CHENEY V. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA[*]

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In 1972, concerned that the committees advising the executive branch were a waste of resources and a vehicle for excessive special interest influence, Congress attempted to control their use by passing the Federal Advisory Committee Act ("FACA").[1] FACA imposes strict transparency requirements on all advisory committees except those composed solely of full-time federal employees.[2] FACA was an aggressive assertion of congressional power, and since its passage courts have weakened the Act in order to respect the constitutional separation of powers.[3] Last Term, in *Cheney v. United States District Court for the District of Columbia* (to be argued Apr. 27, 2004), the Supreme Court was asked to limit FACA further by rejecting the "de facto membership doctrine," which provides that a committee whose official members are all federal employees is subject to FACA if private citizens participate to the extent that they are "functionally indistinguishable" from formal members.[4] The Court may decide the case on procedural grounds or limit its holding to groups directly advising the President. If, however, the Court does reject the de facto membership doctrine altogether, its decision will significantly undermine an important check on special interest influence on executive branch decision-making in general and regarding environmental regulation in particular.

Background

In January of 2001, President George W. Bush created the National Energy Policy Development Group ("NEPDG").[5] The group, which was chaired by Vice President Richard Cheney and officially included only federal employees, was asked to make recommendations for a "dependable,

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[1] 5 U.S.C. app. §§ 1–15 (2000). *See* Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 Yale J. on Reg. 451, 460–64 (1997) (describing the concerns motivating FACA's passage).

[2] 5 U.S.C. app. §§ 1–15 (2000).

[3] *See* Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 466–67 (1989) (rejecting a plain-meaning interpretation of FACA to avoid a conflict with the President's power to make judicial nominations); Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898, 910–11 (D.C. Cir. 1993) ("*AAPS*") (widening an exception to FACA to avoid intefering with the President's ability to obtain confidential advice).

[4] *See AAPS*, 997 F.2d at 915.

[5] NEPDG, National Energy Policy: Report of the National Energy Policy Development Group (2001), *available at* http://www.whitehouse.gov/energy/National-Energy-Policy.pdf.

affordable and environmentally sound" energy supply.[6] NEPDG submitted its final report, the National Energy Plan, on May 16, 2001.[7] Congress failed to pass the highest profile product of the plan, President Bush's energy bill.[8] Nevertheless, NEPDG's finding that over-regulation has caused an "energy crisis" in the U.S.[9] has been the basis for important changes in energy and environmental policy.[10]

During its operation, and especially after the release of its findings, NEPDG was criticized for reaching its conclusions too quickly and operating in secret.[11] Critics also claimed that energy industry executives and lobbyists, such as Kenneth Lay (then the CEO of Enron) and Haley Barbour (an industry lobbyist and former chairman of the Republican National Committee), participated in NEPDG meetings.[12] Shortly after NEPDG delivered its final report, Judicial Watch and the Sierra Club filed suit in federal district court alleging that this participation by private citizens rendered NEPDG subject to FACA under the de facto membership doctrine and seeking to enforce the Act's transparency requirements.[13]

FACA's regulations are designed to ensure that advisory committees are balanced, independent and transparent.[14] Legislation or administrative orders establishing advisory committees must "require the membership of the committee to be fairly balanced in terms of points of view," and must prevent inappropriate influence by the executive branch or special interests.[15] FACA also requires that committee meetings be open to the public[16] and that

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[6] *Id*. at viii.

[7] *Id*. at v.

[8] *See* Carl Hulse, *A Final Push in Congress: Energy Bill*, N.Y. TIMES, Nov. 26, 2003, at A17.

[9] NEPDG, *supra* note 5, at xi-xii; *see also* Joseph Kahn, *The Energy Plan: The Details*, N.Y. TIMES, May 18, 2001, at A15 (stating that the NEPDG report calls for a "regulatory rollback").

[10] For example, EPA dramatically relaxed its "New Source Review" rules, which require that existing power plants be brought into compliance with Clean Air Act standards whenever the plants are substantially upgraded. *See* Bruce Barcott, *Changing All the Rules*, N.Y. TIMES, Apr. 4, 2004 (Magazine) at 38.

