

**Listening to the Eighty-five Percent:**  
**The Federal Advisory Committee Act and Communication between the Private**  
**Sector and the Department of Homeland Security**

**IMPORTANT UPDATE, June 2006:** This paper was written during the summer of 2005, when the Department of Homeland Security had not yet invoked the Federal Advisory Committee Act (FACA) exemption authorized by Congress in the Homeland Security Act of 2002. FACA was one of the main reasons for the private sector’s reluctance to engage in candid dialogues with DHS. However, in March 2006, this paper’s conclusion became out of date when DHS Secretary Chertoff created the Critical Infrastructure Partnership Advisory Council (CIPAC) as a FACA-exempt committee. Although this paper’s conclusion is now moot, the reasoning that supports the conclusion remains a legitimate justification for the creation and continued operation a FACA-exempt committee. DHS recognized many of the problems illustrated by this paper in its notice of the creation of CIPAC. 71 Fed. Reg. 14930 (March 14, 2006). In this notice, DHS also indicated its intent to continue the “spirit” of FACA. Rather than simply issuing a blanket exemption, Secretary Chertoff included language showing DHS’s plan to share information, within reason, through various methods, such as providing notices of CIPAC meetings, whenever possible, and establishing a public website. By taking this approach, DHS attempted to strike a balance between the benefits of government transparency and the homeland security and private sector needs for confidentiality and discretion.

**I. Introduction**

The private sector owns and operates approximately 85 percent of critical infrastructure in the United States.<sup>1</sup> With that in mind, the White House devised a strategy to protect the nation’s critical infrastructure that required cooperation between

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<sup>1</sup> The National Strategy for the Physical Protection of Critical Infrastructure and Key Assets at 8 (The White House, February 2003).

the DHS and the private sector.<sup>2</sup> Various self-organized and self-run groups, representing the private sector for the thirteen critical infrastructure sectors identified by *The National Strategy for Homeland Security*<sup>3</sup> (“*The National Strategy*”), are crucial to ensuring an efficient flow of information between the private sector and the DHS.<sup>4</sup> The private sector groups that interact with the government on critical infrastructure matters are in many ways akin to trade associations. They generally consist of representative members of the industry and, although they may share information with the government, they also devote resources to communication within the industry itself.

Currently, the Department of Homeland Security (“DHS”) is considering various models of organizing private sector input, including one in which representatives of the private sector councils would form a single working group under an umbrella Federal Advisory Committee Act (“FACA”) body. However, the benefit of this organization model over the current scheme of individual industry specific private sector groups reporting to an association group, which in turn reports to a FACA body, is questionable.

Additionally, the uncertainty in how FACA is applied and rigors of complying with FACA have a negative effect on fostering relationships between the DHS and the private sector. Unlike the advisory councils Congress had in mind when drafting FACA, full of those with “substantial parochial interest in the outcome of the matter under discussion, usually some onerous regulatory or policy proposal,”<sup>5</sup> the current dialog revolves around something more urgent than formulating bureaucratic rules – terrorism –

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<sup>2</sup> *See generally, id.*

<sup>3</sup> *Id.* at 4.

<sup>4</sup> Additionally, academic programs like George Mason University School of Law’s Critical Infrastructure Protection Program (“CIP Program”) assist in facilitating communication between the government and the private sector.

<sup>5</sup> *Natural Res.s Def. Council, Inc. v. Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986).

and those that come to the table have a broader world view. FACA creates negative incentives for full disclosure between the private sector and the government because requirements like open meetings and public availability of documents punish good deeds by making vulnerabilities and trade secrets available to terrorist and the competition alike.<sup>6</sup>

This paper will begin by discussing what FACA is and how to determine if FACA applies to a group.<sup>7</sup> It will continue with the meaning of “established;” what constitutes “utilized” within the courts’ FACA framework; what does “in the interest of obtaining advice” mean; what the difference is between operational and advisory groups; and where working groups fall within that scheme. Next, the paper will discuss how, once a group determines that it falls under FACA, it can close meetings and withhold documents from the public without violating the Act. Finally, the paper discusses the FACA exemption in the Homeland Security Act, including a brief summary of its legislative history, a similar provision already in use by the DHS, and what the Secretary must do to invoke his advisory committee exemption powers.

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<sup>6</sup> Representatives Thornberry, Davis, Burton, Portman, Moran, and Armev “Homeland Security Act of 2002.” (148 Cong. Rec. H5845; Date: 7/26/02). Available From: *GPO Access* (Online Service).

