure, if taken out of context, the court’s language might allow some room for argument that this new doctrine applies only to presidential advisory committees. In the paragraph announcing its new definition of membership, the court refers specifically to “a committee in the Executive Office of the President.” *Cheney*, 406 F.3d at 728. But nothing else in the opinion allows such a limited reading. Indeed, the court’s reasoning in no way turns on the fact that the committee in question is presidential and could apply with equal force to agency advisory committees. *See id.*

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sources,”¹⁸⁰ the D.C. Circuit wrote an opinion that weakens FACA with respect to hundreds of agency groups that have no connection with the President and thus no constitutional claim to special protection.

C. Ass’n of American Physicians & Surgeons, Inc. v. Clinton

The Clinton Administration’s failed campaign to reform America’s healthcare system produced another high-profile FACA case: *Ass’n of American Physicians & Surgeons, Inc. (AAPS) v. Clinton*.¹⁸¹ There, the issue was whether the Act applied to a task force composed of eleven high-ranking federal government employees and then-First Lady Hillary Rodham Clinton, who served as chair.¹⁸² As in *Public Citizen*, the government advanced two theories. First, it reasoned that the task force was exempt from FACA because all of its members—including the First Lady—were government officers and employees.¹⁸³ In the alternative, it argued that applying FACA to the task force would violate the Constitution.¹⁸⁴ Thus, the D.C. Circuit was faced with two unappealing options: either shoehorn the First Lady into the definition of “officer” or “employee,” or address the constitutional question. Predictably, it chose the former.

The structure of the D.C. Circuit opinion in *AAPS* made it clear just how much the constitutional tail was wagging the FACA dog. The court devoted a full five pages at the beginning of its opinion to a soul-searching discussion of the constitutional issues involved.¹⁸⁵ Then, it abruptly tossed these weighty considerations aside, explaining that

[p]rudent use of the maxim of statutory construction allows us to avoid the difficult constitutional issue posed by this case. The question whether the President’s spouse is “a full-time officer or employee” of the government is close enough for us properly to construe FACA not to apply to the Task Force merely because Mrs. Clinton is a member.¹⁸⁶

But the court’s opinion belied the argument that the statutory question was a “close” one. The court looked past a definition of “officer or employee” offered in Title 5 of the U.S. Code—the same Title in which FACA is

180. *Id.* (emphasis added).

181. 997 F.2d 898 (D.C. Cir. 1993).

182. *See id.* at 900-01. The other members were “the Secretaries of the Treasury, Defense, Veterans Affairs, Health and Human Services, Labor, and Commerce Departments, the Director of the Office of Management and Budget, the chairman of the Council of Economic Advisers, and three White House advisers.” *Id.*

183. *Id.* at 902. FACA provides that the definition of advisory committee excludes “any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government.” 5 U.S.C. app. 2 § 3(2) (2005).

184. *Ass’n Am. Physicians & Surgeons, Inc.*, 997 F.2d at 902.

185. *See id.* at 906-10.

186. *Id.* at 910-11.

located—that clearly excluded the First Lady.¹⁸⁷ Instead, it directed its attention to a broader definition, housed in Title 1, that only arguably included the First Lady.¹⁸⁸ It then seized on the fact that the 1948 Congress had authorized funding to facilitate the First Lady’s “assistance” of the President as evidence that the 1972 Congress considered her to be “a *de facto* officer or employee” in the context of FACA.¹⁸⁹ At times, even the court seemed skeptical of this logic, conceding that the government’s argument was “by no means overwhelming,”¹⁹⁰ and that the question of the First Lady’s status was “not an easy one.”¹⁹¹ Perhaps for these reasons, it strictly limited its holding to the FACA context.¹⁹²

To be sure, *AAPS* will not have nearly as sweeping an impact on future FACA cases as the *Public Citizen* or *Cheney* opinions, because it turned on an uncommon factual scenario: the presence of the First Lady as a member of the committee. Nevertheless, the case suggests just how far federal courts are willing to stretch the law to avoid applying FACA in the presidential context.

D. Northwest Forest Resource Council v. Espy

Even in the rare instance where a court willingly applies FACA to a presidential advisory committee and finds a violation, constitutional scruples may prevent the court from offering any meaningful remedy. *Northwest Forest Resource Council v. Espy*¹⁹³ involved a group established to advise President Clinton on forest policy that included at least five nonfederal employees.¹⁹⁴ As mentioned above, the district court harshly criticized the *Public Citizen* and *AAPS* decisions and refused to skirt constitutional issues by engaging in “similar creative statutory construction.”¹⁹⁵ It readily found that the group was an advisory committee under FACA¹⁹⁶ and had repeatedly violated the Act.¹⁹⁷

187. *Id.* at 903-04. Under this definition, the court conceded that to qualify as an officer or employee, an individual “must be: (i) appointed to the civil service; (ii) engaged in the performance of a federal function; and (iii) subject to supervision by a higher elected or appointed official.” *Id.* at 903; see 5 U.S.C. §§ 2104-2105 (2005).