[11] *See, e.g.*, Mike Allen & Dana Milbank, *Cheney's Role Offers Strengths and Liabilities*, WASH. POST, May 17, 2001, at A1.

[12] *See, e.g.*, Eric Pianin & Dan Morgan, *Oil Executives Lobbied on Drilling*, WASH. POST, Feb. 27, 2002, at A1. After an extensive study, the General Accounting Office concluded that the members and support staff of NEPDG met with and received written recommendations from "non-federal energy stakeholders," including numerous industry representatives. GENERAL ACCOUNTING OFFICE, PUB. NO. 03-894, ENERGY TASK FORCE: PROCESS USED TO UPDATE THE NATIONAL ENERGY POLICY 15–18 (2003).

[13] Judicial Watch filed its suit in the United States District Court for the District of Columbia on July 16, 2001. Sierra Club filed a similar suit in the United States District Court for the Northern District of California on January 25, 2002. The Sierra Club's suit was transferred to the District of Columbia and consolidated with the Judicial Watch suit. *See* Judicial Watch v. NEPDG, 219 F. Supp. 2d 20, 25–27 (D.D.C. 2002). The defendants in the consolidated suit were NEPDG, the Vice President, NEPDG's other official members, and several private citizens who were allegedly de facto members. *Id.*

[14] 5 U.S.C. app. §§ 1–15 (2004).

[15] *Id*. § 5.

[16] Meetings attended by the President or by agency heads may be exempted from the

all documents used or produced by the committee be available to anyone upon request.[17]

The de facto membership doctrine at issue in *Cheney* is a judicial creation. FACA exempts "any committee which is composed wholly of full-time officers or employees of the federal government," but the statute provides no guidance on the meaning of "composed."[18] The D.C. Circuit addressed this issue in *Association of American Physicians and Surgeons, Inc. v. Clinton* ("*AAPS*"), a suit alleging that President Clinton's Task Force on National Health Care Reform was subject to FACA.[19] In remanding the case for further discovery to determine whether the participation of private consultants in the Task Force's subcommittees rendered those subgroups subject to FACA, the court articulated the de facto membership doctrine: "a consultant may still be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members."[20]

Judicial Watch and the Sierra Club allege that the participation of lobbyists in NEPDG was sufficient to render them de facto members. Their lawsuit seeks an order compelling production of NEPDG's meeting minutes, reports and other records.[21] The Vice President filed a motion to dismiss the suit as an unconstitutional violation of the separation of powers, but the district court denied the motion on the grounds that it was too early in the litigation to resolve a constitutional issue.[22]

The plaintiffs submitted a series of interrogatories seeking to determine the extent to which private citizens participated in the meetings of NEPDG and its subgroups.[23] All defendants except the Vice President complied with the district court's discovery orders.[24] The Vice President sought a protective order on the basis that compelled discovery would itself violate the separation of powers.[25] The district court denied the protective order, and the Vice President appealed this decision to the Court of Appeals for the District of Columbia. The D.C. Circuit rejected the appeal on procedural grounds.[26]

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notice requirement and the President may close a meeting for reasons of National Security. *Id*. § 10.

[17] *Id*. § 5.

[18] *Id*. § 3.

[19] 997 F.2d 898 (D.C. Cir. 1993)

[20] *Id*. at 915.

[21] *See In re* Cheney, 334 F.3d 1096, 1099–1100 (D.C. Cir. 2003).

[22] *Id*.

[23] *Id*. at 1105–06. For example, the plaintiffs requested the names "of all Task Force staff, personnel, consultants, employees and all other persons who participated, in any manner, in the activities of the Task Force of the preparation of the Report." *Id*.

[24] *Id*. at 1100.

[25] *Id*.