<sup>7</sup> Whether an organization is rendering advice as a group is an element of a FACA analysis. However, it is not particularly relevant here and will not be discussed in depth. Suffice it to say, courts hold FACA inapplicable if individuals are providing the advice, as opposed to the relevant advice coming from the group as a whole. *Association of Am. Physicians and Surgeons v. Clinton*, 187 F.3d 655, 658 (D.C. Cir. App. 1999) (finding a “continuum” of sources of advice, on one end of which was a collection of individuals with little or no interaction between each other where FACA did not apply and on the other end a group specifically created to give advice as a group where FACA would apply), *citing with approval, rev’g on other grounds*, 997 F.2d 898, 910-11 (D.D.C.. 1993); *American Soc’y of Dermatology v. Shalala*, 962 F. Supp. 141, 148 (D.D.C. 1996) (holding a panel not subject to FACA because panelists provided their advice as individuals).

## II. What is FACA?

Congress enacted the Federal Advisory Committee Act (“FACA”) in 1972 and it went into effect in 1973.<sup>8</sup> Prior to the enactment of FACA, “numerous committees, boards, commissions, councils, and similar groups” existed to advise the Executive Branch.<sup>9</sup> Congress’ purposes in creating FACA were to limit advisory committees to only those that are necessary, terminate unnecessary committees, develop standards and procedures for advisory committees, guarantee that advisory committees activities are limited to advisory functions, and ensure that Congress and the public are aware of what advisory committees are doing and how federal funds are being spent.<sup>10</sup> According to the United States Supreme Court, FACA was designed to “cure specific ills” -- namely the waste of federal funds on committees where nothing was accomplished and on advice that was tainted by bias -- not to interfere with every meeting between groups offering recommendations and the Executive Branch.<sup>11</sup>

To accomplish the goal of public accountability for advisory committees, Congress mandated several openness requirements including timely notice of meetings, open public meetings, and publicly available documents.<sup>12</sup> Besides litigation costs, failure to comply with FACA may result in a court ordered disclosure of existing documents and minutes of past meetings, an injunction against the advisory committee meeting again until it complies with FACA, and in extreme cases, an injunction against the President or agency using the committee’s recommendations in policy formulations.<sup>13</sup>

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<sup>8</sup> 5 U.S.C. App. 2 § 16 (2005).

<sup>9</sup> *Id.* at § 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Pub. Citizen v. United States Dep’t Justice*, 491 U.S. 440, 453 (1989).

<sup>12</sup> 5 U.S.C. App. 2 at § 10.

<sup>13</sup> *Animal Legal Defense Fund, Inc. v. Shalala*, 104 F.3d 424 (D.C. Cir. 1997); *Public Citizen v. National Economic Comm’n*, 703 F. Supp. 113 (D.D.C. 1989).

One of the most reproduced quotes in regards to FACA is Judge Gesell's statement that "it is apparent that the Act contains a very broad, imprecise definition, and in this respect is not a model of draftsmanship."<sup>14</sup> Unfortunately, to determine if an organization has violated FACA one must first determine if the body *is* an advisory committee under FACA. Because the statute gives "advisory committee" an improbably broad definition<sup>15</sup> and most advisory committee cases are heavily fact pattern specific, the courts were unable to decide what constitutes an advisory committee, and the best they could manage is what does *not* constitute an advisory committee, often giving the impression they were employing the "I'll know it when I see it" method. After seventeen years of cases with still no standardized rule developed to identify an advisory committee subject to FACA, the United States Supreme Court decided to try its hand. While avoiding constitutional questions raised by FACA and relying heavily on legislative history, the Supreme Court choose to discard the plain meaning of "utilize" in the context of FACA.<sup>16</sup> Instead they pronounced "'utilize' is a wooly verb" and found "utilize" should be read to expand "established" to a privately formed group used by the agency in the same manner as "Government-formed advisory committee" and to "groups formed indirectly by quasi-public organizations [...] 'for' public agencies as well as 'by' such

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<sup>14</sup> *Nader v. Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975).

<sup>15</sup> FACA defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof [...] which is - (A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. § 3. As the Supreme Court pointed out: "Read unqualifiedly, it would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice." *Pub. Citizen*, 491 U.S. at 452.

<sup>16</sup> *Id.*

agencies themselves.”<sup>17</sup> Following the issuance of this complicated and often confusing decision, a few lower courts expressed their disagreement with the Supreme Court’s reasoning, specifically with its intense reliance on legislative history in interpreting the statute, including one panel on which current Justice Ginsburg, then Circuit Judge Ginsburg, sat.<sup>18</sup>

### **III. Does FACA apply?**

With a statute, the initial inquiry always must be: does the statute, in this case FACA, even apply to the situation in question. For a group to fall under FACA it must be “established” or “utilized” by the President or an executive agency.<sup>19</sup> Additionally, the establishment or utilization must be “in the interest of obtaining advice or recommendations for the [Executive Branch]” and not primarily operational.<sup>20</sup> To determine whether a sub-group is, independent of its parent FACA body, bound by FACA, one must apply all four analyses.

