EXAMINING THE FEDERAL ADVISORY COMMITTEE ACT—CURRENT ISSUES AND DEVELOPMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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CONTENTS

EXAMINING THE FEDERAL ADVISORY COMMITTEE ACT—CURRENT ISSUES AND DEVELOPMENTS

WEDNESDAY, APRIL 2, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m. in room 2154, Rayburn House Office Building, Hon. Wm. Lacy Clay (chairman of the subcommittee) presiding.

Present: Representatives Clay and Hodes.

Staff present: Darryl Piggee, staff director/counsel; Jean Gosa, clerk; Alissa Bonner, professional staff member; Charisma Williams, staff assistant; Michelle Mitchell, legislative assistant, Office of Wm. Lacy Clay; Leneal Scott, information systems manager; and Charles Phillips, minority counsel.

Mr. CLAY. The Information Policy, Census, and National Archives Subcommittee will now come to order.

Today's hearing will examine the Federal Advisory Committee Act [FACA], its implementation and changes needed to increase the transparency and independence of advisory committees.

We will hear from witnesses who will testify about their experiences with FACA and offer recommendation that they believe will improve the act.

Without objection, the Chair and ranking member will have 5 minutes to make opening statements, followed by opening statements not to exceed 3 minutes by any other Member who seeks recognition.

Without objection, Members and witnesses may have 5 legislative days to submit a written statement or extraneous materials for the record.

I will begin with my opening statement by saying that Congress passed the FACA in 1972 in response to the proliferation of Federal advisory committees with increased cost and little accountability.

The aim of the act was to make Federal advisory committees accountable, transparent, balanced, and independent from the influence of special interests. A FACA seeks to ensure that the Federal Government benefits from a wide range of views on issues of importance to the American people, particularly with respect to sensitive or controversial issues; however, the law has not always been implemented to achieve balance, transparency, and independence.

Recent news articles have reported that the administration has employed litmus tests to push its ideological agenda and exclude otherwise qualified individuals from advisory committees.

A GAO study found that some appointments to scientific and technical advisory committees had generated some controversy due to the perception that appointments were made based on ideology rather than experience or more weighted to favor one group of stakeholders over another.

GAO also found that members of Federal advisory committees are often appointed as representatives who represent entities or organizations and are not screened for conflict of interest, when they should be appointed as special Government employees subject to conflict of interest review. This happened with Vice President Cheney's infamous Energy Task Force that was stacked with industry representatives.

Oversight and Government Reform Committee Chairman Henry Waxman and I have taken action to correct the loopholes in the law. We will introduce the Federal Advisory Committee Act Amendments of 2008, which will improve balance, transparency, and independence. The FACA Amendments will increase the disclosure requirements for advisory committees, require that appointments to advisory committees be made without regard to political affiliation, and require agencies to obtain conflict of interest disclosures.

Our witnesses today will offer their views on the bill and provide recommendations to strengthen the bill. The subcommittee looks forward to hearing their testimony.

[The prepared statement of Hon. Wm. Lacy Clay follows:]

Opening Statement
Wm. Lacy Clay, Chairman

"Examining the Federal Advisory Committee Act (FACA) – Current Issues and Developments"

Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee

Wednesday, April 2, 2008
2154 Rayburn HOB
2:00 P.M.

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Mr. CLAY. I will begin by swearing in our panel today.

I want to start by introducing our panel. We will hear first from Ms. Robin Nazzaro, Director of Natural Resources and the Environment for the Government Accountability Office. She is currently responsible for GAO's work on Federal land management issues. She has been with GAO since 1979 and has a wealth of audit experience, staff office service, and diversity of issue area expertise, including tax, financial management, and information technology. Ms. Nazzaro has overseen GAO's work on several Federal agencies.

Welcome to the subcommittee, Ms. Nazzaro.

Next we will hear from Mr. Robert Flaak, Director of the Committee Management Secretariat for the General Services Administration, the agency charged with implementing FACA. Mr. Flaak's primary responsibilities include advising Federal executive branch agencies on advisory committee operations, developing policy and training to implement the Federal Advisory Committee Act, and establishing and evaluating performance measures to improve advisory committee operation.

For the past 17 years Mr. Flaak has conducted Government-wide training on behalf of GSA, the U.S. Office of Government Ethics, and the EPA on FACA management and operations, ethics, and peer review.

Prior to his current appointment, he was the senior policy advisor in the Office of GSA Administrative Policy.

Thank you for being here, Mr. Flaak.

Mr. FLAAK. Thank you.

Mr. CLAY. Our third witness will be Colonel Frank Wilson, Director of Administration Program Support at the Washington Headquarters Services of the Department of Defense, and FACA Committee Management Office with DOD. Colonel Wilson is responsible for the control and supervision over the establishment, procedures, and accomplishments of DOD's 55 advisory committees and for carrying out the provisions of the Government in the Sunshine Act. He is a Vietnam veteran, having served on active duty with the Air Force from 1966 to 1992.

Thank you for being here and for your service, Mr. Wilson.

Our final witness will be Mr. Shapiro, a University distinguished professor of law and associate dean for research and development at the Wake Forest School of Law. Mr. Shapiro is a scholar member of the Center for Progressive Reform, who he is representing here today. He has written or co-written numerous articles about the administrative process, including FACA, a widely used law school case book on administrative law, and a one-volume student treatise on administrative law.

Thank you, too, for appearing before this subcommittee.

It is the policy of the Oversight and Government Reform Committee to swear in all witnesses before they testify. I would like to ask you to stand and to raise your right hands, please.

[Witnesses sworn.]

Mr. CLAY. Let the record reflect that the witnesses answered in the affirmative.

I ask that each witness now give a brief summary of their testimony and keep the summary under 5 minutes in duration. Your complete written statement will be included in the hearing.

The little light on the table will indicate when you start and when you should finish.

Ms. Nazzaro, we will start with you.

STATEMENTS OF ROBIN NAZZARO, DIRECTOR, NATIONAL RESOURCES AND ENVIRONMENT, GOVERNMENT ACCOUNTABILITY OFFICE; ROBERT FLAAK, DIRECTOR, COMMITTEE MANAGEMENT SECRETARIAT, GENERAL SERVICES ADMINISTRATION; SIDNEY A. SHAPIRO, ASSOCIATE DEAN FOR RESEARCH AND DEVELOPMENT, WAKE FOREST SCHOOL OF LAW, ON BEHALF OF THE CENTER FOR PROGRESSIVE REFORM; AND FRANK WILSON, DIRECTOR, ADMINISTRATION AND MANAGEMENT, DEPARTMENT OF DEFENSE

STATEMENT OF ROBIN NAZZARO

Ms. NAZZARO. Thank you, Mr. Chairman. I am pleased to be here today to discuss our work on Federal advisory committees.

Federal advisory committees have been called the fifth arm of Government because of the significant role they play in shaping public policy by providing advice to Federal agencies, the Congress, and the President on a wide array of issues such as stem cell research, drinking water standards, space exploration, food safety, and Federal land management, to name just a few.

In fiscal year 2007, 52 agencies sponsored 915 active Federal advisory committees, with a total of about 65,000 members. Because of this role, it is essential that membership be and, just as importantly, be perceived as being free from conflict of interest and balanced as a whole.

My testimony today will focus on the key findings and conclusions from our 2004 report, the recommendations we made in that report to the General Services Administration and the Office of Government Ethics and their responses, and potential changes to the Federal Advisory Committee Act to better ensure the independence and balance of the committees.

In 2004 we concluded that additional Government-wide guidance could help agencies better ensure the independence of Federal advisory committee members and the balance of the Federal advisory committees. Specifically, we found OGE guidance on the appropriate use of representative or special Government employee appointments had shortcomings and did not adequately ensure that agencies appoint individuals selected to provide advice on behalf of the Government as special Government employees subject to conflict of interest regulations.

Some agencies were inappropriately appointing most or all members as representatives, expected to reflect the views of a recognizable entity or group, even when the agencies called upon their members to provide advice on behalf of the Government.

In addition, GSA guidance to Federal agencies did not address what types of information could be helpful in assessing the points of view of potential committee members, nor did agency procedures identify what information should be collected about potential Members to make decisions about committee balance.

We made 12 recommendations to GSA and OGE to provide additional guidance to Federal agencies under three broad categories:

the appropriate use of representative appointments; information that could help ensure committees are, in fact and perception, balanced; and practices that could better ensure the independence and balanced committees and increase transparency in the Federal advisory process.

GSA and OGE implemented our recommendations to clarify the use of representative appointments; however, GSA has not fully implemented other recommendations, including those relating to committee balance and measures that would promote greater transparency, in part because of limitations in its authority to require agencies to comply with its guidance.

In light of the responses to our recommendations and our limited review of current appointments that indicate some possible continued misuse of representative appointments, the subcommittee may want to consider amendments incorporating the substance of our 2004 recommendations that could help prevent the misuse of representative appointments and better ensure the independence of committee members by ensuring that the type of advice committee members are asking to provide is the primary consideration in determining whether they should be appointed as special government employees or as representatives.

Special Government employee appointments are made when committee members are asked to provide independent advice on behalf of the Government. Appointments as representatives are limited to the more exceptional circumstances in which members are speaking as stakeholders for entities or the groups they represent. Individuals may not be appointed as representatives to represent classes of expertise. The use of the term representative in statutes and charters does not necessarily direct that members be appointed as representatives. Agencies ask perspective representative members whether they know of any reason their participation might be reasonably questioned, and agencies provide representative members with ethics training.

To better achieve balance, the statute could identify the types of information agencies should consider in assessing prospective committee members' points of views, such as public statements or positions on the matter being reviewed or work for affected entities.

To enhance transparency, the statute could be amended to require agencies to identify the processes used to formulate committees, state in member appointment letters whether the individuals are special Government employees or representatives, and state in committee products the nature of advice provided.

Such legislation could provide greater assurance that committees are and are perceived as being balanced and independent.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions that you may have.

[The prepared statement of Ms. Nazzaro follows:]

United States Government Accountability Office

GAO

Testimony before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives

For Release on Delivery
Expected at 2:00 p.m. EDT
Wednesday, April 2, 2008

FEDERAL ADVISORY COMMITTEE ACT

Issues Related to the Independence and Balance of Advisory Committees

Statement of Robin M. Nazzaro, Director
Natural Resources and Environment

GAO-08-611T

DRAFT

April 2, 2008

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Highlights

Highlights of GAO-08-611T, testimony before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives

FEDERAL ADVISORY COMMITTEE ACT

Issues Related to the Independence and Balance of Advisory Committees

Why GAO Did This Study

Because advisory committees provide input to federal decision makers on significant national issues, it is essential that their membership be, and be perceived as being, free from conflicts of interest and balanced as a whole. The Federal Advisory Committee Act (FACA) was enacted in 1972, in part, because of concerns that special interests had too much influence over federal agency decision makers. The General Services Administration (GSA) develops guidance on establishing and managing FACA committees. The Office of Government Ethics (OGE) develops regulations and guidance for statutory conflict-of-interest provisions that apply to some advisory committee members.

As requested, this testimony discusses key findings and conclusions in our 2004 report, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*; GAO's recommendations to GSA and OGE and their responses; and potential changes to FACA that could better ensure the independence and balance of advisory committees. For our 2004 work, we reviewed policies and procedures issued by GSA, OGE, and nine federal agencies that sponsor many committees. For this testimony, we obtained information from GSA and OGE on actions the agencies have taken to implement our recommendations; we also reviewed data in GSA's FACA data base on advisory committee appointments.

To view the full product, including the scope and methodology, click on GAO-08-611T. For more information, contact Robin M. Nazzaro at (202) 512-3841 or nazzaror@gao.gov.

What GAO Found

In 2004, we concluded that additional governmentwide guidance could help agencies better ensure the independence of federal advisory committee members and the balance of federal advisory committees. For example, OGE guidance to federal agencies did not adequately ensure that agencies appoint individuals selected to provide advice on behalf of the government as "special government employees" subject to conflict-of-interest regulations. Further, we found that some agencies were inappropriately appointing most or all members as "representatives"—expected to reflect the views of the entity or group they are representing and not subject to conflict-of-interest reviews—even when the agencies call upon the members to provide advice on behalf of the government and thus should have been appointed as special government employees. In addition, GSA guidance to federal agencies and agency-specific policies and procedures needed to be improved to better ensure that agencies collect and evaluate information, such as previous or ongoing research, that could be helpful in determining the viewpoints of potential committee members regarding the subject matters being considered and in ensuring that committees are, and are perceived as being, balanced. We also identified several promising practices for forming and managing federal advisory committees that could better ensure that committees are independent and balanced as a whole, such as providing information on how the members of the committee are identified and screened and indicating whether the committee members are providing independent or stakeholder advice.

To help improve the effectiveness of federal advisory committees so that members are, and are perceived as being, independent and committees as a whole are properly balanced, we made 12 recommendations to GSA and OGE to provide additional guidance to federal agencies under three broad categories: (1) the appropriate use of representative appointments; (2) information that could help ensure committees are, in fact, and in perception, balanced; and (3) practices that could better ensure independence and balanced committees and increase transparency in the federal advisory process. GSA and OGE implemented our recommendations to clarify the use of representative appointments. However, current data on appointments indicate that some agencies may continue to inappropriately use representatives rather than special government employees on some committees. Further, GSA said it agrees with GAO's other recommendations, including those relating to committee balance and measures that would promote greater transparency in the federal advisory committee process, but has not issued guidance in these areas as recommended, because of limitations in its authority to require agencies to comply with its guidance.