188. *Ass’n Am. Physicians & Surgeons, Inc.*, 997 F.2d at 904. That definition of officer “includes any person authorized by law to perform the duties of the office.” 1 U.S.C. § 1 (2005).

189. *Ass’n Am. Physicians & Surgeons, Inc.*, 997 F.2d at 904-05.

190. *Id.* at 905.

191. *Id.* at 906.

192. *Id.* at 911. Just like with *Public Citizen*, subsequent legal scholarship was unfriendly to the *AAPS* decision. See Anessa Abrams, *The First Lady: Federal Employee or Citizen-Representative Under FACA?*, 62 GEO. WASH. L. REV. 855, 882 (1994) (reviewing the legislative history and finding that the D.C. Circuit erred in holding that Hillary Clinton was an “officer or employee under FACA”).

193. 846 F. Supp. 1009 (D.D.C. 1994).

194. See *id.* at 1010-11.

195. *Id.* at 1014.

196. *Id.* at 1012.

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But the court's decision regarding relief, guided by the doctrine of constitutional avoidance, gave the plaintiffs only a Pyrrhic victory.¹⁹⁸ It granted a declaratory judgment in favor of the plaintiffs but refused to order the government to release any undisclosed records, summarize its activities, or prepare minutes of each meeting.¹⁹⁹ Significantly, the court also refused to enjoin the Clinton Administration from relying on the team's recommendations.²⁰⁰ This final decision was explicitly based on separation-of-powers considerations: "The Court is aware of no authority upon which it could confidently rely in concluding that it may forbid the President and his Cabinet to act upon advice that comes to them from any source, however irregular."²⁰¹ *Northwest Forest Resource Council* puts the lie to policy arguments in favor of preserving judicial review of presidential advisory committees under FACA. By denying all relief beyond declaratory judgment, the opinion grants the President carte blanche to violate the Act without any meaningful ramifications—the same result that would arise if presidential committees were simply not subject to judicial review under the Act.²⁰²

* * *

Public Citizen, Cheney, AAPS, and Northwest Forest Resource Council illustrate the inherent flaw of FACA. As currently structured, certain provisions of the Act cannot be applied to presidential advisory committees without raising constitutional objections. Courts prefer to avoid these questions and often resort to creative interpretations of FACA to do so. These judicial contortions result in a "worst of both worlds" policy outcome: not only are presidential committees effectively unaccountable under the Act, but the much larger number of agency-level committees operate under a judicially modified version of FACA that is narrower and more limited than the law enacted by Congress.

III. MODELS FOR REFORM

So long as the text of FACA applies equally to presidential and agency advisory committees, the problem outlined above will persist: Plaintiffs will continue to go to court to apply FACA to presidential advisory committees. Presidents will continue to argue that this application of the Act would be unconstitutional. Courts will continue to construe the scope of FACA narrowly to avoid these constitutional questions. And the statute will be whittled down,

197. *Id.* at 1013.

198. *Id.* at 1014.

199. *Id.* at 1015.

200. *Id.*

201. *Id.*

202. *See infra* Part IV.

again and again, contrary to the intent of Congress and the purpose and spirit of the legislation. A brief review of other open-government laws—in particular, the Freedom of Information Act and the Federal and Presidential Records Acts—suggests possible solutions to this problem.

A. FOIA Model

The Freedom of Information Act (FOIA) represents an ongoing effort by Congress to open the inner workings of government to public scrutiny. Dissatisfied with then-existing open-records provisions, Congress passed FOIA in 1966.²⁰³ The new law broadened access by allowing “any person” to request an agency document and forbidding agencies from withholding documents except in certain limited circumstances.²⁰⁴ Thus, from the very start, FOIA targeted federal agencies, but not the President. In 1974, still unhappy about limited public access and concerned by “allegation[s] of conscious recalcitrance on the part of the agencies,” Congress proposed substantial changes to FOIA,²⁰⁵ including a provision specifying which agencies were covered by the Act.²⁰⁶

The 1974 FOIA amendments essentially drew a line within the Executive Office of the President between entities covered by the Act and other units that are closer to the President and fall outside of the Act. As amended, FOIA states that the “Executive Office of the President” is an agency.²⁰⁷ But the legislative history of FOIA indicates that “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President” do not fall within this “agency.”²⁰⁸ In *Kissinger v. Reporters Committee for Freedom of the Press*,²⁰⁹ the Supreme Court crystallized this distinction. The Court considered a FOIA request by journalist William Safire for transcripts of certain conversations involving National Security Adviser Henry Kissinger.²¹⁰ Then-Justice Rehnquist, writing for a unanimous Court, made short work of the matter. After reviewing the legislative history, he wrote that because the “request was limited to a period of time in which Kissinger was serving as Assistant to the President,” the transcripts “were not ‘agency

203. See Pub. L. No. 89-487, 80 Stat. 250 (1966); JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 7.05[2], at 7-51 (2004); see also 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 3.31, at 204-05 (2d ed. 1997).