#### A. Was it “established”?

While the “established” analysis sticks closer to the plain meaning of the term, and therefore is a more straightforward analysis than that for “utilized,” it still tends to be a bit murky in its application. One of the two ways a committee falls under FACA is if it is “established” by an agency.”<sup>21</sup> To meet this standard, the agency or a quasi-public organization must *directly* establish the committee.<sup>22</sup> However, just because a

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<sup>17</sup> *Id.* at 452, 458, 462.

<sup>18</sup> *Animal Legal Def. Fund v. Shalala*, 104 F.3d 424, 428 (D.C. Cir. 1997); *N.W. Forest Res. Council v. ESPY*, 846 F. Supp. 1009, 1014 (D.D.C. 1994).

<sup>19</sup> 5 U.S.C. App. 2 § 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Lombardo v. Handler*, 397 F. Supp. 792 (D.C. Cir. 1976); *Food Chem. News v. Young*, 900 F.2d 328 (D.C. Cir. 1990).

relationship exists between the Federal Government and the developing committee does not mean the government established the committee.<sup>23</sup>

*Food Chemical News* illustrates how narrowly tailored the concept of “established” is.<sup>24</sup> There the Food and Drug Administration (“FDA”) contracted with the Federation of American Societies for Experimental Biology (“FASEB”) to provide expert opinions on food safety through the use of an expert panel.<sup>25</sup> The court found the expert panel was not subject to FACA because although the contract with the FDA *required* its establishment, in actuality it was FASEB, not the FDA that did the establishing.<sup>26</sup>

An inverted situation arose in *Washington Toxics Coalition* when plaintiffs claimed that because a forming committee sought advice from the federal government, the government established the committee.<sup>27</sup> In *Washington Toxics*, an industry group created a committee to develop ways of complying with an act administered by the Environmental Protection Agency (“EPA”).<sup>28</sup> In order to ensure they were providing accurate information to the industry members, the committee consulted with the EPA.<sup>29</sup> The court found that the mere fact the committee sought advice from the EPA in no way showed the EPA established the committee.<sup>30</sup>

Although the White House recognized a need for communication with the private sector in *The National Strategy*, private sector groups are voluntary, self-organized, self-funded, and self-led. As in *Food Chemical News*, the federal government must *directly* establish the committee and simply recognizing and recommending such organizations

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<sup>23</sup> *Wash. Toxics Coalition v. U.S. E.P.A.*, 357 F. Supp. 2d 1266 (W.D. Wash. 2004).

<sup>24</sup> *Food Chem. News*, 900 F.2d 328.

<sup>25</sup> *Id.* at 329-30.

<sup>26</sup> *Id.* 333.

<sup>27</sup> *Wash. Toxics Coalition*, 357 F. Supp. 2d at 1272

<sup>28</sup> *Id.* at 1268.

<sup>29</sup> *Id.* at 1269.

<sup>30</sup> *Id.* at 1272.

exist is not enough. In *Food Chemical News* a contract went so far as to require the establishment of the advisory committee, yet the court did not find the “establishment” was sufficiently direct. Merely, or even strongly, recommending an organization voluntarily form itself is insufficiently direct for the government to have “established” the groups.

Similar to the situation in *Washington Toxics*, the private sector groups developed with assistance from the DHS and the sector specific agency outlined in *The National Strategy*.<sup>31</sup> However, as in *Washington Toxics*, where the court found a mere relationship with a developing committee is not enough evidence to demonstrate a federal agency “established” the committee, the relationship between the groups and the DHS and other agencies does not mean the agencies established the private sector groups. Private sector owners and trade associations merely seeking advice from the government on how best to ensure their private sector group accomplishes its goals does not mean the agencies “established” the private sector groups any more than the EPA established the industry group committee in *Washington Toxics*.

The sector specific industries “established” private sector groups, not the White House, DHS, or sector specific agencies, and it is very likely a court would come to the same conclusion. However, the issue is close enough it may tempt public-interest watchdog groups, and other organizations with interest in the information discussed by the private sector groups, to engage in litigation. Additionally, the possibility of having to participate in litigation and worse yet, having to release sensitive information through

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<sup>31</sup> For each of the thirteen critical infrastructure sectors identified in *The National Strategy*, the White House assigned a lead agency: the Department of Agriculture for the Agriculture Sector, the Department of Energy for the Energy Sector, the Department of the Treasury for the Banking and Finance Sector, etcetera. *The National Strategy* at 18.

