

1-1-2001

Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act

Carolyn Bingham Kello

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Carolyn B. Kello, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 Brook. L. Rev. 345 (2003).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol69/iss1/18>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

NOTE

DRAWING THE CURTAIN ON OPEN GOVERNMENT? IN DEFENSE OF THE FEDERAL ADVISORY COMMITTEE ACT*

I. INTRODUCTION

James Madison said, “A popular government, without popular information, or the means for acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹ Yet, to perform duties mandated by the Constitution, a President may need to confer privately with advisors and receive their insights in confidence, without fear of their advice being tempered by concern for public dissemination. To that end, the Supreme Court has recognized the importance of protecting confidential presidential communications. In *United States v. Nixon*, the Court found an implicit constitutional basis for this protection, though such protection is not absolute.² In *Nixon v. Administrator of General Services*,³ the Court utilized a balancing test to

* © 2003 Carolyn Bingham Kello. All Rights Reserved.

¹ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed. 1910), *quoted in* *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 52 (D.D.C. 2002). Note that this famous quote is frequently cited with reference to the open government statutes, as demonstrated by its use in the *Judicial Watch* opinion.

² *United States v. Nixon*, 418 U.S. 683 (1974) [hereinafter *Nixon I*].

³ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) [hereinafter *Nixon II*].

consider potential disruption to the President's execution of Article II powers when Congress sought access to the President's confidential communications. The Court again used a balancing test to resolve separation of powers issues raised in *Morrison v. Olson*.⁴

Congress has also recognized the need to provide a sphere of secrecy in presidential deliberations by exempting certain presidential communications from the reach of the "open government" statutes.⁵ The open government statutes are a group of regulatory laws that provide public access to the workings of the federal government. Included among these statutes is the Federal Advisory Committee Act (FACA),⁶ a procedural statute that regulates the establishment and use of advisory committees by government officials. The open government statutes protect a vital national interest, since only an informed citizenry can satisfactorily perform its duties in a representative democracy.⁷ FACA furthers this interest by keeping the activities of advisory committees open to public and congressional scrutiny and thus, at least aspirationally, free from special interest control. Yet when applied to presidential advisory groups, ostensibly its most critical application, FACA risks failing its purpose of opening government to the people. As judicial support wanes in the face of constitutional concerns over FACA's scope, a recalcitrant administration can easily evade compliance.

⁴ *Morrison v. Olson*, 487 U.S. 654 (1988) [hereinafter *Morrison*] (employing a balancing test to resolve separation of powers issue and finding that Congress may provide for judicial appointment of an independent counsel to investigate criminal offenses within the federal government).

⁵ Exceptions within the Federal Advisory Committee Act (FACA), the Freedom of Information Act (FOIA), and Government in the Sunshine Act, both express and discretionary, provide for areas of presidential confidentiality. See discussion *infra* text accompanying notes 31 and 32.

⁶ 5 U.S.C. app. §§ 1-14 (2000) (enacted Oct. 6, 1972).

⁷ FOIA, one of the open government statutes which amended the Administrative Procedures Act, was signed into law by President Johnson in 1966, who said:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.

Steven Goldberg, *Freedom Paper No. 6: Public Access to Government Information*, at <http://usinfo.state.gov/products/pubs/archive/freedom/freedom6.htm> (last visited Oct. 2, 2003).

Since FOIA's enactment, the Supreme Court has reinforced its essential purpose to "ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

*Judicial Watch, Inc. v. National Energy Policy Development Group (Judicial Watch)*⁸ exemplifies these issues, casting light on both FACA's objectives and shortcomings. The case is one of several brought in the D.C. District Court against Vice President Richard Cheney and the National Energy Policy Development Group (NEPDG) he headed.⁹ Congress, as well as several prominent and diverse national organizations, sought access to the purpose, structure, membership, and records of NEPDG meetings, which provided the policy advice behind the National Energy Plan released in May of 2001.¹⁰

In particular, the various plaintiffs seek to understand the nature of the relationship between the NEPDG,¹¹ and private representatives of industry who also may have contributed directly to the National Energy Plan through interaction with the NEPDG. The administration of President George W. Bush has thus far refused to provide much of the information sought under FACA and under the Freedom of Information Act.¹² Consequently, the *Judicial Watch* case places in sharp relief problematic issues of the scope and application of FACA when an administration seeks to withhold information.

Part II of this Note establishes the origin and purpose of FACA, its odyssey through the courts, and its reception by successive executive administrations since its introduction in 1972. Part III sets out issues raised by joined plaintiffs *Judicial Watch* and the Sierra Club in their claims against Vice President Cheney, the NEPDG, and its individual members.

⁸ *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 52 (D.D.C. 2002) [hereinafter *Judicial Watch*].

⁹ Two cases were brought under FOIA, and since consolidated: *Judicial Watch, Inc. v. United States Dep't of Energy*, No. 01-0981, 2002 U.S. Dist. LEXIS 3572, at *1 (D.D.C. Feb. 14, 2002) and *Natural Res. Def. Council v. United States Dep't of Energy*, 191 F. Supp. 2d 41 (D.D.C. 2002).

¹⁰ *Nat'l Energy Policy Dev. Group, National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future*, available at www.whitehouse.gov/energy/National-Energy-Policy.pdf (May 2001).

¹¹ Authority for the National Energy Policy Development Group (NEPDG) terminated September 30, 2001. *Judicial Watch*, 219 F. Supp. 2d at 25.

¹² 5 U.S.C. § 552 (2000) (enacted Sept. 6, 1966). According to the Natural Resources Defense Council, in response to its FOIA request and lawsuit, as of May 2002, the Bush Administration had turned over approximately 13,500 records, many heavily redacted, and withheld approximately 16,000 records. Natural Resources Defense Council, *NRDC's Review of the Bush Administration Energy Task Force Records - More Info About the Records, What's Here and How it Got Here*, available at <http://www.nrdc.org/air/energy/taskforce/moreinfo.asp#whatsnot> (last visited Aug. 23, 2003).

Part IV examines the relative success of FACA, and how actions by the courts and the executive branch may now erode that success. Part V offers recommendations for how FACA can continue to achieve its purpose of keeping the public and Congress informed of the activities of government advisory committees. Consistent judicial action in all FACA cases, including those that touch on activities of presidential advisors, will go along way towards assuring this result.

II. BACKGROUND

A. *The Federal Advisory Committee Act*

Attention towards the open government statutes¹³ swelled in the aftermath of Watergate, as the public and Congress reacted to the scandal by seeking greater transparency and accountability from government.¹⁴ The open

¹³ Authority for the statutes derives from Congress' power to create the executive departments and their agencies. Congress may thus "be empowered to legislate concerning . . . public access to [the executive and agencies'] internal affairs, though this power, as it applies to presidential communications, is limited to the extent that the Judicial branch has found a constitutional basis for executive privilege." Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1418-19 (1974). See discussion *infra* Part II.B.1.

¹⁴ The revelations of Watergate eventually drove President Nixon from office. The scandal involved a burglary of the Democratic National Headquarters in the Watergate building on June 17, 1972. In the course of the investigation of the break-in, high level officials in the Nixon administration were implicated in the cover-up, as was President Nixon himself, though he was never indicted. Attorney General Elliot Richardson appointed Archibald Cox, a Harvard Law professor, Special Prosecutor. Cox sought access to secret tapes the President had made of conversations in the executive office.

President Nixon attempted to have Cox fired, ordering first Attorney General Richardson and then the second in command, William French Smith, to do so. Both men in turn refused, and resigned. Third in command, Solicitor General Robert Bork, complied with the President's request, firing Cox. That series of events became known as the Saturday Night Massacre, and increased the call from Congress for the President's impeachment.

A new Special Prosecutor was appointed, Leon Jaworski, who named the President an "unindicted co-conspirator" and renewed the demand for the tapes. A criminal subpoena issued, which Nixon moved to quash. The district court denied the President's motion to quash, and the Supreme Court stepped in, bypassing the court of appeals and ruling unanimously that the President had to comply with the subpoena.

Congress, meanwhile, was holding impeachment hearings. After the Supreme Court ruling, but before the culmination of those hearings, President Nixon complied with the subpoena and then resigned. He was shortly thereafter pardoned by President Gerald Ford. His departure in advance of criminal indictment leaves open the question of whether a sitting President can ever be indicted on a criminal charge, in light of his constitutional pardon power, which could feasibly be exercised on his own behalf.

government statutes include FACA,¹⁵ the Freedom of Information Act (FOIA),¹⁶ which regulates public access to federal government documents, and the Government in the Sunshine Act,¹⁷ which regulates public attendance of federal government meetings. The statutes seek to improve government accountability by enabling greater direct public participation¹⁸ and work in conjunction with other provisions of the Administrative Procedures Act (APA), which standardizes agency practices in an effort towards greater uniformity.¹⁹

With its passage in 1972, FACA codified existing administrative practice²⁰ regarding advisory committee management. FACA was aimed at bolstering public confidence in government by alleviating public concern with special interest sway over policy making.²¹ Through FACA, Congress sought to accomplish these goals by limiting the increasing number of advisory committees and opening their activities to public scrutiny.²²

Because Congress intended to give FACA wide regulatory reach,²³ it is broadly drafted with narrow exceptions, such as those exempting any advisory committees of the Central Intelligence Agency, the Federal Reserve, or local civic groups.²⁴ The Act distinguishes targeted advisory committees

¹⁵ 5 U.S.C. app. §§ 1-14 (2000).

¹⁶ 5 U.S.C. § 552 (2000).

¹⁷ 5 U.S.C. § 552b (2000) (enacted Sept. 13, 1976). *See also* Robert G. Vaughn, *Transparency – The Mechanisms: Open Government and Accountability*, ISSUES OF DEMOCRACY, available at <http://usinfo.state.gov/journals/itdhr/0800/ijde/vaughn.htm> (Aug. 2000). Also included among the open government statutes are the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended in scattered sections of 5 U.S.C.), the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.), and “paradoxically,” the Privacy Act, 5 U.S.C. § 552a (2000). *Id.* (noting that all open government statutes internalize the conflict between information access and privacy and citing to Alan Westin’s book, *Privacy and Freedom*, which “defines democracy and authoritarianism in terms of information policy”).

¹⁸ *See* Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 456 (1997).

¹⁹ 5 U.S.C. §§ 551-559, 701-706 (2000) (revision enacted Sept. 6, 1966) (replacing 5 U.S.C. §§ 1001, 1001(a), enacted June 11, 1946).

²⁰ Croley & Funk, *supra* note 18, at 459-60 (discussing the Executive Order issued by President Kennedy, Exec. Order No. 11,007 (1962), that predates the statutory requirements of FACA). Interestingly, President Nixon issued a more stringent set of guidelines for advisory committees, Exec. Order 11,671, 37 Fed. Reg. 11,307 (June 5, 1972) even as Congress was drafting the bill that was to become FACA.

²¹ 5 U.S.C. app. § 2 (1972) (findings and purpose).

²² Croley & Funk, *supra* note 18, at 452.

²³ *Id.* at 460.

²⁴ 5 U.S.C. app. § 4 (applicability; restrictions).

from agencies or groups organized for other primary purposes, which only incidentally provide advice to the President.²⁵ The Act defines an advisory committee as "any committee, board, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof" established by statute or established or utilized by the President or one or more agencies for the purpose of obtaining advice for the President or for one or more agencies or officers of the Federal Government, but excluding any group made up solely of Federal officers or employees.²⁶ FACA requires continuing congressional review of each advisory committee to ensure that it fulfills its defined purpose, that its membership is "fairly balanced in terms of the points of view represented," and that its advice will be free of any "inappropriate[] influenc[es] by the appointing authority or by any special interest."²⁷ Congress charged the General Services Administration (GSA) with administering FACA, granting it authority to develop and apply guidelines and controls to improve the performance of advisory committees.²⁸

To both monitor and limit the growing number of federal advisory committees, FACA requires that each such committee be established by charter for a term limited to two years, renewable for two-year periods only with proper justification.²⁹ Upon establishment, timely notice must be published in the Federal Register, to serve the "public interest."³⁰ Moreover, no meetings may be held or action taken by an advisory committee without such public notice.³¹ Meetings must be open to the public, except when the President determines otherwise for reasons of national security.³² Notice of meetings must be published in the Federal

²⁵ An advisory committee may be differentiated from an agency in that an advisory committee exists to advise and not to decide. See *infra* text accompanying note 177.

²⁶ 5 U.S.C. app. § 3 (definitions).

²⁷ 5 U.S.C. app. § 5 (responsibilities of congressional committees; review; guidelines).

²⁸ 5 U.S.C. app. § 7 (responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations).

²⁹ 5 U.S.C. app. § 9 (establishment and purpose of advisory committees; publication in Federal Register; charter; filing contents and copy).

³⁰ *Id.*

³¹ *Id.*

³² 5 U.S.C. app. § 10 (advisory committee procedures; meetings; notice;

Register, so that interested members of the public can attend, subject to discretionary exemptions³³ that allow closed meetings in limited circumstances. Records of the advisory committee, including membership records, meeting attendance records, detailed minutes of meetings, matters discussed and conclusions reached, and any reports prepared or received, must be publicly available, subject to nine potential exemptions under FOIA.³⁴ The FOIA exemptions include information specifically exempted by executive order for reasons of national security, internal agency rules, statutory exemptions, confidential trade and financial information, pre-decisional inter and intra-agency memoranda, personnel information, law enforcement information, financial institution records, and oil well data.³⁵ In sum, Congress, reacting to public concern about government accountability and special interest influence, intended FACA to reveal the often hidden workings of executive policy making. Operating through numerous disclosure mechanisms that applied to most advisory committees, FACA formalized the mechanism for greater public scrutiny of the executive branch – a crucial safeguard in a modern, increasingly administrative state. Whether and to

publication in Federal Register; regulations; minutes; certification; annual report; federal officer or employee attendance).