204. 5 U.S.C. § 552(a)(3)(A) (1966); see also KOCH, *supra* note 203, § 3.31, at 205; STEIN ET AL., *supra* note 203, § 7.05[2], at 7-51 to 7-52.

205. See Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561 (1974); KOCH, *supra* note 203, § 3.31, at 208.

206. See STEIN ET AL., *supra* note 203, § 7.05[2], at 7-52.

207. 5 U.S.C. § 552(f) (2005).

208. H.R. CONF. REP. NO. 93-1380, at 15 (1974).

209. 445 U.S. 136 (1980).

210. *Id.* at 142-43.

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records,” and FOIA did not apply.²¹¹ Following this logic, courts have found that various entities within the Executive Office of the President are exempt from FOIA, including: the Executive Residence of the President,²¹² the Council of Economic Advisers,²¹³ the National Security Council,²¹⁴ the Office of Counsel to the President,²¹⁵ and the President’s transition team.²¹⁶

While this presidential exemption was not explicitly included in the text of the Act, it seems to reflect a fair reading of the legislative history. The 1974 FOIA amendments were passed on the heels of Watergate and the Supreme Court’s decision in *United States v. Nixon*.²¹⁷ Congress was sensitive to the possibility that direct regulation of the President might present separation-of-powers problems; subsequent court decisions construing the Act respected this sensitivity.²¹⁸ The FOIA experience thus offers an obvious and straightforward model for avoiding separation-of-powers problems: completely carve the President and his closest advisors out of the law.

B. Presidential Records Act Model

The preservation and disposal of federal records are governed by two statutes: the Federal Records Act of 1950, which sets up an elaborate procedure that applies to the entire federal government,²¹⁹ and the Presidential Records Act of 1978, a narrower law that only applies to the chief executive.²²⁰

While similar in subject, the two statutes were enacted for very different reasons. The Federal Records Act is a longstanding law that erects a comprehensive, government-wide regime controlling the maintenance and disposal of documents. The Presidential Records Act, in contrast, emerged from the cauldron of Watergate. The custom prior to the Nixon Administration was for ex-Presidents to retain their White House records as personal

211. *Id.* at 156.

212. *See* *Armstrong v. Executive Office of President*, 90 F.3d 553 (D.C. Cir. 1996); *Sweetland v. Waters*, 60 F.3d 852 (D.C. Cir. 1995).

213. *See* *Armstrong*, 90 F.3d 553; *Rushforth v. Council of Econ. Advisors*, 762 F.2d 1038 (D.C. Cir. 1985).

214. *See generally* *Armstrong*, 90 F.3d 553.

215. *See* *Nat’l Sec. Archive v. Archivist of United States*, 909 F.2d 541 (D.C. Cir. 1990).

216. *See* *Ill. Inst. for Continuing Legal Educ. v. U.S. Dep’t of Labor*, 545 F. Supp 1229 (N.D. Ill. 1982).

217. 418 U.S. 683 (1974).

218. *See supra* notes 209-16.

219. 44 U.S.C. §§ 2101-2119, 2501-2506, 2901-2909, 3101-3107, 3301-3324 (2005). *See generally* Carl Bretscher, *The President and Judicial Review Under the Records Acts*, 60 GEO. WASH. L. REV. 1477, 1487-91 (1992).

220. 44 U.S.C. §§ 2201-2207 (2005). *See generally* Bretscher, *supra* note 219, at 1481-87.

property.²²¹ Adhering to this custom, former President Nixon entered an agreement with the General Services Administration that gave him complete control over all his records.²²² The Democratic Congress, concerned that Nixon was attempting to cover up his criminal conduct, quickly abrogated this agreement,²²³ and the Supreme Court ultimately upheld Congress's action in *Nixon v. Administrator of General Services*,²²⁴ the landmark separation-of-powers decision discussed above. Four years later, Congress passed the Presidential Records Act to unambiguously assert public ownership of future presidential records and provide procedures for their creation, preservation, and destruction.²²⁵ Thus, the Act was passed by a Congress aware of the Supreme Court's modern separation-of-powers doctrine and sensitive to the constitutional problems inherent in regulations regarding the President's conduct.

