

# The Federal Advisory Committee Act: Balanced Representation and Open Meetings in Conflict with Dispute Resolution

## I. INTRODUCTION: THE CENTRAL ROLE OF ADVISORY COMMITTEES IN RESOLVING IMPORTANT POLITICAL DISPUTES IN SOCIETY

Advisory committees are formed by governmental agencies to render advice on proposed rules and regulations. All advisory committees "have one common thread of a partnership of private citizen participation into the decision-making process of the Federal Government."<sup>1</sup> Advisory committees are composed of parties representing groups whose interests will be affected by a proposed rule. These parties negotiate public interest disputes.<sup>2</sup>

Although the exact form of dispute resolution employed by advisory committees can vary by committee, it is generally described as consensus building.<sup>3</sup> Some committees, formed under the Negotiated Rulemaking Act,<sup>4</sup> engage in negotiated rulemaking. The consensus-building process of other committees approximates this process to varying degrees.<sup>5</sup> For the purposes of this Note, both negotiated rulemaking and consensus building will be called "negotiation" and treated as such.

The Federal Advisory Committee Act (FACA) is an attempt to bring accountability to the negotiation process of committees. The negotiation of regulations in advisory committees is seen by some as a method for restoring confidence in the democratic process for resolving public policy disputes.<sup>6</sup> Advisory committees were not, however, always seen as furthering democratic ends. In the past, there was concern that special

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<sup>1</sup> 1984 FEDERAL ADVISORY COMMITTEES: THIRTEENTH ANNUAL REPORT OF THE PRESIDENT, FISCAL YEAR 1984, at 1 (1985).

<sup>2</sup> STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 345 (1992) ("The most extensive use of consensus-building negotiations to resolve public policy disputes has been the negotiation of regulations by federal agencies.").

<sup>3</sup> *Id.* at 346.

<sup>4</sup> 5 U.S.C. § 561 *et seq.* (1994).

<sup>5</sup> Philip J. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1403-07 (1983) (describing the model of negotiated rulemaking as a consensus-building process); JAMES E. CROWFOOT & JULIA M. WONDOLLECK, ENVIRONMENTAL DISPUTES: COMMUNITY INVOLVEMENT IN CONFLICT RESOLUTION 18 (1990) (treating negotiation and consensus building together as the essence of public policy dispute resolution).

<sup>6</sup> See, e.g., LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987).

interests were exercising too much influence over the agencies that were regulating them.<sup>7</sup> FACA was passed as an attempt to control and limit the influence of advisory committees, so as to curtail the illegitimate influence of special interests over the agencies.<sup>8</sup> FACA's aim is to restore accountability to advisory committees, while recognizing their importance, and to ensure that they remain only advisory in nature.<sup>9</sup> But "the procedures used to enforce rationality and accountability actually inhibit the ability to gain information and develop consensus."<sup>10</sup>

The "balanced representation" and "open meetings" requirements of FACA, two requirements seen as central to restoring public confidence in advisory committees,<sup>11</sup> are also two of its most controversial requirements and are most likely to affect the negotiation process that occurs within the committees.<sup>12</sup>

This Note will describe the controversial effect of FACA on the negotiation process of advisory committees. The focus will be on the open meetings and balanced viewpoint provisions. The aim of this Note is to suggest ways in which the courts and agencies should interpret these provisions in the future to help ameliorate the inhibiting effects of FACA on the consensus-building process. Contrary to current case law trends that attempt to avoid application of FACA altogether,<sup>13</sup> an interpretation of FACA that allows closed meetings when necessary and when balanced representation exists would best serve to resolve disputes involving advisory committees. Obstacles in the recent case law will be discussed, and methods for achieving this objective will be given. The theory that will be defended in this Note is that the closed-meeting requirement can be met by using subgroups of committees to resolve the sensitive issues while maintaining compliance with FACA's open-meeting requirement.

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<sup>7</sup> Richard O. Levine, *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217, 219 (1973).

<sup>8</sup> Levine, *supra* note 7, at 219.

<sup>9</sup> *Id.* at 225.

<sup>10</sup> Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 22 n.128 (1982). See also *Sierra Club v. Costle*, 657 F.2d 298, 352-56 (D.C. Cir. 1981) (Sierra Club maintained that because the EPA considered evidence after the period for public comment ended, interested parties were not informed of new developments in time to make meaningful comments).

<sup>11</sup> S. REP. NO. 281, 102d Cong., 2d Sess. 4 (1992).

<sup>12</sup> Harter, *supra* note 10, at 22-25.

<sup>13</sup> See *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1014 (D.D.C. 1994) (noting that in two recent cases the Supreme Court and the D.C. Circuit were able to avoid application of FACA by "adroit semantics and near-clairvoyant discernment of legislative intent").

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### II. THE FEDERAL ADVISORY COMMITTEE ACT

This section will discuss the provisions of FACA and, more specifically, describe the overall process of committee formation, meetings, and recommendation. The objective is to give the reader a general understanding of the statute, its purpose, and the process through which committees operate.

#### A. *The Purpose of FACA*

The principal purpose of FACA is to “enhance the public accountability of advisory committees . . . and to reduce wasteful expenditures on them.”<sup>14</sup> The other purposes of FACA are, *inter alia*, to keep Congress and the public informed with respect to the number, purpose, membership activities, and cost of advisory committees,<sup>15</sup> and to ensure that the committees remain advisory and do not actually determine the issue for which they were formed.<sup>16</sup> Given that the central purpose of FACA is to provide open meetings, the proposed theory that allows for closed meetings must overcome a higher burden. First of all, it should be made clear that even early in FACA’s history there were closed meetings.<sup>17</sup> This fact indicates that the requirement for open meetings was not absolute. Another theory is that Congress did not intend that use of the phrase “open meetings” meant that every aspect of a meeting should be open for advisory committees.<sup>18</sup> The proposal defended herein will also have measures that protect the value of openness.

#### B. *Advisory Committee Defined*

FACA provides a broad definition of “advisory committee.”<sup>19</sup> A group is an advisory committee if it is either “established” by statute, the president, or an agency, or it is “utilized” by the president or an agency “in

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<sup>14</sup> See *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 459 (1989).

<sup>15</sup> 5 U.S.C. app. § 2(b)(5) (1994).

<sup>16</sup> 5 U.S.C. app. § 2(b)(6) (1994).

<sup>17</sup> 1976 Federal Advisory Committees: Fifth Annual Report of the President, Fiscal Year 1976, at 3 (1978). (reporting that of 259 open meetings that year, there were 33 completely closed meetings and 25 partially closed meetings).

<sup>18</sup> See *infra* notes 144–48 and accompanying text.

<sup>19</sup> One court has recently described FACA as “uncomfortably broad.” *Northwest Forest Resource Council*, 846 F. Supp. at 1010 (“[I]f literally applied, [FACA] would stifle virtually all non-public consultative communication between policy-making federal officials and a group of any two or more other people, any one of whom is not in government service.”).

the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . ."<sup>20</sup> FACA excludes committees composed wholly of full-time officers or employees of the federal government.<sup>21</sup> The breadth of this definition is illustrated by the possibilities that an advisory committee could be a group privately formed yet "utilized" by an agency<sup>22</sup> or established by an agency before their advice is sought.<sup>23</sup>

### C. Restrictions on Advisory Committees

Advisory committees have been criticized for a number of reasons from various viewpoints.<sup>24</sup> FACA's enactment was the result of citizen groups' complaints that the impact of advisory committees on the decision making of agencies was generally contrary to public interest.<sup>25</sup> As one of four measures<sup>26</sup> aimed at restoring public confidence in governmental decision making, FACA requires that: (1) advisory committee meetings be open to the public;<sup>27</sup> (2) certain notice requirements be met to ensure that "all interested persons are notified of meetings prior thereto";<sup>28</sup> (3) interested parties be allowed to attend, appear before, or file statements with any advisory committee;<sup>29</sup> and (4) the committees' documents and records, including minutes, be available for public inspection.<sup>30</sup> In addition, before an advisory committee can be established, the committee must be approved

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<sup>20</sup> 5 U.S.C. app. § 3(2) (1994).

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

<sup>22</sup> *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), *remanded on other grounds*, 580 F.2d 689 (D.C. Cir. 1978).

<sup>23</sup> *Levine*, *supra* note 7, at 225.

<sup>24</sup> *Id.* at 219; *Harter*, *supra* note 10, at 33.