³³ FACA states that:

[s]ubsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

5 U.S.C. app. § 10(d).

³⁴ FACA further states that:

[s]ubject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. app. § 10(b).

Referenced FOIA exemptions to document requests under FACA apply only when such privilege is asserted by the advisory committee; otherwise, documents are obtainable under FACA without a separate FOIA claim.

³⁵ *Id.* See also Bonnie Lewis Gay, *Litigator's Guide to Using Government Source and Freedom of Information Act*, BRIEF (A.B.A.), Fall 1985, at 52.

what extent that promise can be fulfilled within constitutional parameters, however, remains up to the courts.

B. Case Law

1. Supreme Court Guidance on Executive Privilege and Separation of Powers

The Constitution says nothing about the rights of Congress, the courts, or the public to access the President's communications. Nor does it speak to the President's right to refuse such access.³⁶ Nonetheless, when applied to the confidential communications of a President or presidential advisors, FACA raises "formidable" issues of constitutionality.³⁷ It can potentially disrupt Article II duties,³⁸ thus provoking the claim of executive privilege,³⁹ and may overstep the separation of powers. The Supreme Court has provided ample guidance for resolution of these questions. Rather than applying a formalist rule based on rigid separation between government branches, the Court has utilized a functional approach, employing a balancing test⁴⁰ that weighs the potential disruption of a President's constitutional duties against competing constitutional interests.⁴¹ This test rests on the principle that

³⁶ Cox, *supra* note 13, at 1384. Note, however, case law support for such rights of access under the First Amendment. See, e.g., Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. (forthcoming 2004).

³⁷ Public Citizen v. Dep't of Justice, 491 U.S. 440, 466 (1989) [hereinafter *Public Citizen*].

³⁸ Impairment of the President's ability to receive frank advice may disrupt the President's Article II duty to develop and recommend legislative policy to Congress.

³⁹ Cox, *supra* note 13, at 1383 (stating that "[o]ccasionally, presidents asserted a right to withhold information either for themselves or on behalf of their subordinates, and the claim came to be known as 'executive privilege'").

⁴⁰ See Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 718 (1990) (quoting *Nixon I*, 418 U.S. 683, 707 (1974) ("Because 'airtight' separation of powers is not what the Constitution requires, the validity of any intrusion by one branch into the prerogatives of another is to be measured by a functional standard rather than a formal rule.")).

⁴¹ *Nixon II*, 433 U.S. 425 (1977); *Morrison*, 487 U.S. 654 (1988). But see *Public Citizen*, 491 U.S. at 486 (Kennedy, J., concurring in the judgment, dissenting in part) (citing *INS v. Chadha*, 462 U.S. 919 (1983) as an example of the Court's rejection of use of a balancing test in a separation of powers challenge to the legislative veto provision of the Immigration and Nationality Act). Justice Kennedy wrote that "[o]ur decision in *Chadha* might also be read for the more general principle that where an enactment transgresses the explicit distribution of power in the text of the Constitution, then regardless of whether it implicates the Legislative, the Judicial, or the Executive power, a balancing inquiry is not appropriate." *Id.* at 486 n.5. FACA, however, does not present an issue of transgression of a specific power granted in the

the three coequal branches “were not intended to operate with absolute independence.”⁴² The Court has repeatedly stressed that interdependence⁴³ between the branches underpins our governmental system and as such, becomes the starting point from which to judge “inevitable”⁴⁴ conflicts along the borders of power. The Court applied its test to claims of executive privilege in *United States v. Nixon (Nixon I)*,⁴⁵ and to separation of powers issues in *Nixon v. Administrator of General Services (Nixon II)*,⁴⁶ and *Morrison v. Olson*.⁴⁷

Executive privilege is a qualified privilege that allows a President to refuse to disclose his communications to Congress or the public.⁴⁸ While the Constitution makes no explicit reference to a presidential privilege of confidentiality, the Court in *Nixon I*⁴⁹ nonetheless recognized its implicit constitutional basis. The subject of *Nixon I* was the infamous

text of the Constitution.

⁴² *Nixon I*, 418 U.S. at 707. See also Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 906-11 (D.C. Cir. 1993) [hereinafter AAPS] (discussing flaws of a bright-line argument against FACA’s application). But see *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting) (arguing against the majority’s balancing test and in favor of a “clear constitutional prescription that the executive power belongs to the President”); *Public Citizen*, 491 U.S. at 484-86 (Kennedy, J., concurring) (arguing along with two other Justices for a bright-line rule; the majority interpreted FACA so as to avoid addressing the constitutional question).

⁴³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”).

⁴⁴ Cox, *supra* note 13, at 1419 n.141 (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“[T]he doctrine of separation of powers was adopted . . . not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”)).

⁴⁵ 418 U.S. at 707.

⁴⁶ 433 U.S. 425. See also *Morrison*, 487 U.S. 654.

⁴⁷ 487 U.S. 654.

⁴⁸ Though some form of privilege has been asserted since the days of Washington’s presidency, the term “executive privilege” first surfaced during the Eisenhower administration. President Eisenhower said:

There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.

Cox, *supra* note 13, at 1386 (quoting Dwight D. Eisenhower).

⁴⁹ 418 U.S. at 705.

Watergate break-in.⁵⁰ The Court unanimously ruled that President Nixon's claim of executive privilege to withhold confidential tape recordings he made in the Oval Office grew from the President's Article II powers.⁵¹ However, the Court made clear that the privilege was not absolute, and had to give way when the interest of justice demanded.⁵² In this case, a subpoena for the tapes for use as evidence in a criminal trial trumped Nixon's privilege claim.⁵³

Though President Nixon lost this particular battle, the decision was significant for future administrations. For the first time, the Court officially recognized the need for frank and open discussion between a President and his advisors.⁵⁴ Describing the potential chilling effect on presidential advisors' speech, the Court found that:

The valid need for protection of communications between high [g]overnment officials . . . is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern of appearance and for their own interests to the detriment of the decision making process.⁵⁵

Nevertheless, despite this chilling effect,⁵⁶ the Court found this to be a situation where countervailing interests rebutted the presumption of executive privilege.⁵⁷ To hold otherwise "would upset the constitutional balance of a 'workable government' and would gravely impair the power of the courts under Art. III."⁵⁸

Within the specific context of criminal prosecutions, the Court minimized disclosure's chilling effect: "[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in

⁵⁰ *Id.* See *supra* note 14.

⁵¹ *Nixon I*, 418 U.S. at 706-07.

⁵² *Id.*

⁵³ *Id.* at 712.

⁵⁴ *Id.* at 705.

⁵⁵ *Id.*

⁵⁶ The actuality of a chilling effect is both untested, and probably un-testable. It is reasonable to presume that in many cases, the advice given by a private party would be consistent whether or not disclosure was required. For example, it is reasonable to expect a CEO in the oil industry who publicly advocates drilling in the Artic National Wildlife Refuge to privately advise the executive branch to support such drilling in its policy recommendations to Congress.

⁵⁷ *Nixon I*, 418 U.S. at 706.

⁵⁸ *Id.* at 707.

the context of a criminal prosecution.”⁵⁹ Thus, Nixon’s “generalized claim”⁶⁰ of privilege based on the public interest in presidential confidentiality was outweighed by the specific need to obtain the subpoenaed information. The Court further noted that Nixon’s claim did not involve the protection of military or diplomatic communications,⁶¹ implying that such areas of express Article II powers carried more weight than broad assertions of privilege when weighing the relative importance.

Before he resigned from office, Nixon also launched a separation of powers challenge in an attempt to retain control over those same tapes and other presidential documents,⁶² forming the basis of *Nixon II*.⁶³ Congress had passed the Presidential Recordings and Materials Preservation Act of 1974 (PRMPA)⁶⁴ to protect and preserve Nixon’s tapes and documents for national archival purposes and for review in the interest of potential remedial legislative action. PRMPA gave the government control over these materials enabling screening and retention of any non-private material for the public. Nixon challenged the constitutionality of the Act as a violation of separation of powers. The Court rejected any characterization of “airtight”⁶⁵ separation between the branches, and thus rejected Nixon’s argument as “inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system.”⁶⁶

As in the context of executive privilege, the Court articulated a balancing test to examine the potential disruption to a President’s execution of his Article II duties. “[T]he proper inquiry focuses on the extent to which [the statute] prevents

⁵⁹ *Id.* at 712.

⁶⁰ Here, the President’s challenge was not based on confidentiality in communications related to military or foreign affairs, “areas of Art. II duties [towards which] the courts have traditionally shown the utmost deference.” *Id.* at 710.

⁶¹ *Id.*

⁶² See *supra* note 14.

⁶³ *Nixon II*, 433 U.S. 425 (1977).

⁶⁴ The Presidential Recordings and Materials Preservation Act of 1974, Pub. L. No. 93-526, 8 Stat. 1695 (1974) (current version at 44 U.S.C. § 2111 (2000)) (unlike current version, original provisions specifically referred to Nixon by name). Note that the Court found that PRMPA was not a bill of attainder, though it referred to President Nixon by name, since its action did not constitute “punishment.” *Nixon II*, 433 U.S. at 478. For further discussion, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 460 (2d ed. 2002).

⁶⁵ *Nixon II*, 433 U.S. at 443.

⁶⁶ *Id.* at 441.

the executive branch from accomplishing its constitutionally assigned functions.⁶⁷ Here, the Court found "no reason to believe that the restriction on public access⁶⁸ ultimately established by regulation [through the screening process of PRMPA] will not be adequate to preserve executive confidentiality."⁶⁹ This holding reflected a balancing in favor of the "substantial public interests" in preserving the non-private presidential materials and restoring public confidence in government.⁷⁰ But the Court emphasized this was a narrow holding, made necessary by the unusual nature of Nixon's resignation in Watergate's aftermath.⁷¹

The Court more recently reaffirmed its balancing test in separation of powers cases in *Morrison v. Olson*.⁷² *Morrison* concerned a constitutional challenge by the executive branch to the Ethics in Government Act of 1978.⁷³ Like PRMPA, Congress passed the Ethics in Government Act in response to Watergate. This Act authorized the Attorney General to recommend to a special judicial panel the appointment of independent counsel to investigate and prosecute high-level government officials for violations of federal criminal law.⁷⁴ The "independence" of the independent counsel was central to the case: prosecution is a "quintessentially executive activity,"⁷⁵ but from a functionalist

⁶⁷ *Id.* at 426. *But see id.* at 508 (Burger, C.J., dissenting) (conceding that the coordinate branches were not "watertight", but opining that PRMPA constituted "coercion" by Congress over the executive branch, violated separation of powers and dramatically changed the historical course of presidential confidentiality). *See also* Alfange, *supra* note 40, at 718.

⁶⁸ The PRMPA screening process required the director of General Services to take possession of the tapes and documents, and review them to determine which, if any, were purely private materials that would then be returned to the President. Those materials that the director determined were of a public nature were retained for public access. CHEMERINSKY, *supra* note 64, at 350.

⁶⁹ *Nixon II*, 433 U.S. at 450.

⁷⁰ *Id.* at 453.

⁷¹ *Id.* at 483-84.

⁷² *Morrison*, 487 U.S. 654 (1988).

⁷³ Ethics in Government Act of 1978,

⁷⁴ *See* 28 U.S.C. §§ 591-599 (2000) (expiring in 1998 without renewal, thus terminating the office of the Independent Counsel). Notably, this occurred in the aftermath of Independent Counsel Kenneth Starr's extended investigation of President Clinton, under circumstances foreshadowed by Justice Scalia in his dissent in *Morrison*, 487 U.S. at 706. *See infra* note 75. *See also* CHEMERINSKY, *supra* note 64, at 338.

⁷⁵ *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) (basing a clear-cut separation of powers argument on the premise that the Constitution vests prosecutorial authority exclusively in the executive branch). It is interesting to note that Justice Scalia, in his dissent opposing appointment of the independent counsel on separation of powers grounds, states that the primary check on the executive branch is

perspective, investigations of executive branch officials necessarily must be conducted outside the control of those officials.⁷⁶

By a seven-to-one margin, the Court upheld the Act's constitutionality on both textual and functional grounds. By finding that an independent counsel is an "inferior' officer in the constitutional sense"⁷⁷ with limited scope of authority and limited tenure,⁷⁸ the Court held that the Act neither violated the Appointments clause⁷⁹ nor "impermissibly" interfered with the President's Article II authority over prosecutions. Referencing *Nixon II*, the Court found that the Act's requirements *did* reduce the direct control of the Attorney General over the activities of the independent counsel (thereby reducing the President's control), but *did not* "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."⁸⁰ Again, in finding no separation of powers violation, the Court recognized the inherent overlap between the legislative and executive branches and the need for judicial balancing to accommodate competing interests. Thus, through its holdings in these three challenges by the executive branch, the Court has laid the constitutional groundwork necessary for resolution of FACA challenges, via fact-intensive, case-by-case review.

a political one. He thus sets the ground for the need for FACA, since political checks can only exist where information is available to the voting public.

⁷⁶ CHEMERINSKY, *supra* note 64, at 340.

⁷⁷ *Morrison*, 487 U.S. at 672.

⁷⁸ *Id.* at 671-2.

⁷⁹ *Id.* at 658. The Appointments clause provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments.

U.S. CONST. art. II, § 2 cl. 2.