The text of the Presidential Records Act demonstrates its drafters' desire to avoid constitutional conflict. To be sure, the Act directs the President to abide by the law regarding the creation and maintenance of a history of his administration.²²⁶ But, during a President's time in office, the Act places only scant restrictions on how he accomplishes this end. The President alone has the responsibility to decide what measures are appropriate to comply with the records laws.²²⁷ Indeed, the Presidential Records Act "does not authorize any official other than the President to oversee, regulate, inspect, or enforce an incumbent President's compliance with the Act."²²⁸ The President also has sole discretion to determine which records are disposed.²²⁹ It is only after the

221. See Bretscher, *supra* note 219, at 1481.

222. *Id.*

223. *Id.* at 1482.

224. 433 U.S. 425 (1977).

225. Bretscher, *supra* note 219, at 1483. Furthermore, the law defines "presidential records" as:

documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2) (2005).

226. 44 U.S.C. § 2203(a).

227. *Id.*

228. Bretscher, *supra* note 219, at 1484.

229. 44 U.S.C. § 2203(c) (2005). There is a statutory check on the President's ability to discard records. The records must "no longer have administrative, historical, informational, or evidentiary value." Prior to disposal, the President must "obtain[] the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records." *Id.* If the Archivist determines that the records would be of "special interest" to Congress, or that it is in the public interest to consult Congress about the records, she must request the advice of the committees of jurisdiction in both houses. § 2203(e). In this scenario, the President must submit a disposal schedule to the committees and wait sixty days of congressional session before discarding the records. § 2203(d). Ultimately, this is a

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President leaves office that responsibility for presidential records shifts to the Archivist of the United States.²³⁰ Even then, Presidents may restrict public access to certain documents for up to twelve years after the end of their last term.²³¹

Beyond granting the President nearly full discretion during his tenure in office, the Presidential Records Act does not permit judicial review of the President's day-to-day record-keeping practices.²³² While providing for judicial review of the Archivist's conduct,²³³ the Act includes no similar provisions related to the President's actions; in fact, such suits are explicitly barred in at least one circumstance.²³⁴ Given this structure, it is unsurprising that the leading case on point found the Presidential Records Act to be "one of the rare statutes that does impliedly preclude judicial review."²³⁵ In that decision, *Armstrong v. Bush*, the D.C. Circuit noted that "Congress was . . . keenly aware of . . . separation of powers concerns" and "therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office."²³⁶ Reviewing the hands-off structure of the Act, the court concluded that "Congress presumably relied on the fact that subsequent Presidents would honor their statutory obligations to keep a complete record of their administrations."²³⁷ It refused to "upset Congress' carefully crafted balance" by permitting judicial review of the President's record-keeping practices.²³⁸ This case does not mean that courts would not intervene to stop the wholesale destruction or removal of presidential documents, but it strongly supports Congress's preference that courts should not be in the business of policing "day-to-day" procedures governing presidential records.

In short, the Federal and Presidential Records Acts establish a two-tier regulatory regime that is deeply sensitive to the constitutional prerogatives of the chief executive. In this model, the President is shielded from potentially unconstitutional scrutiny in two ways: First, he is not subject to the procedures that apply to the rest of the federal government. Second, he cannot be sued for

weak check. It is triggered only by the Archivist, who serves at the pleasure of the President. *See* § 2103(a). And because it does not provide for judicial review, it accomplishes nothing beyond putting Congress on notice of the impending destruction of documents.

230. § 2203(f).

231. § 2204.

232. For a more thorough treatment of this subject, see Bretscher, *supra* note 219, at 1486-87.

233. *See, e.g.*, 44 U.S.C. §§ 2203(f)(3), 2204(c)(1), 2204(e) (2005).

234. § 2204(b)(3) (prohibiting review of a President's decision to restrict public access to certain public records).

235. *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991).

236. *Id.*

237. *Id.*

238. *Id.* at 291.

violations of the Act committed during his tenure in office. This framework relies on the President's honor and the presumption that he will abide by the Act—and not the courts—to uphold the law.