<sup>25</sup> See H.R. REP. NO. 1016, 92d Cong., 2d Sess. 6 (1972) ("One of the great dangers of unregulated use of advisory committees is that special interest groups may use their memberships on such bodies to promote their private concerns."); see also *Levine*, *supra* note 7, at 219.

<sup>26</sup> The government's attempts to limit agency discretion and increase agency accountability include—in addition to FACA—the Sunshine Act, 5 U.S.C. § 552(b) (1994); *ex parte* prohibitions of the Administrative Procedure Act, 5 U.S.C. §§ 554(d), 557(d) (1976); and the Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. II 1984). Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 135 (1985).

<sup>27</sup> 5 U.S.C. app. § 10(a)(1) (1994).

<sup>28</sup> 5 U.S.C. app. § 10(a)(2) (1994).

<sup>29</sup> 5 U.S.C. app. § 10(a)(3) (1994).

<sup>30</sup> 5 U.S.C. app. §§ 10(b) & (c) (1994).

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by the agency,<sup>31</sup> and a charter must be filed.<sup>32</sup>

### *D. The Committee Process: Formation and Negotiation*

As mentioned above, the negotiation process in which committees engage is either negotiated rulemaking or consensus building. The former process is explicitly encouraged by the Negotiated Rulemaking Act ("Neg-Reg").<sup>33</sup> These are very similar processes.

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<sup>31</sup> 5 U.S.C. app. § 9(a)(2) (1994).

<sup>32</sup> 5 U.S.C. app. § 9(c) (1994).

<sup>33</sup> See Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1705 (1986). Even before the passage of the Negotiated Rulemaking Act (hereinafter Neg-Reg), Perritt thought that negotiated rulemaking groups were advisory committees. Regulatory negotiation groups most likely are advisory committees under FACA. *Id.* A regulatory negotiation group is most likely to be established by an agency "in the interest of obtaining advice or recommendations." *Id.* (quoting 5 U.S.C. app. § 3 (1994)). Agencies will not have delegated their statutory authority to make rules. *Id.* Therefore, Perritt concluded, FACA was applicable. *Id.*

Since the passage of the Neg. Reg., agencies have been "encourage[d] . . . to use the [negotiated rulemaking] process when it enhances the informal rulemaking process." 5 U.S.C. § 561 (1994). The authority of agencies to establish rulemaking committees is found within FACA and under their enabling Acts. Pub. L. No. 101-648, § 2(6), 104 Stat. 4970 (1990). The definition section of the Neg-Reg defines a negotiated rulemaking committee as an "advisory committee established by an agency in accordance with . . . the Federal Advisory Committee Act to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule." 5 U.S.C. § 562(7) (1994). Such committees may be formed by an agency if it is determined that the committee can "adequately represent the interests that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking." 5 U.S.C. § 565(a)(1). If the agency decides not to establish the committee, then notice must be sent to any parties who were potentially interested in participating. 5 U.S.C. § 565(a)(2) (1994). Unless necessary to achieve proper functioning or balance, the membership of the committee is limited to twenty-five members. 5 U.S.C. § 565(b) (1994). The committee is to reach a consensus on a proposed rule or other matter determined by the agency. 5 U.S.C. § 566(a) (1994). A process is set whereby the committee can agree to the selection of the facilitator. 5 U.S.C. § 566(c) (1994). Agency representatives have the same duties and responsibilities as other members of the committee. 5 U.S.C. § 566(b) (1994). This person is different from both the facilitator and the federal official who is authorized to adjourn the meeting under 10(e) of FACA. 5 U.S.C. § 566(c) (1994). The records of the committees must be kept and are subject to public disclosure through the provisions of FACA. 5 U.S.C. § 566(g) (1994).

One explanation of the negotiation process divides it into three stages.<sup>34</sup> In the first stage, a decision is made by an agency to negotiate a particular rule. A convener is chosen, whose tasks include the following: identifying and contacting potential stakeholders, setting deadlines, helping participants to obtain financial and technical resources, providing negotiation training if needed, and handling requests for participation. The convener's job is basically removing obstacles from the negotiation of the rule.<sup>35</sup> Meanwhile, the internal agency staff must satisfy FACA notice and charter requirements.<sup>36</sup>

In the second stage, negotiation occurs.<sup>37</sup> During this process timetables are set, fact-finding is commenced, subcommittees are organized and preliminary proposals are drafted, major differences in interests are confronted, records of all agreements reached are kept, and a draft of the proposed agreed-upon rule is developed.<sup>38</sup> The proposed rule is developed through negotiation among the competing interests represented in the committee.

Negotiated rulemaking, in theory, involves the stakeholders and agency representatives engaging in voluntary face-to-face negotiations to determine how a given interest will be regulated.<sup>39</sup> It is a collaborative, as opposed to adversarial, process between former adversaries to gather information, discuss options, and develop a consensus.<sup>40</sup> If consensus is reached, a proposed rule is published in the Federal Register and public comment is invited before the rule is made effective.<sup>41</sup>

In the final stage, the constituencies of the participants are persuaded to support the rule and a formal agreement is drafted to support the proposed rule during the public comment phase.<sup>42</sup> The committee may be reconvened after the comment period is over to discuss and respond to the comments produced, if any.<sup>43</sup> By including the interested parties in the development of the rule, in theory there should be fewer challenges to the rule than under the old process.<sup>44</sup>

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<sup>34</sup> Susskind & McMahon, *supra* note 26, at 150.

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

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Susskind & McMahon, *supra* note 26, at 136.

<sup>40</sup> *Id.* at 137.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 151.

<sup>43</sup> Susskind & McMahon, *supra* note 26, at 151.

<sup>44</sup> *Id.* at 137.

### E. Authority of Advisory Committees

While advisory committees are usually not delegated actual authority to pass a regulation,<sup>45</sup> the committee charters may require near-delegation of this authority. For example, one committee ended its negotiations with an agreement that required the EPA to publish (for public comment) the rule the committee recommended without any substantive changes.<sup>46</sup> This commitment by the agency to adopt the proposed rule resulting from the negotiation is common and has raised the concern of critics.<sup>47</sup> Their complaint is that the agency is refusing to exercise its authority as an independent decision-maker.<sup>48</sup> The bargaining power of the agency is not to be under-estimated, however, because no rule will be passed unless the agency agrees.<sup>49</sup>

The benefits to society from this type of deal-making also seem to outweigh the harm done by any reduction in decision-making power of the agency. In the above example, the committee members agreed not to oppose or challenge the rule in court, as long as no substantive changes were made to it.<sup>50</sup> This agreement indicates that one of the benefits of a successful negotiation is a reduction in litigation challenging the regulations of the agency. This is a clear saving for society in terms of the foregone costs of litigation.

At the other end of the spectrum are committees that are formed simply to advise the agency on certain facts that will affect the policy underlying the proposed regulation. One commentator called these committees "Scientific and Technical Committees."<sup>51</sup> They have more narrow and manageable assignments than do general committees negotiating broad

<sup>45</sup> Henry H. Perritt, Jr., *Analysis of Four Negotiated Rulemaking Experiments*, 50-118 (Sept. 4, 1985) (Draft Report to the Administrative Conference of the United States (ACUS)) [hereinafter Perritt, Analysis] quoted in Susskind & McMahon, *supra* note 26, at 158 n.121 ("Under all current conceptions of negotiated rulemaking, and clearly reflected in ACUS guidelines, negotiators play only an advisory role in the agency; the agency retains the final decision making authority."); Perritt, *supra* note 33, at 1705 (agencies will not have delegated their statutory authority to make rules).

<sup>46</sup> *Hazardous Waste: Manifest Committee Closes Most Issues; Will Review Broad Concepts in December*, DAILY ENV'T REP. (BNA) No. 173, at D-16 (Sept. 9, 1993) [hereinafter *Hazardous Waste*].

<sup>47</sup> NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, & PRACTICE* § 12.11 (2d ed. 1994).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Hazardous Waste*, *supra* note 46, at D-16.

<sup>51</sup> Levine, *supra* note 7, at 218.

public policy.<sup>52</sup> Through these committees, scientists, and other professionals give highly specialized advice to executive departments such as Defense; Agriculture; and Health, Education, and Welfare.<sup>53</sup> Although one might think that these types of groups appear more politically stable, Technical Committees can be extremely controversial.<sup>54</sup> These groups still have significant power to influence the agency; however, the power is more indirect.

Whether the committee is engaging in the negotiated rulemaking process under Neg-Reg, or developing consensus on a technical data recommendation, FACA exerts tremendous influence over the nature of the negotiations. As we shall see in the next section, this influence can be detrimental to reaching a sound consensus.