In light of indications that some agencies may continue to use representative appointments inappropriately and GSA's support for including GAO's 2004 recommendations in FACA—including those aimed at enhancing balance and transparency—the Subcommittee may wish to incorporate the substance of GAO's recommendations into FACA as it considers amendments to the act.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss our 2004 report on the independence and balance of federal advisory committees in the context of possible amendments to the Federal Advisory Committee Act (FACA).[1] In fiscal year 2007, 52 agencies sponsored 915 active federal advisory committees with a total of about 65,000 members. Federal advisory committees have been called the "fifth arm of government" because of the significant role they play in advising federal agencies, the Congress, and the President on important national issues.[2] To be effective, advisory committees must be—and, just as importantly, be perceived as being—independent and balanced as a whole. As we reported in 2004, controversies regarding the federal advisory committee system have included concerns that some appointments have been based on ideology rather than expertise or were weighted to favor one group of stakeholders over others.

Members appointed to federal advisory committees to provide advice on behalf of the government on the basis of their best judgment are appointed as "special government employees." Members may also be appointed to federal advisory committees as "representatives" to provide stakeholder advice—that is, advice reflecting the views of the entity or interest group they are representing, such as industry, labor, or consumers. The General Services Administration (GSA) is responsible for developing regulations and guidance regarding the establishment of advisory committees under FACA. The Office of Government Ethics (OGE) is responsible for developing regulations and guidance for federal advisory committee members serving as special government employees who must meet certain federal requirements pertaining to freedom from conflicts of interest.[3] In addition to OGE and GSA regulations and guidance, federal agencies have their own policies and procedures to establish and manage advisory committees.

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[1]GAO, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*, GAO-04-328 (Washington, D.C.: Apr. 16, 2004).

[2]In this view, federal advisory committees follow the executive, legislative, judicial, and regulatory "arms" of government. Hearings on S. 1637, S. 2064, S. 1964 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92nd Congress, 1st Sess., pt. 1 at 12 (1971).

[3]Federal conflict-of-interest statutes (18 U.S.C. § 201), including the principal criminal financial conflict-of-interest statute (18 U.S.C. § 208), apply to regular and, in large part, special government employees.

As requested, my testimony today addresses (1) key findings and conclusions in our 2004 report, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*,[4] (2) the recommendations we made in that report to GSA and OGE to address deficiencies we identified and their responses to the recommendations, and (3) potential changes to FACA that could better ensure the independence and balance of advisory committees as the Subcommittee considers amendments to the act. For our 2004 work, we reviewed relevant policies and procedures issued by GSA, OGE, and nine federal agencies that sponsor many advisory committees.[5] For this testimony, we supplemented our 2004 report with information we obtained from GSA and OGE on actions the agencies have taken to implement our recommendations. Several recommendations remained open as of March 2008, and we followed up with GSA and OGE to identify their responses to these recommendations. Using the GSA FACA database, we updated some advisory committee information about selected agencies and reviewed governmentwide data on appointments to advisory committees. Finally, in light of the GSA and OGE responses to our recommendations and the actions taken by some agencies sponsoring advisory committees regarding appointments, we identified potential changes to FACA that the Congress may wish to consider to help GSA and OGE better ensure independence and balance. We conducted this work from March 17, 2008, to April 2, 2008, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[4]GAO-04-328.

[5]We reviewed committees at the Department of Energy, the Environmental Protection Agency, the Department of Health and Human Services (as well as at three of its agencies—the Centers for Disease Control and Prevention, the National Institutes of Health, and the Food and Drug Administration), the Department of the Interior, the National Aeronautics and Space Administration, and the Department of Agriculture.

BACKGROUND

When the Congress enacted FACA in 1972, one of the principal concerns it was responding to was that certain special interests had too much influence over federal agency decision makers. In this act, the Congress articulated certain principles regarding advisory committees, including broad requirements for balance, independence, and transparency. Specifically, FACA requires that the membership of committees be "fairly balanced in terms of points of view presented and the functions to be performed by the advisory committee."[6] Courts have interpreted this requirement as providing agencies with broad discretion in balancing their committees.

Further, FACA requires that any legislation or agency action that creates a committee contain provisions to ensure that the advice and recommendations of the committee will be independent and not inappropriately influenced by the appointing authority (the agency) or any special interest. Finally, FACA generally requires that agencies announce committee meetings ahead of time and give notice to interested parties about such meetings. With some exceptions, the meetings are to be open to the public, and agencies are to prepare meeting minutes and make them available to interested parties.[7] FACA also set broad guidelines for the creation and management of federal advisory committees, most of which are created or authorized by the Congress. Agencies also establish committees using their general statutory authority, and some are created by presidential directives.

Further, the act requires that all committees have a charter, and that each charter contain specific information, including the committee's scope and objectives, a description of duties, and the number and frequency of meetings. As required by FACA, advisory committee charters generally expire at the end of 2 years unless renewed by the

[6]Pub. L. No. 92-463, 86 Stat. 770 (1972) (classified at 5 U.S.C. app. 2).
[7]The President or head of an agency may determine that a meeting be closed if, for example, the meeting will include discussions of classified information, reviews of proprietary data submitted in support of federal grant applications, or deliberations involving considerations of personal privacy.

agency or by the Congress. This requirement encourages agencies to periodically reexamine their need for specific committees. GSA, through its Committee Management Secretariat, is responsible for prescribing administrative guidelines and management controls applicable to advisory committees governmentwide. However, GSA does not have the authority to approve or deny agency decisions regarding the creation or management of advisory committees.

To fulfill its responsibilities, GSA has developed regulations and other guidance to assist agencies in implementing FACA requirements, provides training to agency officials, and was instrumental in creating the Interagency Committee on Federal Advisory Committee Management. GSA also has created and maintains an online FACA database (available to the public at www.fido.gov/facadatabase) for which the agencies provide and verify the data, which include committee charters; membership rosters; budgets; and, in many cases, links to committee meeting schedules, minutes, and reports. The database also includes information about a committee's classification (e.g., scientific and technical, national policy issue, or grant review).

While GSA's Committee Management Secretariat provides FACA guidance to federal agencies, each agency also develops its own policies and procedures for following FACA requirements. Under FACA, agency heads are responsible for issuing administrative guidelines and management controls applicable to their agency's advisory committees. Generally, federal agencies have a reasonable amount of discretion with regard to creating committees, drafting their charters, establishing their scope and objectives, classifying the committee type, determining what type of advice they are to provide, and appointing members to serve on committees.[8] In addition, to assist with the management of their federal advisory committees, agency heads are required to appoint a committee management officer to oversee the agency's compliance with FACA requirements, including recordkeeping. Finally, agency heads must appoint a designated federal

[8]However, when the Congress authorizes an agency to establish a particular committee or a President establishes a committee, the agency may have less flexibility in establishing and managing the committee because such things as the committee's objectives, the types of expertise and backgrounds of members, and even the type of advice that is to be provided may be specified by the Congress or the President.

official for each committee to oversee its activities. Among other things, the designated federal official must approve or call the meetings of the committee, approve the agendas (except for presidential advisory committees), and attend the meetings.

OGE is responsible for issuing regulations and guidance for agencies to follow in complying with statutory conflict-of-interest provisions that apply to all federal employees, including special government employees serving on federal advisory committees. A special government employee is statutorily defined as an officer or employee who is retained, designated, appointed, or employed by the government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days. Many agencies use special government employees, either as advisory committee members or as individual experts or consultants. Special government employees, like regular federal employees, are to provide their own best judgment in a manner that is free from conflicts of interest and without acting as a stakeholder to represent any particular point of view.[9] Accordingly, special government employees appointed to federal advisory committees are hired for their expertise and skills and are expected to provide advice on behalf of the government on the basis of their own best judgment. Special government employees are subject to the federal financial conflict-of-interest requirements, although ones that are somewhat less restrictive than those for regular federal government employees.[10] Specifically, special government employees serving on federal advisory committees are provided with an exemption that allows them to participate in particular matters that have a direct and predictable effect on their financial interest if the interest arises from their nonfederal employment and the matter will not have a special or distinct effect on the employee or employer other than as part of a class. This exemption does not extend to a committee member's personal financial and other interests in the matter, such as stock ownership in the employer. If a committee member has a potential financial conflict of interest that

[9]Office of Government Ethics, *Letter to the Chairman of a National Commission*, June 24, 1993 (93 x 14).

[10]The criminal financial conflict-of-interest statute and related OGE regulations prohibit regular and special government employees from participating in a "particular matter" that may have a direct and predictable effect on their financial interest, unless granted a waiver. A particular matter is one that involves deliberation, decision, or action that is focused on the interests of specific people or a discrete and identifiable class of people. 5 C.F.R. § 2640.103(a)(1).

is not covered under this or other exemptions, a waiver of the conflict-of-interest provisions may be granted if the appointing official determines that the need for the special government employee's services outweighs the potential for conflict of interest or that the conflict is not significant. This standard for granting waivers is less stringent than the standard for regular government employees.

The principal tool that agencies use to assess whether nominees or members of advisory committees have conflicts of interest is the OGE Form 450, *Executive Branch Confidential Financial Disclosure Report*, which special government employees are required to submit annually. The Form 450 requests financial information about the committee member and the member's spouse and dependent children, such as sources of income and identification of assets, but it does not request filers to provide the related dollar amounts, such as salaries.[11] Even if committees are addressing broad or general issues, rather than particular matters, committee members hired as special government employees are generally required to complete the confidential financial disclosure form.[12] Agencies appoint ethics officials who are responsible for ensuring agency compliance with the federal conflict-of-interest statutes, and OGE conducts periodic audits of agency ethics programs to evaluate their compliance and, as warranted, makes recommendations to agencies to correct deficiencies in their ethics programs.

Under administrative guidance initially developed in the early 1960s, a number of members of federal advisory committees are not hired as special government employees, but are instead appointed as representatives. Members appointed to advisory committees as representatives are expected to represent the views of relevant stakeholders with an interest in the subject of discussion, such as an industry, a union, an environmental organization, or other such entity. That is, representative members are expected to represent a particular and known bias—it is understood that information, opinions, and advice from representatives are to reflect the bias of the particular group that they are

[11]Some agencies, such as the Environmental Protection Agency and the Food and Drug Administration, have developed alternative confidential financial disclosure forms that request additional information on activities and affiliations, such as expert legal testimony.
[12]Special government employees who serve in excess of 60 days above a certain salary level, however, must file a public disclosure form.

appointed to represent. Because these individuals are to represent outside interests, they do not meet the statutory definition of federal employee or special government employee and are therefore not subject to the criminal financial conflict-of-interest statute. According to GSA and OGE officials, in 2004 reliable governmentwide data on the number of representative members serving on federal advisory committees were not available.

FINDINGS AND CONCLUSIONS FROM OUR 2004 REPORT ON THE INDEPENDENCE AND BALANCE OF COMMITTEES

In 2004, we concluded that additional governmentwide guidance could help agencies better ensure the independence of federal advisory committee members and the balance of federal advisory committees. We found that OGE guidance to federal agencies had shortcomings and did not adequately ensure that agencies appropriately appoint individuals selected to provide advice on behalf of the government as special government employees. We found that some agencies were inappropriately appointing members as representatives who, as a result, were not subject to conflict-of-interest reviews. In addition, GSA guidance to federal agencies, and agency-specific policies and procedures, needed to be improved to better ensure that agencies elicit from potential committee members information that could be helpful in determining their viewpoints regarding the subject matters being considered—information that could help ensure that committees are, and are perceived as being, balanced. Specifically, we found the following:

- OGE guidance on the appropriate use of representative or special government employee appointments to advisory committees had limitations that we believed were a factor in three of the agencies we reviewed continuing the long-standing practice of essentially appointing all members as representatives. That is, the Department of Energy, the Department of the Interior, and the Department of Agriculture had appointed most or all members to their federal advisory committees as representatives—even in cases where the members were called

upon to provide advice on behalf of the government and thus would be more appropriately appointed as special government employees. Because conflict-of-interest reviews are required only for federal or special government employees, agencies do not conduct conflict-of-interest reviews for members appointed as representatives. As a result, the agencies could not be assured that the real or perceived conflicts of interest of their committee members who provided advice on behalf of the government were identified and appropriately mitigated. Further, allegations that the members had conflicts of interest could call into question the independence of the committee and jeopardize the credibility of the committee's work.

- In addition to the FACA requirement for balance, it is important that committees are perceived as balanced in order for their advice to be credible and effective. However, we reported that GSA guidance did not address what types of information could be helpful to agencies in assessing the points of view of potential committee members, nor did agency procedures identify what information should be collected about potential members to make decisions about committee balance. Consequently, many agencies did not identify and systematically collect and evaluate information pertinent to determining the points of view of committee members regarding the subject matters being considered. For example, of the nine agencies we reviewed, only the Environmental Protection Agency (EPA) consistently (1) collected information on committee members appointed as special government employees that enabled the agency to assess the points of view of the potential members and (2) used this information to help achieve balance. Without sufficient information about prospective committee members prior to appointment, agencies cannot ensure that their committees are, and are perceived as being, balanced.

We identified several promising practices for forming and managing federal advisory committees that could better ensure that committees are, and are perceived as being, independent and balanced. These practices include (1) obtaining nominations for

committees from the public, (2) using clearly defined processes to obtain and review pertinent information on potential members regarding potential conflicts of interest and points of view, and (3) prescreening prospective members using a structured interview. In our view, these measures reflect the principles of FACA by employing clearly defined procedures to promote systematic, consistent, and transparent efforts to achieve independent and balanced committees. In addition, we identified selected measures that could promote greater transparency in the federal advisory committee process and improve the public's ability to evaluate whether agencies have complied with conflict-of-interest requirements and FACA requirements for balance, such as providing information on how the members of the committees are identified and screened and indicating whether the committee members are providing independent or stakeholder advice. Implemented effectively, these practices could help agencies avoid the public criticisms to which some committees have been subjected. That is, if more agencies adopted and effectively implemented these practices, they would have greater assurance that their committees are, and are perceived as being, independent and balanced.