IV. THE FACA SOLUTION

FOIA and the Presidential Records Act offer two intriguing models for reforming FACA. The primary appeal of the FOIA model is its simplicity. By exempting all presidential advisory committees from FACA, Congress could completely eliminate the separation-of-powers problems currently inherent in the Act. Courts would only consider FACA in the context of agency advisory committees and could construe it as broadly as Congress intended, without fear of constitutional conflict.²³⁹

From a policy perspective, however, the FOIA model is problematic. Unlike FOIA, which was intended to increase openness at the agency level,²⁴⁰ Congress explicitly designed FACA to reach presidential advisory committees.²⁴¹ At the time, these committees played a prominent and influential role in the federal government, and Congress viewed them as both inefficient and unaccountable.²⁴² FACA succeeded in making the presidential advisory committee system more efficient and, arguably, more accountable. In the first five years after FACA was enacted, presidential advisory committees spent about \$800,000 per committee each year (in 2004 dollars).²⁴³ In 2004, they cost under \$500,000 each, on average.²⁴⁴ FACA also lifted the veil of secrecy from presidential advisory committees and injected public participation into the committee process. In 2004, the Bush Administration reported that

239. One of the few scholarly works to propose a reform to FACA offers a variation on the FOIA model. *See* Wolff, *supra* note 6, at 1066-67. This proposal would “specifically exempt advisory committees that advise the President from the openness requirement and the document disclosure requirement [of FACA] when such committees are formulating policy or presenting advice and recommendations to the President.” *Id.* at 1066.

240. *See supra* text accompanying note 204.

241. *See supra* text accompanying notes 57-71.

242. *See id.*

243. This figure was calculated from data compiled in the Annual Report of the President on Federal Advisory Committees for years 1972 through 1976; it was adjusted for inflation using the CPI Inflation Calculator. *See supra* note 47.

244. *See* FACA Database, *supra* note 8. The growth rate in total number of committees has also been kept under control. In the early 1970s, there were about three dozen presidential advisory committees per year, *see, e.g.*, SECOND ANNUAL REPORT OF THE PRESIDENT ON FEDERAL ADVISORY COMMITTEES 4 (1974); in 2004, there were forty-eight, *see* FACA Database, *supra* note 8—a modest increase of 33% considering that over the same span the population grew by 37%, *see* Infoplease Website, <http://www.infoplease.com/yearbyyear.html> (last visited Nov. 19, 2005), and federal budget outlays, adjusted for inflation, grew by 120%, *see* Historical Budget Data, <http://www.cbo.gov/showdoc.cfm?index=1821&sequence=0> (last visited Nov. 19, 2005) (inflation adjusted using the CPI Inflation Calculator, *supra* note 47).

forty-eight presidential advisory committees existed.²⁴⁵ Pursuant to the Act, they filed charters explaining their purpose,²⁴⁶ published notice of their meetings,²⁴⁷ and presumably kept accurate records that were open to scrutiny. They held 134 meetings, three quarters of which were open to the public.²⁴⁸ In addition, the government maintained a comprehensive database of information on current and past federal advisory committees, freely available to the public on the Internet.²⁴⁹ And the law required presidential committees to be “fairly balanced in terms of . . . points of view.”²⁵⁰ Exempting presidential advisory committees from FACA wholesale would risk reversing these gains, allowing abstract constitutional concerns to largely override Congress’s policy goals.²⁵¹

The Records Act model provides a more promising approach. By only exempting presidential advisory committees from *judicial review* under FACA, Congress would undo the troubling chain of causation that has gutted the Act: courts would simply dismiss any FACA claim upon a showing that the challenged entity was a presidential advisory committee. The judicial branch would thus never be confronted by FACA separation-of-powers issues—and would not have to establish faulty precedents by construing the Act narrowly to avoid these issues. As a result, courts applying FACA to nonpresidential advisory committees could give the Act the full force that a faithful reading of its text and legislative history demands.

A reform modeled on the Records Act would also avoid the “baby out with the bathwater” result created by the FOIA model. While the President could no longer be *sued* under FACA, the law would still apply to him. Instead of relying on the courts to enforce its regulations, Congress would rely on the integrity and honesty of the President and his staff. In these cynical times, this is no doubt a novel proposition to some. But the experience of the Presidential

245. See FACA Database, *supra* note 8.

246. See *id.* (making available information regarding charters of existing presidential advisory committees).

247. See, e.g., President’s Information Technology Advisory Committee (PITAC) Home Page, <http://www.itrd.gov/pitac> (last visited Nov. 19, 2005) (providing Internet notice of meetings of PITAC and copies of Federal Register notices).

248. See FACA Database, *supra* note 8. The closed meetings were concentrated among only a handful of committees: the President’s National Security Telecommunications Advisory Committee, the President’s Export Council Subcommittee on Export Administration, the United States Naval Academy Board of Visitors, the United States Air Force Academy Board of Visitors, the Cultural Property Advisory Committee, the United States Advisory Commission on Public Diplomacy, the President’s Cancer Panel, the National Council on the Humanities, the President’s Commission on White House Fellowships, and the Advisory Committee for Trade Policy and Negotiations. *Id.*

249. See *id.*

250. See *supra* note 60.

251. To be sure, none of these policy gains are realized in situations in which the government contends that an entity is not an advisory committee, either because it claims it does not “utilize” the entity (e.g., *Public Citizen*) or because it argues that the entity is composed entirely of federal government officers and employees (e.g., *AAPS* and *Cheney*).