### III. NEGOTIATION THEORY AND FACA: OPENNESS AND BALANCE

This section begins with a more detailed description of the open meetings and balance provisions of FACA. These provisions are most often cited as inhibiting the negotiation process. Next, a discussion of negotiation theory is given to provide context for the criticisms of the open meetings and balance requirements based on their negative effects on negotiation. These set the stage for a discussion of the suggested solution to the conflict between the requirements of FACA and effective negotiation.

#### A. *FACA as an Impediment to Dialogue.*

Some argue that FACA is an impediment to consensus between the agencies and interested parties for a number of reasons.<sup>55</sup> Only two of these

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<sup>52</sup> Levine, *supra* note 7, at 218.

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994); *Northwest Forest Resource Council*, 846 F. Supp. 1009; *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2d Cir. 1979).

<sup>55</sup> CROWFOOT & WONDOLLECK, *supra* note 5, at 23 (stating that the lack of flexibility in the FACA structure inhibits non-traditional procedures from being used to help bring conflicting parties to a consensus). The review by Congress and the executive branch of advisory committees in general, required to ensure that they are performing their function, 5 U.S.C. app. §§ 5-7 (1994), can hinder their ability to adequately resolve an issue. Harter, *supra* note 10, at 22 n.128. For example, President Clinton recently issued an executive order cutting the number of advisory committees by one-third. Exec. Order No. 12,838, 58 Fed. Reg. 8207 (1993). FACA imposes various standards not fully conducive to negotiations. Harter, *supra* note 10, at 22. The charter requirement has been described as time-consuming



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reasons will be discussed here: (1) the open meetings requirement, and (2) the balanced viewpoint requirement.<sup>56</sup>

### 1. *Balanced Viewpoint Requirement*

While FACA requires that a committee's composition be fairly balanced in the viewpoints represented, the statute does not clearly define a "balanced viewpoint." Legislative history suggests that this provision "require[s] that membership of the advisory committee shall be representative of those who have a direct interest in the purpose of the committee."<sup>57</sup> The courts have therefore required that a fairly balanced committee include those who have a direct interest in the purpose of the committee.<sup>58</sup> This does not mean, however, that "Congress intended the 'fairly balanced' requirement to entitle every interested party or group affected to representation on the committee."<sup>59</sup> Furthermore, there is no right created by the statute in representation on a committee.<sup>60</sup> One court has stated that the appropriate inquiry is whether the committee's membership "represent[s] a fair balance of viewpoints given the functions to be performed."<sup>61</sup>

While each interested party may not be entitled to representation, there are methods for ensuring that representation of each party is achieved.<sup>62</sup> This is a desirable end because it reduces the possibility of future litigation and it helps to instill confidence and acceptance of the resulting rule.

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and burdensome. Perritt, *supra* note 33, at 1704. FACA gives supremacy to an officer of the federal government, by authorizing the officer to adjourn the meetings and prohibit a committee from conducting business in the absence of that officer. Harter, *supra* note 10, at 33; 5 U.S.C. app. § 10(e) (1994). FACA also emphasizes that an advisory committee is just that—advisory; the final action is within the determination of the agency. 5 U.S.C. app. § 9(b) (1994). All of the above suppress the organization of regulatory-negotiation committees.

<sup>56</sup> Harter, *supra* note 10, at 22, n.128 (noting that uncertainty tends to discourage contacts between the agency and the private sector).

<sup>57</sup> S. REP. NO. 1098, 92d Cong., 2d Sess. 9 (1972).

<sup>58</sup> Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 423 (D.C. Cir. 1989).

<sup>59</sup> *Id.* (quoting National Treasury Employees Union v. Reagan, Civ.A No. 88-186, 1988 WL 21700, at \*3 (D.D.C. Feb. 25, 1988)).

<sup>60</sup> *Id.*

<sup>61</sup> National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 (D.C. Cir. 1983).

<sup>62</sup> Susskind & McMahon, *supra* note 26, at 155-56.

## 2. The Open Meetings Requirement

The concept of open meetings has a few potential meanings. Within the context of FACA, it means that reasonable notice will be provided to the public of the time, place, and subject matter to be discussed of advisory committees. Furthermore, committee documents can be obtained by members of the public upon request. Finally, members of the public may have an opportunity to express their concerns to the committee for consideration in the negotiation. The open meetings requirement does not provide a right to participate in the meeting itself.

The requirement for public meetings has been described as "inhibiting" the consensus-building process.<sup>63</sup> The open meetings provision, if strictly interpreted and applied by courts, could make exploration by committees of potential resolutions to disputes difficult.<sup>64</sup> Originally, the only exceptions to the open meetings requirement were those allowed by subject matter under the Freedom of Information Act.<sup>65</sup> In 1976, an amendment was passed which included exceptions to the Freedom Of Information Act's [hereinafter FOIA] open meetings requirement within the group of exceptions allowed to FACA's open meetings requirement.<sup>66</sup>

FACA meetings are open to the public unless good cause is shown to hold the meeting privately.<sup>67</sup> Advisory committee meetings are closed to the public under FACA only when they involve: (1) matters covered by exceptions 1-7 of the Freedom of Information Act; (2) criminal accusations directed at a person or other formal censures of a person; (3) frustration of proposed agency action if prematurely known; or (4) agency participation in formal rulemaking litigation.<sup>68</sup> The General Services Administration's (GSA) regulations implementing FACA also allow certain meetings to be exempt from FACA.<sup>69</sup> These meetings include: (1) meetings for the purposes of exchanging information,<sup>70</sup> (2) meetings held by a private group (not an agency) for the purpose of expressing the group's views so long as

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<sup>63</sup> Harter, *supra* note 10, at 33; Perritt, *supra* note 33, at 1704-05. *But cf.* James T. O'Reilly, *Committees and Competition: Restoring Industry Input to Federal Advisory Committees*, 41 BUS. LAW. 1293, 1294 (1986) (noting that the open-meetings requirement of FACA has generated little litigation compared to other legislation requiring documentary access).

<sup>64</sup> Perritt, *supra* note 33, at 1703.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 5 U.S.C. app. § 10(a)(1) (1994).

<sup>68</sup> Perritt, *supra* note 33, at 1703-04.

<sup>69</sup> 41 C.F.R. § 101.6.1004 (1994).

<sup>70</sup> *Id.* at 41 C.F.R. § 101.6.1004(h)(1) (1994).

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the group does not use the group as a “preferred source of advice or recommendations,”<sup>71</sup> and (3) meetings for the purpose of “obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendation.”<sup>72</sup> Subcommittees of advisory committees are covered by FACA, according to the preamble of the GSA regulations, only when they report directly to the agency rather than through the main advisory committee. Additionally, informal meetings of two or more members of advisory committees are not covered by FACA, according to the preamble, when the purpose of the meeting is (1) to gather information, (2) to conduct research, or (3) to draft option papers for the full advisory committee.<sup>73</sup>

In order to get around the FACA requirements of open meetings and published notice, the agency head to which the committee must report must authorize the confidentiality of a meeting in accordance with standards set up by the FOIA.<sup>74</sup> This process is awkward and time-consuming in the negotiated rulemaking context.<sup>75</sup> Harter suggests that FACA should be revised to allow for a more hassle-free method of conducting negotiated rulemaking meetings in private.<sup>76</sup>

### B. Negotiation

Negotiated rulemaking is an alternative to the hybrid method of rulemaking. The hybrid method of rulemaking was the result of a process laid out in the Administrative Procedure Act and supplemented by judicial and legislative action. Theoretically, its foundations were in the adversarial process of dispute resolution. Critics of the hybrid process have charged that its shortcomings,<sup>77</sup> rooted in its adversarial nature, have evoked the need for the negotiated rulemaking process alternative.<sup>78</sup>

#### 1. *The Political Legitimacy of Negotiation*

Proponents of the negotiated rulemaking process claim that one of its

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<sup>71</sup> 41 C.F.R. § 101.6.1004(h)(2) (1994):

<sup>72</sup> 41 C.F.R. § 101.6.1004(j) (1994).

<sup>73</sup> Federal Advisory Committee Management, 48 Fed. Reg. 19324 (1983).

<sup>74</sup> See 5 U.S.C. §§ 552b(c), (d)(1), (1994).

<sup>75</sup> Harter, *supra* note 10, at 85 n.458.

<sup>76</sup> *Id.* at 85.

<sup>77</sup> See Susskind & McMahon, *supra* note 26, at 133-34 (listing complaints from all groups about federal rulemaking).