OUR 2004 RECOMMENDATIONS TO GSA AND OGE AND THEIR RESPONSES

Because the effectiveness of competent federal advisory committees can be undermined if the members are, or are perceived as, lacking in independence or if committees as a whole do not appear to be properly balanced, we made 12 recommendations to GSA and OGE to provide additional guidance to federal agencies under three broad categories: (1) the appropriate use of representative appointments; (2) information that could help ensure committees are, in fact and in perception, balanced; and (3) practices that could better ensure independent and balanced committees and increase transparency in the federal advisory process. While our report focused primarily on scientific and technical federal advisory committees, the limitations of the guidance and the promising practices we identified pertaining to independence and balance are pertinent to federal advisory committees in general. Thus, our recommendations were directed to GSA and OGE because of their responsibilities for providing governmentwide guidance on federal

ethics and advisory committee management requirements. GSA and OGE have taken steps to implement many, but not all, of the recommendations we made in 2004.

Regarding representative appointments, we recommended that guidance from OGE to agencies could be improved to better ensure that members appointed to committees as representatives were, in fact, representing a recognizable group or entity. OGE agreed with our conclusion that some agencies may have been inappropriately identifying certain advisory committee members as representatives instead of special government employees and issued OGE guidance documents in July 2004 and August 2005 that clarified the distinction between special government employees and representative members. In particular, as we recommended, OGE clarified that (1) members should not be appointed as representatives purely on the basis of their expertise, (2) appointments as representatives are limited to circumstances in which the members are speaking as stakeholders for the entities or groups they represent, and (3) the term "representative" or similar terms in an advisory committees' authorizing legislation or other documents does not necessarily mean that members are to be appointed as representatives. We also recommended that OGE and GSA modify their FACA training materials to incorporate the changes in guidance regarding the appointment process, which they have done. In addition, we recommended that GSA expand its FACA database to identify each committee member's appointment category and, for representative members, the entity or group represented. GSA quickly implemented this recommendation and now has data on appointments beginning in 2005.

We also recommended that OGE and GSA direct agencies to review their appointments of representative and special government employee committee members to make sure that they were appropriate. OGE's 2004 and 2005 guidance documents addressed this issue by, among other things, recommending that agency ethics officials periodically review appointment designations to ensure that they are proper. OGE's guidance expressed the concern that some agencies may be designating their committee members as representatives primarily to avoid subjecting them to the disclosure statements required for special government employees to identify potential conflicts of interest. The

guidance further stated that such improper appointments should be corrected immediately. OGE also suggested that for the committees required to renew their charters every 2 years, agencies use the rechartering process to ensure that the appointment designations are correct.[13] In March 2008, the Director of GSA's Committee Management Secretariat told us that while GSA has not issued formal guidance directing agencies to review appointment designations, it has addressed this recommendation by examining the types of appointments agencies are planning when it conducts desk audits of committee charters for both new and renewed committees and by providing information on appropriate appointments at quarterly meetings with committee management staff and at FACA training classes. The GSA official said that when GSA sees questionable appointments—for example, subject matter experts being appointed as representatives instead of as special government employees—it recommends that agency staff clear this decision with their legal counsel. However, he added that agencies are not compelled to respond to GSA guidance, and some have not changed their long-standing appointment practices despite GSA's questions and suggestions. He noted that, under FACA, GSA has the authority to issue guidance but not regulations.

Neither OGE nor GSA implemented our recommendation aimed at ensuring that committee members serving as representative members do not have points of view or biases other than the known interests they are representing. Because members appointed to committees as representatives do not undergo the conflict-of-interest review that special government employees receive, we recommended that representative members, at a minimum, receive ethics training and be asked whether they know of any reason their participation on the committee might reasonably be questioned—for example, because of any personal benefits that could ensue from financial holdings, patents, or other interests. OGE neither agreed or disagreed with this recommendation when commenting on our draft report but subsequently stated in its comments on the published report that it does not have the authority to prescribe rules of conduct for persons who are not employees or officers of the executive branch, such as committee

[13]Under FACA, advisory committee charters generally expire at the end of 2 years unless renewed by the agency or Congress. Some committees, however, do not expire under the terms of the legislation creating them.

members appointed as representatives. The GSA official said while the agency supports the intent of our recommendation, it defers to OGE on ethics matters. However, in this case, given the limitations OGE identified, it may be more appropriate for GSA to take the lead on implementing this recommendation under FACA.

Regarding the importance of ensuring that committees are, in fact and in perception, balanced in terms of points of view and functions to be performed, we recommended that GSA issue guidance to agencies on the types of information that they should gather about prospective committee members. While GSA has not issued formal guidance in this regard, its does include in its FACA training materials examples of agency practices that do ask prospective members about, for example, their previous or ongoing involvement with the issue or public statements or positions on the matter being reviewed.

Finally, to better ensure independent and balanced committees and increase transparency in the federal advisory process, we recommended that GSA issue guidance to agencies to help ensure that the committee members, agency and congressional officials, and the public better understand the committee formation process and the nature of the advice provided by advisory committees. Specifically, we recommended that GSA issue guidance that agencies should

- identify the committee formation process used for each committee, particularly how members are identified and screened and how the committees are assessed for balance;

- state in the appointment letters whether the members are special government employees or representatives and, in cases where appointments are as representatives, the letters should further identify the entity or group that they are to represent; and

- state in the committee products the nature of the advice that was to be provided—that is, whether the product is based on independent advice or on consensus among the various identified interests or stakeholders.

In its comments on our draft 2004 report and in a July 2004 letter regarding the published report, GSA stated that addressing these recommendations would require further consultation with OGE and affected executive agencies. In the ensuing years, GSA has not issued formal guidance implementing these recommendations. In March 2008, the Director of the Committee Management Secretariat told us that he generally supports the intent of the recommendations but that GSA is reluctant to direct agencies to carry out these aspects of their personnel or advisory committee practices without the statutory authority to do so. He noted that regarding the recommendation addressing the committee formation process, GSA's FACA management training materials provide information on the best practice employed by some of EPA's federal advisory committees of articulating their committee formation process and providing this information on their committees' Web pages. We consider this action a partial implementation of the recommendation.

POTENTIAL CHANGES TO FACA THAT COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE, BALANCE, AND TRANSPARENCY

You asked us to provide recommendations for improving the Federal Advisory Committee Act. Regarding the key recommendations we made aimed at addressing the inappropriate use of representative appointments, while both OGE and GSA were fully responsive to our recommendations to issue guidance to federal agencies clarifying such appointments, appointment data we reviewed raise questions about agency compliance. For example, in 2004, we reported that three of the nine agencies we reviewed had historically used representative appointments for all or most of their advisory committees, even when the agencies called upon the members to provide independent advice on behalf of the government. Overall, based our review of the latest data on committee appointments, for these three agencies, this appointment practice continued

through fiscal year 2007. Further, of these three agencies, which we identified as having questionable practices with respect to appointments for scientific and technical committees in 2004, one is still appointing members to scientific and technical committees primarily as representatives, and one has reduced the number of representative appointments but still has a majority of representative appointments. The third shifted substantially away from representative appointments for its scientific and technical committees in 2006 following our report—but made appointments to two new committees in 2007 with representative members that might be more appropriately appointed as special government employees.

Regarding the agency that is still primarily using representative members on its scientific and technical committees, not only do the subject matters being considered by many of these committees suggest that the government would be seeking independent expert advice rather than stakeholder advice, but the agency's identification of the entities or persons some representatives are speaking for suggests this agency is not abiding by the OGE and GSA guidance regarding representative appointments. For example, for some committees, this agency identifies the entity that all of the individual representative members are speaking for as the advisory committee itself. We believe these instances likely reflect an inappropriate use of representative rather than special government employee appointments. In addition, we note that some members appointed as representatives are described in the FACA database as representing an expertise or "academia" generally. As discussed above, the OGE guidance clarified that generally members may not be appointed as representatives to represent classes of expertise. Thus, it is not clear that agencies inappropriately using representative appointments have taken sufficient corrective action or that such actions will be sustained despite steps OGE and GSA have taken to clarify the appropriate use of representatives in response to our recommendations.

Governmentwide data collected by GSA show that from 2005 (when GSA began to collect the data in response to our recommendation to do so) through 2007, the percentage of committee members appointed as special government employees

increased from about 28 percentage to about 32 percent; the members appointed as representatives declined from just over 17 percent to about 16 percent.[14] In March 2008, the Director of the Committee Management Secretariat at GSA told us that it is not clear whether these data indicate that the problem of inappropriate use of representative appointments has been fixed. He emphasized that GSA can suggest to agencies that they change the type of committee appointments they make but cannot direct them to do so. He noted that the agencies that historically have relied on representative appointments may not feel compelled to comply with the guidance because "it is not in the law." Finally, he said GSA would support incorporating the substance of our recommendations regarding representative and special government employees into FACA. Clarifying appointment issues in the act could resolve questions about or challenges to GSA's authorities and thereby better support agency compliance with GSA and OGE guidance on this critical issue.

In consideration of the above, the Subcommittee may want to consider amendments to FACA that could help prevent the inappropriate use of representative appointments and better ensure the independence of committee members by clarifying the nature of advice to be provided by special government employees versus representative members of advisory committees and require that all committee members, not just special government employees, be provided ethics training.

In addition, as discussed above, our 2004 recommendations to GSA addressing (1) committee balance and (2) practices that could better ensure independent and balanced committees and increase transparency have either not been implemented or have been partially addressed. We believe it is significant that, on the basis of its understanding of its authorities and its experience in overseeing federal advisory committees—including trying to convince agencies to follow its guidance and training materials—GSA told us in March 2008 that it would support incorporating the substance of our recommendations in these areas into FACA. Not only are our recommendations consistent with four

[14]GSA identifies three other types of appointments that were not the focus of our 2004 report. They are peer review consultants (at the National Institutes of Health only), regular government employees, and ex officio members.

categories (or objectives) of amendments to the act that GSA told us the agency generally supports, but they identify actions that GSA believes could help achieve its objectives, such as enhancing the federal advisory committee process and increasing the public's confidence both in the process and in committee recommendations. Consequently, we believe the Subcommittee may also wish to incorporate into FACA the substance of our recommendations addressing (1) the types of information agencies should consider in assessing prospective committee members' points of view to better ensure the overall balance of committees and (2) the committee formation process, clarity in appointment letters as to the type of advice members are being asked to provide, and (3) identifying in committee products the nature of the advice provided. Along these lines, we understand that the proposed legislative amendments to FACA that may be introduced today may incorporate some of our 2004 recommendations. Overall, we believe that additions to FACA along the lines discussed in our testimony and detailed in our 2004 report could provide greater assurance that committees are, and are perceived as being, independent and balanced.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions that you or other Members of the Subcommittee may have at this time.

GAO Contacts and Staff Acknowledgments

For further information about this testimony, please contact Robin M. Nazzaro on (202) 512-3841 or nazzaror@gao.gov. Contact points for our Congressional Relations and Public Affairs Offices may be found on the last page of this statement. Contributors to this testimony include Christine Fishkin (Assistant Director), Ross Campbell, Carol Kolarik, Nancy Crothers, Richard P. Johnson, and Jeanette Soares.

Mr. CLAY. Thank you very much.
Mr. Flaak, you may proceed.

STATEMENT OF ROBERT FLAAK

Mr. FLAAK. Mr. Chairman, thank you for inviting me to speak today on GSA's implementation of the Federal Advisory Committee Act. My full testimony incorporates our comments and how we handled the recommendations from the GAO, and I want to address those in my oral statement.

What I would like to do is characterize how the GSA's Committee Management Secretariat manages its program and the kind of work that we do in terms of providing compliance and oversight of the Federal advisory committee program.

First of all, we are responsible for issuing administrative guidelines on FACA, the FACA rule that provides framework for Government-wide oversight and helps departments and agencies manage their FACA operations. Agencies, through their committee management officers and their designated Federal officials who actually run the committees, have joined responsibility for implementing the act and for issuing additional guidelines that are needed to address the unique requirements of that particular agency.

In order to provide agencies with the tools necessary for successful oversight and management of their advisory committee program, the Secretariat has developed a compliance and oversight program that uses a combination of shared management approaches, Web-based tools, inter-agency coordination, training, and the application of best practice guidelines, and we do this because, as Robin mentioned a moment ago, there are some limits on the authority that we have, so, rather than use authority we don't have, we find other ways that are effective in managing this program.

Now let me point out what some of these are. As required by section 7(c) of the act we prepare the FACA rule, which is 41 CFR 102–3. This provides agencies with detailed guidance on the implementation of FACA. The guidance in this rule comes from the language in FACA and from case law. GSA prepares the Web-based Cases Law Digest, a compendium of FACA case law that was developed by interagency work group. They provide citations and summaries of relevant FACA case law, as well as Comptroller General decisions and Office of Legal Counsel opinions. It has information up through 2003, and we are presently in the process of updating that up through 2008.

Secretariat staff members that work for me directly serve as GSA FACA desk officers. Each of our desk officers has a coordinating responsibility for advisory committee appointments, renewals, and terminations, FACA policy interpretation with the Federal agencies, and best practice guidance with a dozen or more individual agencies, and they do this through the committee management officers.