Records Act suggests that Americans are willing to trust their Presidents to faithfully apply open-government law to themselves in the absence of judicial review—and that Presidents, in turn, do so without much controversy.

Further, there exist numerous extrajudicial checks on the President to force him to comply with FACA's dictates. The prolonged furor over Vice President Cheney's National Energy Policy Development Group shows that the media and the public at large are intrigued by allegations of excessive secrecy in the White House. To be sure, some of this media scrutiny and public attention was likely prompted by the protracted litigation and the possibility of a court decision adverse to the Vice President. Nonetheless, it stands to reason that, even under a Records Act model, public interest watchdogs, investigative reporters, and congressional committees would continue to critically review the operations of presidential advisory committees and alert the greater public to any transgressions. Given the poll-driven nature of the modern presidency,²⁵² this popular opinion check is a powerful one.

In a related vein, Presidents will be compelled to follow the procedural guidelines of FACA by their own desire for an advisory committee process that appears to be legitimate. Most presidential advisory committees are created to craft policy initiatives and help pass them into law.²⁵³ A common perception that a committee was biased, that it failed to truly deliberate, or that its conclusions were preordained, can signal the death knell for its proposal.²⁵⁴ Consider, for example, the fate of President George W. Bush's Commission to Strengthen Social Security, which was charged with submitting "bipartisan recommendations to modernize and restore fiscal soundness to the Social Security system."²⁵⁵ Because the "bipartisan" committee included only individuals who favored privatizing the system,²⁵⁶ critics quickly succeeded in characterizing it as a "stacked" committee.²⁵⁷ Predictably, the committee's

252. See ROBERT M. EISINGER, *THE EVOLUTION OF PRESIDENTIAL POLLING* (2003).

253. See WOLANIN, *supra* note 6, at 11 ("The primary presidential purpose for the largest number of commissions is to formulate innovative domestic policies and to facilitate their adoption.").

254. See *id.* at 77 (noting that including "representatives of all sides of the major cleavages within the policy-making community and the attentive public on a given issue" is a "requirement for credibility").

255. Exec. Order No. 13,210, 66 Fed. Reg. 22,895 (May 4, 2001).

256. See Amy Goldstein, *Breaux Predicts Bush Social Security Efforts Doomed*, WASH. POST, May 4, 2001, at A12 (quoting Senator John Breaux (D-La.) as saying that the Commission's chance of success was "zero to none" because all sixteen of its members supported some form of privatization).

257. See, e.g., Thomas M. DeFrank & Timothy J. Berger, *Big-Name Panels Mixed Bag*, DAILY NEWS (New York), Nov. 28, 2002, at 6 ("The President's Commission to Strengthen Social Security . . . was stacked to ensure that it supports his plan to privatize the system."); Editorial, *The Silent Privatizers*, ST. PETERSBURG TIMES (Florida), July 22, 2002, at 8A ("The president stacked his Commission to Strengthen Social Security with supporters of his plan to allow workers to divert portions of their payroll taxes to accounts that invest in stocks and bonds.").

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final report endorsed three models for reform that all partially privatized Social Security.²⁵⁸ The report fell on deaf ears,²⁵⁹ and at the time of this writing, President Bush is still struggling to jumpstart his Social Security reform efforts.²⁶⁰ The lesson is clear: presidential advisory committees will not succeed in advancing policy initiatives if they are perceived as illegitimate. Therefore, Presidents have a strong incentive to adhere to FACA's rules, if only to preserve their advisory committees as effective political tools.

None of this is to say that the Records Act model is a perfect regime from a policy perspective. As *Cheney*, *AAPS*, and *Public Citizen* make clear, even when confronted with the threat of a lawsuit, Presidents are willing to engage in conduct that arguably violates FACA. Exempting the President from judicial review under FACA would further reduce his incentive to comply with the letter and spirit of the Act. But this policy drawback is greatly outweighed by the attendant benefits of the Records Act model: specifically, avoiding separation-of-powers conflicts and strengthening the Act with respect to nonpresidential advisory committees.