FACA may cause valuable private sector individuals and organizations to shy away from participating in private sector groups. This would obviously reduce the overall effectiveness of the communication between the DHS and the private sector groups.

#### B. Was it “utilized”?

If a committee was not “established” by a federal agency, it still may be subject to FACA if it was “utilized” by an agency.<sup>32</sup> Finding a literal reading of FACA would give the Act unreasonably sweeping powers and force a constitutional question the Court wanted to avoid addressing<sup>33</sup>, the United States Supreme Court chose to discard the plain language meaning of “utilize,” and so the “utilize” analysis is multi-layered and anything but straightforward. To determine if an agency “utilized” a committee within the meaning of the statute, the United States Supreme Court laid down a two-pronged test in *Public Citizen v. Dept. of Justice*.<sup>34</sup> The first prong is if the committee is “amenable to strict management by agency officials.”<sup>35</sup> Essentially this means the agency must “utilize” the committee in the same manner as if it had “established” the committee.<sup>36</sup> Government funding of the committee may be evidence of management, but “influence is

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<sup>32</sup> 5 U.S.C. § 3.

<sup>33</sup> The dispute in *Public Citizen* revolved around whether FACA applied to the American Bar Association’s Standing Committee on Federal Judiciary (“ABA Committee”). The ABA Committee traditionally advised the President, through the DOJ, on the qualifications of potential Supreme Court nominees. 491 U.S. at 443-5. The plaintiffs sued under FACA when the ABA committee refused their request for the names of nominee candidates. *Id.* at 447. In discarding the plain meaning of “utilize” the Court was trying to avoid two main problems. The first was forcing large numbers of private groups, for example the Republican National Committee, who occasionally consult with the Government, to be subject to FACA. *Id.* at 462. The second problem the Court was trying to avoid was addressing “the extent to which Congress may interfere with the President’s constitutional prerogative to nominate federal judges” by being forced to address the constitutionality of FACA in the situation. *Id.* at 469.

<sup>34</sup> 491 U.S. 440.

<sup>35</sup> *Id.* at 457.

<sup>36</sup> *Id.*

not control” and agencies have gone so far as to suggest the members of a committee without the court finding they exercised “actual management or control.”<sup>37</sup>

The second prong of the *Public Citizen* test asks if the institution that created the committee is so closely tied to the Government as to be thought of as “quasi-public.”<sup>38</sup> An otherwise private committee that meets this test may be considered “utilized” by the government.<sup>39</sup>

Whether a private sector group is “utilized” by the DHS is a close call. The groups are self-led and self-run, so at first blush they do not appear “amenable to strict management by agency officials.” However, they receive assistance and coordination from the CIP Program’s Private Sector Programs and the Government Coordinating Councils, which the DHS funds. DHS may even provide, at a sector group’s request, a Secretariat who assists in running meetings and aids in other organizational matters. Nevertheless, “influence is not control” and *Public Citizen* requires *strict* management. The key is that the services provided by the DHS are optional. The private sector groups are self-led and financed, so they will not fall apart without the DHS’s support. The very fact that the groups are able to choose which services they will and will not take advantage of, underscores this point. However, DHS’s refusal to recognize certain groups unless they conform to its organizational plans and the very existence of the organizational plans themselves indicates DHS may in fact intend to employ some form of “strict management” over the private sector groups.

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<sup>37</sup> *Id.* at 460; *Wash. Legal Found. v. United States Sentencing Comm’n*, 17 F.3d 1446, 1450-51 (D.C. Cir. App. 1994) (finding the DOJ did not utilize an advisory committee even though it “exercise[d] significant influence on [the] deliberations and on the ensuing recommendations”); *Byrd v. United States EPA*, 174 F.3d 239 (D.C. Cir. App. 1999) (holding the EPA did not “utilize” a committee created by a contractor through strict management despite the fact the committee partially consisted of member chosen from a list submitted by the EPA).

<sup>38</sup> *Pub. Citizen*, 491 U.S. at 461; *Animal Legal Def. Fund.*, 104 F.3d at 428.

<sup>39</sup> *Animal Legal Def. Fund.*, 104 F.3d at 430.

The private sector groups are clearly representatives of the private sector and so the court can hardly consider it “quasi-public.” Additionally, as discussed above, the groups were not established by a quasi-public organization like the National Academies of Science,<sup>40</sup> so the second prong of the test is inapplicable.