[26] *See id*. at 1109. The Vice President filed a petition for a writ of mandamus and an interlocutory appeal. The court found that it lacked jurisdiction over the appeal and that the Vice President had failed to justify the "extraordinary" remedy of mandamus relief. The Vice President could comply with the discovery orders while asserting specific claims of execu-

The Vice President filed a petition for a writ of certiorari with the Supreme Court on September 30, 2003.[27] The petition argued that the separation of powers issues raised by the suit could not wait to be adjudicated until after a final decision because the discovery itself was "at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA."[28] The petition also cited Judge Randolph's strongly worded dissent from the Circuit Court opinion, which argued that "as applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality. This case pushes it over."[29] Certiorari was granted on December 15, 2003, with argument scheduled for April 27, 2004, and a decision expected after this journal goes to print.[30]

In his brief, the Vice President urged the Court to reject the de facto membership doctrine on both statutory and constitutional grounds.[31] His first argument was that the de facto membership doctrine from *AAPS* was incorrect as a matter of statutory interpretation. The Vice President claimed that Congress intended to limit the encroachment of FACA on the executive branch by allowing the President to determine whether or not a group would be subject to the Act.[32] FACA specifically exempts committees consisting only of employees of the federal government,[33] and prohibits the creation of FACA-governed advisory committees unless authorized "by statute or by the President."[34] The Vice President argued that these two provisions demonstrate Congressional intent to allow the President to determine whether a particular group will fall within FACA's scope.[35] The de facto membership doctrine eliminates this discretion, since a group chartered with only federal employees as members can "become" an advisory committee subject to FACA because of the subsequent participation of private citizens. The Vice President also argued that the de facto mem-

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tive privilege over any sensitive documents. The constitutional issues would then be ripe for adjudication by the District Court in the course of its supervision of discovery. *Id*.

[27] Petition for a Writ of Certiorari, Cheney v. United States Dist. Court for the Dist. of Columbia, 124 S. Ct. 958 (2003) (No. 03-475), *available at* 2003 WL 22669130.

[28] *Id*. at *7.

[29] *Id.* at *7–*8 (quoting *In re* Cheney, 334 F.3d at 1113 (Randolph, J., dissenting)).

[30] *See Cheney*, 124 S. Ct. 958 (No. 03-475).

[31] *See* Brief for the Petitioners at 38–39, *Cheney*, 124 S. Ct. 958 (2004) (No. 03-475), *available at* 2004 WL 250239 [hereinafter Brief for the Petitioners]. The brief also addressed the procedural issues that were the basis of the Circuit Court's decision, arguing that the case is not an ordinary discovery dispute because the discovery requested by the plaintiffs in order to determine whether NEPDG is subject to FACA (disclosure of the attendance at NEPDG meetings and the participation of each person present) is substantially the same as the remedy they seek in the event that FACA applies (publication of a list of attendees and minutes as well as any reports used or issued by NEPDG). Because discovery itself would be a constitutional harm, the brief concluded that it is appropriate for the Court to intervene at the discovery stage. *See id*.

[32] *Id*. at 15.

[33] 5 U.S.C. app. § 3 (2000).

[34] *Id*. § 9.

[35] Brief for the Petitioners, *supra* note 31, at 18.

bership doctrine effectively repeals the statutory exemption for committees composed solely of federal employees because the determination of whether or not an advisory committee is subject to FACA turns on a "formless, post-hoc judicial inquiry" which can be triggered by a mere allegation of participation by private citizens.[36]

Second, the Vice President urged the Court to reject the de facto membership doctrine as a violation of the separation of powers. The Constitution gives the President the authority to "give Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient" (the "Recommendation Clause").[37] The President is also empowered to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to their respective Offices" (the "Opinion Clause").[38] Implicit in these two powers, argued the Vice President, is the authority to consult with senior members of the executive branch in the formation of policy, and to involve the Vice President in the process. Moreover, since these powers are specifically given to the President, he should be able to solicit advice free from congressional interference.[39] The application of FACA to committees such as NEPDG would be an unconstitutional interference with these powers for at least two reasons. First, FACA's transparency requirements might prevent the President from receiving candid opinions from committee members.[40] Second, the Act's requirement that a committee be "fairly balanced" would be a substantive encroachment on the President's ability to select his advisors and determine the manner in which they meet.[41]