Moreover, it is important to keep in mind that the negative policy effects of the Records Act model are limited in scope. First, presidential advisory committees account for only a tiny sliver of all federal advisory committees—five percent in 2004.²⁶¹ Second, of this small number, just under half are created not by the President, but by Congress.²⁶² It seems unlikely that the President could abuse a committee created at Congress's own initiative, whose inquiry is guided by a congressional directive; even in that improbable event, Congress could probably remedy the problem by cutting off funding for the committee. Third, while presidential advisory committees are certainly an important tool of the modern President,²⁶³ there is a logical limit on just how much damage a President can do by abusing the advisory committee process. After all, advisory committees by definition do nothing else other than *advise*.²⁶⁴ So even where a President stacks a committee or closes its

258. See PRESIDENT'S COMM'N TO STRENGTHEN SOCIAL SECURITY, STRENGTHENING SOCIAL SECURITY AND CREATING PERSONAL WEALTH FOR ALL AMERICANS: REPORT OF THE PRESIDENT'S COMMISSION TO STRENGTHEN SOCIAL SECURITY (2001), available at http://www.csss.gov/reports/Final_report.pdf.

259. See Jim Barlow, *Privatization Battle Will Heat Up Again*, HOUSTON CHRON., Jan. 10, 2002, at B1. To be fair, the report was issued in the immediate aftermath of the September 11, 2001, attacks and in the midst of the Afghanistan War. See *id.*

260. See Jonathan Weisman, *Skepticism of Bush's Social Security Plan Is Growing*, WASH. POST, Mar. 15, 2005, at A1.

261. According to the government's FACA database, there were 965 active federal advisory committees in fiscal year 2004 and 48 presidential advisory committees. See FACA Database, *supra* note 8.

262. Of the forty-eight presidential advisory committees extant in 2004, twenty-one were congressionally created. See *id.*

263. See *supra* text accompanying notes 15-23.

264. The Act provides that, "[u]nless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions." 5

proceedings to guarantee a particular outcome, the committee remains powerless to actually change government policy. And while the President can certainly act upon the committee's preordained advice, he just as easily could adopt the same policy without creating the committee in the first place.²⁶⁵ Finally, given existing judicial policy towards presidential committees, it is hard to see how the Records Act model would be substantially inferior to the status quo. Courts *already* consistently reject plaintiffs' efforts to apply FACA to presidential advisory committees.²⁶⁶ Under the Records Act model, Congress would simply dispense with the pretense that plaintiffs can state a viable FACA claim against a presidential committee.

Accordingly, to adopt an effective Records Act model, Congress must amend FACA to exempt presidential advisory committees from judicial review. Before embarking on this revision, Congress should keep in mind several considerations:

Definition of "Presidential Advisory Committee": Currently, FACA defines "presidential advisory committee" by implication as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established or utilized by the President" and includes at least one nongovernment member.²⁶⁷ This definition provides courts with a judicially manageable standard to capture most presidential advisory committees.

Under a Records Act model, however, this definition might allow the executive branch to game the system—and shield sensitive committees from judicial review simply by claiming *ex post* that they are "utilized" by the President. This scenario could be avoided by putting the onus of identifying presidential advisory committees on the President *ex ante*. Under this scheme, the President would have to memorialize his intention to "utilize" a committee through an executive order, pronouncement, or other formal means. Absent such a document, reviewing courts would treat committees as presumptively nonpresidential.

Scope of Carve-Out: The Records Act precludes judicial review of any conduct by a President related to his records for the duration of his term. The

U.S.C. app. 2 § 9(b) (2005).

265. Indeed, in this respect, presidential advisory committees might sometimes be *less* powerful than agency advisory committees. Presidential committees often focus on broad policy issues, upon which Presidents and their staffs may draw their own conclusions without any particularized expertise. *See supra* notes 15-20. In contrast, many agency committees concentrate on narrow, complicated, technical subjects. *See, e.g.*, Biological Chemistry and Macromolecular Biophysics Integrated Review Group, <http://www.fido.gov/facadatabase/committeemenu.asp?CID=21156> (last visited Nov. 19, 2005). It seems probable that government officials would be more likely to defer to the expertise of an advisory committee focusing on such a highly specialized area.

266. *See supra* Part II. Or, they apply the Act but offer no meaningful relief. *See supra* text accompanying notes 156-65.

267. 5 U.S.C. app. 2 § 3 (2005).

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easiest and best approach for fixing FACA would be to follow this same tack and simply prohibit judicial review under any provision of the Act. This approach would avoid the hassle of dissecting FACA between provisions that might possibly offend the separation-of-powers doctrine and those that would not—a complicated and potentially divisive endeavor, given the hazy nature of contemporary separation-of-powers doctrine. Additionally, this strategy would remove *any* possibility that a federal court would be forced to narrowly construe FACA in order to respect the constitutional authority of the President.²⁶⁸

Congress should consider making one exception to this ban on judicial review for enforcement of FACA's open-records provisions after a President has left office. This would bring FACA in line with the spirit of the Records Act, while still avoiding any constitutional conflicts regarding the powers of sitting Presidents.