⁸⁰ *Morrison*, 487 U.S. at 658. Note also the outcome of *Clinton v. Jones*, 520 U.S. 681 (1997). Here, the Court set a rather high bar for disruption of a President's ability to execute his Article II duties, holding that the "burden on the President's time and energy that is a mere by-product of such review" was not enough to outweigh the plaintiff's right in this case to proceed with her civil litigation. *Id.* at 705.

2. FACA Cases

a. What Counts as an "Advisory Group"

The doctrine of constitutional avoidance instructs that no constitutional question should be decided unless necessary to resolving the case at hand; constitutional interpretation should not be broader than the facts at issue.⁸¹ In *Public Citizen v. U.S. Department of Justice*,⁸² the only Supreme Court FACA case, the Court adhered to this doctrine to avert the "formidable constitutional difficulties" it foresaw in disruption of the President's ability to seek advice from private persons.⁸³ The issue was whether FACA applied to executive branch consultation with the American Bar Association (ABA) in the judicial nomination process. Through review of the FACA's history and interpretation, the majority read the definition of "advisory group" to exclude the ABA, thus exempting the group's meetings with the President from FACA's requirements.

Because the President must "utilize" the advice of a group for it to count as advisory, the Court's interpretation depended upon severely limiting the meaning of the word "utilized" in the statute, to arrive at the conclusion that the President had not "utilized" the ABA when he consulted them in consideration of judicial candidates.⁸⁴ Expressing concern with the "unfettered breadth" of FACA's definition of advisory group, the Court justified its seeming stretch in this instance by postulating that absurd results would follow if the law applied to any private organization which offered advice to the President at his request.⁸⁵ Three justices, concurring in the judgment but dissenting in part on the majority's rationale,⁸⁶ would have held that FACA unconstitutionally interfered with

⁸¹ See *infra* text accompanying notes 150-52.

⁸² 491 U.S. 440 (1989).

⁸³ *Id.* at 466.

⁸⁴ *Id.* at 452 (finding that "utilize" is a wooly verb" and not susceptible to precise definition within the "contours left undefined" in FACA).

⁸⁵ *Id.* at 452 n.8.

⁸⁶ Justice Kennedy filed an opinion, joined by Chief Justice Rehnquist and Justice O'Connor, concurring in the judgment, but dissenting in part as to application of a balancing test in this instance, where FACA interfered directly with the President's powers under the Appointments Clause. *Id.* at 486-88. Justice Scalia took no part in the determination of the case. *Id.*

the President's Article II appointment power⁸⁷ and also violated the separation of powers.⁸⁸

Echoing the general constitutional concerns of *Public Citizen*, the D.C. Circuit Court of Appeals found in *Association of American Physicians & Surgeons v. Clinton* (AAPS)⁸⁹ that the Act's definition of advisory group did not apply to a 1993 health care task force led by the sitting President's wife, Hillary Clinton. A challenge ensued, with plaintiffs claiming that the first lady's status as a private citizen meant FACA requirements applied to the task force and had been violated.

Following the lead of the Supreme Court's statutory analysis in *Public Citizen*, the circuit court in AAPS stretched the definition of government "employee" to include the President's wife, thus ensuring that the advisory group she led was wholly composed of government officials and employees and thus not subject to FACA disclosure.⁹⁰ As had the Supreme Court before it, the circuit court thus avoided ruling whether the Act impacts a President's ability to seek advice directly from private citizens.⁹¹ Despite ruling against FACA's application in this instance, the court raised the issue of "de facto" membership, recognizing that distinctions between formally recognized members and private consultants could be rather murky,⁹² and were open to government manipulation.⁹³

⁸⁷ *Id.* at 482. See also CHEMERINSKY, *supra* note 64, at 338-40.

⁸⁸ *Public Citizen*, 491 U.S. at 486-89.

⁸⁹ AAPS, 997 F.2d 898 (D.C. Cir. 1993).

⁹⁰ *Id.* See *supra* text accompanying note 26.

⁹¹ AAPS, 997 F.2d at 910.

⁹² *Id.* at 915. Specifically, the court found the "key issue" to be: not whether these consultants are "full-time" government employees under section 3(2), but whether they can be considered members of the working group at all. When 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 We are confident that Congress did not intend FACA to extend to episodic meetings between government officials and a consultant. To do so would achieve the absurd result *Public Citizen* warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens.

But 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. Then his status as a private citizen would disqualify the working group from the section 3(2) exemption for meetings of full-time government officials.

Id. (emphasis added).

In its opinion in *In re Sealed Case*, another FACA challenge, the D.C. Circuit Court of Appeals suggested it *would* extend constitutional protection beyond direct communications with the President to that of his direct advisors.⁹⁴ Yet the court also warned that such a narrowing of FACA's scope could "sequester" too much from public view:

[O]penness in government has always been thought crucial to ensuring that the people remain in control of their government.... The very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance.⁹⁵

For these reasons, the *In re Sealed Case* court limited its own holding to the circumstances of the case at hand, out of concern for undercutting FACA's central purpose.⁹⁶ It therefore remains unknown whether FACA can constitutionally require close presidential advisors to reveal the nature or sources of their own deliberations when such advice is ultimately intended for the benefit of the President.

In addition to the above cases, further statutory interpretation by the courts and by the GSA under its regulatory authority has clarified the definition of advisory committee under FACA. The courts and the GSA agree on the fundamentals of this definition: An advisory committee exists or is utilized for a specific *purpose*, namely to give advice to the President or officials or employees of government; via a *formally organized group*; with *fixed membership* including at least one non-government member.⁹⁷ Ad hoc meetings to check the pulse of the public fall outside this definition,⁹⁸ as do

⁹³ *Id.* (noting that, through limitations on the form of advisory groups under FACA requirements, the government exercises "a good deal of control over whether a group constitutes a FACA advisory committee").

⁹⁴ *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

⁹⁵ *Id.* at 749, cited in *Judicial Watch*, 219 F. Supp. 2d 20, 52 (D.D.C. 2002).

⁹⁶ *Id.* at 753 ("Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us . . . we take no position on how the institutional needs of Congress and the President should be balanced"), cited in *Judicial Watch*, 219 F. Supp. 2d at 52.

⁹⁷ *AAPS*, 997 F.2d at 915; see also Croley & Funk, *supra* note 18, at 473 (identifying these three core components of the definition of advisory committee under FACA).

⁹⁸ *Nader v. Baroody*, 396 F. Supp. 1231, 1233 (D.D.C. 1975) (holding that biweekly meetings were an informal exchange of views, "amorphous" in form, and without the specific purpose of providing advice).

informal meetings where advice is not specifically sought,⁹⁹ though a single formal meeting could qualify.¹⁰⁰ Because advice, and not factual information, is FACA's concern, the communications of groups that are primarily operational rather than advisory fall outside the statute.¹⁰¹ In contrast, policy advice falls squarely within the target of FACA, especially when the executive branch specifically seeks the advice from a group mandated to provide it, and considers no alternative source for the advice.¹⁰²

b. What Constitutes Sufficient Balance of an Advisory Group

FACA requires that advisory committees have balanced membership to ensure diversity in represented viewpoints and to avoid capture by special interests. Notably, however, the Act omits a standard by which a court could evaluate compliance with this term.¹⁰³ Some courts have looked to the function of the advisory committee to determine whether the group is sufficiently diverse.¹⁰⁴ At least one court found that the

⁹⁹ *Id.*

¹⁰⁰ See *Nat'l Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2d. Cir. 1979) (finding the group here met the FACA's definition of advisory committee though just one meeting was held, since future reliance on the group was also possible).

¹⁰¹ *Cal. Forestry Ass'n v. United States Forest Serv.*, 102 F.3d 609 (D.D.C. 1996) (finding group was advisory in purpose, thus FACA was applicable); *Northwest Forest Res. Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994) (finding group was advisory in purpose, thus FACA was applicable); *Judicial Watch v. Clinton*, 76 F.3d 1232 (D.C. Cir. 1996) (finding legal defense team was operational, not advisory, thus FACA does not apply); *Nat'l Resources Def. Council v. EPA*, 806 F. Supp. 275 (D.D.C. 1992) (finding actions of group were operational, not advisory, thus FACA does not apply).

¹⁰² See *Northwest Forest Res. Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994) (finding group's mandate was to develop policy options and the administration considered no other source for advice); *Food Chem. News v. Davis*, 378 F. Supp. 1048 (D.D.C. 1974) (holding FACA applicable though only two informal meetings took place, supported by the fact that the agency had specifically formed the group to provide policy advice regarding liquor labeling); *Nader*, 396 F. Supp. at 1234 (ruling the FACA not applicable since the group here was not called together to render specific policy advice); *Judicial Watch v. Clinton*, 76 F.3d 1232 (finding advice rendered by legal defense team was for private purposes, not policy driven, thus FACA does not apply).

¹⁰³ See *supra* note 27. See also *Sanchez v. Pena*, 17 F. Supp. 2d. 1235 (D.N.M. 1998).

¹⁰⁴ *Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 708 F. Supp. 359 (D.D.C. 1988) (finding upon review of the function of the advisory committee that it required highly technical membership with expertise in science and food processing); *Cargill v. United States*, 173 F.3d 323 (5th Cir. 1999) (finding adequate balance in the advisory committee since its function was technical and not political).

chartering agency's own balance requirements supplied workable standards.¹⁰⁵ However, other courts have held the absence of standards in FACA's text renders the term unreviewable.¹⁰⁶

c. Remedies

Similarly, FACA omits any remedial provision, thus leaving the courts to fashion appropriate relief.¹⁰⁷ Courts widely diverge on whether relief should be granted at all, and if so, on the nature of that relief. Plaintiffs may seek declaratory judgment to clarify their rights to access meetings and information, but such relief cannot remedy retrospective harm caused by violations.¹⁰⁸ Injunction may thus be appropriate, for

¹⁰⁵ *Fertilizer Inst. v. EPA*, 938 F. Supp. 52 (D.D.C. 1996) (finding the sponsoring agency's own charter provided the law to apply in its requirement that three individuals from private industry were part of the advisory committee).

¹⁰⁶ *Sanchez*, 17 F. Supp. 2d 1235 (finding the question of balance unreviewable given the absence of statutory guidance and the political nature of the question). *But see Nat'l Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 334 (2d. Cir. 1979) (finding the balance requirement applicable to the agency creating the advisory committee to assure against inappropriate influence by special interests).

¹⁰⁷ Though the statutory language of FACA omits provisions for private remedy, violation of FACA's terms represents "sufficiently distinct injury to provide standing to sue", *Public Citizen*, 491 U.S. at 441, thus enabling a claim that such violation was "arbitrary and capricious" under the Administrative Procedures Act (APA). The APA governs agency procedures, including the open meeting and public information requirements of FACA and FOIA. APA regulations seek to ensure uniformity, thus applying equally to all agencies, regardless of form or function. *See discussion infra* Part II.C.2.

¹⁰⁸ *Nat'l Nutritional Foods Ass'n*, 603 F.2d at 336 (discussing declaratory judgment as proper relief, though its grant is discretionary with the district court). Here, the court upheld the district court's refusal to grant relief, stating:

The question of remedy remains. So far as we are aware, no court has held that a violation of FACA would invalidate a regulation adopted under otherwise appropriate procedures, simply because it stemmed from the advisory committee's recommendations, or even that pending rulemaking must be aborted and a fresh start made. We perceive no sound basis for doing so. Applicable rulemaking procedures afford ample opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal.

Id.

But see Alabama-Tombigbee Rivers Coalition v. Dept. of Interior, 26 F.3d 1103, 1107 (11th Cir. 1994) (noting the inadequacy of declaratory judgment as a form of relief since it does nothing to address plaintiff's injury nor induce future compliance with the FACA). This court found "injunctive relief as the *only* vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements. Anything less would be tantamount to nothing." *Id.* (emphasis added). However, it also recognized:

that other Circuits have affirmed the denial of injunctive relief requested as a result of FACA violations. *See, e.g., Public Citizen v. National Advisory Committee*, 281 U.S. App. D.C. 1, 886 F.2d 419 (D.C. Cir. 1989); *National*

example, to force compliance with FACA's notice¹⁰⁹ or open meeting terms¹¹⁰ when an advisory group is still under charter, or to obtain access to documents when its charter has expired. Citing the important purpose of FACA in opening the activities of the government to the people, the inadequacy of other relief, and the fact that unchecked non-compliance renders the Act a "nullity," some courts have employed a most stringent remedy: enjoining the government from using the work product of its advisory group.¹¹¹ By contrast, other courts have found such relief excessive due to taxpayer expense in producing the work product, and the perceived harmlessness of a mere regulatory violation.¹¹² Clearly, differing factual circumstances have dictated very different outcomes across FACA cases, as would be expected under a case-by-case balancing approach. Still, the relative success of the Act remains vulnerable to the actions of the executive branch in terms of the level of support offered, or withheld, in promoting and enforcing its requirements.

C. *Executive Branch Receptiveness to FACA*

Receptiveness to FACA's underlying open government principles varies with successive administrations. While there appears to be general compliance and agreement on FACA's value at the agency level, where career civil servants hold sway,¹¹³ Presidents have displayed different attitudes toward

Nutritional Foods Ass'n. v. Califano, 603 F.2d 327 (2nd Cir. 1979). However, neither Circuit held that injunctive relief was a categorically unavailable remedy for a FACA violation. Rather, the consideration of the possibility of injunctive relief suggests that those courts found no express or implied prohibition of this remedy. They merely found that on the individual facts of the cases before them, injunctive relief was inappropriate. We have different facts before us and, accordingly, reach a different result.

Id. at 1107 n.8.

¹⁰⁹ See *supra* text accompanying notes 30-31.

¹¹⁰ See *supra* text accompanying notes 32-33.