The Secretariat has designed a Web-based shared management system, which has also been known as our FACA data base, to manage and compile meeting, membership, charter, costs, and other information and operational data on all Federal advisory

committees. These are available on our Web site and are used in our annual comprehensive review of Federal advisory committees.

The Secretariat has also incorporated performance measures in our shared management system for all agencies to provide information on their advisory committees and to examine committee outcomes, such as the number of recommendations accepted by an agency or the estimated value of the advice that has been impacted by that advisory committee or even across the agency. They are Government-wide and agency-wide roll-ups of this data.

The Secretariat periodically administers an advisory committee engagement survey, which we originally designed with the Gallup Corp., to advisory committee members, staff, and decisionmakers, and the intent of this is to measure the extent to which sponsoring agencies address factors that are critical to the success of their advisory committees.

The GSA chairs the 60-member Interagency Advisory Committee on FACA. It brings all the CMOs together quarterly to discuss FACA policy, best practices, training, and compliance issues. The Inter-Agency Committee does host a number of individual task forces and work groups that deal with a variety of issues, from developing Presidential transition packages for FACA programs and the coming transition issues, refining the questionnaire that we ask on performance measures, improving training, updating the case law digest, developing guidance updates, working on our shared management system, and so on.

Last, but certainly not least, the Secretariat has conducted a FACA training program since 1989 which includes a formal introductory FACA training course that is taught about five to six times a year here in the Washington area for approximately 300 Federal employees each year.

The course is taught by an inter-agency team of subject matter experts from GSA, EPA, DOD, Office of Government Ethics, National Archives and Records Administration, and the public to provide the students with an oversight of what they are expected to do.

The course includes information on FACA history, laws related to FACA, legal and ethical issues, recordkeeping, committee operations, membership processes, and so on.

Also more recently we conducted a 1-day committee management officer training seminar this past September attended by just about all the CMOs. Again, we held a FACA training conference in December, which was attended by over 200 people and had approximately 35 speakers.

Mr. Chairman, the Secretariat has had a proactive compliance and oversight program, and I am justifiably proud of the significant results—results that we have been able to accomplish with a staff of only five dedicated professionals.

As noted in my full testimony, GSA and OGE have taken appropriate actions, as we deem appropriate to respond to the recommendations by GAO, and with regard to amending the FACA, specifically GSA would not generally support amendments that unnecessarily limit the discretion of the executive branch or the case-by-case flexibility needed for each agency and each of the Federal advisory committees to support critical mission requirements.

I am aware that you are proposing amendments to the FACA that we have seen an early version of, and we look forward to working with you to ensure that Federal agencies receive appropriate statutory, regulatory, and best practices guidance and support in the management of their program.

Mr. Chairman, this concludes my prepared statement. I would be happy to answer any questions.

[The prepared statement of Mr. Flaak follows:]

STATEMENT OF

ROBERT FLAAK
DIRECTOR

COMMITTEE MANAGEMENT SECRETARIAT

U.S. GENERAL SERVICES ADMINISTRATION

BEFORE THE

INFORMATION POLICY,

CENSUS, AND NATIONAL ARCHIVES SUBCOMMITTEE

OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

WEDNESDAY, APRIL 2, 2008

2154 Rayburn HOB

Mr. Chairman, Members of the Subcommittee, thank you for inviting me to speak on the General Services Administration's (GSA's) implementation of the Federal Advisory Committee Act (FACA); steps GSA has taken to implement recommendations made by the Government Accountability Office (GAO) in its April 2004 report (*Federal Advisory Committees – Additional Guidance Could Help Agencies Better Ensure Independence and Balance,* GAO-04-028); and GSA's recommendations for improving the Act.

While citizen-advisors have been called upon since the earliest days of the Republic to obtain objective and informed advice, it was not until after the end of World War II that advisory committees became institutionalized as a unique tool of democratic government. As the influence and number of advisory committees grew, so did concerns within the Executive and Legislative Branches regarding their management, cost, and accountability. In 1962, President Kennedy issued an Executive Order establishing guidelines for using such groups, and these guidelines were expanded in 1964.

In 1972, Congress passed the Federal Advisory Committee Act to accomplish two important objectives: (1) to establish the means for providing Congressional and Executive Branch oversight over the number and costs of advisory committees; and (2) to ensure that advisory committees operate in plain view of the public. Simply stated, the Act's purpose is to illuminate how agencies make decisions based upon advice and recommendations from individuals outside of Government, while also making sure that the costs to support advisory committees are commensurate with the benefits received.

Today, advisory committees are used by over 60 departments and agencies to address issues that reflect the complex mandates undertaken by the Government. During fiscal year 2007, over 65,000 committee members served

on more than 900 committees and provided advice and recommendations on such matters as vaccine research and safety, nuclear, biological and chemical threat reduction, civil rights, veterans' health and rehabilitation, management of natural resources, and strategies for national defense, protection of the environment, and human health and welfare.

FACA IMPLEMENTATION BY GSA

Several important government-wide roles and responsibilities are assigned by the Act to the Administrator of General Services and to GSA's Committee Management Secretariat which, taken together with those specific functions reserved for the Congress and Executive Branch Departments and agencies, are designed to improve the management and accountability of advisory committees. Among the statutory responsibilities assigned to the Administrator are:

- Conducting an annual comprehensive review of the activities and responsibilities of each advisory committee (section 7(b));
- Requesting information from agencies to help GSA carry out its responsibilities (section 7(b));
- Issuing administrative guidelines and management controls applicable to advisory committees (section 7(c)); and
- Issuing guidelines on committee member compensation in conjunction with the Office of Personnel Management (section 7(d)).

GSA Committee Management Secretariat Programs

The Secretariat provides agencies with tools to ensure successful oversight of their Federal advisory committee program, using a combination of shared management approaches, web-based tools, interagency coordination, and the application of best practice guidance. Compliance and oversight are managed by the Secretariat through the following programs:

- GSA FACA Rule – 41 CFR 102-3 provides agency with detailed guidance on the implementation of FACA. The current rule was issued in July 2001 and was developed by an interagency work group. The guidance in the rule follows from the language in FACA and from case law. The Secretariat is preparing to update the rule in 2010.

- Case Law Digest – This is a compendium of FACA Case Law that was developed by an interagency team led by GSA. It provides citations and summaries of FACA-relevant case law up through 2003. It is currently being updated by an interagency team including representatives from GSA, EPA, and DOJ – there are approximately 30 new cases being added.

- GSA Desk Officers – All agencies with Federal advisory committees are assigned to a Secretariat Desk Officer. Desk Officers coordinate advisory committee establishments, renewals and terminations, FACA policy interpretation, and best practice guidance with the agencies' Committee Management Officers (CMO's).

- Shared Management System (SMS) - The Secretariat uses a web-based Shared Management System (also known as the FACA Database) to manage and compile meeting, membership, charter, costs and other administrative and operational data on all Federal advisory committees. This data is available to the public via the GSA website.

- Annual Comprehensive Review (ACR) – The Annual Comprehensive Review of Federal Advisory Committees is required by section 7(b) of the Act. The Secretariat uses the Shared Management System to capture

and display this information. Agency compliance with reporting requirements is measured via a publicly-accessible scorecard (red-yellow-green) at the close of each fiscal year.

- Performance Measures - The Secretariat has incorporated performance measures for advisory committees in the Shared Management System. Data are collected from individual advisory committees during the ACR, with government-wide and agency roll-up. These measures examine advisory committee outcomes such as number of recommendations accepted by an agency and the estimated value of the advice impacted by advisory committees.

- Advisory Committee Engagement Survey (ACES) -The Secretariat periodically administers this online survey to advisory committee members and staff, and FACA decision makers. ACES measures the extent to which sponsoring agencies address factors that are critical to the success of advisory committees.

- Interagency Committee on Federal Advisory Committee Management (IAC) - Chaired by GSA, this 60-member interagency committee brings all CMOs together quarterly for discussions on FACA policy, best practices, training, and compliance issues. The IAC hosts numerous interagency work groups to manage FACA issues of interest (e.g., updating the case law digest; developing regulatory updates; improving training programs; refining the ACES questionnaire; developing updates to the SMS; developing presidential transition packages for FACA programs; etc.)

- FACA Training Program – Since 1989, the Secretariat has conducted a FACA training program which includes a formal introductory FACA course given five to six times a year to approximately 300 Federal employees.

GSA's introductory FACA course addresses the following topics: FACA history, laws related to FACA, legal and other ethics issues, recordkeeping, committee operations, membership processes, public interactions, and the use of the Secretariat's Shared Management System. The Secretariat also administered a one-day CMO training seminar in FY2007, and a two-day FACA Training Conference in FY2008.

Overview of Department and Agency Responsibilities

Responsibilities assigned by FACA to departments and agencies that sponsor Federal advisory committees include:

- Establishing uniform administrative guidelines and management controls (section 8(a));
- Appointing a Committee Management Officer (CMO) to provide oversight of the agency's entire committee inventory (section 8(b));
- Consulting with the Secretariat regarding proposals to establish advisory committees (section 9(a)(2));
- Filing Charters with the Congress prior to initiating committee activities (section 9(c));
- Maintaining records, minutes, and reports covering closed meetings (section 10(b)(c)(d));
- Appointing a Designated Federal Officer (DFO) for each committee (section 10(e));
- Maintaining financial records (section 12(a));
- Providing support services (section 12(b)); and
- Terminating advisory committees as appropriate, consistent with FACA (section 14(a)(1)(A)).

Agency CMOs are responsible for implementing FACA on behalf of the agency head. Within each agency, individual DFOs must work with their respective CMO to implement the Act's requirements at the committee level. Together, the CMO

and DFO are responsible for ensuring compliance with FACA, the agency's internal operating procedures, guidelines issued by GSA, and any other applicable statutes or regulations, such as those issued by the United States Office of Government Ethics (OGE), the National Archives and Records Administration (NARA), or the Office of Personnel Management (OPM). Although the Act is quite detailed in the specific procedures agencies must follow with respect to the establishment of advisory committees, the conduct of meetings, and the availability of records, it provides substantial flexibility to agency heads in other areas, such as membership selection and tenure. GSA believes this is appropriate given the diverse needs of the Executive Branch and the necessity for agencies to quickly adopt new operating procedures where conditions warrant.

Balance and Influence of the Appointing Authority

The Act does not include provisions covering individual committee member conflicts of interest. The applicability of conflict of interest laws and various ethical requirements for members of advisory committees who serve as Special Government Employees (SGEs) are covered by other laws and by regulations or other guidance issued by the U.S. Office of Government Ethics.

The Act, however, does include two important provisions designed to promote the objectivity of advisory committee deliberations. First, section 5(b)(2) requires "the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the committee." Second, section 5(b) requires "provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead

be the result of the advisory committee's independent judgment." Thus, while the Act stresses the importance of assuring an advisory committee's independent judgment, it also requires that the composition of advisory committees reflect the expertise and interests that are necessary to accomplish the committee's mission.

The Act does not define those factors that should be considered in achieving "balance." However, the Secretariat's guidelines provide that, *"...in the selection of members for the advisory committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee. Committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed."* (41 CFR 102-3.60(b)(3)) In their efforts to balance the points of view of a committee's membership, agencies focus primarily on the subject matter to be addressed by the committee; nevertheless, while not required by FACA, other factors may be appropriate in relation to a committee's function, such as geographical representation; racial or ethnic diversity; occupational affiliation; or the need to consult with State, local, or tribal governments. GSA describes these factors further in section III of Appendix A to Subpart B, 41 CFR 102-3.

Similarly, FACA does not outline specific steps that must be taken to ensure that advice and recommendations offered by an advisory committee are free from inappropriate influence by the appointing authority or special interests. Accordingly, each agency is responsible for developing specific operating procedures, consistent with the Act and GSA's guidelines to ensure an advisory committee's independence, and to promote a balanced committee membership.

GSA RESPONSE TO GAO RECOMMENDATIONS

In it's April 2004 report (*Federal Advisory Committees – Additional Guidance Could Help Agencies Better Ensure Independence and Balance*, GAO-04-328), the U.S. Government Accountability Office (GAO) recommended a number of improvements that both GSA and OGE could make to improve the independence and balance of Federal advisory committees. The following is a summary of the recommendations (some are merged) that were made to GSA and how GSA addressed each recommendation.

To ensure distribution of the GAO recommendations to agency FACA managers, GSA provided the GAO report to all agency CMOs at the time of the September 23, 2004 meeting of the Interagency Committee on Federal Advisory Committee Management. CMOs were also provided with both GSA and OGE planned responses and action plans

for addressing the recommendations. Attendees were briefed on the GAO report and GSA's planned actions. In addition, OGE briefed the attendees on its responses to the GAO recommendations.

GAO Recommendation - (The Director of OGE and) the GSA Committee Management Secretariat (should) direct Federal agencies to review their representative appointments to Federal advisory committees either as the 2-year charters expire or, for those committees with indefinite charters, within 1 year to determine if the appointments are appropriate and to reappoint members as special government employees, where appropriate, and direct agency committee management officials to consult with agency ethics officials in making decisions about the type of appointments that should be made for each committee.