<sup>78</sup> Harter, *supra* note 10, at 6.

benefits is that it imparts political legitimacy to the resulting regulation.<sup>79</sup> This is because it seeks to include all interested parties and allows the public to scrutinize the decision-making process.

The political legitimacy, at least among the negotiators, of a negotiated rule is assured by the self-interest of the participants.<sup>80</sup> The theory is that the negotiators will not agree to a rule which they cannot accept.<sup>81</sup> If all interested parties are included in this process, then overall political legitimacy of a negotiated rule should be achieved. The result is that voluntary compliance with the rule will help to lower enforcement costs and present fewer challenges to the rule.

Without getting into an in-depth exploration of the theoretical foundations of negotiated rulemaking,<sup>82</sup> this subsection will explore the open meetings and balanced representation aspects of negotiation theory.

## 2. Balance In Negotiation

The need for balanced participation in negotiation is grounded in its tendency to promote (1) the finality of the resolution and (2) a breadth of information and ideas. While there are concerns that suggest a requirement of balance is not always beneficial, no concerns argue openly against it. Defining balance is perhaps a more controversial issue than requiring it. The opposite is true for open meetings. For now, the need for balance will be discussed.

If all interested groups are not included from the beginning or satisfied by the result, the consensus-building process could be lost.<sup>83</sup> Public

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<sup>79</sup> Harter, *supra* note 10, at 6. One group of commentators discusses the need for negotiated rule making in public policy disputes as follows:

Though our representative democracy—with its separate levels and branches of government—is the foundation of our political system, we need to improve the ways in which we use it to resolve public disputes. . . . In particular, we need to find ways of dealing with differences that will restore public confidence in government, and improve relationships among various segments.

SUSSKIND & CRUIKSHANK, *supra* note 6, at 10.

<sup>80</sup> Harter, *supra* note 5, at 1405.

<sup>81</sup> *Id.*

<sup>82</sup> See Susskind & McMahon, *supra* note 26, at 140–42, for a discussion of the theory of negotiated rulemaking.

<sup>83</sup> GOLDBERG ET AL., *supra* note 2, at 339; Susskind & McMahon, *supra* note 26, at 141; CROWFOOT & WONDOLLECK, *supra* note 5, at 20 (“For [the environmental dispute settlement process] to be effective, all groups with a stake in the conflict must be identified

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participation helps to develop a political base on which to rest a decision.<sup>84</sup> This in turn will reduce challenges to the decision and thus allow society to avoid the costs of resolving those challenges.<sup>85</sup> It is more beneficial to include as many interested parties as possible, despite the logistical problems that may arise, than to exclude a potentially interested party who could raise problems later in the negotiation process or after a hard fought agreement has been won among the participating parties.<sup>86</sup> "Even on technical committees, the intent of the legislation was to suggest inclusion of consumer or other non expert public members."<sup>87</sup> The idea is to start with a large number of representatives and reduce the number by selecting appropriate representatives.<sup>88</sup>

Balanced representation also brings broad sources of information for agency decisions.<sup>89</sup> By allowing public participation and challenges to the government experts, new ideas can be raised and considered.<sup>90</sup> Balanced participation, especially in the technical committees, helps to build a sound scientific base for the committee recommendation. Two commentators, Susskind and McMahon, stated the issue as follows:

If, during the review and comment period, qualified experts testify that important scientific evidence has been ignored or misinterpreted, the result should clearly be judged an inferior or unwise rule. Although the wisdom of the negotiated rule will become clear once the rule has been implemented, it might be disastrous to delay evaluation until that point.<sup>91</sup>

The interaction between these two concerns, political legitimacy and the need for broad bases of information, is illustrated precisely by the comments of parties excluded from the advisory committee used to resolve the spotted owl controversy:

By excluding opinions other than those viewed acceptable by the

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and involved.").

<sup>84</sup> Henry H. Perritt, Jr. & James A. Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Act After Two Years*, 63 GEO. L.J. 725, 727 (1975).

<sup>85</sup> *Id.* at 728. Full participation can diffuse opposition by creating a sense of obligation by the regulated to abide by regulation which they had a role in developing. *Id.* This is especially important when the regulation depends on voluntary compliance. *Id.* at n.15.

<sup>86</sup> GOLDBERG ET AL., *supra* note 2, at 339.

<sup>87</sup> O'Reilly, *supra* note 63, at 1300.

<sup>88</sup> GOLDBERG ET AL., *supra* note 2, at 339.

<sup>89</sup> Perritt & Wilkinson, *supra* note 84, at 727.

<sup>90</sup> *Id.* at 728.

<sup>91</sup> Susskind & McMahon, *supra* note 26, at 141-42.

team, the president's scientists skewed the range of options considered, eliminating alternatives that would have inflicted far less suffering on the hard working citizens of the Pacific Northwest.<sup>92</sup>

Without the FACA procedures, our data was ignored, industry scientists' views were ignored, and other scientists on the team withdrew when other outside opinions were ignored. . . . [T]here will be plenty of time to show that a different substantive outcome would have occurred [under the FACA procedures].<sup>93</sup>

These statements voice both the political dissatisfaction of being excluded from the negotiations as well as the concern about considering all possible points of view.

There does not appear to be anyone who opposes balanced representation *per se*, but some are concerned that a balance requirement (1) waters down the quality of advice given to the agency by allowing untrained representatives to fill the seats that could be filled by trained representatives and (2) endangers the ability to achieve resolution by allowing too many parties.

The business community is concerned with the potential for bad advice being given due to mandatory participation by those who are less familiar with a regulated industry or lack technical knowledge.<sup>94</sup> The loose guidance given by Congress and the implementing regulations is interpreted as a grant of wide discretion on the part of the agency to appoint members based on technical skill or representative status.<sup>95</sup> Attempts to satisfy either of these values often imply a cost in terms of the other. Some have suggested that one solution in weighing these two values is to require a cap on the percentage of public interest or consumer group representatives on a committee. The result would be to allow committees to bring together those with the most business and technical skill and thus provide the best possible advice to the government. This is not a consensus view. In general, the business community's view is not in favor of mandatory caps on the number of representatives of public interests allowed, but is in favor of a minimum education level or experience requirement.<sup>96</sup>

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<sup>92</sup> *Forestry: Judge Rules Not to Block Forest Plan, Says Clinton Administration Broke Law*, DAILY ENV'T REP. (BNA) No. 55, at D-12 (March 23, 1994) (quoting a March 12, 1994 statement by the Northwest Forestry Association).

<sup>93</sup> *Id.* (quoting a March 22, 1994 statement by Mark Rey, Vice President of the American Forest and Paper Association).

<sup>94</sup> O'Reilly, *supra* note 63, at 1298.

<sup>95</sup> *Id.* at 1299.

<sup>96</sup> O'Reilly, *supra* note 63, at 1303.

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The second concern with balance is that it might make committee size unmanageable. The result would be a failed negotiation process. The consensus today is that twenty-five is an appropriate upper limit for committee size. One way to reconcile these two values—manageable negotiation and balanced representation—would be to work with “pools” of parties. The idea would be to start with a large pool. The members of the pool would form groups with common interests in the issue and then select representatives from that pool. This process has met with some success and can help to ameliorate the negative effect of a balance requirement on the size of the advisory committee. There are some instances when there are too many diverse interests for this process to work. In these cases, negotiation is not the appropriate method to achieve a resolution of the issue. The proposal presented here is directed at those instances when negotiation is appropriate given the number and diversity of interests.

### 3. *Open Meetings in Negotiation*

There are at least three competing interests involved in the dispute over the wisdom of requiring confidential negotiation: (1) promoting effective negotiation, (2) preserving evidence for judicial and administrative proceedings, and (3) “promoting public access to information needed for accountability and decision making in a democratic society.”<sup>97</sup> Those who are for and against public negotiations can best be viewed as placing their focus on one of these interests. Those who oppose open meetings focus on its negative impact on effective negotiation. Those who are in favor of open meetings focus on the need for political accountability.

#### a. *The Need for Openness*

Those who favor open negotiations give at least four reasons why closed meetings would undermine political accountability: (1) openness helps to equalize power differences between parties,<sup>98</sup> (2) closing the meetings precludes consideration of important advice,<sup>99</sup> (3) where public interests are involved the public should be aware of how these interests are being negotiated,<sup>100</sup> and (4) wrongfully excluded parties will have a more difficult time challenging the results of a closed meeting than they would an

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<sup>97</sup> GOLDBERG ET AL., *supra* note 2, at 179.

<sup>98</sup> Perritt, *supra* note 33, at 1639.