Reversing Faulty Precedent: Any reform to FACA would be incomplete without reversing the court decisions that have chipped away at the Act under the current regime. Most obviously, Congress must reject the narrow *Public Citizen* definition of "utilized." The pre-*Public Citizen* General Services Administration guidelines seem to best capture the true spirit behind the text of FACA. As characterized by the district court in *Public Citizen*, these regulations defined a "utilized" committee as

a committee or other group . . . with an established existence outside the Federal Government which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.²⁶⁹

268. Alternatively, if a complete carve-out proves politically infeasible, Congress could engage in a line-item analysis of the Act and attempt to exempt only those provisions that create constitutional difficulties. At a minimum, all provisions that arguably conflict with a sitting President's power to seek advice and information, or exercise his other constitutional powers, should be exempted from judicial review. *See generally supra* text accompanying notes 79-93. This includes the balance requirement, which interferes with the President's ability to choose with *whom* he will consult. *See supra* note 62. It also includes many of the procedural directives of Section 10, such as the requirements for open meetings, notice of meetings, and public comment, 5 U.S.C. app. 2 § 10 (2005), and the Act's open records provisions, §§ 10(b), 11(a). These open-government initiatives, while otherwise commendable, may interfere with a President's ability to obtain candid, accurate information. *See supra* text accompanying notes 86-88.

The Section 14 regulations on a committee's lifespan, 5 U.S.C. app. 2 § 14 (2005), though easily circumvented by a sitting President, are similarly problematic. But other FACA provisions are less problematic and might be left out of the exemption. For example, the requirement that committees file a charter before commencing their work seems relatively benign. § 9(c). *But see In re Cheney*, 406 F.3d 723, 727 (D.C. Cir. 2005) (listing the charter requirement as a provision that may be constitutionally problematic).

269. *Wash. Legal Found. v. U.S. Dep't of Justice*, 691 F. Supp. 483, 488 (D.D.C. 1988) (internal citation omitted).

This broad understanding of “utilized” could be captured by simply amending the existing language to read “utilized, either directly or indirectly.”

Congress should also clarify the requirements for committee membership under the Act. A more reasonable approach than the narrow *Cheney* definition of “member”—which turns on whether an individual holds a vote or a veto—can be found in *Ass’n of American Physicians & Surgeons*. There, the D.C. Circuit suggested that regular attendance and substantial participation at committee meetings are the hallmarks of committee membership.²⁷⁰ This broader definition better implements Congress’s original desire to prevent special interests from quietly gaining improper influence over advisory groups.²⁷¹

In sum, Congress should amend FACA to strike a better, more thoughtful balance between the Act’s original policy goals and the constitutional goal of preserving presidential autonomy to obtain advice and information. This revision need not strike presidential advisory committees from FACA altogether; indeed, that approach would unnecessarily risk reversing much of the progress made by the Act to date. Rather, Congress should follow the model already successfully employed by the Presidential Records Act: it should exempt presidential advisory committees from judicial review under FACA—or, at a minimum, under those provisions of the Act that threaten to encroach on the President’s constitutionally assigned power to gather information.

CONCLUSION

The Federal Advisory Committee Act offers a cautionary tale for lawmakers: every law is cast against an immutable constitutional backdrop that can work unintended and perverse consequences on the law’s operation. And in the open-government arena in particular, this story serves as a reminder that Congress must tread lightly in those realms where the President acts with constitutional authority. To be sure, the 1972 Congress that passed FACA could not have known that the Supreme Court would revitalize its separation-of-powers doctrine after Watergate—or that this doctrine would force future courts to construe the Act narrowly in the presidential context. But given the accrued experience of over three decades of FACA case law, the present Congress can surely make up for its predecessor’s lack of clairvoyance. Congress should fix FACA to avoid any possibility of encroachment on the

270. *Ass’n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993).

271. In addition, Congress should consider making a handful of other modifications to FACA that are well beyond the scope of this Note. Most notably, it should amend the statute to provide for a direct cause of action. Congress should also provide for *de novo* judicial review and attorney’s fees under the Act. Finally, Congress might also consider making a few minor substantive changes to FACA—such as clarifying that the “balance” requirement applies to *all* federal advisory committees. *See supra* note 60.

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President's constitutional prerogatives. And going forward, as Congress develops and revises laws to make our government more open and accountable, it should draw on its FACA experience and resist the temptation to treat the President as coequal with the rest of the executive branch.