¹¹¹ *Alabama-Tombigbee Rivers Coalition*, 26 F.3d at 1106 (enjoining the use of prepared report of advisory group which violated FACA to induce compliance and citing with approval the district court's opinion that a simple "excuse me" after the fact was insufficient in light of the important purpose of the Act). See also *Cal. Forestry Ass'n*, 102 F.3d 609 (D.D.C. 1996) (holding that injunction against use of advisory group's work product could be an appropriate remedy on remand).

¹¹² *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994) (holding relief of injunction excessive, though group was found to have violated the FACA).

¹¹³ Croley & Funk, *supra* note 18, at 538 (providing survey results and anecdotal support from agency respondents indicating widespread compliance and agreement with principles of the FACA). It is important to recognize that these results may represent a Clinton-era attitude. However, most respondents were career civil

the general principles of openness as applied to executive communications. Presidents Ford, Carter, and Clinton all verbalized a commitment to "open government" while still reserving their executive privilege, though among them, only President Clinton actually asserted that privilege.¹¹⁴ In contrast, Presidents Reagan and George H.W. Bush were more protective of executive secrecy, though they chose methods other than executive privilege to work around information requests.¹¹⁵ The current administration of George W. Bush has taken a hard line, seeking to protect not only his own communications, but also those of previous President's administrations.¹¹⁶

Presidents have resisted revealing confidential communications right up to the point where response from Congress, the media, and public interest groups suggested the costs in political capital and public opinion overrode any interest in protecting presidential secrecy. History contains many instances of the President and executive officers ultimately bowing to political pressure and revealing communications to overcome a negative public perception brought on by noncompliance.¹¹⁷ For example, President Reagan dropped an assertion of privilege when contempt charges were brought against Interior Secretary James Watt in a high-profile national land use case.¹¹⁸ Similarly, during the Whitewater investigations, President Clinton backed down from a threatened use of privilege after extremely negative characterizations in the press.¹¹⁹

Sometimes, however, Presidents have been able to avoid negative impact while withholding information sought under the open government statutes. For example, the first Bush

servants, thus their attitudes towards the FACA may transcend administration changes and remain a valid generalization.

¹¹⁴ Matthew Cooper Weiner, Note, *In the Wake of Whitewater: Executive Privilege and the Institutionalized Conflict Element of Separation of Powers*, 12 J.L. & POL. 775, 801-02 (1996).

¹¹⁵ *Id.* at 802-05 (referencing Reagan's political deal-making and the George H.W. Bush administration's "deft handling" in avoiding compliance to requests to turn over the Reagan diaries).

¹¹⁶ Pam M. Holt, *Steady the Privilege Pendulum*, CHRISTIAN SCI. MONITOR, Apr. 4, 2002, at 13 (discussing George W. Bush's protection of his administration's communications regarding the national energy policy and homeland security, as well extension of protection for his father's papers, which may include details of Iran-Contra activities, and sought-after Clinton-era papers).

¹¹⁷ Weiner, *supra* note 114, at 795-803.

¹¹⁸ *Id.* at 802-03.

¹¹⁹ *Id.* at 806.

administration, without asserting privilege, used tactics to stall the media as it sought information on the Desert Storm operations of the Gulf War. When Congresswoman Barbara Boxer picked up the inquiry, the administration first delayed initial court proceedings, only later raising the issue of executive privilege.¹²⁰ Ultimately, it released the information, but "too late to play a role in Congress' decision-making process."¹²¹

Presidents may also leverage their attitudes towards open government for political ends. Soon after taking office, President Clinton called on all federal departments to renew their commitment to open government principles as he attempted to streamline agency operations and increase public accountability.¹²² In contrast, in the interest of national security post the September 11 terrorist attacks, the George W. Bush administration increased government secrecy, with apparent public approval.¹²³ For example, under the direction of Attorney General John Ashcroft, records detailing energy facility specifications, previously available, have been removed from general public purview under FOIA, though access may still be available through a more regulated process.¹²⁴ Such management of public opinion through varying receptiveness to FACA principles is part of the political process. Still, regardless of whether the executive branch voices support for FACA, media and public pressure historically has tended to induce compliance with it and the other open government statutes.

¹²⁰ *Id.* at 805.

¹²¹ *Id.*

¹²² See Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993) (Termination and Limitation of Federal Advisory Committees); Clinton Mem., Weekly Compilation of Presidential Documents, 1993 Presidential Documents Online via GPO Access, available at <http://frwais.access.gpo.gov> (October 4, 1993), cited in Dept. of Energy, Notice of Conference on Freedom of Information Act Policies and Procedures, 61 Fed. Reg. 14766 (April 3, 1996) (calling on all Federal departments and agencies to renew their commitment to the underlying principles and sound administration of the FOIA).

¹²³ I am assuming general approval, given President Bush's continued high ratings in public opinion polls. Note, for example, Newsweek's poll of public approval/disapproval of the way George W. Bush is handling his job as President: The President enjoyed consistently high results, particularly since the terrorist attacks of September 11, 2001. Polling Report.com, *President Bush: Job Ratings*, at <http://www.pollingreport.com/BushJob.htm> (last visited Aug. 24, 2003). These results are reflected in similar polls by ABC News/Washington Post, CBS News, Fox News, and others. *Id.*

¹²⁴ Department of Energy, Federal Regulatory Commission, Proposed Rules, 67 Fed. Reg. 3129 (Jan. 16, 2002).

Considering that compliance with FACA is nondiscretionary, challenges have been relatively few. Existing case law has helped fill gaps in the Act, creating an adequate framework for adjudication in most circumstances. When constitutional issues have arisen with regard to FACA, however, the judiciary has yet to tackle the difficult task of determining just how much information should be sequestered from public view upon application of the balancing test put forward in *Nixon II* and *Morrison*.

III. A CURRENT FACA CASE: *JUDICIAL WATCH V. NEPDG*

Judicial Watch, a FACA challenge to a group advising the President on national energy policy, forges into uncharted territory in terms of the constitutional issues raised by application of the Act to close presidential advisors.

A. *Background*

In a January 29, 2001 memorandum, President George W. Bush established the National Energy Policy Development Group.¹²⁵ The memorandum directed NEPDG members to gather information, deliberate, and make policy recommendations to the President to help the private sector and the government promote “dependable, affordable, and environmentally sound production and distribution of energy.”¹²⁶ NEPDG ultimately delivered its recommendations to the President within its charter period, and the National Energy Plan was released in May of 2001.¹²⁷ The NEPDG expired upon termination of its charter.

The National Energy Plan includes 105 specific recommendations.¹²⁸ Though forty-two of these

¹²⁵ Bush Mem. Establishing Nat'l Energy Policy Dev. Group, Jan. 29, 2001. See *Judicial Watch*, 219 F. Supp. 2d 20, 24 (D.D.C. 2002). See also Public Papers of the President, George Bush – 2001, U.S. Gov't Printing Office via GPO Access, Vol. 1, at 30, available at <http://www.gpo.access.gov/executive.html#presidential> (Jan. 29, 2001).

¹²⁶ Nat'l Energy Policy Dev. Group, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future*, available at www.whitehouse.gov/energy/National-Energy-Policy.pdf (May 16, 2001).

¹²⁷ *Id.*

¹²⁸ Gary C. Bryner, *The National Energy Policy: Assessing Energy Policy Choices*, 73 U. COLO. L. REV. 341, 346-49 (2002). As of August 20, 2003, according to administration officials, 90 of the 105 proposals from the National Energy Policy were put into effect. Elisabeth Bumiller & Jeff Gerth, *Legislation: Ambitious Bush Plan is Undone by Energy Politics*, N.Y. TIMES, Aug. 20, 2003, at A16.

recommendations deal with energy conservation, the plan clearly emphasizes continued reliance on traditional energy sources.¹²⁹ It focuses on increasing supplies of energy primarily by promoting policies favorable to the petroleum industry, such as drilling on federal lands, including the Arctic Wildlife Refuge.¹³⁰ The plan also calls for increasing the use and supply of nuclear power through tax incentives for new nuclear facilities and through expedited license processing.¹³¹ Additionally, the plan benefits the coal industry through a rollback of emissions standards,¹³² which would allow existing coal plants to expand without meeting the more stringent clean air standards required of new plants.¹³³ The plan supports its objectives via a general "streamlining" of the regulatory processes of the Clean Air Act, the Clean Water Act, and the National Environmental Policy Act.¹³⁴

As a result of concern over improper influence by the energy industry on the development of the National Energy Policy,¹³⁵ the conservative watchdog group Judicial Watch¹³⁶

¹²⁹ Bryner, *supra* note 128, at 346.

¹³⁰ *Id.* at 347.

¹³¹ *Id.* at 348.

¹³² *Id.* at 377.

¹³³ The coal industry provisions amount to a rewriting of "New Source Review, which historically has required aging coal-fired power plants, oil refineries and factories to install modern pollution-control equipment when they expand or upgrade." Erin Kelly, *Clean Air Changes Opposed; Leahy, Jeffords Express Dismay over Power Plant Rules*, BURLINGTON FREE PRESS, Jan. 17, 2003, at 2A. The new regulations were announced December 2002, as the new Congress opened, and were immediately challenged by a number of Northeastern states, including New York, New Jersey, and Vermont, which claim they are adversely affected by emissions from the primarily Southern coal plants. *Id.* Senator Patrick Leahy of Vermont indicated that the current Bush administration "engaged in a pattern of rolling back clean air, clean water and wilderness protection laws Friday afternoons or right before holidays when lawmakers are generally out of town and the public isn't paying much attention." *Id.*

¹³⁴ The impact on the Clean Air Act of the coal industry provision of the National Energy Plan is one example of how the administration seeks to eliminate what it views as over-burdensome regulatory obstacles. Another example is the Bush administration's emergency forest treatment program, its "Healthy Forests" initiative, which provides for an end-run around the National Environmental Policy Act (NEPA) by placing areas of national forest under "emergency" status due to the risk of fire. See Stephen L. Kass & Jean M. McCarroll, *Undermining the U.S. National Environmental Policy Act (NEPA)*, N.Y. L.J., Oct. 25, 2002, at 3, 7. The designated treatment is then carried out – mature trees are logged by the private timber industry without the delay necessitated by following the normal regulatory procedures under NEPA. *Id.*

¹³⁵ The exceptional secrecy surrounding the development of the National Energy Policy coupled with the steadfast refusal by the Bush administration to reveal its sources suggests to its critics, perhaps unfairly, that the administration has something to hide regarding its sources of policy advice. Still, the question of whether special interest was "holding the pen" for government is not unreasonable based on the nature of the pro-industry recommendations in the report, and the close ties that exist

brought claims under FACA and FOIA, seeking information on the nature, subject matter and attendance of NEPDG meetings.¹³⁷ The *Judicial Watch* case names as defendants the NEPDG, individual members of the federal government, and private individuals believed to be members of the NEPDG.¹³⁸

Vice President Richard Cheney headed the NEPDG. The government initially refused to name other members of the

between the President, Vice President, and top officials in the administration and the energy industry. For example, the President was a board member of Harken Oil and Gas, the Vice President was CEO of Halliburton, an energy services company, and the Secretary of the Army was an Enron executive. See George Lardner Jr. & Lois Romano, *Bush Name Helps Fuel Oil Dealings*, WASH. POST, July 30, 1999, at A1; Press Release, Halliburton, Dick Cheney Resumes Role as Chairman of Halliburton Company (Feb. 1, 2000); Press Release, Halliburton, Lesar to Succeed Cheney as Halliburton Chairman and CEO (July 25, 2000); Frank Pellegrini, *For Enron, Washington May Have Been a Bad Investment*, TIME ONLINE-EDITION, at <http://www.time.com/nation/article/0,8599,193907,00.html> (Jan. 15, 2002). See also MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION, COMMITTEE ON GOVERNMENT REFORM, U.S. HOUSE OF REPRESENTATIVES, 107TH CONG., REPORT ON BUSH ADMINISTRATION CONTACTS WITH ENRON (May 2002).

Additionally, since 1999, U.S. campaign contributions from the oil and gas industry have totaled \$42,621,517, according to the nonpartisan Center for Responsive Politics. See Justin Gerdes, *Big Oil Still Lubes U.S. Energy Policy*, KNIGHT-RIDDER TRIBUNE BUSINESS NEWS: ENVIRONMENTAL NEWS, Apr. 5, 2002. From the limited records thus far released as a result of a successful FOIA suit by the National Resources Defense Council against the NEPDG, it is known that NEPDG member Spencer Abraham alone "met with more than 100 representatives of energy industry companies" from January to May 2001. Danielle Knight, *Documents Show Bush Energy Plan Fuelled by Industry*, Politics-US, Inter Press Service, Global Information Network, Mar. 27, 2002. Taken together, the energy business interests Abraham met with (while the NEPDG was under charter) contributed in excess of \$16 million to the Republican Party since 1999. *Id.* Such a large sum of money from a single interest group invariably raises the specter of improper influence over policy making.

¹³⁶ Judicial Watch describes itself as "the public interest law firm that investigates and prosecutes government corruption." *Court Considers Discovery in Cheney Energy Task Force Case*, at <http://www.judicialwatch.org/1367.shtml> (last visited June 29, 2003) (quoting Judicial Watch press release).