<sup>99</sup> Perritt & Wilkinson, *supra* note 84, at 730.

<sup>100</sup> Cf. GOLDBERG ET AL., *supra* note 2, at 180 (Noting that the social policy for allowing public access to negotiation discussions is strengthened when the negotiation involves an issue of public interest and not of private interest like divorce).

open meeting. Each of these reasons will be briefly elaborated.

Open meetings help to equalize the bargaining power between the traditionally powerful special interest groups and the traditionally weaker public interest groups.<sup>101</sup> Open meetings allow the public interest groups to get public support through the media.<sup>102</sup> This allows them to raise money needed to carry on the negotiation<sup>103</sup> and also to put outside political pressure on the special interest groups.<sup>104</sup> Unless public interest groups feel that they will come to the negotiation table on equal grounds and will have something to gain through negotiation rather than traditional means of dispute resolution, they will avoid negotiation altogether.<sup>105</sup> If all interested parties are not present, the legitimacy of the negotiation process is threatened. In addition, the results of a negotiation perceived to be imbalanced will seem less legitimate in the weaker parties' eyes. Therefore, the tendency of open meetings to equalize the bargaining power of the parties is essential for legitimacy.

Closing the meetings precludes consideration of important advice. Allowing the public to comment on the negotiations or the proposed rule during the negotiations helps to present all relevant angles on the issue and instills a sense of legitimacy by allowing the non-participating public to feel that they had input in the negotiation process.

The public should be allowed access to meetings where public interests are being negotiated. The concern about confidentiality in negotiation in the public policy context differs from the concern about confidentiality in

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<sup>101</sup> CROWFOOT & WONDOLLECK, *supra* note 5, at 3. "Citizen organizations are most often the least powerful party among the multiple parties seeking to influence a specific environmental policy or management decision." *Id.* They have fewer dollars and staff and depend on contributions, legal rights, sympathy, and the "traditions of a pluralistic and democratic political culture." *Id.* They are also in competition with each other for influence over environmental policies. *Id.*

<sup>102</sup> *Id.* at 171-72 (stating that name recognition was necessary for public interests to be recognized as a powerful interest in the dispute and noting that participation in an open process can improve citizen group's image by allowing recognition of knowledge of willingness to resolve an issue and that well-planned media campaigns allow environmentalist groups to present their view in the best possible light).

<sup>103</sup> *Id.* (noting that for organizations "building . . . membership through public action . . . , anonymity could be deadly").

<sup>104</sup> *Id.* at 145 (quoting Karita Zimmerman, *Negotiated Investment Strategies: A New Approach to Public-Private Partnership* (1984) (unpublished M. thesis in City Planning, MIT) ("Extensive publicity . . . serves as political leverage when implementing the agreement as well as re-stimulating interest in the proceedings. An informed public becomes the watchdog in a controversial negotiation.")).

<sup>105</sup> *Id.* at 29.



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negotiation of individual rights.<sup>106</sup> Private party mediation and negotiations involve individual interests, rights, and information to which the public's right to know is less strong. In broad policy negotiations, where more global concerns and interests are involved, the public's right of access to negotiations is stronger.

The fourth concern is that non-participating interested parties might be forced into a position of trying to change the agency's decision in a short time in the face of a long consensus-building process supporting the decision.<sup>107</sup> In addition, the parties would have to do so without access to the information considered in forming the decision<sup>108</sup> and burdened by the administrative hassles of getting access to that information.<sup>109</sup>

In sum, open meetings help to provide political legitimacy to committee meetings. Open meetings make the process more fair and more thorough. Open meetings allow public scrutiny of decisions that will effect the public's rights and provide wrongfully excluded parties with a better opportunity to present their claims.

### b. *The Need for Privacy*

Confidential communications between private parties and agencies are looked down upon or prohibited by the current political environment.<sup>110</sup> Nevertheless, there are those who believe that negotiation is best carried out in private.<sup>111</sup> These viewpoints can be illustrated in terms of a concern about effective negotiation.

Public access is believed to have a negative effect on negotiation by discouraging parties from compromising in politically unfavorable ways.<sup>112</sup> Philip Harter, a major figure in the field of negotiation and consensus building,<sup>113</sup> gives at least four reasons for the need for privacy in negotiation based on the promotion of effective negotiation. First, concessions are a necessary part of negotiating a consensus.<sup>114</sup> The problem

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<sup>106</sup> See GOLDBERG ET AL., *supra* note 2, at 289.

<sup>107</sup> Perritt & Wilkinson, *supra* note 84, at 730.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (stating that agency response to a Freedom of Information Act request for minutes or recommendations could take a long time).

<sup>110</sup> Harter, *supra* note 10, at 84.

<sup>111</sup> O'Reilly, *supra* note 63, at 1296 (describing the ideal committee meeting as confidential to encourage disclosure); Harter, *supra* note 10, at 84.

<sup>112</sup> GOLDBERG ET AL., *supra* note 2, at 179.

<sup>113</sup> *Id.* at 345 (describing Harter's *Negotiating Regulations: A Cure for Malaise* as a "seminal article").

<sup>114</sup> Harter, *supra* note 10, at 84.

with open meetings is that unpopular concessions must be explained to constituencies and sometimes this means telling part of the constituency that their interests were not of central importance.<sup>115</sup> Private negotiations prevent the injection of the press into the relationship of the participants and the mediators.<sup>116</sup> Therefore, the constituency has less knowledge of the concessions their representatives made in order to reach their results. As a result, the representatives can maintain face with all of their constituencies.

Second, confidential or potentially damaging data will not be revealed at a public meeting because of various risks, including the loss of an advantage over business competitors and the possibility of future litigation.<sup>117</sup> Therefore, openness creates a disincentive to reveal all relevant data. The core of administrative law is reliance on expertise in the agency.<sup>118</sup> Before rules or regulations can be formulated, the agency and its committees require full access to pertinent information from a variety of sources determined by the supposed effect of the regulation.<sup>119</sup> Without this information, the committee cannot negotiate effective rules. The information may be revealed as the basis of a proposed rule. However, there is a disincentive of revealing the information early due to the risk of negotiation breakdown and the loss of confidentiality and its effects on subsequent disputes.<sup>120</sup>

Third, there is a disincentive to participate in a negotiating process if parties believe that the positions they assume for the process may be used against them in a later dispute.<sup>121</sup> For example, private companies and agency representatives have been reluctant to attend meetings at the FTC for

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<sup>115</sup> *Id.* See also Perritt, *supra* note 33, at 1665.

<sup>116</sup> Harter, *supra* note 10, at 84 n.452; GOLDBERG ET AL., *supra* note 2, at 179. After two years of failing to reach an agreement with interested parties through open negotiation, the Virginia Department of Transportation hired a mediation company to help resolve a dispute about the location of a highway. The Government and neighborhood representatives convened a meeting. The group decided to exclude others, including the press, and authorized the mediators to issue periodic public reports about their progress. Richmond newspapers filed a suit in state court asking that all persons attending the mediation be enjoined from holding a closed session. They argued that the Virginia Freedom of Information Act requires open meetings when the entities involved are supported wholly or principally by public funds and are created to advise a public body. The Department of Transportation countered by claiming that a mediation privilege created an exception to the access requirements. Before the court could resolve the case, however, the parties reached an agreement.

<sup>117</sup> Harter, *supra* note 10, at 84.

<sup>118</sup> Perritt & Wilkinson, *supra* note 84, at 726.

<sup>119</sup> *Id.* at 726.

<sup>120</sup> Harter, *supra* note 10, at 84.

<sup>121</sup> *Id.*

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this reason.<sup>122</sup> The concern from both points of view was that if strategies and information were revealed at an early stage of a negotiation, then the negotiation could break down and those positions and strategies could be used against them in the future.<sup>123</sup> Therefore, they were unwilling to meet openly with agency officials and go on record as endorsing certain points of view or positions.

Fourth, the public forum may cause parties to continue to stake out extreme positions and to be reluctant to compromise from these positions.<sup>124</sup> This is caused by constituency pressure and clearly acts as an inhibitor to the consensus-building process. If the participants fail to retreat from extreme and inconsistent positions, then common ground between them cannot be achieved. Parties will be pressured to adopt the extreme positions of their constituents, whose views are formed without consideration of the other interests involved. From the constituency point of view, any perceived concessions could threaten the representative's position as representative. Therefore, the representatives have an incentive to stake out extreme positions in open meetings where their constituencies are watching their every move.