On this basis, the Vice President argued that the Court should reject the de facto membership doctrine because statutes should be interpreted to avoid constitutional problems. In a prior FACA case, *Public Citizen v. Dep't of Justice*, the court concluded that FACA did not apply to the President's consultations with the American Bar Association regarding judicial nominations because such application would have been an unconstitutional interference with his power to make judicial appointments.[42] The Vice President urged the Court to follow the precedent set by *Public Citizen* and reject the de facto membership doctrine, at least as applied to Presidential advisory committees.[43] If, however, the Court finds that the de facto member interpretation of the statute is unavoidable, then the Vice President argued that the Court should find FACA to be unconstitutional as applied to committees directly advising the President.[44]

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[36] *Id.*
[37] U.S. CONST. art. II, § 3.
[38] U.S. CONST. art. II, § 2.
[39] Brief for the Petitioners, *supra* note 31, at 30.
[40] *Id.* at 32.
[41] *Id.* at 34.
[42] *Id.* at 35 (citing Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 466–67 (1989)).
[43] Brief for the Petitioners, *supra* note 31, at 37.
[44] *Id.* at 38. This was also the course urged by three concurring justices in *Public Citi-*

Judicial Watch and the Sierra Club disputed the Vice President's statutory and constitutional arguments against the de facto membership doctrine. First, as a matter of pure statutory interpretation, the Sierra Club noted that the exemption applies to groups "composed" of federal employees and argues that the plain meaning of the word refers to actual composition rather than formal membership of the committee.[45] The Sierra Club also argued that the Vice President's interpretation of FACA would render the law toothless: "if agencies know that no court can go behind the formal designation of a committee's membership to determine even whether FACA applies, that will provide a huge opportunity to render FACA almost meaningless."[46]

The respondents also disputed the Vice President's constitutional analysis. Specifically, they argued that the Vice President mischaracterized the test for a violation of the separation of powers when he asserted that any action of Congress which infringes on an enumerated Presidential power is forbidden. Judicial Watch noted that in the past the Court has used a balancing test to decide separation of powers questions, weighing the interests of each branch to determine which one must yield.[47]

The respondents argued that no Presidential powers are infringed by the application of FACA, since the President remains free to solicit the opinions of the members of the executive branch through advisory committees that are explicitly exempt from FACA and to solicit advice from private citizens through less formal channels.[48] Moreover, even if the powers granted by the Opinion and Recommendation Clauses are hindered by FACA, the plaintiffs argued that they are relatively unimportant powers. Unlike the exclusive power to appoint judges, which led the court to narrow its interpretation of FACA out of respect for presidential power in *Public Citizen*, the Opinion and Recommendation Clauses grant shared powers.[49] Anyone can recommend legislation to Congress, and Congress's investigative power entitles it to demand information from executive branch members.[50] In contrast, the respondents argued that FACA serves impor-

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zen, who would have held that the President "utilized" the ABA under FACA but that this application of FACA was unconstitutional. *See* 491 U.S. at 482.

[45] Brief of the Respondent Sierra Club at 28, *Cheney*, 124 S.Ct. 958 (2004) (No. 03-475), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_03/03-475Resp.pdf [hereinafter Brief for Sierra Club].

[46] *Id.* at 30.

[47] Brief in Opposition of Respondent Judicial Watch, Inc. at 40–41, *Cheney*, 124 S.Ct. 958 (2003) (No. 03-475), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_03/03-475respJW.pdf [hereinafter Brief for Judicial Watch]. The brief quoted from *Nixon v. Administrator of General Services*, which held that a congressional act which hinders the performance of the Executive Branch's constitutionally assigned functions can be allowed if "the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.* at 43 (citing 433 U.S. 425, 443 (1977)).

[48] Brief for Judicial Watch, *supra* note 47, at 47.

[49] *Id.* at 46.

[50] *Id.* at 45.

tant public and congressional interests which outweigh any minor infringement on executive powers. Specifically, FACA serves to inform the public and to restore "confidence in the integrity of governmental decision-making."[51]

Finally, the respondents strongly urged the Court to disregard these constitutional arguments as premature and instead decide the case on procedural grounds. They emphasized that any discovery would be "tightly reined" by the district court,[52] especially since the D.C. Circuit further narrowed the scope of permissible discovery.[53] None of the discovery requests would personally involve the Vice President or the President, and any sensitive material could be redacted. Moreover, if the Vice President had a specific objection to a particular request, he could make a formal claim of privilege.[54] Therefore, the respondents concluded, separation of powers issues are not inherent to discovery and the Court should refrain from deciding constitutional issues that are purely speculative.