¹³⁷ Plaintiff Judicial Watch filed suit on July 16, 2001. Related claims under FOIA were filed in the D.C. District Court by both Judicial Watch and the National Resources Defense Council (NRDC) against the Department of Energy and Department of Justice. See *Judicial Watch v. United States Dep't of Energy*, No. 01-0981, 2002 U.S. Dist. LEXIS 3572, at *1 (D.D.C. Feb. 14, 2002); *Natural Res. Def. Council v. United States Dep't of Energy*, 191 F. Supp. 2d 41 (D.D.C. 2002). An order issued in the latter suit, resulting in the production of some, but not all, sought-after documents, though these were heavily redacted; continuing claims have been consolidated and NRDC is pursuing a contempt complaint against the Department of Justice. See Dana Milbank, *Presidential Order Followed Draft by Lobbyists*, WASH. POST, Mar. 27, 2002, at A26.

Also, an unprecedented suit by the General Accounting Office (GAO) was filed in the D.C. District Court against Vice President Cheney, though on different grounds, as Congress sought essentially the same information as Judicial Watch, the NRDC and the Sierra Club. *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002). The GAO claims, since dismissed, were brought under its financial oversight authority over federal agencies and on specific federal laws regarding energy policy development.

¹³⁸ *Judicial Watch*, 219 F. Supp. 2d 20, 23 (D.D.C. 2002).

group, but later alleged that all members were government officials or employees.¹³⁹ If true, this would exempt the NEPDG from claims under FACA, since FACA only applies to advisory groups containing at least one non-government member.

Contradicting the government's position, Judicial Watch alleged that the NEPDG did indeed have non-government members, including, among others named in its complaint: Kenneth Lay, former Chairman of Enron; energy industry lobbyist Mark Racicot, former governor of Montana; and Haley Barbour, former head of the Republican National Committee.¹⁴⁰ In discovery, Judicial Watch sought specific information on meeting attendance to show that the NEPDG included private individuals as it alleged. Specifically, the attendance records would reveal what "regular" attendance constituted for purposes of the NEPDG, and whether any private person in fact attended meetings as regularly as the government members. Moreover, even if there were no formally recognized private members, AAPS held that the exemption from FACA for an advisory committee entirely comprised of government members did not apply when government committee members' "involvement and roles are functionally indistinguishable from those of other [private] members."¹⁴¹

On a motion for transfer by the government defendants, the lawsuit was consolidated with a suit by the Sierra Club, an environmental organization. In its suit against Vice President Cheney and the NEPDG in the Northern District of California,¹⁴² the Sierra Club was pursuing claims under FACA, the APA,¹⁴³ and the federal mandamus statute.¹⁴⁴ Judicial Watch

¹³⁹ The George W. Bush administration initially refused to name other members of the NEPDG, but eventually claimed that the group was made up solely of government officials and department heads, including among others: Colin Powell, Secretary of State; Paul O'Neil, Secretary of the Treasury; Spencer Abraham, Secretary of Energy; Christine Todd Whitman, Administrator of EPA; and Gail Norton, Secretary of the Department of Interior. See Plaintiff Judicial Watch's Second Amended Complaint at 5-7, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

¹⁴⁰ Plaintiff Judicial Watch's Second Amended Complaint at 8, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

¹⁴¹ AAPS, 997 F.2d 898, 915 (1993) (discussing the possibility of de facto membership for private individuals whose involvement with the advisory group was virtually the same as government members). See discussion *supra* note 91 and accompanying text.

¹⁴² *Judicial Watch*, 219 F. Supp. 2d at 23-24.

¹⁴³ 5 U.S.C. § 706(2)(A) and (D) (2000).

¹⁴⁴ 28 U.S.C. § 1361 (2000).

was permitted to amend its original complaint, incorporating claims raised by the Sierra Club under the APA and mandamus statute.¹⁴⁵ Judge Emmett G. Sullivan of the D.C. District Court presided over the consolidated cases.

In a January 31, 2002 court order, Judge Sullivan found the government's claim that "discovery would directly interfere with the President's core constitutional power to obtain candid and confidential advice from his closest advisers" to be "conclusory" and ordered the government to detail specifically "[i]n what way would allowing limited discovery . . . violate Article II of the United States Constitution."¹⁴⁶ The information the plaintiffs sought under FACA included the number, locations and times of meetings; what was discussed; and who attended, including the number of private individuals in attendance, and how many times any one individual attended an NEPDG meeting.¹⁴⁷

B. *The Government's Constitutional Claims*

In a memorandum opinion issued July 11, 2002, Judge Sullivan noted that the outcome of the related FOIA cases¹⁴⁸ against the government could impact the statutory and constitutional issues raised in the *Judicial Watch* case.¹⁴⁹ Further, he stated that under the doctrine of constitutional avoidance,¹⁵⁰ it was inappropriate to rule on the constitutional issues presented in light of the early stage of the proceedings.¹⁵¹ Thus, the court refused to "fashion a constitutional ruling broader than the precise facts underlying this case," noting

¹⁴⁵ *Judicial Watch*, 219 F. Supp. 2d at 27.

¹⁴⁶ Court Order of January 31, 2002, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

¹⁴⁷ *Id.*

¹⁴⁸ See *supra* text accompanying note 137 (discussing related FOIA cases).

¹⁴⁹ *Judicial Watch*, 219 F. Supp. 2d at 27.

¹⁵⁰ *Id.* at 45 (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.")).

¹⁵¹ *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997), and *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been the Court's considered practice not to decide abstract, hypothetical or contingent questions ... or to decide any constitutional question in advance of the necessity for its decision ... or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied ... or to decide any constitutional question except with reference to the particular facts to which it is to be applied.")).

that any constitutional inquiry in a future proceeding would depend upon a “nuanced” development of the factual record.¹⁵²

In strong language, Judge Sullivan chastised government counsel for deliberately misrepresenting Supreme Court precedent in the government’s claim that FACA interfered with the President’s express constitutional authority to receive confidential advice, whether from his advisors or private individuals.¹⁵³ Government counsel based its flawed “bright-line” separation of powers argument upon the concurring, and not majority opinion of *Public Citizen*.¹⁵⁴ Judge Sullivan called the government’s position “untenable,”¹⁵⁵ and clarified that the proper inquiry turned upon the interdependence, and not independence, of the coordinate branches.¹⁵⁶ Calling “the implications of the bright-line rule advocated by the government stunning,” Judge Sullivan noted that by extension, “such a ruling would eviscerate the understanding of checks and balances on which our constitutional order depends.”¹⁵⁷

While passing on the constitutional issues, Judge Sullivan carefully articulated what the fact-intensive constitutional inquiry would entail when the case was properly before the court.¹⁵⁸ Per the *Nixon II/Morrison* balancing test,¹⁵⁹ the court would first determine whether FACA’s application (here, limited to access to NEPDG membership and meeting records since publication and notice was already after the fact) would prevent the President from fulfilling any of his constitutionally assigned duties.¹⁶⁰ Only where the potential for such disruption was present would the court then decide

¹⁵² *Id.*

¹⁵³ *Id.* at 50 n.14.

¹⁵⁴ The Government conceded that the Supreme Court balancing test of *Nixon II/Morrison* would apply in testing the FACA’s constitutionality. *Id.* at 48 (“While conceding that the *Nixon/Morrison* balancing test applies, the government urges this court nonetheless to apply the bright-line rule embraced by the *Public Citizen* concurrence.”).

¹⁵⁵ *Judicial Watch*, 219 F. Supp. 2d. at 50.

¹⁵⁶ *Nixon II*, 433 U.S. 425, 443 (1977). *But cf. Morrison*, 487 U.S. 654, 705 (1988) (Scalia, J. dissenting) (writing that executive power “does not mean *some* of the executive power, but *all* of the executive power”).

¹⁵⁷ *Judicial Watch*, 219 F. Supp. 2d at 50.

¹⁵⁸ The *Judicial Watch* case decided only preliminary issues of mootness, standing, validity of claims, and whether discovery could proceed over the Government’s objections, in accordance with the doctrine of constitutional avoidance. *Id.* at 28.

¹⁵⁹ *Id.* at 47-49, 55.

¹⁶⁰ *Nixon I*, 418 U.S. 683 (1974).

whether any constitutionally authorized congressional purpose justified the disruption.¹⁶¹ The greater the intrusion into the executive sphere, the greater the justification had to be.¹⁶²

In this case, the government argued that "application of FACA to the NEPDG encroaches on the sphere of the Executive by infringing the President's right to receive the confidential advice necessary to discharge his unique duties."¹⁶³ Judge Sullivan articulated the question raised under FACA in this case "as not whether the President's constitutionally protected ability to receive advice in confidence was undermined, but whether his advisors' ability to deliberate in confidence is constitutionally protected, and how far down the line that protection extends."¹⁶⁴ Here, Judge Sullivan noted, the pleadings suggested that the only direct communication with the President resulting from NEPDG deliberation was the group's presentation to him of the final energy policy report, which is in fact a public document.¹⁶⁵

Judge Sullivan observed that although the Supreme Court has "repeatedly recognized . . . the importance to the Presidency of receiving candid, honest, and when necessary, unpopular, advice"¹⁶⁶ it has not yet ruled on the issue of how far protection extends. The D.C. Circuit, however, had ruled: In *re Sealed Case* extended constitutional protection beyond direct communications between government executives and the President.¹⁶⁷ Despite the outcome of *In re Sealed Case*, Judge Sullivan clarified that the D.C. Circuit limited its holding to the facts of that case and warned of the risk of extending

¹⁶¹ *Judicial Watch*, 219 F. Supp. 2d at 47 (citing *Nixon II*, 433 U.S. at 443 and *AAPS*, 997 F.2d 898, 910 (D.C. Cir. 1993)).

¹⁶² *Id.* at 45 ("[D]evelopment of the factual record will better enable this Court, if ultimately faced with deciding whether it violates separation of powers to apply the APA, FACA, or the federal mandamus statute in this context, with the information necessary to properly apply the constitutional balancing test in the nuanced, fact-intensive fashion required by precedent."). See also *Morrison*, 487 U.S. 654 (1988); *Nixon II*, 433 U.S. 425; *AAPS*, 997 F.2d at 898.

¹⁶³ *Judicial Watch*, 219 F. Supp. 2d at 47.

¹⁶⁴ *Id.* at 52. See also *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (leaving open, in circumstances beyond those of the case at hand, the question of whether executive privilege can be extended to include the communications of his chief advisors).

¹⁶⁵ *Judicial Watch*, 219 F. Supp. 2d at 52.

¹⁶⁶ *Id.* at 51-52 (citing *Nixon I*, 418 U.S. 683, 705 (1974)).

¹⁶⁷ *In re Sealed Case*, 121 F.3d at 749-51.

constitutional protection too far and “sequestering” certain information from public view.¹⁶⁸

Should the case progress to consideration of the constitutional issues, according to Judge Sullivan, the *Nixon II/Morrison* balancing test would consider the sum of FACA’s requirements in assessing the potential disruption to a President’s ability to carry out his constitutional duties.¹⁶⁹ The Judge also noted that revealing the names of participants as well as generated documents was likely a “less onerous” burden than portrayed by the government, especially considering the discretionary exemptions available within FACA.¹⁷⁰

C. *Plaintiffs’ Claims under FACA, the APA, the Federal Mandamus Statute, and FOIA*

While withholding any ruling on the separation of powers issues raised by the government, the court proceeded to rule on the issues of mootness, potential remedies, and standing, as they related to claims under FACA, the APA, the federal mandamus statute, and FOIA. The court ultimately dismissed the claims against the private defendants as outside of the terms of the statute, retaining only the claims against government entities and officials.

1. FACA Claims

The court held that claims of FACA violation were not moot despite the termination of the NEPDG charter, since methods of relief were still available. For example, the plaintiffs could seek an injunction to obtain access to documents that continued to exist, and/or a declaratory judgment that the government violated the plaintiffs’ rights under FACA.¹⁷¹ Additionally, since Judicial Watch alleged in its

¹⁶⁸ *Judicial Watch*, 219 F. Supp. 2d at 52 (citing *In re Sealed Case*, 121 F.3d 729).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 53 (noting the available exemptions under FACA, including information that is part of the deliberative process, national security concerns, and ability to close meetings). The relative insignificance of the burden imposed was noted by Amicus NRDC and referenced by Judge Sullivan. *Id.* For discussion of these exemptions, see *supra* text accompanying notes 32-35.

¹⁷¹ *Judicial Watch*, 219 F. Supp. 2d at 28 (citing *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999); *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999)). Though such a remedy has precedential value, at least one court has determined that only injunctive relief offers sufficient remedial effect for FACA violations. *Alabama-Tombigbee Rivers*

complaint that the NEPDG still existed, despite termination under charter, a question of fact remained and thus all FACA violations claimed by plaintiff Judicial Watch were potentially viable. Despite this, and despite the number of prior suits by private individuals under FACA, Judge Sullivan held that the 2001 Supreme Court ruling in *Alexander v. Sandoval*¹⁷² required that further private action under FACA cease, since the court could not read in a private right of action where Congress had not explicitly provided for such a right in the text of the statute.¹⁷³ Thus, all direct FACA claims were dismissed.¹⁷⁴

2. FACA Claims Brought Under the APA

In the alternative to bringing direct claims of FACA violation, to enforce private rights granted under the Act, both *Judicial Watch* plaintiffs claimed that the government's violation of FACA was an "arbitrary and capricious" failure to comply with the APA.¹⁷⁵ That is, by violating the requirements of FACA, the government failed in its performance of nondiscretionary duty as required by the APA.¹⁷⁶ However, FACA claims under the APA apply only to entities that meet the statutory definition of "agency" and specifically, to "final agency action" by these alleged agencies.¹⁷⁷ Thus, this inquiry opened questions of fact as to whether the government defendants were agencies capable of final agency action.

Because plaintiff Sierra Club conceded that Vice President Cheney was not an agency, the court dismissed the APA claims against him and avoided facing the question of whether a Vice President can *ever* be an agency under the terms of the statute, a question also left unresolved by earlier

Coalition, 26 F.3d 1103, 1107 (11th Cir. 1994). See cases cited *supra* note 108.