> *Response: OGE issued DAEOgrams DO-04-022 (7/19/04) and DO-05-012 (8/12/05) to further assist agencies in distinguishing between SGEs and Representatives during the member designation process* and to

improve agency designation practices for purposes of applying Federal ethics rules to members serving as SGEs. *These documents serve to strengthen the CMO-DAEO consultation process called for in Appendix A to Subpart C (IV.2.) of the GSA FACA guidelines. (Basic guidance regarding the applicability of the Conflict of Interest Statutes and Federal Advisory Committee members is contained in OGE Advisory Opinion 82 x 22 (7/9/82).)* In addition, I understand that OGE in 2004 modified its ethics program review guidelines pertaining to advisory committees and has focused particular attention on ensuring that agency ethics officials are properly designating the status of advisory committee members for purposes of applying Federal ethics rules to members serving as SGEs. *During GSA's formal FACA Management Training course, agencies are further advised to contact their ethics and FACA attorneys for input when selecting members of any type, and in particular when choosing between SGEs and Representatives. This guidance appears in section IV.2.B of Appendix A to Subpart C of 41 CFR 102-3.*

For charters subject to renewal under FACA beginning with FY 2006, GSA added a member designation review date transaction column in the on-line consultation module of the FACA Database. (Designations for committees with indefinite charters (i.e., exempt from renewal) were reviewed during FY 2006.) The pertinent new instructions for this renewal consultation requirement were added to the Database HELP feature and Manuals.

Since 2006, GSA has also taken an aggressive posture in reviewing advisory committee charters during consultations on new establishments, renewals and amendments. Although FACA only requires that agencies "consult" with GSA on charters (see FACA 9(a)(2)), GSA's approach is to have GSA Desk Officers review the charter language for compliance with current regulatory requirements as well as for compliance with the revised

requirements (which include a section on membership designation) for charters that GSA intends to incorporate into the next revision of 41 CFR 102-3. This Desk Officer review is followed by a second review by the Director, Committee Management Secretariat, to ensure that charters have language specified by FACA and the implementing guidelines, and to ensure that member designations are appropriate. GSA formally notifies agencies in writing of any concerns with charter language.

GAO Recommendation - GSA (and OGE) (should) revise the training materials for the FACA management course, incorporating the additional OGE guidance as recommended above, and ensure that the course materials highlight the fact that appointment decisions should be based on the type of advice the committee members are to provide.

Response - GSA and OGE made the appropriate revisions to both the Meeting Management and Ethics Training Classes of the GSA FACA Management Training Course for FY2005, focusing on the member designation process and the CMO-DAEO relationship involved, and incorporating the current OGE guidance. The course material is reviewed regularly (with major updates in the summer of 2006 and 2007 during GSA sponsored instructor training meetings), and is updated as new guidance is issued.

GAO Recommendation - (OGE and) GSA (should) direct agencies to determine, for each relevant committee, the potential for such other (unknown points of view or) biases and take appropriate steps to ensure their representative members do not have such biases. At a minimum, Representatives should receive ethics training and be asked whether they know of any reason their participation on the committee might reasonably be questioned--....

Response - GSA believes that responsible agency CMOs or other officials, as appropriate, should determine for each relevant committee, the extent to which their potential Representatives should be vetted during

the initial planning for fairly-balanced membership, and in the preliminary review processes during membership selection. Whether Representatives should be asked to participate in member briefings is subject to an agency's decision. GSA believes it is helpful for Representatives to receive necessary information on the agency's expectations regarding any standard of behavior, with respect to a member's duties and role on a Federal Advisory Committee. Further, a structured interview conducted by an agency during the vetting or appointment process would assist in making sensible and defensible choices in achieving balance. During presentations in the GSA FACA Management Training Course, GSA recommends that agencies follow this approach."

GAO Recommendation - GSA (should) provide guidance to agencies regarding what background information might be relevant in assessing committee members' points of view.

Response - GSA believes that considerations of potential members' points of view to be represented with respect to the functions to be performed by a committee are to be made by an agency during the initial planning process for fairly-balanced membership, and that each member will be designated appropriately prior to a committee's meeting or taking any action. Each agency is in the best position to determine from its program clientele, customers, and stakeholders, the pertinent points of view and their effect on a committee's functioning, and what views should be represented by members, interested parties, and other participants.

GSA's current guidance in 41 CFR 102-3.60 has been more aggressively applied during the consultation process for the establishment of new discretionary Federal advisory committees, especially with regard to the description of the agency's plan to attain fairly-balanced membership. Proposed charters are assessed by the Secretariat, and commented upon as necessary, particularly with respect to the designation of members.

Finally, as we note in Section III of Appendix A to Subpart B of 41 CFR 102-3, the composition of an advisory committee depends on a number of factors (i.e., committee mission, perspectives needed, need for divergent views, geographical, ethnic, social, economic or scientific impact of recommendations). Agencies have to make individual determinations based on the function of the committee being established and the anticipated role of the members.

GAO Recommendation - GSA (should) issue guidance that agencies should: identify the committee (membership) formation process for each committee... ; state in the appointment letters to committee members whether they are appointed as Special Government Employees (SGEs) or Representatives (and identify the latter's entity or group); identify each member's appointment category on the GSA FACA Database (and for Representative members, the entity or group represented); and state in the committee products the nature of the advice provided (independent or consensus)... .

Response - In the FACA Management Training Course, GSA recommends that agencies use a standardized process for membership selection. This includes use of the Federal Register and the Internet to recruit members, and a formalized process for evaluating those candidates. A copy of an official agency document used for this purpose is handed out for illustration.

GSA added several new fields for member designation categories in the FACA Database module beginning with the FY 2005 Annual Comprehensive Review (ACR) of each committee. Also, a field has been added for the identification of the represented group when an individual has been designated as a "Representative Member." Instructions have been added to the Database HELP feature and Manuals. GSA's final

Member Designation Categories and Selection Criteria were issued to CMOs at the May 12, 2005 Interagency Committee (IAC) Meeting, and CMO instructions for the FY 2005 ACR were issued at the September 15, 2005 IAC Meeting. Minutes of these IAC meetings are posted on the GSA website.

In September 2007, GSA held a one-day CMO Training Seminar attended by 60 participants (primarily CMOs) from 40 Federal agencies. Presenters represented GSA, the National Archives and Records Administration, the Department of Homeland Security, and the U.S. Office of Government Ethics. Broad topics presented at this seminar included the application of ethics rules to FACA members and improving advisory committee practices; FACA recordkeeping for CMOs; and managing presidential transition for advisory committees. During the seminar, CMOs were briefed on the need for a clear plan for membership, on ensuring that their advisory committee members understood if they were Special Government Employees or Representative members, and if the latter, who they represented. CMOs were also advised to include member designation in their advisory committee appointment letters: OGE has also advised in its 2004 DAEOgram that ethics officials ensure that appointment letters or other appointment documentation state clearly a member's designation and that Government ethics rules apply to a member who serves as an SGE.

In December 2007, GSA held a national FACA Training Conference attended by over 225 FACA professionals from over 50 Federal agencies. Thirty-five speakers and panelists presented on the role of the CMO; external views on advisory committee contributions; managing committees for excellence; forming successful committees, FACA policy advice, using

the GSA Shared Management System, and communications and accountability. Participants were trained on and received materials on documenting the advisory committee membership formation process.

GSA recommends that agencies make maximum use of the Internet, and display relevant agency and committee documents and products on agency websites, as appropriate, that would serve to be informative and contemporaneously available to all interested parties and the public at large. Such usage enhances the public participation aspects of FACA and ensures and increases transparency in the advisory committee process. GSA's Shared Management System provides for an agency to enter either the agency or specific committee website URL to which information can be posted. This is particularly true for draft and final advisory committee advice or recommendations.

Although some agencies apply voting criteria to their final products (report, advice, or recommendations), many more use a consensus-based approach. Regardless of the approach used, and we discuss this in the FACA Management Training Course briefly, agencies and their advisory committees will normally use the method best suited to their needs. Generally, advisory committee procedures documents that form the basis for the operation of the committee, or meeting transcripts, minutes, draft and final reports, comments, and the information in the FACA meeting record will clearly identify how advice was generated.

Mr. CLAY. Thank you very much, Mr. Flaak.

We will go to Mr. Wilson now. You may proceed for 5 minutes.

STATEMENT OF FRANK WILSON

Mr. WILSON. Thank you for the opportunity to address this committee about potential improvements to the Federal Advisory Committee Act of 1972.

By way of introduction, August 2006 most of the Secretary of Defense's statutory and regulatory authorities involving Federal advisory committees were delegated to Mr. Michael B. Donley, Director for Administration and Management, Office of the Secretary of Defense. As the major policy decisionmaker, Mr. Donley consulted with the Secretary and Deputy Secretary of Defense on key FACA-related issues.

As the Department's Committee Management Officer, I work closely with the GSA's Committee Management Secretariat, Mr. Bob Flaak, who I join with today to testify before the committee.

With the assistance of Mr. Jim Freeman, Deputy Committee Management Officer, we handle the day-to-day policy oversight and program issues for Mr. Donley. As I offer our thoughts on potential improvements to the Federal Advisory Committee Act, it is important to know that my deputy and I bring both policy and operational perspectives to this task.

In addition to my CMO role in help to set and oversee committee management policy in the Department of Defense, my secondary role is to provide logistical support to various DOD-supported Federal advisory committees supported by the Washington Headquarters Services.

With the combined experience base of 11 years, my deputy and I act as program managers, operationally establishing, supporting, and terminating numerous Federal advisory committees. Our work includes a broad spectrum of support, including budget development, facility management, information technology, human resources, financial management, event management, supplies, and contract support—everything needed to operationally establish or terminate a Federal advisory committee.

With the able support of a skillful staff, we have successfully stood up key committees in a short period of time, the most recent of which was the President's Commission on Care for America's Returning Wounded Warriors. We were fortunate enough to have this committee up and running in 7 short working days.

Mr. Chairman, based upon our unique perspective and experience, I would like to offer six recommendations for modification to the act for your consideration.

Committee member appointments and renewals—DOD and Office of Personnel Management discussions concerning expert or consultant appointment authority in 5 CFR 304.103 are ongoing. Currently, the Department of Defense reviews over 1,200 committee members on an annual basis, which is a heavy administrative burden.

Delineation of chairperson authorities and responsibilities—there is little discussion of the chairperson's authorities and responsibilities in the act and its implementing Federal regulations. This lack of clarification in our opinion sometimes creates a misconception

that the committee lacks independence. We believe the act should clarify that the chairperson, as head of the committee, is responsible for ensuring that the committee operates consistent with existing statutes, Federal regulations, and agency guidelines.

Acquisition of leased Federal advisory committees—acquiring leased Federal advisory committees in a timely manner is always a major stumbling block when standing up Federal advisory committees, especially those lasting only 45 or 60 or perhaps 90 days, and large committees like the Commission on the National Guard and Reserves or the Base Reduction and Closure Commission. From an agency perspective, it would be easier to stand up a committee if GSA had the authority in limited circumstances to waive the competition requirement for leased Federal advisory committee acquisition under Title 40 of the United States Code.

Tracking of recommendations and outcomes—we have seen in the last year alone an increased significance in the role Federal advisory committees have in examining and making recommendations on subjects of great interest to the public. From our perspective, the act currently details information about every aspect of Federal advisory committee work, with the exception of what may be the most important by-product, recommendations and outcomes. The outcomes are the final phase of the committee life cycle, and, like the committee's deliberative process, of paramount concern to your constituents. To this end we recommend that the act require a transparent mechanism for tracking and reporting the status of final recommendations and outcomes.

Addressing technological advancements—it has been our experience that the creative nature of some committees makes it increasingly challenging for the Department of Defense to walk that fine line between management oversight and ensuring that we do not unduly influence the committee's work. We recognize that we live in a technological age not envisioned when the legislation was originally enacted. We recommend this subcommittee explore the opportunities and the restraints that new technology creates for committees and agencies, keeping in mind the act's underlying principles. For example, video teleconferencing offers an opportunity to facilitate committee meetings, but at what expense to public participation or agency security requirements?

Scheduled review of legislation—there is currently no regular schedule for review of the act and consideration of the changing environments in which committees must operate. For this reason, we recommend the act require a mandatory review of the legislation every 10 years. A set of evaluation criteria should be created to conduct this schedule assessment in order to provide a baseline for discussions at each successive review.

Finally, Mr. Chairman, we hope these recommendations will be of value to you as you consider modifications to the act. Ultimately, we recognize that when we look for ways to leverage technology, communicate more successfully with each other and the public, the results are committees that can work within the scope of a FAC legislation and are actively engaged in the level and quality of work needed by the Department.

This concludes my prepared statement. I appreciate the opportunity to share with you our perspectives and experience, and I would be pleased to answer any questions that you may have.

[The prepared statement of Mr. Wilson follows:]

STATEMENT FOR THE RECORD OF

FRANK M. WILSON

COMMITTEE MANAGEMENT OFFICER

FOR THE DEPARTMENT OF DEFENSE

BEFORE THE

INFORMATION POLICY, CENSUS, AND NATIONAL

ARCHIVES SUBCOMMITTEE

OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

APRIL 2, 2008

Good Afternoon, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to address this committee about potential improvements to the Federal Advisory Committee Act (FACA) of 1972.

By way of introduction, in August 2006, most of the Secretary of Defense's statutory and regulatory authorities involving federal advisory committees were delegated to Mr. Michael B. Donley, the Director for Administration and Management, Office of the Secretary of Defense. As the major policy decision-maker, Mr. Donley consults with the Secretary and Deputy Secretary of Defense on key FACA-related issues.

As the Department's Committee Management Officer (CMO) I work closely with the GSA's Committee Management Secretariat, Mr. Bob Flaak, who I join with today to testify before the committee. With the assistance of Mr. Jim Freeman, Deputy Committee Management Officer, we handle the day-to day policy oversight and program issues for Mr. Donley.