While it currently appears the DHS is not actually “utilizing” the private sector groups under *Public Citizen*’s strict management test, as DHS continues to develop its policy toward the groups and the relationship between the agency and groups evolve this may change. It is difficult to tell *ex ante* when and if this shift will take place, but if the DHS continues to follow its current trend of tightening the reins, it is very likely in the near future DHS will be “utilizing” the groups subject to their status independent of the umbrella FACA.<sup>41</sup> Additionally, as it stands now, the “utilize” issue is a close enough call it will probably spawn litigation.

### C. Was it “in the interest”?

Regardless of whether the committee was “established” or “utilized,” the agency must “establish” or “utilize” the committee “in the interest of obtaining advice or recommendations for the [Executive Branch]” for FACA to be applicable.<sup>42</sup> This standard is only met if the agency “establishes” the committee with intent to use its

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<sup>40</sup> The Supreme Court in *Public Citizen* only cited a single example of a quasi-public organization: the National Academies of Science (“NAS”). 491 U.S. at 462. As with almost everything else associated with FACA, this has caused confusion with when and how FACA applies. See *Animal Legal Def. Fund.*, 104 F.3d at 429. Part of the confusion stems from the fact that although the Supreme Court used the NAS as an example of when FACA would apply, FACA itself excludes committees created by the NAS from its definition of an “advisory committee.” 5 U.S.C. 3(2)(A)(ii).

<sup>41</sup> See sub-group discussion *infra*.

<sup>42</sup> 5 U.S.C. App. 2 § 3.

work product, or if the government is apparently “utilizing” the committee, the use of the committee’s work product is not “subsequent and optional.”<sup>43</sup>

In *California Forestry Association*, there was no question that the United States Forest Service directly formed the committee.<sup>44</sup> Thus, the issue became whether the Forest Service established the committee with the intent to use the study it performed or if the use of the committee’s work product was “subsequent and optional.”<sup>45</sup> The court found it was clear the Forest Service established the committee “in the interest of obtaining advice or recommendations for the [Executive Branch]” both because there was evidence the committee drafted the study with the Forest Service in mind and because the Forest Service did in fact use the study.<sup>46</sup>

Although it is clear some of the private sector groups’ duties include preparing and disseminating information for infra-sector use, it is also clear a main purpose of a private sector group is to be an interface for the industry with the DHS and other agencies. The group’s duties include advising about vulnerabilities and devising and recommending strategies to minimize risk. Much of this information is government oriented, and may not necessarily be shared with the sector community at large before its use by the government. Therefore, use by the DHS of a private sector group’s work product is not “subsequent and optional.” It is highly probable if a court finds the DHS “established” or “utilized” the private sector group it will also find that it was “in the interest of obtaining advice or recommendations for the [Executive Branch].”

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<sup>43</sup> *Sofamor Danek Group v. Gaus*, 61 F.3d 929 (D.C. Cir. App. 1995) (finding for FACA to apply to a group the plaintiff needed to show the federal agency intended to use the work group product as “recommendations to formulate policy” and this use was not “subsequent and optional”); *Cal. Forestry Ass’n v. United States Forest Serv.*, 102 F.3d 609 (D.C. Cir. 1996).

<sup>44</sup> *Cal. Forestry Ass’n*, 102 F.3d at 611.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 612.

#### D. Is the group operational or advisory?

If a group is primarily operational, as opposed to advisory, it is not bound by FACA. An organization is primarily operational if the organization generally does not provide the government with policy advice or if it performs functions provided for by law.<sup>47</sup>

Although private sector groups share information amongst themselves and some of what they provide the government is pure information, many probably also give the government policy advice on how best to protect critical infrastructure. To use the operational exception to FACA, the operational requirements would force private sector groups to be careful to minimize any advice provide to the government. This would undercut the open dialog between the private sector and the DHS, in addition to eliminating a valuable resource for the DHS. With the private sector controlling so much of the critical infrastructure, the DHS needs private sector perspectives that pure information and minimal advice cannot provide.

Unless a private sector group completely rearranged its role, it is very likely a court would find a private sector group functions in an advisory and not operational manner. Therefore, for comfort reasons another method must be used to allow such groups freedom from FACA.

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<sup>47</sup> *Nat'l Resource Defense Council v. EPA*, 806 F. Supp. 275, 276 (D.D.C. 1992) (finding a group's functions were operational because they were provided for by law); *Sofamor Danek Group v. Gaus*, 61 F.3d 929 (D.C. Cir. App. 1995) (finding a panel was operational because it provided guidelines to health care professionals, not advice to the government); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 8 (D.D.C. 1995) (holding a trust established by the President and First Lady to defray legal expenses was operational because it did not render advice to the government), *aff'd* 76 F.3d 1232 (D.C. Cir. App. 1996).