Analysis

The Court may decide *Cheney* on purely procedural grounds, as Judicial Watch and the Sierra Club argued it must. Such a decision, however, will only postpone the evaluation of the statutory and constitutional arguments raised by the Vice President since he will likely raise the same issues again if he loses on remand. Even if the issue does not arise later in this case, it will be addressed the next time a suit is brought on the basis of the de facto membership doctrine. Whenever the issue is decided, the fate of the de facto membership doctrine has significant implications for the effectiveness of FACA and, since FACA committees play a substantial role in environmental policymaking, for the future of environmental regulation.

One of the primary motivations for the passage of FACA was the desire to limit industry influence on environmental regulation. For example, President Nixon's National Industrial Pollution Control Council ("NIPCC") shaped federal regulation of pollution but included only industry representatives, to the exclusion of environmental and consumer groups.[55] FACA's transparency, balance and anti-"undue influence" requirements were a response to this and other examples of egregious special-interest capture of advisory committees.[56]

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[51] *Id*. at 48.
[52] *Id*. at 7.
[53] *See In re* Cheney, 334 F.3d 1096, 1105–06 (D.C. Cir. 2003).
[54] *Id*. at 1106.
[55] Laurie Aurelia, *The Federal Advisory Committee Act and Its Failure to Work Effectively in the Environmental Context*, 23 B.C. Envtl. Aff. L. Rev. 87, 94–95 (1995).
[56] *See* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 73–75 (1994).

Advisory committees, however, are not merely a vehicle for special interests that environmentalists should seek to restrict as much as possible. They also play a valuable role in policymaking, especially in the environmental arena. First, by allowing regulatory agencies to bring together experts from government, interest groups, academia and the private sector, advisory committees are a cost-effective means to ensure that regulatory decisions are made on the basis of the best science.[57] EPA creates committees based on particular policy areas or issues to obtain scientific or other expert advice.[58] Second, an advisory committee can serve as a forum for non-expert stakeholders to convey their views and interests to regulatory decision-makers. This input increases both the quality and the public legitimacy of regulatory actions.[59] The Department of the Interior establishes locally focused committees to bring together a variety of stakeholders and perspectives on the issues facing a particular state, ecosystem or national park.[60]

FACA-regulated committees like these continue to play an important role in environmental policy. In 2004 there were 971 advisory committees chartered under FACA.[61] Of the total, 236, or 24%, are associated with agencies that have a significant influence on environmental issues.[62] In order to understand the impact of FACA on environmental regulation, however, it is important to recognize that the NEPDG is not a typical advisory committee. Of those 236 committees, only 19, or 8%, are National Policy Issue Advisory Boards making high-level policy recommendations.[63] Non-Scientific Program Advisory Boards such as the Alaska Resource Advisory Council, which give stakeholder input on localized or specialized issues, are much more common, totaling 118 committees or 50%.[64] Of the remaining

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[57] *See* Aurelia, *supra* note 55, at 91.

[58] For example, the Clean Air Scientific Advisory Committee provides "advice, information and recommendations on the scientific and technical aspects of issues related to air quality criteria and national ambient air quality standards." Its seven members are all scientists associated with universities or research institutions. General Services Administration, FACA Database, *available at* http://www.fido.gov/facadatabase/public.asp (last visited Apr. 26, 2004) [hereinafter FACA Database].

[59] *See* Thomas C. Beierle & Rebecca J. Long, The Federal Advisory Committee Act and Public Participation in Environmental Policy 5–7 (Resources for the Future, Discussion Paper No. 99-17, 1999), *available at* http://www.rff.org/rff/Documents/RFF-DP-99-50.pdf (last visited Apr. 26, 2004).

[60] For example, the Alaska Resource Advisory Council's official purpose is to give the Bureau of Land Management "access to a wide variety of stakeholders/customers to learn their issues and concerns and incorporate these into agency decisions." ARAC has nineteen members: four representatives of environmental groups, four from local business, three from the energy industry, three from Native American groups, three from the public at large, and two elected officials. FACA Database, *supra* note 58.