As I offer our thoughts on potential improvements to the Federal Advisory Committee Act, it is important for you to know that my deputy and I bring both policy and operational perspectives to this task. In addition to my CMO role in help to set and oversee committee management policy in DoD, my secondary role is to provide logistical support to various DoD-supported federal advisory committees supported by the Washington Headquarters Services.

With a combined experience base of 11 years, my deputy and I act as program managers operationally establishing, supporting and terminating numerous federal advisory committees. Our work includes a broad spectrum of support, including budget development, facility management, information technology, human resources, financial management, event management, supplies and contract support – everything needed to "operationally establish or terminate" a federal advisory committee. With the able

support of a skillful staff we have successfully stood up key committees in a short period of time, the most recent of which was *The President's Commission on Care for America's Returning Wounded Warriors*. We were fortunate enough to have this Committee up and running in seven short working days.

RECOMMENDATIONS

Mr. Chairman, based upon our unique perspective and experiences, I would like to offer six recommendations for modification to the Act, for your consideration:

Committee Member Appointments and Renewals

DoD and OPM discussions concerning expert or consultant appointment authority in 5 CFR 304.103 are ongoing. 1 Currently, DoD reviews over 1200 committee members on an annual basis, which is a heavy administrative burden.

Delineation of Chairperson Authorities and Responsibilities

There is little discussion of the chairperson's authorities and responsibilities in the Act and it's implementing federal regulations. This lack of clarification, in our opinion, sometimes creates a misperception that the committee lacks independence. We believe the Act should clarify that the chairperson, as head of the committee, is responsible for ensuring that the committee operates consistent with existing statutes, federal regulations and agency guidelines.

Acquisition of Leased Facilities

Acquiring leased facilities in a timely manner is always a major stumbling block when standing up a federal advisory committee, especially those lasting only 45, 60, or 90 days and large committees like the *Commission on the National Guard and Reserves* or the *Base Reduction and Closure Commission*. From an agency perspective, it would be easier to stand up a committee if GSA had the authority in

limited circumstances to waive the competition requirement for leased facility acquisition under title 40, United States Code.

Tracking of Recommendations and Outcomes

We have seen in the last year alone an increased significance in the role federal advisory committees have in examining and making recommendations on subjects of great interest to the public. From our perspective, the Act currently details information about every aspect of Federal Advisory Committee work, with the exception of what may be the most important by-product: Recommendations and Outcomes. The outcomes are the final phase of the Committee "life cycle" and, like the committee's deliberative process, of paramount concern to your constituents. To this end we recommend that the Act require a transparent mechanism for tracking and reporting the status of final recommendations and outcomes.

Addressing Technological Advancements

It has been our experience that the creative nature of some committees makes it increasingly challenging for the Department to walk that fine line between management oversight and ensuring that we do not unduly influence the committee's work.

We recognize that we live in a technological age not envisioned when the legislation was originally enacted. We recommend this Subcommittee explore opportunities and the restraints that new technology creates for committees and agencies; keeping in mind the Act's underlying principals. For example, video teleconferencing offers an opportunity to facilitate committee meetings, but at what expense to public participation or agency security requirements.

Scheduled Review of Legislation

There is currently no regular schedule for review of the Act and consideration of the changing environments in which Committees must operate. For this reason, we recommend The Act require a mandatory review of the legislation every 10 years. A set of evaluation criteria should be created to conduct this scheduled assessment in order to provide a baseline for discussions at each successive review.

Finally, Mr. Chairman, we hope these recommendations will be of value to you as you consider modifications to the Act. Ultimately, we recognize that when we look for ways to leverage technology, communicate more successfully with each other and the public ... the results are committees that can work within the scope of the FACA legislation and are actively engaged in the level and quality of work needed by the Department.

This concludes my prepared statement. I appreciate the opportunity to share with you our perspectives and experience. I would be pleased to answer any questions you may have.

Mr. CLAY. Thank you so much, Mr. Wilson.
Mr. Shapiro, you may proceed.

STATEMENT OF SIDNEY A. SHAPIRO

Mr. SHAPIRO. Mr. Chairman, thank you for the invitation to testify.

The public's confidence in and respect for our Government is directly influenced by the transparency and sunshine provisions that good Government laws like FACA can provide. Congressional action is required to rectify three problems with the current operation of FACA. Legislation is necessary to close the loopholes in FACA's coverage, promote better transparency in the advisory committee process, and improve the screening process for conflicts of interest.

Congress should take these actions before we witness more stories of secret, biased, or unaccountable advisory committees influencing the scope and nature of Government policies and recommendations.

The courts have created four loopholes that make it relatively easy for agencies to avoid FACA if they wish.

Under the contractor loophole, agencies can avoid the statute by hiring private contractors to organize and operate an advisory committee.

Under the strict management loophole, agencies can avoid FACA by letting a regulated entity appoint the committee members and share joint control of the agenda.

Under the subcommittee loophole, an advisory committee can avoid the transparency and balance requirements of the statute by creating subcommittees to do the real work of the committee.

Finally, under the non-voting participant loophole, outsiders can take an active role in Government committees without the committee becoming subject to the statute, as long as the private parties do not vote in committee deliberations.

The proposed legislation would close these loopholes.

Concerning the non-voting participant loophole, Congress should clarify the participation of private individuals in Government committees triggers the application of the act, even if the individual does not have a vote.

The existence of agency Web sites makes it possible to take advantage of public oversight and participation in the administration of FACA. Relevant information about the advisory committee process should be posted on these Web sites. In addition, Congress should require agencies to invite public comment on potential committee members and provide the information necessary to make these comments meaningful.

If enacted, the proposed legislation would meet only the first of these goals. I would suggest, however, that public comment on proposed nominees, which is not included in the most current draft of the legislation, be added. Such public comment is the only practical way to police the balance and conflict of interest provisions of the statute.

Finally, FACA instructs agency officials to ensure the committees will not be inappropriately influenced by any special interests. Four problems have developed in implementing this directive.

First, as we heard a moment ago, agencies avoid conflict of interest rules by appointing committee members as representatives in situations where the public would be better served by making committee members special Government employees subject to the Government's conflict of interest rules.

Second, although Federal law permits waiver of financial conflict of interest in certain circumstances for committee members, Congress should police the misuse of such waivers.

Third, there is no legal requirement that agencies give prompt public notice of waivers of conflicts of interest and permit public objection before they occur.

The final problem is that each agency has its own criteria for determining when potential committee members have a conflict of interest.

The proposed legislation responds to these concerns by requiring the administrator of GSA to promulgate conflict of interest regulations. Congress, however, should give specific directions to the administrator. The regulations should require that agencies justify the use of representatives on an advisory committee, establish presumptive limitations on the number of conflict of interest waivers available per committee, and adopt a definition of conflict of interest that is designed to cover all interests that could potentially affect a committee member's objectivity in reviewing the issues before the committee.

In addition, Congress should require public comment on potential waivers of conflict of interest rules.

Thank you for the opportunity to testify.

[The prepared statement of Mr. Shapiro follows:]

TESTIMONY OF SIDNEY A. SHAPIRO

UNIVERSITY DISTINGUISHED CHAIR IN LAW,
ASSOCIATE DEAN FOR RESEARCH AND DEVELOPMENT,
WAKE FOREST SCHOOL OF LAW
AND
MEMBER SCHOLAR,
CENTER FOR PROGRESSIVE REFORM

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

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

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

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

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

CLOSING LOOPHOLES

The Contractor Loophole

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

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

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

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

[1] *See Food Chemical News v. Young*, 900 F.2d 328, 329-30 (D.C. Cir. 1990), cert. denied, 498 U.S. 846 (1990).
[2] *See id.* at 333.
[3] 174 F.3d 239 (D.C. Cir 1999), cert. denied, 529 U.S. 1018 (2000).
[4] *See id.* at 245-48.
[5] *See id.* at 241-42.
[6] *Id.* at 246.
[7] 5 U.S.C. app. II §§3(2)(B)-(C).
[8] 491 U.S. 440 (1989).

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

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

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

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

The "Strict Management" Loophole

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

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

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

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[9] *See id.*, at 452-53.
[10] *See id.* at 466-67.
[11] *See id.* at 457-58.
[12] Complaint, *NRDC v. Johnson*, Case No. I:05CV00340, 19-20 (D.D.C.) (document on file with the Center for Progressive Reform).

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

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

The Nonvoting Participant Loophole

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

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

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

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

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

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

[15] *Id.* at 728.

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

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

The Subcommittee Loophole

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

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

Legislative Repair

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

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

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17. 711 F.2d 1071 (D.C. Cir. 1983).
18. *Id.* at 1072.
19. Nat'l Anti-Hunger Coal. v. Executive Comm. of the President's Private Sector Survey of Cost Control, 557 F. Supp. 524, 525 (D.D.C. 1983).
20. *Id.*
21. *Id.* at 1072, 1074.
22. *Id.* at 1075–76, 1075 (internal quotations omitted).

IMPROVING TRANSPARENCY

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

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

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

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

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

[24] 5 U.S.C. app. II §§5(b)(3), (c).

[25] *Id.* at §5(b)(2).

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

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

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

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

IMPROVING SCREENING FOR CONFLICTS OF INTEREST

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

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

[27] Letter from the Center for Science in the Public Interest, et al. re: Comments on Expansion of RCRA Comparable Fuel Exclusion: Proposed Rule, *available at* http://www.cspinet.org/new/pdf/20070914_epa_comp_fuels_comments.doc (accessed March 26, 2008).
[28] *Id.*
[29] 5 U.S.C. app. II §§5(b)(3), (c).
[30] 5 U.S.C. App. IV (Ethics in Government Act); 18 U.S.C. § 208 (conflicts of interest statute).

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

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

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

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

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

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

[31] U.S. GOV'T ACCOUNTABILITY OFFICE, *Federal Advisory Committees: Additional Guidance Could Help Ensure Independence and Balance*, GAO-04-328, 20-23 (April 2004).
[32] *Id.* at 20.
[33] *See generally*, Sidney A. Shapiro and Rena I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 L. & CONTEMP. PROBS. 99 (2006).
[34] 18 U.S.C. §208(b)(3).
[35] 5 U.S.C. app. II §15(b)(1).

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

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

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

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

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

SUMMARY AND CONCLUSION

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

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

Thank you for the opportunity to testify.

Mr. CLAY. Thank you so much, Mr. Shapiro.

We will start the questioning phase of the hearing, and I will start with Mr. Flaak.

Mr. Flaak, one of the ways agencies avoid complying with the disclosure and open meeting requirements is by setting up subcommittees or task forces that are not required to comply with FACA. In 2001, GSA updated its regulations on FACA. Previous regulations required subcommittees of advisory committees to comply with FACA's disclosure requirements.

GSA changed this regulation and now says that if a subcommittee reports to a parent committee the subcommittee does not have to comply with FACA. It seems that this is a loophole that allows agencies to avoid FACA by setting up subcommittees to hold meetings and conduct the business of the meeting without any sunshine, without any transparency.

Do you think there is any real problem with requiring subcommittees to comply with FACA?

Mr. FLAAK. The reason, Mr. Chairman, that the GSA regulations were changed in 2001 to reflect that subcommittees were not subject to the act was, as explained in the prologue to that regulation or to that rule, the work group that developed this particular update to the rule included representation from the Department of Justice. In the discussions during the development of this document it was determined that, because the recent court cases that had taken place—*Anti Hunger Coalition* v. *the Executive Committee* is a good example of this—that the subcommittee situation, if a subcommittee is subject to all of the requirements of FACA the same way a full committee would be, then it would be subject to all of the open meeting requirements. In the case of a subcommittee, it is not subject to the chartering requirement because it does not report directly to an agency.

Because of that, if a subcommittee is not subject to at least one of those requirements under FACA that they be chartered, it shouldn't be subject to any of the requirements under FACA.

Now, for agencies that have an active program where they are using subcommittees and using them appropriately and not letting the parent committee do the rubber stamp, which is the biggest concern, I think, those programs are pretty effective.

It is hard for us to manage or to be aware of how agencies use subcommittees, because we don't get reporting on those unless they advise us. In our part of the chartering process, when an advisory committee is chartered and we concur in that charter and we review that charter on behalf of the agency, if there are subcommittees to be formed by that group we would become aware of it at that time, or if they enter that information into our shared management system.

So there are opportunities for mischief, certainly.

Mr. CLAY. So we need to correct that. We need to eliminate these gaping loopholes that allow for subverting U.S. law, allow for concealing information. I mean, what are we talking about here? These are advisory committees.

Mr. FLAAK. Yes.

Mr. CLAY. They don't set policy. These are advisory committees. They are advising agencies and departments. All of this secretive

conducting of business, that is not what our Government is about. That is not how we operate as Government.

Let me ask you some more questions.

GAO recommended in its report that GSA be given stronger enforcement authority in statute in order to improve compliance by agency. During your audits of agencies, has GAS encountered cases where agencies do not comply because there was GSA lax enforcement authority? Can you give us some examples?

Mr. FLAAK. Well, certainly we have no enforcement authority to begin with. When we work with agencies across the Government—and we work primarily with the committee management officer—and we identify what those committees are doing, if there is anything that they are doing that we would view as being inappropriate or in contravention to what FACA requires as it is presently written, we notify them of that and we put it in writing.

We have no enforcement group. We have no compliance group. I have five members of my staff who manage this whole program. So other than providing advice and guidance to the agencies, that is pretty much the extent of what we are able to do.

Mr. CLAY. Have you ever seen a case that involves a situation where GSA informed an agency that an individual should have been appointed as a representative, as opposed to a special Government employee?

Mr. FLAAK. We have had instances when we reviewed charters for advisory committees and the charter language that we are looking at indicates that the individuals who serve on that group will be experts, and then later in that same charter says they will be appointed as representative members.