¹⁷² *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (holding that courts may not read in a private cause of action where none is specifically authorized within the text of a statute, even though that statute may explicitly create private rights). In *Judicial Watch*, Judge Sullivan held that FACA is such a statute. Thus, though the public was clearly designated rights under the statute, no express language created a cause of action enabling a direct private challenge under FACA.

¹⁷³ *Judicial Watch*, 219 F. Supp. 2d at 33-34. Plaintiff Judicial Watch argued that direct FACA claims were valid. *Id.* at 33. Plaintiff Sierra Club conceded that they were not, thus brought no such claims. *Id.*

¹⁷⁴ *Id.* at 34.

¹⁷⁵ *Id.* at 34-35.

¹⁷⁶ *Id.* at 34.

¹⁷⁷ *Id.* at 34-35, 40.

cases.¹⁷⁸ The court also dismissed the APA claims against NEPDG, since the Sierra Club conceded that the NEPDG no longer existed, given its termination under charter. Because Judicial Watch had fully adopted the Sierra Clubs concessions, all APA claims against the Vice President and the NEPDG were thus dismissed.¹⁷⁹ Accordingly, the court avoided deciding whether the NEPDG or its subgroups were sufficiently independent to qualify as agencies under APA regulations and thus susceptible to claims of APA violation. However, because defendant cabinet members and agency heads are agency actors and can be sued under the APA, the court preserved the claims against the remaining government defendants.

To make out valid claims under the APA, the plaintiffs had to satisfy two predicates. First, they had to show that the FACA violations embodied agency action, namely decisions by the group. Second, they had to show that the violations were final agency action, not merely a deliberative step toward some final action.¹⁸⁰ Regarding the agency action predicate, a significant pitfall existed. If, later in the case, the court found that Vice President Cheney, and not the collective or individual members of the NEPDG, made the decisions, the claim would

¹⁷⁸ *Public Citizen vs. Dep't of Justice*, 491 U.S. 440 (1989) (employing the doctrine of constitutional avoidance to bypass the question of whether a Vice President can be an agency); *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir 1993) (ruling that the APA did not apply to the President, and alluding in dicta to its non-application to the Vice President).

¹⁷⁹ *Judicial Watch*, 219 F. Supp. 2d at 35. Specifically, the court held: Because Sierra Club has conceded that the NEPDG no longer exists, any APA claim brought directly against the NEPDG must be dismissed. Even though Sierra Club's FACA claims with respect to the federal defendants are not moot, if the NEPDG no longer exists, then it can not be sued as a defendant. Thus, the Court need not resolve the question of whether the NEPDG or its alleged sub-groups were sufficiently independent to qualify as an "agency" for purposes of the APA.

Id.

In its amended complaint, Judicial Watch adopted the Sierra Club's concessions with respect to the APA in their entirety, thus no claim of APA violation against the Vice President or the NEPDG survived. *Id.* at 35 n.8.

¹⁸⁰ The *Judicial Watch* opinion cited the Supreme Court's definition of "final agency action" from *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997):

As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,' *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

Judicial Watch, 219 F. Supp. 2d at 39.

fail since the Sierra Club had already conceded that the Vice President was not an agency. Regarding the final action requirement, the court determined that final agency action was present by asking first, "whether the action (in closing NEPDG meetings) was [the] consummation of the deliberative process . . . not merely tentative or interlocutory action," and second, whether rights and obligations had been determined from which legal consequences would flow.¹⁸¹ For example, by closing the NEPDG meetings, the government had truncated plaintiffs' rights to access under FACA, rendering the actions final for the purposes of the APA.¹⁸²

The court also recognized that the establishment of NEPDG subgroups by any of the individual agency heads who were NEPDG members (such as the Secretary of Energy, the Secretary of the Interior and the Administrator of the EPA) created a valid claim under the APA for FACA violation.¹⁸³ Though these agency heads also served as advisors to the President (potentially exempting them from FACA), actions by any of them in establishing a subgroup could be ascribed to their dual role as agency head for purposes of the APA. Existing precedent, the court noted, had established that there was "no basis for distinguishing between roles [of presidential advisor or agency head] and thus no meaningful distinction between the acts and responsibilities in one or the other role."¹⁸⁴ Thus, an agency head who established a subgroup without authorization and approval would be liable for violation of FACA claims under the APA.¹⁸⁵

¹⁸¹ Regarding final agency action, the court applied the two prong test of the Supreme Court in *Bennett v. Spear*, 520 U.S. 154, to determine that final agency action was present. *Id.* at 40.

¹⁸² *Id.* According to the *Judicial Watch* opinion:

The decisions to hold meetings without public access to the meetings or the records created indeed had a legal consequence – the denial of the public's right of access to that information. Plaintiffs and other interested groups and citizens were prevented from enforcing their right to access information that exists pursuant to FACA. Subsequent actions taken without granting access, and the failure to grant access itself, constitute final agency action.

Id.

¹⁸³ *Id.* at 36-40. See discussion of formal NEPDG membership *supra* note 139.

¹⁸⁴ *Judicial Watch*, 219 F. Supp. 2d at 39.

¹⁸⁵ *Id.* at 44.

What is clear from the statute is that some government official, whether it is the Vice President or the NEPDG participants or someone else, has a duty pursuant to FACA if the facts as alleged are proven. To whom that non-discretionary duty falls is a question to be explored in discovery. At this stage of the case, however, the Court need only acknowledge that FACA creates

3. FACA Claims Brought Under the Federal Mandamus Statute

The court held that the federal mandamus statute¹⁸⁶ could supply both jurisdiction and a cause of action where “another federal statute imposes a non-discretionary duty on a federal official and where no other relief is available.”¹⁸⁷ As previously noted, FACA is such a statute, requiring agency compliance with all of its terms if no exemptions apply. The use of the mandamus statute, however, is within the discretion of the district court asked to invoke it. Because it is “a drastic remedy,” a court cannot properly invoke mandamus unless it is sufficiently free from doubt that there is no substantive or jurisdictional alternative under the circumstances.¹⁸⁸ Judge Sullivan ruled that mandamus was available against all government defendants, including the Vice President, to compel the production of NEPDG documents, as per plaintiff Sierra Club’s claim, and for this and all FACA violations, as per plaintiff Judicial Watch’s claims (since Judicial Watch contends that the NEPDG still exists). However, Judge Sullivan held that separation of powers issues made the invocation of mandamus premature at such an early stage of the proceedings.¹⁸⁹ Thus, the court reserved decision on whether a writ of mandamus should issue.

4. Claims Under FOIA

Finally, the court dismissed Judicial Watch’s FOIA claims, since Judicial Watch had made the error of asserting them only against Vice President Cheney and not against the NEPDG. The court noted that FOIA applied *only* to agencies and, moreover, specifically *not* to agencies within the executive office with the “sole function . . . to advise and assist the [P]resident.”¹⁹⁰ The court accepted the defendant’s argument,

non-discretionary duties, and that, according to plaintiffs’ allegations, one of the defendants sued here could have violated those duties.

Id.

¹⁸⁶ 28 U.S.C. § 1361 (2000) (“Action to compel an officer of the United States to perform his duty. The district court shall have original jurisdiction of any action in the nature of mandamus to an officer or an employee of the United States or an agency thereof to perform a duty owed to the plaintiff.”)

¹⁸⁷ *Judicial Watch*, 219 F. Supp. 2d at 40.

¹⁸⁸ *Id.* at 41.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 55.

though based on inconclusive precedent,¹⁹¹ that the Vice President is not an agency for purposes of FOIA.¹⁹² Since Judicial Watch failed to assert any FOIA claims against the NEPDG, the court did not have to decide whether the NEPDG was an agency for purposes of FOIA.

In summary, the *Judicial Watch* court dismissed all direct FACA claims, since the Act contains no provision for private cause of action. Claims under the APA for FACA violation remained against defendant cabinet members and agency heads, but were dismissed as to the Vice President and the NEPDG, due to plaintiff Sierra Club's concessions and plaintiff Judicial Watch's adoption of those concessions. Claims against the Vice President, cabinet members, and agency heads remained under the Federal mandamus statute, as well as claims against the NEPDG by plaintiff Judicial Watch, since Judicial Watch alleged that the NEPDG still exists. All the FOIA claims were dismissed on procedural grounds. Finally, all claims against private defendants were dismissed, since FACA, the APA, and mandamus statute are not applicable to private persons.

D. *Limited Discovery Ordered*

On August 2, 2002, Judge Sullivan ordered for a second time that the government comply with discovery or file detailed and precise objections to "particular" discovery requests, and "not make general invocations of privilege with respect to categories of documents or questions, but . . . identify and explain their invocations of privilege with particularity."¹⁹³

¹⁹¹ *Id.* (citing *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1986); *Armstrong v. Bush*, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (holding that the President and Vice President are not subject to the Federal Records Act, but rather are subject only to the Presidential Records Act)).

As to the applicability of the FOIA to the Vice President, there is some confusion in the law as to whether a presidential advisor constitutes an "agency" within the definition of FOIA. FOIA includes in its definition "the Executive Office of the President" which includes cabinet members but may not include White House staff or non-executive "Office of the President" staff. FOIA does not apply to those agencies whose sole function is to advise and assist the President. Even if they also advise the President, agencies/agency heads with significant operational autonomy are subject to FOIA, unless sought-after documents fall under an existing exemption, such as national security. *Id.* See also *supra* note 169.

¹⁹² *Judicial Watch*, 219 F. Supp. 2d at 55.

¹⁹³ Court Order of August 2, 2002, at 2, cited in Plaintiff Judicial Watch's Opposition to Defendants' Motion for a Stay Pending Appeal, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

Instead of proceeding with discovery, the government waited the full thirty-day response period before filing a motion for a protective order and for reconsideration.¹⁹⁴ Judge Sullivan denied the motion on October 17, 2002, saying that the government had not provided particularized justification for its request.¹⁹⁵ He again ordered the parties to proceed with limited discovery, requiring that the government individually state and justify¹⁹⁶ a claim of privilege for each document or information request. The government then moved for a stay while it pursued an interlocutory appeal of the October 17, 2002 order.¹⁹⁷ Judicial Watch opposed the motion, noting “numerous attempts by Defendant to delay this case.”¹⁹⁸ In its filing, Judicial Watch noted that the government’s delaying had already guaranteed that any information ultimately released would come after the 2002 elections, potentially a calculated tactic on the part of the government to avoid any damage such release might engender.¹⁹⁹ In light of the repeated delays, and the potential injury accrued, Judicial Watch prompted the court to fashion relief “in furtherance of the public interest.”²⁰⁰

¹⁹⁴ Plaintiff Judicial Watch’s Opposition to Defendants’ Motion for a Stay Pending Appeal at 2, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

¹⁹⁵ Order Denying Defendants’ Motion for a Protective Order and for Reconsideration Pending Appellate Review, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

¹⁹⁶ *Id.* See also *supra* notes 145-46.

¹⁹⁷ In support of its appeal, the government relied upon *Cuomo v. United States Nuclear Regulatory Comm’n.*, 772 F.2d 972 (D.C. Cir. 1985), which named four factors for consideration, though none are prerequisites: (i) the likelihood the party seeking the stay will prevail on the merits; (ii) irreparable harm to that party if a stay is not granted; (iii) harm to others if the stay is granted; and (iv) public interest in granting the stay. Order Denying Defendants’ Motion for a Protective Order and for Reconsideration Pending Appellate Review at 3, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

¹⁹⁸ Plaintiff Judicial Watch’s Opposition to Defendants’ Motion for a Stay Pending Appeal at 2, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

¹⁹⁹ *Id.* Plaintiff Judicial Watch further noted:

the Government’s “astonishing assertion that it is *they*, not Plaintiffs and the public, that will suffer irreparable injury if their frivolous motion for a stay is not granted. On the contrary, it is the Plaintiffs in this case and, most importantly, the American public, who continue to be injured by the Executive Defendants’ refusal to respond to Plaintiffs’ legitimate and court-authorized discovery request regarding the operation of the NEPDG.”

Id.

²⁰⁰ *Id.* at 3 (citing Nat’l Ass’n of Farmworkers Org. v. Marshall, 628 F.2d 604,

On November 27, 2002, Judge Sullivan again ordered that discovery proceed over the government's objections, "the latest step in a lengthy procedural dispute between the White House and . . . the District Court."²⁰¹ The government lost its interlocutory appeal and was once again ordered to proceed with discovery.²⁰² In dismissing the government's appeal, a three-judge panel of the D.C. Circuit Court noted that the government's appeal was premature as it had never claimed executive privilege, nor availed itself of any opportunity to narrow the *scope* of discovery.²⁰³ The circuit court panel opined that, upon the government's proceeding with the discovery order, the district court would protect its legitimate interests in privacy via "tightly reigned discovery" and *in camera* review as appropriate.²⁰⁴ Thus, the government was put back in the same position it was in at the very first discovery ruling by Judge Sullivan at the district court. Meanwhile, as the case progressed, most of the provisions of the National Energy Plan were implemented, leaving obvious questions of the efficacy of enforcement when an executive administration, as here, is resistant.²⁰⁵

616 (D.C. Cir. 1980)).

Countering the Government's motion for appeal, plaintiffs argued that, at the district court level, appellate review of a discovery order is usually appropriate only at conclusion of the litigation. "[E]ven orders to produce information over strong objection based on privilege are not appealable, despite the claim that once the cat is out of the bag the privilege is gone." *Id.* (citing *Reise v. Bd. of Regents of the Univ. of Wis. Sys.*, 957 F.2d 293, 295 (7th Cir. 1992)).