### E. Where do sub-groups fall?

Deciding where public openness requirements of FACA kick in for advisory committee working groups and other sub-groups can be problematic. While umbrella FACA organizations protect most sub-groups, it is possible for a sub-committee independently to be subject to FACA. Generally, it is the main FACA organization, not a federal agency, which directly establishes or utilizes the sub-group and sub-committee advice is usually subject to review by the higher FACA committee before being passed on to the Executive Branch.<sup>48</sup> However, in situations where the FACA committee is just rubberstamping the advice before passing it on, it is possible a sub-group must independently comply with FACA.<sup>49</sup>

*ALCOA v. National Marine Fisheries Service* involved a suit brought against the Fisheries Service when it ignored the plaintiffs' requests to participate in meetings of its working groups.<sup>50</sup> However, because the working groups only existed as a result of a court order, the 9<sup>th</sup> Circuit Court of Appeals found the groups were established by the court, not the agency, and therefore not subject to FACA.<sup>51</sup>

If a parent FACA organization oversees a working group and reviews the sub-group's reports and recommendations then it is not subject to FACA because it is the advisory committee, not the federal agency that is "utilizing" the group and is the recipient of its advice.<sup>52</sup> Therefore, the more levels of buffers that exist between the sub-committee and the agency, the less likely it is that a court will find the lower level

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<sup>48</sup> *Nat'l Anti-Hunger Coalition v. Executive Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983); *Aluminum Co. of Am. v. Nat'l Marine Fisheries Serv.*, 92 F.3d 902 (9<sup>th</sup> Cir. App. 1996); *PETA v. Barshefsky*, 925 F. Supp. 844 (D.D.C. 1996).

<sup>49</sup> *Nat'l Anti-Hunger Coalition*, 711 F.2d at 1075-76.

<sup>50</sup> *Aluminum Co. of Am.*, 92 F.3d 903-904.

<sup>51</sup> *Id.* at 908.

<sup>52</sup> *See, Nat'l Anti-Hunger Coalition*, 711 F.2d at 1072-76.

committee is subject to FACA. This is because the court becomes increasingly likely to find it was the next committee up that “utilized” the sub-committee’s recommendations. Clearly, this is especially true if each committee level is conducting an independent review of the advice before passing it on. Therein lies a benefit to industry specific private sector groups reporting to an association group that in turn reports to the FACA group because an extra layer of protection for sector level trade sensitive information is created. Under that model, provided the association group is in fact conducting a thorough review before turning the information over to the FACA group it becomes significantly less likely a court could be convinced the individual private sector group is subject to FACA independent of the umbrella organizational.

Additionally, there an issue with an organizational model in which the DHS chooses members of the private sector groups to sit on a working group of a FACA body. Under that scenario, it is not really the FACA body that is “establishing” the working group, because the DHS is in fact *directly* “establishing” the group and then just attaching it to an existing FACA body. Although there are likely ways around the issue, it does create a point of contention to which litigants may attach themselves.

While it is likely a parent FACA body would protect the private sector groups from FACA, several routes of attack exist to attempt to subject a sub-group directly to FACA. This is especially true of the model where the DHS creates a single cross-sector working group to directly report to an existing FACA. However, under either model, the potential for varied interpretations of at what level groups are subject to FACA is very likely to result in a chilling effect on the openness of sector representatives participating in these groups.

#### IV. FACA's exemptions to public information

After a court or the committee itself determines if FACA governs, FACA allows the committee limited options to keep information from becoming public. One option is to close meetings and a second option is to withhold documents.

##### A. Closed meetings

An advisory committee that is subject to FACA still may close meetings if it meets certain requirements within the Government in the Sunshine Act ("Sunshine Act").<sup>53 54</sup> To close any meeting an advisory committee must limit discussion at each individual meeting to a subject that falls within one of the ten narrow exceptions to open meeting requirements and the burden is on the defendant to overcome the presumption of openness.<sup>55</sup>

In *Barshefsky*, the United States Trade Representative ("USTR") issued a two-year blanket closure to the public of all meetings of twenty-one private sector advisory committees pursuant to 19 U.S.C. § 2155(f)(2). The statute the USTR used to close meetings contained a special exemption to FACA for USTR advisory committee meetings where public disclosure of the matter under discussion would harm United States trade power.<sup>56</sup> The court held a blanket closure was illegal because it was tantamount to declaring the discussion in every meeting for that two-year period was wholly limited to matters that fell within the FACA exemption.