Despite these problems, Harter admits that highly technical and controversial standards are often developed in open meetings and that "the negotiation process can clearly work in public."<sup>125</sup> Even politically heated regulations may, per experience, be capable of negotiation in public.<sup>126</sup>

### IV. SOLUTIONS

There is a conflict between the need for political legitimacy in the use of advisory committees and the need for effective negotiation in advisory committees. By requiring openness of committee meetings in the attempt to ensure accountability, FACA threatens to undermine effective negotiation in the committees for the reasons laid out above. But closing committee meetings, even parts of committee meetings raises the concerns of those who favor open negotiation. In resolving this conflict inherent in the structure of FACA, any proposed solution would need to adequately address each of these concerns.

This section has two major components. First, the proposed solution will be laid out in more detail. Arguments will be given that the above

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<sup>122</sup> Robert B. Reich, *Regulation by Confrontation*, 59 HARV. BUS. REV. 82, 88-89 (1981).

<sup>123</sup> *Id.*

<sup>124</sup> Harter, *supra* note 10, at 84.

<sup>125</sup> *Id.* at 84 n.455.

<sup>126</sup> *Id.* at 84.

concerns based on negotiation theory can be adequately satisfied by this solution. Second, the legal bases and obstacles of this proposed solution will be examined.

### A. *Proposed Solution*

A solution to this problem, which addresses all the relevant concerns, is to allow subgroups of the parties to negotiate their sensitive disputes behind closed doors, but only when balanced representation exists in the committee.<sup>127</sup> This proposal selectively addresses the need for privacy in committee meetings. While closing all meetings would undermine the concerns of those who are in favor of open meetings, the proposal allows members to make certain disclosures and to adopt positions outside of public scrutiny. The requirement of balance in the full meeting addresses concerns about accountability. The main mechanism for ensuring accountability is the application of pressure from balanced representation at the full committee level on the subgroup to privately negotiate in solutions that are acceptable to the full committee. If all interested parties are present, the formation, composition, and negotiation of private subgroups will be externally influenced by the full committee to resolve sensitive disputes legitimately. At the same time, those who embrace concerns about open meetings are provided a forum to ameliorate their concerns, namely private subgroup meetings.

If committee meetings are to be closed, two possible procedures could be followed to decide how information from these meetings would be presented to the public: (1) provide a rule saying no one may publicly characterize the view of another in a public statement—a process used in dialogue groups of business people and environmentalists;<sup>128</sup> or (2) a ban on public statements unless agreement after review by all parties.<sup>129</sup> In any event, a process should be developed whereby parties agree not to use the information disclosed during the negotiations against each other.

### B. *Closing Subcommittee Meetings*

By allowing certain groups of committees to break off and negotiate behind closed doors in certain circumstances, all concerns about open meetings can be met. The use of closed subcommittee meetings has become a regular practice with advisory committees.<sup>130</sup> It is, however, a

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<sup>127</sup> ROGERS & MCEWEN, *supra* note 47, at 59.

<sup>128</sup> Harter, *supra* note 10, at 85 n.460.

<sup>129</sup> *Id.* at 85.

<sup>130</sup> Robert Brenner, Policy Director of the EPA Air Office, and Lorie Schmidt,

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controversial practice, especially to those being closed out.<sup>131</sup> Certain limitations need to be established to ensure that the concerns listed above are addressed. The main prerequisite for allowing closed subcommittee meetings should be a finding of balanced representation in the committee itself.

Combining open committee meetings with closed subcommittee meetings satisfies the concerns of those who favor open meetings. The effect of equalizing the bargaining power between parties is not lost because the public interest groups can still attain publicity through the open full committee meetings. Public awareness of how public interests are being negotiated at the full committee meetings would exist. Agreements by private subgroups not to disclose certain information may also include agreements to allow disclosure of other aspects of the negotiation process. The resolution of the issue negotiated in private would be communicated to the full committee and to the public. The problem of parties being forced to change a rule in the face of a hard fought negotiation has no application to the closing of a subcommittee. The reason for this, as discussed below, is that the subcommittee cannot have a legally closed meeting and advise the agency (or the executive). Those parties member to the full committee can attempt to influence the result of the subcommittee negotiation by opposing it in the full meeting negotiation. In sum, all of the concerns of those in favor of open meetings are adequately satisfied by the proposal of closing subcommittee meetings.

The concerns of those opposed to closed meetings are also addressed by allowing subcommittee meetings to be closed. Unpopular concessions on sensitive issues can be held confidential if made in a closed meeting of a subcommittee. Subcommittee members can make the necessary concessions while preserving the representatives' political credibility. The risk of disclosing confidential information needed for effective negotiation is minimized by use of the closed subcommittee meetings in conjunction with agreements to keep disclosures confidential. Similarly, the risk of taking positions during closed meetings is also reduced. Finally, when subcommittees are behind closed doors, the incentive to take extreme positions and the reluctance to compromise, which exist in open meetings, will dissipate.

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Assistant EPA General Counsel for Air and Radiation, told a BNA reporter that closed subcommittee groups "happen all the time during regulatory negotiations and other occasions." *Air Pollution: State, Auto Representatives Meet in Private on Cal Lev Alternative*, ENV'T. REP. (BNA) No. 238, at D-17 (Dec. 14, 1994).

<sup>131</sup> An attorney for Public Citizen, David Vladick, said that the fact that "they do it all of the time does not make it legal." *Id.*

### C. Balance Ensures Legitimacy

Closed meetings, it has been argued, will not damage the political legitimacy of the results of negotiations among appropriate representatives.<sup>132</sup> If meetings are closed in appropriate circumstances,<sup>133</sup> the safeguard of public scrutiny is protected by the negotiation process itself.<sup>134</sup> The political legitimacy derives from the adoption of the regulation by the balance of the participating parties and not from the openness of the meetings.<sup>135</sup> "[T]he nature of negotiated rulemaking . . . [appropriately pursued] ensures the adequacy of representation of affected groups. Thus, it provides its own form of political accountability, which probably is greater than when the agency makes rules unilaterally."<sup>136</sup> "If the negotiation takes place among appropriately balanced interest representatives, the opportunity for adversarial exploration of policy and factual issues is preserved in the negotiation itself."<sup>137</sup> Therefore, the issue of accountability should not preclude closed meetings, at least in certain circumstances.

The problem is that the scope of the concerns that this argument addresses is too narrow. It does not account for a party wrongfully excluded who must face the agency and its rule after the negotiation.

Balance in the full committee will supply pressure for closed subcommittees to resolve issues in ways that will be acceptable to the full committee. If committee members negotiate separately and privately, then they will be under pressure of achieving a consensus which all parties can agree. The same pressure will help to achieve a compromise on the concern about watering down the advice from technical committees.

Private meetings of experts can be held where the negotiation will not be hindered by non-sophisticated participants. In addition, as there is no limit on the number of consultants a committee may use, if a wider range of experts is needed, the subgroup could work with extra consultants. At the same time, if their proposal is accepted by the committee, it will help to ensure political legitimacy as well. Privacy of the subgroup meeting will lead to candid disclosure of the facts. If a subgroup proposal based on confidential facts impedes agreement in the committee, then either the subgroup can reconvene in private to re-negotiate, or an impasse has been reached in which no confidential information has been released; in either

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<sup>132</sup> This qualified position may indicate that those who are in favor of closed negotiation cannot also favor less balance.

<sup>133</sup> Harter, *supra* note 10, at 84.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Perritt, *Analysis, supra* note 45.

<sup>137</sup> *Id.* at 159 n.123.

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case, there is no risk of early disclosure of information.

### D. Legal Basis of Proposed Solution

This proposal is directed toward both agencies using committees to develop policy proposals and to reviewing courts. The following section describes for the agency the legal constraints and support for the proposal. In addition, a procedure for helping to ensure balance, as well as a procedural standard for review, is provided.

There is precedent in the case law and the relevant authorities that may offer a solution to the inherent contradiction within FACA.<sup>138</sup> The solution involves two propositions: if (1) there is a fairly balanced membership of the parent committee then (2) subgroups of advisory committees should be allowed to hold closed meetings.<sup>139</sup> The legal underpinnings of the latter proposition shall be taken up first.