Mr. CLAY. OK. FACA——

Mr. FLAAK. That would suggest that there is a problem here, because any time I see the term expert on a charter I assume they are talking a special Government employee, which is usually the case.

Mr. CLAY. FACA requires that Federal advisory committee meetings be open to the public. The law provides for closed meetings in cases where the President or agency head determines that classified or proprietary information will be discussed. What is the total amount of meetings advisory committees held in fiscal year 2008?

Mr. FLAAK. In 2008 the data is still pretty raw because it only comes in to us as agencies submit it to us. The number is on our system. I don't have that data with me today. For 2007, though, the number was approximately 7,000 meetings.

Mr. CLAY. OK. And of those 7,000 meetings held, what percentage of meetings was closed?

Mr. FLAAK. Well, I can give you the exact number, actually.

Mr. CLAY. OK. We have time.

Mr. FLAAK. Agencies held 6,938 meetings in 2007. Of those, 290 were partially closed and 4,541 were closed; 2,100 were open.

Mr. CLAY. Repeat it again. Just repeat those figures for me.

Mr. FLAAK. Absolutely. Total number of meetings, 6,938; total partially closed—that means part of the meeting was also open—290; totally closed, 4,541; totally open, 2,107.

Mr. CLAY. OK. The numbers you gave us, that is more than half of the meetings. I mean, are we operating in secret now? Is Government operating in secret?

Mr. FLAAK. Let me explain why some of those numbers show up that way. The preponderance of those closed meetings are with three agencies. They are with the National Science Foundation, with the Department of Defense, and with the Health and Human Services Department. Those are meetings that are held in large part because of grant reviews, or, in the case of the Defense Department, for classified information.

Mr. CLAY. Which agency has the highest percentage of closed meetings?

Mr. FLAAK. The highest percentage I would suspect is HHS I think is first.

Mr. CLAY. Well, other than HHS. Other than HHS, who——

Mr. FLAAK. NSF, National Science Foundation.

Mr. CLAY. I see. FACA requires that committees publish a summary of closed meetings.

Mr. FLAAK. Yes.

Mr. CLAY. Does GSA audit agencies to determine if agencies are complying with this regulation? If not, why? And if so, what are the findings of the audits?

Mr. FLAAK. The information on closed meeting reports is submitted by the agency to the Library of Congress every year. It is not submitted to GSA.

Mr. CLAY. They are not. I see. OK. So it goes to the Library and you don't ever see it?

Mr. FLAAK. We don't see those. No.

Mr. CLAY. I see. Are summaries posted in a timely manner, or do you have any information on that?

Mr. FLAAK. We have the information that they post on our data base as to when they do have closed meeting information. That is included in the reports that those agencies submit on our data base regarding their meetings for the year. That is how we have these numbers.

Mr. CLAY. I am going to digest some of this information I have just heard and let my colleague from New Hampshire have his 5 minutes.

Mr. Hodes.

Mr. HODES. Thank you, Mr. Chairman. Thanks for holding this hearing. I thank the panelists for appearing at really what is a very important hearing. I am a relatively new Member of Congress, and came, I must admit, with a bias toward sunshine and transparency in Government. One of the major points of interest out in the general public when I was a member of the general public was Vice President Cheney's Energy Task Force and the way it was conducted, the results, and whether or not any of the information about who participated and how things went could be digested by the public in whose interest, theoretically, the task force was meeting.

There is a perception that, while the administration claimed the task force was made up of only Federal employees, energy industry executives, and other outside groups participated in that task force.

I wanted to explore for a moment some of the judicial action around the events.

The D.C. Circuit Court of Appeals found that, because only Federal employees had a power to vote, the task force was not subject to the requirements of FACA. Now, that was interesting in light of an earlier decision in 1993 when the D.C. Circuit Court held, in a decision on President Clinton's Task Force on National Health Care Reform, "A consultant may still be properly described as a member of an advisory committee if he is involved in a role functionally indistinguishable from those of the other members. 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."

Professor Shapiro, this seems to go to what you discussed in your written testimony in the "non-voting participant loophole" in which a change was made from recognizing the status of a de facto member but now imposing a new requirement for arguably—well, I guess I would ask can you tell us why the court reversed itself that way?

Mr. SHAPIRO. Well, it got a strong push from the Supreme Court. In between the decisions of the D.C. Circuit, the attempt by the plaintiffs to obtain discovery was appealed to the Supreme Court, and the Court, without deciding as such, did ruminate that requiring the President to make disclosures that the President might not want to make could be a violation of his Executive Privilege. Then they sent it back to the D.C. Circuit.

Unfortunately, what the D.C. Circuit did is make a decision for all time, when they should have limited that particular case to a Presidential advisory committee and tackled the problem that way.

So in order to avoid the constitutional problem, the D.C. Circuit created this loophole for non-voting participants, which made the act inapplicable to the Cheney Committee, and task force seemingly avoided the constitutional problem.

Unfortunately, that same loophole now applies across the Government to committees that have nothing to do with the President.

Mr. HODES. So we had an interlocutory decision without a holding from the Supreme Court on a narrow area which could have been confined to Presidential committees; instead, the D.C. Circuit decided in its wisdom that it should be universally applicable and we have a gaping loophole in transparency.

Mr. SHAPIRO. Yes, sir.

Mr. HODES. So that means, if I am understanding you, that an agency could avoid FACA by technically only giving Federal employees the ability to vote on a committee, but at the same time inviting outside parties to participate as fully as any other members in the deliberations of the committee?

Mr. SHAPIRO. It would seem so.

Mr. HODES. Have you reviewed or thought about the draft legislation, draft amendments to FACA that are under consideration? And do you believe that, as drafted, the language is clear enough so that we would avoid any further misinterpretation by the courts and also avoid constitutional challenges of the kind that occurred previously?

Mr. SHAPIRO. The language in the draft which I saw this morning does go at this, but I think it would be advisable to take it on at the exact point that the D.C. Circuit left it and make explicit language that just because someone doesn't vote doesn't necessarily excuse this committee from falling under FACA, since that is what they tied it to. The language now talks about if someone participates, a private party, participates to the same extent, for all extending purposes, as Government employees, then the committee would be subject to FACA. And that language might be fine as far as it goes, but why not go just a little bit further and include the voting language, just to make sure that the courts don't misinterpret that Congress, information act, is overruling the D.C. Circuit opinion.

Mr. HODES. I understand that you have seen the language this morning and haven't had a lot of time to digest it. In your written testimony you mentioned some other loopholes—the contractor loophole, the strict management loophole, the one we just talked about, the subcommittee loophole. Let me talk for a minute, I think, about the subcommittee loophole.

You mentioned that the D.C. Circuit Court's decision in National Anti-Hunger Coalition, FACA does not apply to task forces unless the parent committee is merely "rubber stamping" the task force's recommendations. Reading the language of FACA, it says the term advisory committee means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof that is established under statute or established or utilized by the President or an agency. Do you think FACA was intended to exempt subcommittees and task forces?

Mr. SHAPIRO. No.

Mr. HODES. Do you think that the language as drafted currently, that you read this morning and haven't had a great time to address, sufficiently addresses clarifying what needs to be clarified to clean this part of things up?

Mr. SHAPIRO. Yes, I don't. I think the act now picks up subcommittees. As we heard from Mr. Flaak, it might be necessary to make some fine tuning when we apply it to subcommittees. You wouldn't want to separately charter, for example, subcommittees and the committee, itself, so some thought will have to go into what is the effect of extending the act to subcommittees, and it may be certain technical parts of FACA would be inapplicable to the subcommittee.

But with that adjustment, I think the proposed bill is reaching out appropriately to include subcommittees.

Mr. HODES. Just finally, I saw that my red light was flashing. I don't want to overstay my welcome. To the extent that you have thoughts on the other two loopholes and the clarity of language that we are thinking about, I would be happy to have your thoughts submitted in writing to the committee.

Mr. SHAPIRO. Thank you, sir.

[The information referred to follows:]

Wm. Lacy Clay
(Original Signature of Member)

110TH CONGRESS
2D SESSION

H. R. _____

To amend the Federal Advisory Committee Act to increase the transparency and accountability of Federal advisory committees, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. CLAY (for himself and Mr. WAXMAN) introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Federal Advisory Committee Act to increase the transparency and accountability of Federal advisory committees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Advisory Committee Act Amendments of 2008".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. ENSURING INDEPENDENT ADVICE AND EXPERTISE.

(a) BAR ON POLITICAL LITMUS TESTS.— Section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended—

(1) in the section heading by inserting "**membership;**" after "**advisory committees;**";

(2) by redesignating subsections (b) and (c) as subsections (d) and (e), respectively; and

(3) by inserting after subsection (a) the following:

"(b) APPOINTMENTS MADE WITHOUT REGARD TO POLITICAL AFFILIATION OR ACTIVITY.—All appointments to advisory committees shall be made without regard to political affiliation or political activity, unless required by Federal statute.".

(b) CONFLICTS OF INTEREST DISCLOSURE.—Section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) is further amended by inserting after subsection (b) (as added by subsection (a)) the following:

"(c) CONFLICTS OF INTEREST DISCLOSURE.—

"(1) The head of each agency shall ensure that no individual appointed to serve on an advisory com-

mittee that reports to the agency has a conflict of interest that is relevant to the functions to be performed by the advisory committee, unless the head of the agency determines that the conflict is unavoidable and that the need for the individual's services outweighs the potential impacts of the conflict of interest. The head of each agency shall require that each individual the agency appoints or intends to appoint to serve on an advisory committee inform the agency official responsible for appointing the individual of any actual or potential conflict of interest the individual has that is relevant to the functions to be performed and that, for an individual appointed to serve on an advisory committee, the conflict is publicly disclosed as described in section 11.

"(2) The head of each agency shall ensure that each report of an advisory committee that reports to the agency is the result of the advisory committee's independent judgment. Each advisory committee shall include in each report of the committee a statement describing the process used by the advisory committee in formulating the recommendations or conclusions contained in the report.".

(c) REGULATIONS AND GUIDANCE.—Not later than 180 days after the date of the enactment of this Act, the

Administrator of General Services, in consultation with the Director of the Office of Government Ethics, shall—

(1) promulgate regulations defining conflict of interest and such other regulations as the Administrator finds necessary to carry out and ensure the enforcement of this section; and

(2) issue guidance for agencies and advisory committees on procedures and best practices for ensuring that advisory committees provide independent advice and expertise.

SEC. 3. PREVENTING EFFORTS TO CIRCUMVENT THE FEDERAL ADVISORY COMMITTEE ACT AND PUBLIC DISCLOSURE.

(a) DE FACTO MEMBERS.—Section 4 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by adding at the end the following:

"(d) TREATMENT OF INDIVIDUAL AS MEMBER.—An individual who is not a full-time or permanent part-time officer or employee of the Federal Government shall be regarded as a member of a committee if the individual regularly attends and participates in committee meetings as if the individual were a member, even if the individual does not have the right to vote or veto the advice or recommendations of the advisory committee.".

(b) WHITE HOUSE INTERAGENCY ADVISORY COMMITTEES.—Section 11 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by adding at the end the following:

"(f) WHITE HOUSE INTERAGENCY ADVISORY COMMITTEES.—Any communication between—

"(1) an interagency committee or task force established by the President or the Vice President or any member or staff acting on behalf of such an interagency committee or task force, and

"(2) any person who is not an officer or employee of the Federal Government,

shall be made available for public inspection and copying. Any portion of a communication that involves a matter described in section 552(b) of title 5, United States Code, or that is subject to a valid constitutionally based privilege against such disclosure, may be withheld from public disclosure.".

(c) SUBCOMMITTEES.—Section 4 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by striking subsection (a) and inserting the following:

"(a) APPLICATION.—The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee, including any subcommittee or subgroup thereof, except to the extent that

any Act of Congress establishing any such advisory committee specifically provides otherwise. Any subcommittee or subgroup that reports to a parent committee established under section 9(a) is not required to comply with section 9(e). In this subsection, the term 'subgroup' includes any working group, task force, or other entity formed for the purpose of assisting the committee or any subcommittee of the committee in its work.".

(d) COMMITTEES CREATED UNDER CONTRACT.—Section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.) is amended in the matter following subparagraph (C) by adding at the end the following: "An advisory committee is considered to be established by an agency, agencies, or the President, if it is formed, created, or organized under contract, other transactional authority, cooperative agreement, grant, or otherwise at the request or direction of, an agency, agencies, or the President.".

(e) ADVISORY COMMITTEES CONTAINING SPECIAL GOVERNMENT EMPLOYEES.—Section 4 of the Federal Advisory Committee Act (5 U.S.C. App.) is further amended by adding at the end the following new subsection:

"(e) SPECIAL GOVERNMENT EMPLOYEES.—Committee members appointed as special government employees shall not be considered full-time or part-time officers or employees of the Federal Government for purposes of

determining the applicability of this Act under section 3(2).".

SEC. 4. INCREASING TRANSPARENCY OF ADVISORY COMMITTEES.

(a) INFORMATION REQUIREMENT.— Section 11 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended—

(1) by amending the section heading to read as follows:

"SEC. 11. DISCLOSURE OF INFORMATION.";

(2) by redesignating subsection (a) as subsection (d) and in that subsection—

(A) by inserting the following subsection heading: "AVAILABILITY OF PAPER COPIES OF TRANSCRIPTS.—"; and

(B) by inserting after "duplication," the following: "paper";

(3) by redesignating subsection (b) as subsection (e); and

(4) by inserting before subsection (d), as redesignated by paragraph (2), the following new subsections:

"(a) IN GENERAL.—With respect to each advisory committee, the head of the agency to which the advisory

committee reports shall make publicly available in accordance with subsection (b) the following information:

"(1) The charter of the advisory committee.