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<sup>53</sup> Although because of FACA an advisory committee under the DHS has to work within the Sunshine Act to close a meeting, curiously enough, Sunshine Act does not independently apply to the DHS. The Sunshine Act only applies to agencies headed by two or more individuals, while a single Secretary runs the DHS. 5 U.S.C. 552(a)(1); *Public Citizen v. Barshefsky*, 939 F. Supp. 31 (D.C. Cir. App. 1996).

<sup>54</sup> 5 U.S.C. 552(b).

<sup>55</sup> *Public Citizen v. National Economic Comm'n*, 703 F. Supp. 113 (D.D.C. 1989); *Public Citizen*, 939 F. Supp. at 37.

<sup>56</sup> 19 U.S.C. § 2155(f)(2).

Should the court deem private sector advisory committees are subject to FACA it is still possible they may close their meetings. Two of the Sunshine Act exceptions are likely applicable to the topics a private sector committee might discuss.<sup>57</sup> The first exemption should apply when councils discuss private sector owned or operated critical infrastructure protection as it is highly relevant to homeland security, and President Bush has issued an Executive Order recognizing it as such.<sup>58</sup> Additionally, the fourth exception should apply because the purpose of the private sector groups is to get a private sector viewpoint and clearly, that includes information about trade secrets and other confidential commercial information. Without the private sector group members sharing such information, the group's recommendations would be significantly less effective.

Although it is very likely most of what private sector groups discuss falls under a Sunshine exception, organizations subject to FACA still must to issue a notice of a closed meeting for each meeting. Additionally, should litigation ever ensue, the burden would be on the DHS to show the matter under discussion fell within the narrow exception. Finally, even though the private sector group may succeed at closing an individual meeting, they would not escape FACA requirements pertaining to keeping records.

### B. Withholding Documents

Under FACA,<sup>59</sup> a FACA body does not have to provide all the information it has to the public.<sup>60</sup> Pre-decisional materials are exempt, as are documents that would

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<sup>57</sup> Exception 1: matters by Executive Order pertaining to national defense or Exception 4: trade secrets and privileged and confidential commercial or financial information would likely apply. 5 U.S.C. § 522b (c)(1), (4).

<sup>58</sup> Executive Order 13231, 66 F.R. 53063 (2001).

<sup>59</sup> This discussion will limit the issue to FACA. Future publications will discuss the role of the Freedom of Information Act (FOIA), the private sector, and critical infrastructure.

otherwise be “public records,” but employing a balancing test, the specific interests for continued secrecy outweigh interests in favor of openness.<sup>61</sup>

Depending on what the group wishes to withhold, this may be a relatively easy standard to meet, for example in the case of something that is clearly pre-decisional, or relatively difficult, as in the case of something that would otherwise be a public record. Should a group wish to withhold a document that is a public record under FACA, and should there be litigation, the court would force the DHS to submit the document to the judge for review and argue as to why it meets the balancing test. While it is likely they would succeed for the same reasons as open meetings above, the possibility of litigation creates a burden that forces the FACA group to retain documents.

#### **V. The Homeland Security Act exemption to FACA**

Private sector organizations that wish to assist the DHS have another option to jumping through FACA’s hoops. The Homeland Security Act of 2002 (“HSA”) included an exemption to FACA.<sup>62</sup> Once the DHS Secretary evokes his power to exempt a committee from FACA it is free from all the public disclosure requirements of FACA, such as open meetings and public availability of documents. Working within the exemption may be the best way for the DHS to interact with private sector groups while balancing their need to keep deliberations and information confidential.

The DHS has yet to use the FACA exemption, but legislative history suggests that Congress drafted it with private sector consultations in mind.<sup>63</sup> Several Congressmen

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<sup>60</sup> *Wash. Legal Found.*, 17 F.3d at 1452 (noting if all advisory committee documents are subject to a common law right to public disclosure then FACA would be redundant).

<sup>61</sup> *Id.* at 1451 (remanding to the lower court to review the documents in question to determine if they met this test).

<sup>62</sup> 6 U.S.C. § 451 (2005).