In the past, the application of FACA to certain groups has been uncertain.<sup>140</sup> One type of group that has been particularly controversial is

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<sup>138</sup> *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524 (D.D.C.) (holding that task forces chaired by members of presidential commission are not advisory committees), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983); *Consumers Union of United States v. Department of Health, Educ. & Welfare*, 409 F. Supp. 473 (D.D.C.) (explaining that presentation by industry group on voluntary industry-sponsored proposal was not an advisory committee where agency lacked authority to regulate the subject), *aff'd*, 551 F.2d 466 (D.C. Cir. 1977); *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) (holding that White House meetings with selected private groups are not advisory committees). See also cases decided under the Sunshine Act, 5 U.S.C. § 5526 (1994), e.g., *FCC v. ITT World Communications*, 466 U.S. 463 (1984) (holding that informal background sessions or negotiations are not "meetings").

One commentator argues that FACA is concerned with the communication of advice to the agency and not how the advice is developed among the private interest groups. Perritt, *supra* note 33, at 1705 ("FACA applies only to sessions at which the agency is present, not to negotiating sessions or caucuses from which the agency is absent.").

<sup>139</sup> There are cases which may allow meetings to be closed to protect effective deliberations, especially where the committee membership is balanced. Compare *Nader v. Dunlop*, 370 F. Supp. 177 (D.D.C. 1973) (holding that FACA does not permit closing all meetings to protect deliberative consultations among members) with *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101 (D.C. Cir. 1976) (approving closure of portions of 3 of 20 meetings because intra-agency memoranda within exemption 5 of Freedom of Information Act had been discussed).

<sup>140</sup> *Federal Advisory Committee Management*, 48 Fed. Reg. 19,324 (1983) (discussing uncertainty in the application of FACA to groups formed on an ad hoc basis and to private groups which advise an agency).

the subgroup of an advisory committee.<sup>141</sup> FACA requires that groups which are "utilized or established by" the executive of an agency be subject to its provisions.<sup>142</sup> Subgroups which report to the parent committee and are established by the parent committee do not, according to case law,<sup>143</sup> fall under this category.

In *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*,<sup>144</sup> the court held that task force meetings, co-chaired by members of the parent committee, were exempt from FACA because the task forces were formed to gather information and formulate recommendations for the committee to consider. They lacked authority to advise either the president or the agency which established the parent committee.<sup>145</sup> The court stated as its reason for so holding:

[S]urely Congress did not contemplate that interested parties like the plaintiffs should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering process and preliminary decision-making process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy

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<sup>141</sup> GEN. ACCT. OFF., *Better Evaluations Needed to Weed Out Useless Federal Advisory Committees*, GEN. ACCT. OFF. REP. 19 (Apr. 7, 1977).

<sup>142</sup> *Association of Amer. Physicians and Surgeons v. Clinton*, 997 F.2d 898, 921-22 (D.C. Cir. 1993) (Buckley, J., concurring):

[B]ecause committees not composed exclusively of federal officers and employees have members who are not required to forswear their private associations and insulate themselves against potential conflicts of interest, FACA requires, as an alternative check, that their deliberations be conducted in open.

<sup>143</sup> *Id.* Analytically, this category could include subgroups, if the notion of "utilized" by an agency or the executive is interpreted broadly to include groups utilized by committees.

<sup>144</sup> 557 F. Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983). *See also* ITT World Communications, 466 U.S. at 465 (holding that the Sunshine Act did not require that meetings between a panel of the FCC and foreign officials be open to the public). Congress recognized, according to the Court, that "informal background discussions [that] clarify issues and expose varying views' are a necessary part of an agency's work." 466 U.S. at 469 (quoting Senate Report on Sunshine Act). Therefore, the Court found that strictly applying FACA requirements to such discussions would "impair normal agency operations without achieving significant public benefit." *Id.* at 470.

<sup>145</sup> 557 F. Supp. at 529.



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recommendations.<sup>146</sup>

In addition to the case law, the GSA's regulations (implementing FACA) define "meetings" in such a way as to preclude application of the openness provision to deliberations<sup>147</sup> that relate to the advisory committee's function:

[FACA does not apply to] [m]eetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research . . . to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee[.]<sup>148</sup>

Thus, there are both case law and agency sources which allow for subgroup meetings to be closed.

Some have criticized these interpretations as a loophole that allows committees to avoid the openness provisions by acting through subcommittees.<sup>149</sup> An amendment to FACA was proposed in 1992 to fix this and other problems with the statute.<sup>150</sup> The purpose of the proposed amendment was to require openness but also to recognize that subgroups did not require a charter or balance.<sup>151</sup>

Opening all subgroup meetings causes problems by overlooking the potential benefits to the negotiation process resulting from flexibility to close these subgroups' meetings.<sup>152</sup> Some parties are more willing to engage in the process, and ultimately to make concessions on highly controversial issues, so long as they are assured of at least a limited amount of confidentiality.<sup>153</sup>

Difficulty arises when it comes to establishing a legal basis for the

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<sup>146</sup> 557 F. Supp. at 529.

<sup>147</sup> Perritt claims that using the GSA definition to exempt meetings from the openness provision would "distort the negotiation process, and would not entirely eliminate the possibility that a court would find that the spirit of the GSA regulations were violated, or that the regulations contravened FACA." Perritt, *supra* note 33, at 1706.

<sup>148</sup> 41 C.F.R. § 101.6.1004(k) (1994).

<sup>149</sup> S. REP. NO. 281, 102d Cong., 2d Sess. 7-8 (1992).

<sup>150</sup> *Id.* at 8.

<sup>151</sup> *Id.*

<sup>152</sup> Four case studies suggest that meetings which were only nominally opened were not adversely affected by this fact. Perritt, *supra* note 33, at 1707. It is noteworthy, however, that FACA was interpreted in these cases as permitting closed meetings of subgroups and caucuses. *Id.*

<sup>153</sup> Perritt, *supra* note 33, at 1707.

proposition of a balanced representation requirement. The fair balance requirement is the most litigated provision of FACA.<sup>154</sup> There is no standard expressly provided by the statute to determine when a committee's membership is fairly balanced.<sup>155</sup> In addition, the lack of a standard has caused controversy in the case law. Some even claim that the issue is not justiciable.<sup>156</sup>

Unfortunately, this note will not provide the magical standard for determining when a committee's membership is fairly balanced. Indeed, such a feat may be impossible given the widely varying functions of advisory committees and the divergent interests and issues for which they are formed.

Instead, the solution proposed herein is a procedural test for determining when relief should be granted based on an alleged violation of the balance requirement. Based on the concerns of negotiation theorists, this test provides guidelines to help determine if procedure has been followed. This helps ensure that the risk of excluding interested parties, and so undermining the negotiation process, has been minimized. The test is meant as a supplement to the test used by the courts based on the function of the advisory committee. The proposed test has three prongs:

- (1) Has the agency followed a process designed to reasonably ensure representation from all interested parties and was the complaining party excluded through some fault of her own?
- (2) Is the negotiation process ongoing or has the advisory committee made its recommendation?
- (3) Will the public comment period of the rulemaking procedure give the party an adequate opportunity to have input into the rule, and what is the nature of the affected interest?

The first part of the first prong of the test is meant to ensure that at least an opportunity was presented for balance to be achieved. The 1992 amendment provided a method for judicial review of the balance requirement that focused on the procedure followed by the federal official whose duty it was to establish a balanced committee.<sup>157</sup> The official was to concentrate on including both public and private sector groups as well as other relevant interests.<sup>158</sup> A plan designed to ensure balance<sup>159</sup> and the

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<sup>154</sup> S. REP. NO. 281, 102d Cong., 2d sess. 9 (1992).

<sup>155</sup> O'Reilly, *supra* note 63, at 1299.

<sup>156</sup> See National Advisory Comm. on Microbiological Criteria, 886 F.2d, at 426 (Silberman, J., concurring) ("I cannot discern any meaningful standard that is susceptible of judicial application in the [fair balance requirement]. . .").

<sup>157</sup> S. REP. NO. 281, 102d Cong., 2d Sess. 9 (1992).

<sup>158</sup> *Id.*

<sup>159</sup> Such a plan would require substantive notice requirements. Notice should include

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action taken to implement it were to be included in the committee report.<sup>160</sup> This was a good beginning, but the plan needed to be refined.

The statute says that balanced representation on a committee should be determined in light of the "functions to be performed by the advisory committee."<sup>161</sup> This becomes problematic when there is a committee whose function is limited to a scientific technical purpose, yet whose impact socially and economically is potentially much broader.<sup>162</sup> Therefore, "relevant interests" needs to be defined in terms of not only the function of the committee, but also in terms of the foreseeable significant social and economic impacts. Special efforts must be made to contact those whose interests will be significantly impacted.<sup>163</sup> Where an unreasonable attempt is made by the official to achieve balance, then relief for the parties excluded should more easily, although not automatically, be granted.