²⁰¹ Katherine Q. Seelye, *Judge Again Bars Effort to Keep Cheney Files Secret*, N.Y. TIMES, November 28, 2002, at A30.

The question is whether the White House is subject to discovery at all. The Administration says the White House is beyond the court's reach and can't be asked any questions. The judge rejected that. So they went to the Court of Appeals, saying that what Judge Sullivan did was so extraordinary that it requires their immediate intervention.

Id. (quoting Sanjay Narayan, counsel for Plaintiff Sierra Club).

²⁰² *In re Richard B. Cheney*, Vice President of the United States, 334 F.3d 1096 (D.C. Cir. 2003), *rehearing and rehearing en banc denied*, 2003 U.S. App. LEXIS 18831, 18832 (D.C. Cir., Sept. 10, 2003). Following the three-judge panel's decision denying Vice President Cheney's interlocutory appeal, the full U.S. Court of Appeals for the District of Columbia Circuit voted five to three against rehearing, issuing a one-paragraph ruling that did not include its reasons for denial. *Id.*; *see also Court Rejects Rehearing Cheney Energy Case*, L.A. TIMES, Sept. 12, 2003, at A33. The Justice Department then filed papers seeking Supreme Court review of the decision, though a grant of such review is considered highly unlikely. Carol Leonnig, *Cheney Seeking Supreme Court Review of Energy Panel Case*, WASH. POST, Sept. 17, 2003, at A04.

²⁰³ *Id.* at 26-27.

²⁰⁴ *Id.* at 28.

²⁰⁵ *See supra* note 128.

IV. ANALYSIS

Though agencies have generally complied with FACA, courts have denuded its vital purpose by tentatively applying it to the actions of presidential advisors. In the very few cases involving presidential advisors, the doctrine of constitutional avoidance and the resultant narrowing of FACA's scope has created murky law, and worse, unchecked executive avoidance.

Despite the existing Supreme Court framework for resolution of issues of separation of powers and executive privilege, the judiciary has been unwilling to apply the balancing test of *Nixon II* and *Morrison* in FACA cases involving close presidential advisors.²⁰⁶ Rather, when confronted with admittedly difficult constitutional issues, courts have chosen to limit FACA by narrowing its scope and broadening its exemptions through dubious statutory interpretation,²⁰⁷ contra to its unambiguous purpose.²⁰⁸ Without the full and consistent support of the courts in its application, including providing appropriate relief for violations, FACA may become a virtual nullity, resulting in legislation that exists at the whim of the executive branch – the sort of result that the separation of powers doctrine seeks to prevent.

However, the current opacity calls neither for the courts to draw a bright line that cedes a larger sphere of secrecy to the executive branch, nor to narrow the zone of privacy in presidential communications. Instead, the situation demands that courts apply, in *all* cases, the functional standard provided by the Supreme Court. Different outcomes under fact-intensive, case-by-case analysis do not indicate inconsistency, but rather are the natural result of a consistent, principled approach that accounts for a variety of competing and legitimate concerns. Without consistent judicial treatment, the executive branch simply will continue to evade the statute, so long as the political costs do not compel otherwise. The irony here, however, is that FACA itself provides the fodder for political

²⁰⁶ A decision in *Judicial Watch* is pending as of the date of this paper, but the *Judicial Watch* court has clearly identified the *Nixon II/Morrison* balancing test as applicable to resolution. See *supra* notes 157-62 and accompanying text.

²⁰⁷ *Public Citizen*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring, but dissenting in part as to the majority's statutory interpretation, given the plain meaning of the word "utilize").

²⁰⁸ Note the examples of *Public Citizen*, *In re Sealed Case* and *AAPS*, discussed *supra* Part I.B.2.

pressure. Thus, diminution of FACA reduces the potency of political checks.

A. *Drafting Flaws and Judicial Avoidance*

The Supreme Court, while employing the doctrine of constitutional avoidance in *Public Citizen*, voiced concern that FACA is too broadly drafted, noting in particular the unfettered definition of "advisory committee."²⁰⁹ Still, most FACA cases do not involve constitutional issues. Lower court interpretations of FACA are both available and workable, including interpretations of FACA's most serious drafting flaws: the absence of a standard for judging its balanced point of view requirement and the absence of a private remedy. As example of the former, the courts in *Cargill v. United States*²¹⁰ and *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*²¹¹ judged the balance requirement according to the function of the advisory group at issue. In both cases, the end result of the advisory groups' work was technical, not political, and thus adequate balance existed among the highly technically qualified membership.²¹²

Regarding remedies, the court in *Alabama-Tombigbee Rivers Coalition v. Dept. of Interior*²¹³ provided an example of protective remedial action by enjoining use of the report prepared by an advisory committee in violation of FACA. That court held that "a simple 'excuse me' after the fact was insufficient in light of the important purpose of the Act."²¹⁴ Accordingly, even though FACA suffers from drafting flaws, there is no reason for courts to eschew the statute's commands, as prior judicial interpretation has supplied the necessary stopgaps.

B. *Executive Branch Avoidance*

Inquiry into FACA's application to presidential advisors must include consideration of how disclosure might disrupt the

²⁰⁹ *Public Citizen*, 491 U.S. 440.

²¹⁰ 173 F.3d 323 (5th Cir. 1999).

²¹¹ 708 F. Supp. 359 (D.D.C. 1988).

²¹² See *supra* note 104.

²¹³ 26 F.3d 1103 (11th Cir. 1994).

²¹⁴ *Id.* See also *Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609 (D.D.C. 1996) (holding that injunction against use of advisory group's work product could be an appropriate remedy on remand).

President's ability to carry out his constitutional duties, such as proposing legislation.²¹⁵ If compliance would disrupt, the *Nixon II/Morrison* balancing test then weighs the disruption against the competing interest promoted by the statute and borne out by the facts of the case.²¹⁶ With regard to FACA, this competing interest is Congress' express purpose to make advisory committees publicly accountable in order to fend off special interest control over the policy-making process. Apart from prevailing on these scales, however, the executive branch has other ways of avoiding disclosure. Without technically violating FACA, the executive branch can skirt its reach by legitimately invoking its exemptions, as well as through less legitimate means.

When considering the relative burdens of compliance, the court must note the exemptions available to the President.²¹⁷ These include, among other express exemptions, the right to close meetings in the interest of national security or to withhold documents related to national security or foreign policy. The exemptions thus exclude a broad range of communications and activities that would otherwise be open to public scrutiny under FACA.

Further, the Supreme Court's definition of "advisory committee" clearly excludes independently established private organizations that exist for some primary purpose besides giving advice to the President. Under Supreme Court interpretation, FACA would apply only to formally organized groups with a regular membership that have been specifically called upon to deliver advice and recommendations to the government,²¹⁸ most particularly if that advice will be considered exclusively in the development of national policy.²¹⁹ Only when such a group includes within its membership at least one private individual does it meet the definition of advisory committee, thus triggering FACA. Complying with the publication and reporting requirements may be perceived as

²¹⁵ U.S. CONST. art. II, § 3 ("recommend to their Consideration such Measures as he shall judge necessary and expedient").

²¹⁶ U.S. CONST. art. I, § 8 ("To make all laws which shall be necessary and proper for carrying into Execution the forgoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

²¹⁷ See *supra* notes 32-35 and accompanying text.

²¹⁸ *Public Citizen*, 491 U.S. 440 (1989).

²¹⁹ See *supra* discussion at note 100 (citing FACA cases which deal with formation of a group for the specific purpose of policy development).

tedious and inefficient, and opening meetings to the public may invite delay in proceedings, but considering the risk FACA attempts to avoid, the burden is certainly less than onerous.²²⁰

Within this framework, even without considering exemptions available within FACA, it is fairly easy for an administration to avoid FACA's reach by working around the Act's technical provisions.²²¹ Such defensive action on the part of the executive branch unfortunately provides entree for special interests and would likely be a bad faith violation of the Act's purpose. For example, the executive branch could simply stall FACA proceedings to delay compliance until rights under FACA are rendered moot, or until a more politically expedient time to cooperate arises. Additionally, the requisite limited charter time of advisory committees eliminates action against the group post-termination, another means to avoid political accountability.

Without consistent enforcement of FACA provisions, there is limited risk in non-compliance. Further, when mootness doctrines or a court's weak analysis limits available remedies,²²² a violating agency has nothing to fear unless the media and public exert pressure. This, however, is the crux of the problem, and points out the need for FACA. FACA itself provides the information that allows the public to serve as a political check on the activities of government. Thus, an administration hostile to FACA's open government purpose can achieve its goal to sidestep the Act without asserting privilege and without specifically addressing the constitutional issues, if any.²²³ The result is unchecked executive power. By virtue of the

²²⁰ See *supra* note 170 and accompanying text.

²²¹ The court of *Association of American Physicians & Surgeons, Inc.* also suggests this:

Since form is a factor, it would appear that the government has a good deal of control over whether a group constitutes a FACA advisory committee. Perhaps, for that reason, it is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch. In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose.

AAPS, 997 F.2d 898, 915 (D.C. Cir. 1993).

²²² See discussion *supra* Part I.B.2.

²²³ This result disposes of Justice Scalia's discussion in his dissenting opinion in *Morrison* that argues against the balancing test applied by the majority. *Morrison*, 487 U.S. 654, 706 (1988). Justice Scalia argues that political pressure alone, not intrabranched policing, must be relied upon to address potential criminal acts within the executive administration. Such an argument fails when asserted against FACA, since FACA's purpose is to make government transparent to enable the forces of political pressure to build when appropriate. Without public access to the workings of

burgeoning size of the administrative arm of government,²²⁴ this power has increased dramatically in the years since FACA's introduction.²²⁵ In sum, the various avenues of executive avoidance, combined with inconsistent and often watered-down court interpretation, have significantly eroded FACA's purpose and protections, accumulating that lost power in the executive branch.

V. RECOMMENDATIONS

Though FACA has quietly done its work, enjoying fairly consistent compliance and support at the agency level since its enactment in 1972, it can more fully protect the public interest in openness with active support from the judiciary. Specifically, the courts can utilize existing FACA precedent to fill statutory gaps with regard to the balance requirement. More importantly, the courts must be willing to apply FACA in situations involving groups which advise the President, using Supreme Court precedent as necessary to justify – or deny – its application. Finally, the courts must continue to exercise their equity powers in fashioning appropriate remedies for FACA violations.

A. *Interpret FACA in Favor of its Broad Purpose and Narrow Exceptions*

By consistently applying precedent, courts can clarify the limited definition of “advisory committee,” which properly excludes certain private organizations from FACA's reach.²²⁶ Such a limited definition comports with the Act's purpose and

government, such political pressure is forestalled. *Id.* See *supra* notes 41, 74.

²²⁴ “Approximately 10,000 advisory committees [are] in existence at any given time.” General Services Administration, Committee Management Secretariat, *The Federal Advisory Committee Act (FACA) Brochure*, available at <http://www.gsa.gov/Portal/content/> (last visited July 21, 2003). See generally U.S. Government Printing Office, *The United States Government Manual 2002-03*, available at <http://www.gpoaccess.gov/gmanual/index.html> (providing descriptions of the various federal departments and agencies) (last visited Aug. 23, 2003).

²²⁵ See discussion *supra* Part I.C. Perhaps, though, fear of loss of political capital has eroded in the near past, as world events may have limited Americans' appetites for protracted political showdowns. See *Remember When This Would Have Been Huge News?*, THE HOTLINE (AMERICAN POLITICAL NETWORK), Oct. 18, 2002 (discussing Vice President Cheney's refusal to turn over NEPDG documents despite a court order).

²²⁶ Excluded are those private organizations founded and operated for a primary purposes beyond advising the President, such as the ABA. See *supra* text accompanying note 84.

findings, and the Supreme Court precedent of *Public Citizen*. Additional case law and GSA interpretation articulates a workable standard with which to judge the threshold issue of FACA applicability. Courts can also clarify the problems of FACA's omissions: the absence of a standard for judging whether an advisory group is adequately balanced and a provision for private remedies.²²⁷ A judicial standard that looks to the function of the advisory group to judge whether it is "fairly balanced in terms of the points of view represented" is appropriate and maintains the broad purpose of FACA. Alternatively, Congress could correct this omission by adopting this precedent by amendment, which would have the dual benefit of reaffirming political support for FACA as well as filling a gap. An amendment providing for a private right of action would also be true to the express purpose of FACA to provide access and information to both the public and the Congress.

B. Use the Supreme Court's Balancing Test

Supreme Court precedent establishes that the courts have the power to "say what the law is,"²²⁸ and provides the balancing test of *Nixon II/Morrison* to resolve skirmishes along the borders of power that arise under FACA. Thus, FACA is not per se unconstitutional as applied to presidential advisory groups. Rather, the courts may consider the specific burden placed on the President through disclosure, and the potential disruption disclosure would cause to the President's ability to execute duties under Article II. This functional approach involves pragmatic case-by-case analysis, considering the nature and purpose of the advisory group, and the specific topic on which the President seeks advice. In weighing the relative burden, the courts must consider both the measurable burden of regulatory compliance and the unquantifiable burden of impairing a President's ability to receive candid advice, including whether this advice comes directly or through the conduit of close presidential advisors who are in turn advised by others.

²²⁷ Omitted from the text of FACA is provision of private remedy or a standard for judging whether an advisory committee is balanced in terms of represented point of view. See *supra* note 107 and accompanying text.