<sup>63</sup> See, Representatives Thornberry, Davis, Burton, Portman, Moran, and Armev “Homeland Security Act of 2002.” (148 Cong. Rec. H5845; Date: 7/26/02). Available From: *GPO Access* (Online Service).

spoke with concern about the low probability that firms would share information about vulnerabilities if customers, competitors, investors, and terrorists would be privy to that information through the government's various Good Government laws, and emphasized the need to safe guard companies so they would feel free to share information with the government.<sup>64</sup> However, not everyone agreed with the FACA exemption and the provision met with significant resistance before Congress ultimately passed the bill with the provision.<sup>65</sup> The history of legislative opposition to this provision may render its use politically sensitive.

While the DHS has not yet used the FACA exemption in the HSA, it has used a similar exemption in Maritime Transportation Security Act ("MTSA") of 2002. Congress passed this piece of legislation at approximately the same time as the HSA and its FACA exemption is remarkably similar to that of the HSA. The MTSA gave authority to the Secretary of the department overseeing the Coast Guard the power to create Area Maritime Security Advisory Committees ("AMSAC") that were automatically exempt from FACA.<sup>66</sup> To date, the DHS has formed at least three such committees and the exemption was evoked for each committee.<sup>67</sup> Many of the AMSACs functions parallel those of the private sector groups, in that they provide a line of communication between government and industry and identify critical maritime infrastructure and risks.<sup>68</sup>

To exempt an advisory committee from FACA the Secretary of the Department of Homeland Security need only publish a notice in the Federal Register 1) announcing the

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<sup>64</sup> *Id.*

<sup>65</sup> See e.g., U.S. Congress. Select Committee on Homeland Security "H.R. 5005, The Homeland Security Act of 2002, Days 1 and 2." (Date: 7/15/02 – 7/16/02). Available From: *GPO Access* (Online Service).

<sup>66</sup> 46 U.S.C. 70112(a)(2)(A), (g)(1)(B).

<sup>67</sup> 70 Fed. Reg. 3217 (Date: 01/21/2005); 70 Fed. Reg. 9364 (Date: 02/25/2005); 70 Fed. Reg. 28552 (Date 05/18/2005).

<sup>68</sup> See AMSAC Sample Charter at [www.uscg.mil/hq/g-m/mp/pdf/AMSCSampleCharter1.pdf](http://www.uscg.mil/hq/g-m/mp/pdf/AMSCSampleCharter1.pdf).

establishment of the exempt committee 2) identifying its purpose and 3) identifying its membership.<sup>69</sup> The level of specificity required to identify the membership of a federal advisory committee does not require the identification of the individual members.<sup>70</sup> Instead, descriptions of the types of interests the members represent are sufficient.<sup>71</sup>

## **VI. Conclusion**

The DHS should evoke the HSA FACA exemption for the private sector groups, rather than subject them to FACA. While a court may not find the private sector groups are subject to FACA, because they do not meet the “established,” “utilized,” “in the interest of,” or sub-groups criteria, the court also may find the groups are subject to FACA. Regardless of the outcome in court, the fear that litigation is a possibility will likely hamper candid communication between the private sector and the DHS. The mere prospect of a suit or information becoming public will make the private sector wary of full disclosure with the DHS. Decades of confusingly unclear interpretations of FACA, which spawned prolific litigation, make it too likely a suit will result from the continued use of the FACA format.

In many cases, industries and the government are traditionally at odds. The FACA exemption is a chance to protect developing lines of communication between the private sector and the government and it is essential that these lines stay open in the face of a new threat from extremism. Existing FACA methods of protecting sensitive information are insufficient and inefficient. The working group model, and the protection afforded by it, may be ineffective. The DHS is asking the private sector to share trade

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<sup>69</sup> 6 U.S.C. § 451(a) (2005).

<sup>70</sup> See Department of State, Advisory Committee Renewal Notice, 70 Fed. Reg. 23291; Office of the Secretary, USDA, Notice of Intent to Renew Federal Advisory Committee, 70 Fed. Reg. 17050.

<sup>71</sup> 70 Fed. Reg. 23291 (“representatives of the major U.S. tuna harvesting, processing, and marketing sectors”); 70 Fed. Reg. 17050 (“a holder of a livestock grazing permit [...] within the Monument area”).

secrets, vulnerabilities, and other sensitive information. It is hardly surprising if they behave in a risk-adverse manner. The DHS now faces a new parochial paradigm from the pre-FACA days. Rather than eagerly serving on advisory committees to further selfish interests, in today's world, although the private sector wants to do what it can to secure our nation, it needs be assured it is not harming itself by serving. To do this the DHS must remove the situation from the poor draftsmanship of FACA.

Finally, the use of AMSACs establishes a DHS precedent of using FACA exemptions created by Congress. Considering the marked similarities between the two types of committees there should be no reason why the DHS would be unwilling to use the congressionally granted exception to FACA for the private sector groups.