[61] *Id*.

[62] The Department of the Interior has 116 chartered committees; the Department of Agriculture has 65; the Environmental Protection Agency has 24, and the Department of Energy has 21. *Id*.

[63] *Id*.

[64] *Id*.

42%, nearly half, or 46 committees, are Scientific Technical Program Advisory Boards like the Clean Air Science Advisory Committee, which provide expert input.[65] While groups such as NEPDG garner the most attention, these lower-profile advisory committees likely have a larger impact on environmental regulation.

FACA's impact on the use of these groups has been the subject of conflicting criticism: one set of critics claims that FACA is toothless while the other argues that it is too strict. The first criticism of FACA is that its requirements of balance and transparency are routinely ignored with impunity because the Act is largely unenforceable.[66] Federal courts have repeatedly restricted the application of the law.[67] Even when courts have found violations of FACA they have generally refused to grant anything other than declaratory relief.[68]

Others, however, argue that FACA is too strict because its requirements "chill" collaboration between federal agencies, state and local officials and environmental activists.[69] On this view, agencies avoid involving stakeholders in their decision-making for fear of triggering FACA's requirements. Critics have dubbed this phenomenon "FACA-phobia."[70] For example, FACA has been an obstacle to the formation of ecosystem management groups. Ecosystem management, adopted by federal land management agencies in the early 1990s, is based on the premise that land managers should manage complete ecosystems rather than discrete elements of an ecosystem.[71] Ecosystem management often involves the use of groups of government officials, environmental advocates and industry representatives to gather input on the implications of regulatory choices.[72] FACA, however, has hampered the formation of ecosystem management groups for two reasons. First, citizen and environmental groups are deterred from engaging with federal agencies because in order to do so they must first

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[65] *Id.*

[66] *See* Aurelia, *supra* note 55, at 116.

[67] For example, in *Natural Resources Defense Council v. Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986), the court found that a panel of six scientists asked by the Department of Energy to study the safety of a nuclear reactor was not an advisory committee even though it fit the statutory definition because it posed none of the dangers that FACA sought to avoid. *Id*.

[68] *Cheney* is an atypical FACA suit because it seeks only public disclosure of NEPDG's records. Most previous suits have sought to prevent the government from acting on the basis of recommendations from committees that failed to comply with FACA. *See, e.g.*, N.W. Forest Res. Council v. Espy, 846 F. Supp. 1009, 1016 (D.D.C. 1994) (holding that, although an interagency working group charged with shaping a comprehensive forest management policy was subject to FACA and had not complied with its requirements, only declaratory relief was appropriate). One court has enforced FACA through injunctive relief, but this is the exception. *See* Alabama-Tombigbee Rivers Coalition v. U.S. Fish & Wildlife Serv., 1993 U.S. Dist. LEXIS 20322 (N.D. Ala.).

[69] *See* BEIERLE & LONG, *supra* note 59, at 9–17.

[70] *See id.* at 11.

[71] *See* Sheila Lynch, *The Federal Advisory Committee Act: An Obstacle to Ecosystem Management by Federal Agencies?*, 71 WASH. L. REV. 431, 433–34 (1996).

[72] *See id*. at 434–36.

be chartered under FACA, a lengthy process which involves yielding some control over the group to the government.[73] Second, federal agencies are deterred from interacting with such groups on an ad hoc basis for fear of running afoul of FACA's requirements.[74] There is also reason to believe that such a chilling effect is more widespread. In the most recent General Accounting Office study of the effect of FACA, eight of the nineteen surveyed federal agencies reported that the risk of litigation inhibited their ability to get input from groups and individuals outside of FACA.[75]

Viewed in this context, a decision in *Cheney* rejecting the de facto membership doctrine could have mixed implications for environmental policymaking. If the Court rejects the de facto membership doctrine on the basis of separation of powers, the impact of the decision will likely be narrow. The Vice President's separation of powers arguments hinge on the close connection between NEPDG and the President.[76] The Opinion and Recommendation Clauses empower the President to consult with his advisers and gather information, but advisory committees created by federal agencies are likely too remote from the President to fall within the scope of these constitutional powers.[77] Therefore, a rejection of the de facto membership doctrine on constitutional grounds would probably be limited to Presidential advisory committees, defined as those which are created to advise the President.[78] While this holding would have consequences for high-profile groups like NEPDG, such groups are actually a small portion of the advisory committees governed by FACA.[79]