²²⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

For advisory groups that meet FACA's definition, the readily measurable burden is the administrative cost of complying with FACA's regulatory procedures. This includes providing public notice and access to meetings and information.²²⁹ It is an administrative burden to be sure, but one shared equally by all agencies, and factored into staff and budgetary allowances. Moreover, if an agency violates FACA, the burden of the release of documents and information may be made more difficult by passage of time, requiring retrieval of archived information, for example. Because an offending agency can control this cost, the additional burden would not weigh in the government's favor. As seen in *Judicial Watch*, the government's failure to release information on the makeup of the NEPDG and the information and documents produced by the NEPDG undoubtedly compounded the government's burden when ordered to produce these later. More importantly, such delay may also increase the harm to plaintiffs and impact appropriate remedies.

Regarding the unquantifiable burden on the President's ability to receive frank, candid advice from advisors, the Supreme Court's functional approach should control, since there is no "airtight" separation between the branches.²³⁰ The courts should thus weigh what, if any, chilling in communications will result in light of the nature and purpose of the advice sought and the distance of the advice-giver from the President when such advice is not directly proffered. Further, FACA's exemptions, which encompass express Article II powers such as national security, foreign policy, and discretionary and statutory exemptions,²³¹ carve out a broad swath of protection, notably leaving domestic policy making open to public scrutiny.

When required to weigh the burden on the President for FACA compliance, as in *Judicial Watch*, a court should consider how, if at all, individual members of a policy advisory group might temper their speech. If members have a public position on particular issues, as would an environmental or energy industry lobbyist, it is less likely that a chilling effect would follow from application of FACA, since it could be expected that the same advice would be offered in the role of

²²⁹ See *supra* text accompanying notes 30-34 and accompanying text.

²³⁰ See *supra* text accompanying note 64.

²³¹ See *supra* notes 32-35.

presidential advisor. Further, if advice was sought on a sensitive topic, such as policy for the security of nuclear reactors, existing exemptions to FACA would apply and such advice would not be open to public dissemination.²³² Thus, as applied to a fact pattern similar to that of *Judicial Watch*, the public interest in accessing the sources and content of domestic energy policy advice would outweigh any chilling effect.

It is essential that FACA's scope not be peremptorily limited in cases involving advisory committee recommendations to the President or his close advisors, circumstances where FACA is most crucial to keeping special interests at bay. In this scenario, courts should use the *Nixon II/Morrison* balancing test. The D.C. Circuit Court of Appeals nearly said as much in its *In re Sealed Case* opinion, even as it extended FACA exemptions to communications of the President's advisors on constitutional grounds. By limiting its decision to the facts of the case, the court did not rule out a functional approach by the lower courts.

The balancing test is appropriate because the recommendation clause²³³ does *not*, as the government argued in *Judicial Watch*, "give[] the President the sole discretion to decide what measures to propose to Congress, . . . leav[ing] no room for congressional interference."²³⁴ Rather, because the boundaries between the branches are not airtight, the balancing test properly determines, on a case-by-case basis, whether a FACA request impermissibly disrupts the President's ability to propose legislation. Attempting to fashion a bright line that concisely divides the executive and legislative branches would inevitably offset the balance of powers, tipping it too far towards the executive branch and the ever-growing administrative apparatus under its direction.

²³² See *supra* notes 32-33.

²³³ U.S. CONST. art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measure as he shall judge necessary and expedient").

²³⁴ *Judicial Watch*, 219 F. Supp. 2d 20, 48 (D.D.C. 2002) ("The Executive Branch has long argued for a more formalistic understanding of the separation of powers doctrine than the Supreme Court and other courts have been willing to accept."). In support of this statement, the *Judicial Watch* court cites to *Nixon I*, 418 U.S. 683, 706-07 (1974), *Nixon II*, 433 U.S. 425, 441-44 (1977), and *AAPS*, 997 F.2d 898, 906 (D.C. Cir. 1993). *Judicial Watch*, 219 F. Supp. 2d at 48.

C. *Provide a Real Remedy to Induce Timely and Meaningful Compliance*

Judicial Watch involved an open question of fact as to whether FACA applied at all, since the government claimed that all members of the NEPDG were government employees.²³⁵ In a similar, hypothetical case, two factors would impact the harm caused by the violation and its appropriate remedy: the timing of the litigation and the nature of the advisory group's work product. If, as was the case in *Judicial Watch*, litigation follows the termination of the advisory group and execution of its recommendations, some rights under FACA become moot.²³⁶ These include provisions for notice of the existence and purpose of the advisory group, access to its meetings, and the ability to contribute to its dialogue. Still, as in *Judicial Watch*, some rights survive even after termination.²³⁷ Surviving rights include access to generated reports, meeting minutes, and attendance records. Thus, injunction is still an available and appropriate remedy, as is declaratory judgment to clarify the plaintiff's rights, which may serve to encourage future compliance.

Apart from consideration of the timing factor in assessing the nature of harm rendered, timing also plays a role in assessing the extent of harm. For example, in *Judicial Watch*, before proceedings began, the NEPDG had already released its report and Congress had considered and enacted parts of it.²³⁸ This compounded the harm to the plaintiffs and to the public at large, as the public lost the opportunity to access and influence the group's workings in the first place, and because those workings became law in the second place.²³⁹

²³⁵ See *supra* note 139 and accompanying text.

²³⁶ See *supra* text accompanying note 170.

²³⁷ *Id.*

²³⁸ For example, as of November 2003, provisions of the National Energy Plan that recommended downward alteration in coal emissions standards have been promulgated in the form of the Environmental Protection Agency's new rules for "New Source Review" that provoked a multi-state lawsuit. See Seth Borenstein, *U.S. Eases Pollution Rules to Spur Work on Power Plants*, CENTRE DAILY TIMES, Nov. 23, 2003, at B9; see also *supra* note 133 and accompanying text.

²³⁹ Plaintiff *Judicial Watch's* Opposition to Defendants' Motion for a Stay Pending Appeal at 5, *Judicial Watch*, 219 F. Supp. 2d 20 (D.D.C. 2002) (No. Civ. Action 01-1530) (rebutting the government's assertion that the plaintiffs will not be harmed by further delay of proceedings since plaintiff *Judicial Watch* exists for the express purpose of "educat[ing] the public about the conduct of public officials . . . through requests for information like the ones at issue here"), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

Additionally, the *Judicial Watch* plaintiffs complained that the government had enhanced the harm through its delay of proceedings as legislative and regulatory activity continued throughout the protracted discovery and appeals process.²⁴⁰ In particular, the government's delay in complying with the court's discovery order until *after* the 2002 elections greatly increased potential harm,²⁴¹ in that the voting public had no access to the basis of important domestic policy and could not cast fully informed votes.

The intended purpose of an advisory group's work product also impacts the extent of potential harm of an FACA violation and in turn its remedy. Because FACA provides no guidance for judging violations of its balance requirement, the court may instead look to the internal purpose of the advisory group to assess the proper balance.²⁴² Advice on a plan for domestic energy policy, as proffered by the NEPDG in the *Judicial Watch* example, has pervasive national impact. Widely diverging viewpoints exist on the topic of what the nation should do to meet its energy needs.²⁴³ Most frequently, the energy industry and environmentalists occupy polar extremes. Including the viewpoints of one major interest group while excluding opposing voices, as the Sierra Club claimed had happened in *Judicial Watch*, violates FACA's balance requirement in a manner that should trigger a more comprehensive remedy.

While all violations of FACA warrant remedy, bad faith violations warrant the most severe remedy: enjoining use of the advisory group's end product. Similar to the award of punitive damages in tort law, when a court finds that a FACA violation is in bad faith, enjoining the government's use of the advisory committee's work product is appropriate both to reverse harm where possible and to serve as an example across agencies to induce future compliance. This essentially forces the managing agency or government official to start over and seek advice in timely compliance with the terms of FACA. For example, as applied to *Judicial Watch*, such a severe remedy would enjoin

²⁴⁰ See *supra* notes 198-200 and accompanying text.

²⁴¹ See *supra* note 199.

²⁴² See *supra* notes 104-06 and accompanying text (discussing managing agencies' ability to utilize their own internal guidelines for judging the balance of an advisory group).

²⁴³ See, e.g., Union of Concerned Scientists, *Clean Energy Blueprint, A Smarter National Energy Policy for Today and the Future*, available at <http://www.ucsusa.org/energy> (Oct. 2001).

the government from using the NEPDG's policy recommendations that became the National Energy Plan, forestalling further legislation and regulatory action and forcing the process to begin anew.

When a plaintiff can show that a defending agency deliberately employed techniques to delay or avoid compliance, or skewed the represented viewpoints in favor of special interest so that the advisory group could not be called "balanced," such a severe penalty may be warranted. For example, the plaintiffs in *Judicial Watch* alleged that the government deliberately evaded FACA's notice requirements to deny the public the chance to attend meetings.²⁴⁴ This, if proven, epitomizes a calculated violation.

Deliberately misrepresenting group membership can also show intentional violation. For example, in the *Judicial Watch* case, the government initially refused to name the members of the NEPDG and then only later provided a list of members, a list comprised exclusively of government employees. If, as the plaintiffs alleged, there were in fact private members of the NEPDG (or the group included any private person as a de facto member,²⁴⁵ which can be shown by attendance records and meeting minutes), deliberate violations occurred. Additionally, an administration may deliberately attempt to evade the definition of "advisory group" by denying the existence of private members within the advisory committee, by simply not including them in the membership roster, by establishing non-advisory subgroups,²⁴⁶ or by soliciting their input only outside of "regular" meetings.²⁴⁷ In

²⁴⁴ *Judicial Watch*, 219 F. Supp. 2d 20, 36 (D.D.C. 2002) (listing plaintiffs claimed FACA violations).

²⁴⁵ *AAPS*, 997 F.2d 898, 915 (D.C. Cir. 1993). See discussion *supra* note 140 and accompanying text.

²⁴⁶ GSA regulations essentially establish such a loophole for subgroups. This is not supported by case precedent or legislative history. Croley & Funk, *supra* note 18, at 474-75.

²⁴⁷ An interview of Vice President Cheney on Nightline by Ted Koppel exemplifies this:

Koppel: . . . What is the difference about what Hillary Clinton did with the health program from what you folks did with the energy policy?

Cheney: She brought in outsiders, people who were not government employees, who were not full-time . . .

Koppel: You didn't do that?

Cheney: No.

Koppel: No outsiders?

Cheney: Well, not as part of the deliberating process.

Koppel: Well . . .

Cheney: No, that's very important.

Judicial Watch, for example, plaintiffs alleged that the government freely practiced this avoidance technique when it held repeated informal meetings with certain energy industry insiders and then incorporated the substance of those conversations in its formal deliberations. Walking a similarly fine line of legality, use of unofficial subgroups of private individuals shows bad faith, if not deliberate violation – ostensibly a matter of degree. A further example of actions that fall in a gray area of legality is administrative foot-dragging that creates delay sufficient to avoid significant political impact. As discussed in *Judicial Watch*, plaintiffs alleged that the government engaged in this behavior (successfully) to avoid compliance until after national elections took place.²⁴⁸ Clearly, many devices to evade compliance exist, some in obvious violation of law, but many on the borderline. In the fact-intensive inquiry the Act demands, considering motivation is thus essential for determining the appropriate remedy for FACA violations.

VI. CONCLUSION

While there may be nothing wrong with a President making domestic policy recommendations received directly from special interest groups, the public has a right to know

Koppel: . . . Are you finessing that just a little bit too finely?

Cheney: No. No, you're misreading what the statute [FACA] says. There's a big difference. We meet all the time behind closed doors to make economic policy or to make education policy. Now, you may deal with outside groups. They may have points of view they want to represent. We heard from energy people. We heard from consumer groups. I met with congressmen and senators and governors. We heard from a broad variety of folks out there, but they were not in the meetings where we put together the policy and made recommendations to the President. That's the big difference.

Koppel: Isn't that a fine point?

Cheney: That's a very important point.

Koppel: In other words, if we . . . have one meeting here . . . with a bunch of people, and because of your background and the President's background in the energy industry yourselves . . . the assumption is that you did consult with a lot of your pals in the energy industry. If you consult with them in this room, and then you adjourn to the next room to make policy, that . . .

Cheney: That's not the way the law works.

Koppel: That satisfies the law?

Cheney: . . . That is not the way it worked . . .

Koppel: But why not just take the wind out of the sails of all of your critics and say, 'Here's a list of the people we consulted'?

Plaintiff *Judicial Watch's* Second Amended Complaint at 9-11 (quoting ABC broadcast of "Nightline" on July 25, 2001), available at <http://www.judicialwatch.org/1270.shtml> (last visited Oct. 10, 2003).

²⁴⁸ See *supra* notes 199, 240.

when this occurs. Moreover, the public has a compelling need to know in order to effectively participate in the democratic process. FACA codifies this right, and its provisions and penalties should apply when the risk of special interest capture is at its apex: when an advisory group is the exclusive source of the President's policy recommendations. Thus, consistent judicial oversight, both of FACA's applicability and its remedies, is essential to ensuring the Act's purpose. Courts can ensure that government remains open and accountable by applying the *Nixon III/Morrison* balancing test on a case-by-case basis. Continued and consistent application of FACA at *all* levels of government would arm the public with its sharpest weapon: "the power which knowledge gives."²⁴⁹

Carolyn Bingham Kello*

²⁴⁹ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed. 1910), *quoted in* *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 52 (D.D.C. 2002). *See supra* text accompanying note 1.

* B.A., Pennsylvania State University; J.D. candidate, 2004, Brooklyn Law School. The author extends her sincere thanks for the insights and guidance of Associate Dean Joel Gora, Professor Heidi Kitrosser, the Brooklyn Law Review editors and, especially, Nicholas Kello.