"(2) A description of the process used to establish and appoint the members of the advisory committee, including the following:

"(A) The process for identifying prospective members.

"(B) The process of selecting members for balance of viewpoints or expertise.

"(C) A justification of the need for representative members, if any.

"(3) A list of all current members, including, for each member, the following:

"(A) The name of any person or entity that nominated the member.

"(B) The reason the member was appointed to the committee.

"(C) Whether the member is designated as a special government employee or a representative.

"(D) In the case of a representative, the individuals or entity whose viewpoint the member represents.

"(E) Any conflict of interest relevant to the functions to be performed by the committee.

"(4) A list of all members designated as special government employees for whom written certifications were made under section 208(b) of title 18, United States Code, a summary description of the conflict necessitating the certification, and the reason for granting the certification.

"(5) A summary of the process used by the advisory committee for making decisions.

"(6) Transcripts or audio or video recordings of all meetings of the committee.

"(7) Any written determination by the President or the head of the agency to which the advisory committee reports, pursuant to section 10(d), to close a meeting or any portion of a meeting and the reasons for such determination.

"(8) Notices of future meetings of the committee.

"(9) Any additional information considered relevant by the head of the agency to which the advisory committee reports.

"(b) MANNER OF DISCLOSURE.—

"(1) Except as provided in paragraph (2), the head of an agency shall make the information re-

quired to be disclosed under this section available electronically on the official public internet site of the agency at least 15 calendar days before each meeting of an advisory committee. If the head of the agency determines that such timing is not practicable for any required information, he shall make the information available as soon as practicable but no later than 48 hours before the next meeting of the committee.

"(2) The head of an agency shall make available electronically, on the official public internet site of the agency, a transcript or audio or video recording of each advisory committee meeting not later than 7 calendar days after the meeting.

"(c) PROVISION OF INFORMATION BY ADMINISTRATOR OF GENERAL SERVICES.—The Administrator of General Services shall provide, on the official public internet site of the General Services Administration, electronic access to the information made available by each agency under this section.".

(b) CHARTER FILING.—Section 9(e) of the Federal Advisory Committee Act (5 U.S.C. App.), as redesignated by section 2, is amended by striking "with (1) the Administrator," and all that follows through ", or" and inserting "(1) with the Administrator and"

SEC. 5. COMPTROLLER GENERAL REVIEW AND REPORTS.

(a) REVIEW.—The Comptroller General of the United States shall review compliance by agencies with the Federal Advisory Committee Act, as amended by this Act, including whether agencies are appropriately appointing advisory committee members as either special government employees or representatives.

(b) REPORT.—The Comptroller General shall submit to the committees described in subsection (c) two reports on the results of the review, as follows:

(1) The first report shall be submitted not later than one year after the date of promulgation of regulations under section 2.

(2) The second report shall be submitted not later than five years after such date of promulgation of regulations.

(c) COMMITTEES.—The committees described in this subsection are the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate.

SEC. 6. DEFINITION.

Section 3 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by adding at the end the following new paragraph:

"(5) The term 'special Government employee' has the same meaning as in section 202(a) of title 18, United States Code.".

SEC. 7. EFFECTIVE DATE.

This Act shall take effect 30 days after the date of the enactment of this Act, except as otherwise provided in section 2(e).

Mr. HODES. Thank you very much.

Thank you, Mr. Chairman.

Mr. CLAY. Thank you, Mr. Hodes.

Ms. Nazzaro, GAO's 2004 report entitled, "Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance," states, "To be effective, advisory committees must be and, just as importantly, be perceived as being independent and balanced." In your professional opinion, why is it important that Federal advisory committees be perceived as being independent, and how does it impact a committee's operation when the public does not perceive it as being independent?

Ms. NAZZARO. I think at this point it is hard to determine what exactly has caused all the consternation with these advisory committees, but there does seem to be the issue over the perception that because there is not adequate transparency in the committee process and the makeup of the committees, how these committees are formulated and the roles that the individuals play, there certainly is this perception that the Government is doing something, as you referred to earlier, in a secretive fashion.

So we certainly believe that not only should these committees be made up of independent members and the committee's themselves be balanced, but there has to be that transparency aspect to assure the general public agrees and does not have a problem with the findings, and then the ultimate actions that either the agency or Congress or the President may take as a result of this input.

Mr. CLAY. GAO was asked to examine the extent to which existing guidance and policies and procedures for evaluating committee members for conflicts of interest and parts of you ensure independent members and balanced committees. In your opinion, do agencies have in place the systems required to effectively screen potential committee members for conflict of interest?

Ms. NAZZARO. I would say that goes back to one of our primary concerns with the whole process, and that is the concern over the appropriate use of representative appointments, because representative appointments do not get the same kind of conflict of interest screening that the SGE appointments get, and even in the limited analysis that we did to followup on our recommendations this year, we still continue to see what we think is inappropriate use of those appointments, whether they should be representative or they should be SGE.

For example, we saw a number of committees, including the National Organic Standards Board, the Grain Inspection Advisory Committee, the Fruit and Vegetable Industry Advisory Committee—these committees, when they clarified why the individuals were representatives rather than SGE, they identified that they were representing the advisory committee, itself, strongly suggesting that the SGE appointments would have been more appropriate.

Mr. CLAY. Can you tell the subcommittee some of the affirmative steps agencies took to incorporate GAO's recommendations into their policy and procedures for Federal advisory committees?

Ms. NAZZARO. Both GSA and the Office of Government Ethics did take a number of steps or actions to address our recommendations, including additional training, improving the quality of the training that they provide to the committees, and the advice. They have

also, particularly in the case of GSA, done a lot to improve the data base, the FACA data base, if you will, which provides a lot more information to the general public on the makeup of these committees. But our concern is that, despite the guidance that these agencies have provided, the agencies in some cases seem to be able to just ignore that guidance because it does not have the statute behind it that would force the compliance.

Mr. CLAY. Sure. I can imagine that can be disheartening for someone in your position that makes the recommendation and then at least implies that they should follow the spirit of the law.

Thank you for your response.

Mr. Shapiro, an earlier draft of the bill I introduced today included language requiring each agency to provide an opportunity for the public to comment on the members the agency plans to appoint to an advisory committee, and we heard some concerns that this requirement could be embarrassing to potential advisory committee members if negative comments are submitted, and that the fear of that happening could discourage potential committee members from serving, especially if the comments could be made publicly available.

Given these concerns, we did not include this language in the bill as introduced, but I am interested in getting feedback on this proposal, as it could be added later as an amendment if it is worth pursuing.

Do any of you on this panel have a view on whether it would be useful to provide notice and comment on appointments, and, if so, would that information be kept confidential or would it be publicly available under FACA? I will let you start, Mr. Shapiro, and then we will go to Wilson and back down the line.

Mr. SHAPIRO. Thank you, Mr. Chairman.

There is somewhat of a track record on this, since the National Academy of Sciences is required by the legislation to announce in advance committee members. Now, it is not quite the same because there isn't a public comment period, but the National Academy certainly hears from people if they feel somehow that a committee appointment is inappropriate, and I think that was worked very well over there, and anyway we could find out by asking them. So there is some evidence that this could work.

Second, as to whether it could be personally embarrassing to a person, I suppose that is always possible. The public could file any kind of comment. But the comments really go only to two things, neither of which should be personally embarrassing to anyone.

First, the comments would go to the agency about the balance of the committee, so the point here is if the committee is imbalanced because it doesn't represent a full spectrum of views, then I would expect the public to comment as such. This is no fault of anyone who is being considered for a committee; it is the fault of the agency for not balancing the committee, so no one should take umbrage at that.

And then, finally, as for the conflict of interest, again one of the issues is whether the agency is inappropriately using representatives where it should use special Government officials. We could have public comment on that. Again, I don't see why that is embar-

rassing to the individual, except they are caught up in something not of their doing, so that is relatively neutral.

And then, finally, I suppose the most possibly embarrassing thing is conflict of interest, itself, but the statutes are clear and you are not supposed to be on an advisory committee if you have conflict of interest. You do have to disclose the data about your conflict. That is public information.

So once again I am not quite sure that a public comment on that kind of information ought to discourage people, because they are presently presenting conflict of interest information.

Mr. CLAY. I look forward to working with you on that provision.

Mr. Wilson.

Mr. WILSON. In large part I would agree with Mr. Shapiro. Generally, from potential committee members we get more push-back from the financial disclosure statements. Some committee members would just as soon not sit on a committee because they have to go through that process. The Department of Defense, in the interest of transparency and accountability and communication, only has special Government employees from a committee member standpoint. We don't use representatives. We only have two committees directed by Congress—Missouri River, North Dakota, and South Dakota—that actually have representative members, and that is from the Indian nations of both those States.

So the only thing I could think of is perhaps if a committee member, if it was public knowledge that this potential committee member had lack of credentials, but, you know, that could happen with anyone.

Mr. CLAY. Thank you for that.

Ms. Nazzaro, any comment on that?

Ms. NAZZARO. I would generally agree with Mr. Shapiro's comments. As far as experience, in addition to the academy, National Academies, we also mention FDA in our report has a general practice of getting this kind of information up front, making it clear to their members that they need to provide this type of information and providing it.

Mr. CLAY. Thank you. How about you, Mr. Flaak? Any position?

Mr. FLAAK. Yes. Actually, I do, Mr. Chairman. While we don't necessarily know which agencies are doing what in this regard specifically, unless we are talking with them directly, in my prior life at EPA I was a designated Federal officer and managed a program over there for almost 20 years running advisory committees, and we used only special Government employees in our program.

We instituted a process much like the one that Sid mentioned with the Academy of Sciences. Any time we formed a new panel, we put a notice up on the Web site we were recruiting people. People could submit their names. We used that as a starting point and eventually we got down to a list of 20 or 25 names which were published on the Web site for public comment as to whether or not these folks were appropriate for the committee. We weren't asking whether or not they had conflicts of interest, just opening it up for general commentary.

Now, for the most part we didn't receive any comments. Occasionally somebody said, Well, did you know this guy did this or did that.

We used that process in concert with all of the reviews we did—conflict of interest, disclosure forms, background checks, looking at information that they may have published previously, and general expertise to determine if they were appropriate for the committee, and eventually published the final list.

So yes, the system can work fairly well.

Mr. CLAY. OK.

Mr. FLAAK. But I can tell you it is very onerous and time consuming for the staff. It does take a lot of work to do that.

Mr. CLAY. Thank you. Thank you for your response.

Mr. Hodes, your second round of questioning?

Mr. HODES. Thank you, Mr. Chairman. I will try to be brief, knowing we have to vote.

Recently it was reported that the EPA removed a chemist, Dr. Deborah Rice, the chair of an advisory committee reviewing draft health assessment for a type of flame retardant. The removal of the chair of the committee followed a letter from the American Chemistry Council that raised concerns about her impartiality based on testimony she gave to a State legislature in Maine on the health dangers posed by the flame retardant.

There have been concerns raised about the removal of Dr. Rice while other EPA advisory committee members have been permitted to serve, despite having ties to the chemical industry.

In addition to the questions it raises about conflict of interest, it raises for me the questions of removal of a member or chair of an advisory committee, and perhaps, Mr. Flaak, you could tell us whether or not FACA currently has practices and procedures for the removal of members of these committees.

Mr. FLAAK. It does not.

Mr. HODES. None?

Mr. FLAAK. No. If agencies desire to appoint or not appoint individuals or take members off their committees, that is up to the agencies.

Mr. HODES. Given the concerns raised about the potential influence of outside parties in the removal process that have been raised by this case and perhaps others, should there be practices and procedures, do you think, for removal of members of advisory committees of some kind?

Mr. FLAAK. Generically for the Government and FACA, I think the agencies are better served by having a good transparent process by which they select the people in the first place.

Mr. HODES. So you think that a transparent selection process that is open, accountable, and deals with the conflicts of interest questions——

Mr. FLAAK. Absolutely.

Mr. HODES [continuing]. Is sufficient, and we don't need to do anything at the back end, so to speak?

Mr. FLAAK. I don't think we do. No.

Mr. HODES. Anybody else on the panel have thoughts?

Mr. SHAPIRO. I agree with that. That particular example is sort of a worst of all worlds. If I have this correct, that was a private contractor, so this committee wasn't under the legislation to start with. The issue of whether or not Dr. Rice had a conflict—which it doesn't appear she did—or whether the committee was unbal-

anced is best decided on the front end. Even if she had a particular point of view on the scientific merits that doesn't necessarily disqualify her; it goes to whether or not the whole committee is balanced. So removing one person after the fact may, in fact, make the committee unbalanced at that point. There is no way of knowing.

Mr. HODES. Mr. Wilson.

Mr. WILSON. I concur with the previous two comments. It is much better off to have a full and transparent vetting process of the committee, you know, prospective committee members in advance than it is to go through the opposite and take care of it at the opposite end.

Mr. HODES. Terrific. Thank you very much.

That is all I have, Mr. Chairman.

Mr. CLAY. Thank you, Mr. Hodes.

Let me thank the entire panel for their testimony today. From your testimony, it is apparent that the Federal Advisory Committee Act, after 35 years, is due for some revisions. We will certainly be working on that out of this subcommittee and the full committee, and I look forward to working with all of you on a good product.

That concludes this hearing. The committee is adjourned.

[Whereupon, at 3:05 p.m., the subcommittee was adjourned.]