If the Court, however, agrees with the Vice President's statutory argument and concludes that FACA should be interpreted so that the official membership of an advisory committee determines whether or not the Act applies, the holding will apply to advisory committees established not only by the President, but also by Congress and administrative agencies. Such a wholesale rejection of the doctrine would severely undermine FACA's role as a restraint on special interests. Most obviously, as the Sierra Club argued, the rejection of the de facto membership doctrine would allow an agency to evade FACA's requirements simply by creating a group whose

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[73] *See* BEIERLE & LONG, *supra* note 59, at 9–10. In one case, it took a group five years to obtain a FACA charter and begin giving input to the Forest Service. *Id*.

[74] *See id*. at 11–12.

[75] GENERAL ACCOUNTING OFFICE, PUB. NO. 98-147, FEDERAL ADVISORY COMMITTEE ACT: VIEWS OF COMMITTEE MEMBERS AND AGENCIES ON FEDERAL ADVISORY COMMITTEE ISSUES 16 (1998).

[76] Brief of Petitioners, *supra* note 31, at 30–34.

[77] *See, e.g.*, *AAPS*, 997 F.2d at 910–11 (noting that the President's executive powers likely extend to protect the confidentiality of groups "directly reporting and advising the President").

[78] 5 U.S.C. app. § 3 (2000).

[79] Of the 971 FACA chartered committees, only forty-two are Presidential advisory committees. Of those, only five have mandates that clearly relate to environmental issues. FACA Database, *supra* note 58.

official members were all federal employees.[80] Non-federal employees could then participate without triggering FACA and courts would be powerless to intervene. Of course, there is no reason to think that federal agencies would drastically change their handling of advisory committees overnight—FACA is rarely enforced even with the de facto member doctrine and yet most agencies continue to comply with it anyway. Agencies which are loath to comply with the onerous requirements of FACA, however, would be able to collaborate with outside consultants and industry representatives without fear of FACA litigation. Combined with FACA's existing weaknesses, this loophole would seriously undermine FACA's ability to regulate the influence of special interests on administrative decisions.

Some critics of FACA would likely argue that the rejection of the de facto membership doctrine could actually be beneficial because it would reduce the chilling effect on stakeholder participation that results from the current ambiguity in the law. Without the de facto membership doctrine, agencies would also be able to consult with private citizens and environmental groups without fear of triggering FACA-based litigation. To the extent that the ability to solicit expert opinions and stakeholder input improves the quality of environmental regulation, a weaker FACA would arguably improve regulation by making it easier to involve private citizens in agency processes.

But any benefit from increased stakeholder participation would be more than outweighed by the potential loss of transparency and balance caused by a weakened FACA. Like the Freedom of Information Act and other similar statutes, FACA creates bureaucratic burdens in order to ensure open government. When applied to an administration that seeks input from consumer groups, local governments and environmental interests, FACA inhibits the effectiveness of environmental regulation by making such consultations more cumbersome and therefore less likely to occur. When applied, however, to an administration that charters committees at risk of capture by industry groups and other special interests (for example, the pre-FACA National Industrial Pollution Control Council), FACA operates as an important check on the ability of one point of view to dominate the process. FACA's requirements make it more difficult for federal agencies to consult nongovernmental actors, but also ensure that the consultations that do occur are balanced and open. The de facto membership doctrine involves a similar trade-off: if federal agencies could be trusted to keep their interactions with interest groups open and fair there would be no need for the doctrine, but the premise behind FACA (and the lesson from pre-FACA advisory committees) is that regulation is necessary to prevent abuse and special interest capture. It would be misguided for environmental groups to conclude that benefits from a weaker FACA are worth the loss of an important check on governmental decision-making.

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[80] Brief for Sierra Club, *supra* note 45, at 43.