The second part of prong one, whether the excluded party is at fault, provides assurance that parties are seeking relief in good faith. In the event that a reasonable plan is followed by the federal official, the party seeking relief must demonstrate that they were not "sleeping on their rights" or attempting to undermine the committee process through delayed intervention. Parties who did not actually receive notice or who are otherwise reasonably excused may be granted relief. But parties who are unable to meet their burden of good faith should be denied relief.

The second prong of the test, whether the negotiations are ongoing, reflects a potential conflict in the circuits over when injunctive relief is

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enough information to allow parties to know if their interests are to be affected.

<sup>160</sup> S. REP. NO. 281, 102d Cong., 2d Sess. 9 (1992).

<sup>161</sup> 5 U.S.C. app. 2 § 5(b)(2) (1995).

<sup>162</sup> See *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 Alabama-Tombigbee Rivers Coalition v. United States Dep't of Interior, NO. CIV.A.93-AR-2322-5, 1993 WL 646410 (N.D. Ala.), *aff'd*, 26 F.3d 1103 (11th Cir. 1994).

<sup>163</sup> This requirement should be modeled after the requirements of the Regulatory Flexibility Act. 5 U.S.C. §§ 601-12 (1994). This Act requires the publication of an analysis that describes the effects a proposed rule has on small businesses. This analysis is subject to public comment. The agency must provide reasonable notice to small businesses to encourage their participation.

Similarly here, relevant interests could be described in a published analysis of a proposed committee's function. Public comment could be provided to help bolster the agency's analysis for those interests which could be affected. Then actual notice could be provided to those relevant interests.

One concern is that so many parties would respond to certain committee announcements that the number of relevant interests would exceed the practical limitations of negotiation. In this case there could either be a pooling process or negotiations may have to be reconsidered as the appropriate method for resolving the issue.

appropriate. There is some agreement among courts that injunctive relief should be granted to an excluded party on an alleged violation of balance while the negotiation is continuing.<sup>164</sup> The proposed test affirms this point of view, assuming that the party has met the good faith burden. But there is potential disagreement, depending on how one interprets the case law, as to whether relief should be granted after the committee makes its recommendation.<sup>165</sup> There are at least three possible forms of injunctive relief that could be granted at this stage. First, the court might require a reconvening of the committee to allow the aggrieved party to be heard. Second, the court might enjoin the agency from acting on the proposed recommendation. Third, the court might invalidate the agency's action altogether. Only the second type of relief has ever actually been granted.<sup>166</sup> The first may appear too burdensome,<sup>167</sup> but any costs should be weighed in terms of the potential benefits of avoiding future litigation of challenge to the rule (and this balance could come out either way). The third type of action is most controversial and would likely be justified in only the most

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<sup>164</sup> *Alabama-Tombigbee Rivers Coalition* 26 F.3d at 1107 ("We find injunctive relief as the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements."); *Seattle Audubon* 871 F. Supp. at 1309 ("FACA can and should be enforced by injunctive relief during the process; that is, by an order requiring that a proposed or existing committee comply with the statute.").

<sup>165</sup> In *Seattle Audubon*, the court, in its consideration of injunctive relief for a FACA violation, drew a distinction between granting such relief while the negotiation process is still occurring and granting such relief either after the recommendation has been made or the committee has served its purpose. *Id.* The court noted that agency action based on the recommendation of a committee had not been invalidated, and proceeded to distinguish *Alabama-Tombigbee Rivers Coalition*. It did so by noting that "the plaintiffs obtained a temporary restraining order *before* the report was distributed and used by the government." *Id.* at 1310. As the *Seattle Audubon* court read it, the injunction was granted during the negotiation process, as opposed to after the committee had made its recommendation and served its purpose. Therefore, the *Alabama-Tombigbee Rivers Coalition* holding only authorized injunctive relief during the process of negotiation. It would not require automatic invalidation of every agency action based on recommendations made by advisory committees formed illegally under FACA, because it was reconcilable with numerous opinions denying injunctive relief. *Id.*

<sup>166</sup> *Alabama-Tombigbee Rivers Coalition* 26 F.3d at 1003 (enjoining the Fish and Wildlife Service from listing the Alabama Sturgeon on the endangered species list based on the recommendation of an illegal advisory committee).

<sup>167</sup> *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979) (finding the fact that the agency was not going to reconvene the committee a sufficient reason not to grant injunctive relief).

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extreme cases, if ever.<sup>168</sup> This inquiry into the ongoing nature of the negotiations relates to the third and final prong.

The final prong of the proposed test requires an inquiry into the nature of the post-negotiation relief. An opportunity for contemporaneous participation by parties with a direct interest in negotiation best serves the purpose of FACA.<sup>169</sup> This aspect of the test is an attempt to address a perceived shortcoming in case law which suggests that appropriate relief for parties unfairly excluded is the traditional public comment process.<sup>170</sup> The problem with this suggestion, in terms of negotiation theory, is that it fails to consider the benefits derived by the committee from the excluded viewpoint. The reason negotiated rulemaking has gained momentum is precisely because of the inadequacies of the hybrid method. This is not to say that the public comment process is always inadequate; but rather it cannot be assumed in every case to be the best solution for a party who has been wrongfully excluded.

Different factors should be considered, such as whether the negotiation process is ongoing. The earlier in the negotiation that relief is sought, the less adequate post-negotiation relief is for a deserving party. The nature of the interest being represented is also important. If a large portion of affected interests, for example a group of industries or large public citizen's group, is asking to be heard, then post-negotiation is less adequate from the

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<sup>168</sup> Perritt claimed that “[r]emedies for violation of FACA are limited and probably do not include invalidation of agency decisions made in reliance on advisory committee proceedings that violate FACA.” Perritt, *supra* note 33, at 1704. See also *National Nutritional Foods Ass’n v. Califano*, 603 F.2d at 336 (“So far as we are aware, no court has held that a violation of FACA would invalidate a regulation adopted under otherwise appropriate procedures, simply because it stemmed from the advisory committee’s recommendations, or even that pending rulemaking must be aborted and a fresh start made.”).

<sup>169</sup> One circuit court has reasoned that the purpose of FACA, to subject the use of advisory committees by the government to public scrutiny, required an emphasis on openness and debate. *Alabama-Tombigbee Rivers Coalition* 26 F.3d at 1106. Therefore the timing of the public’s observation of an advisory committee is crucial. *Id.* Public comment must be contemporaneous to the advisory committee process since retrospective commentary would render FACA requirements meaningless. *Id.* (quoting the district court). The court concluded that “[t]o allow government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act.” *Id.* at 1107.

<sup>170</sup> *Seattle Audubon Society* 871 F. Supp. at 1310 (quoting Secretary Babbitt). *National Nutritional Foods Ass’n* 603 F.2d at 336 (“Applicable rulemaking procedures afford ample opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal.”) As another example of inadequate relief, one court denied injunctive relief because the government claimed that had FACA been followed, the result would have been the same. *Northwest Forest Resource Council* 846 F. Supp. at 1015.

standpoint of finality of the negotiated result. This relates to the expanded notion of "relevant interest" discussed above. The adequacy and availability of the record of the committee is also important.<sup>171</sup>

## V. CONCLUSION

The use of advisory committees has historically proven to be a controversial practice. As a measure aimed at providing for political accountability, FACA lessened the controversy surrounding the practice, but FACA did not erase the controversy. Political legitimacy and successful, effective negotiation are two values that clash within the framework of FACA. The suggested solution herein attempts to resolve this clash and to erase more of the existing controversy over the advisory committees. At the heart of this proposal is the notion that balanced representation on the full committee can ensure the political legitimacy of the negotiation process, even if some of that process is conducted in private. This solution does not significantly thwart the concerns of negotiation theorists on either side of the open-meetings issue, and it helps to achieve

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<sup>171</sup> The 1992 proposed Amendment suggested a process that made access to committee documents easier. S. REP. NO. 281, 102d Cong., 2d Sess. 12 (1992). This idea is endorsed here with certain expansions. The amendment proposed to make documents available from a central location and within forty-eight hours of the meeting that would cover the subject of the document. This notion could be expanded and incorporated into relief granted by the courts. First, it should be broadened to cover committee documents from the public comment period. It may be overly burdensome to require all committees to make their documents available from a central location and on a 48-hour-notice basis. If not, this requirement would alleviate much of the difficulty of challenging a negotiated rule from a post-negotiation excluded position. If it is too burdensome to require all committees to comply with these requirements, then at least those documents of committees from which a court has determined that a party has been wrongfully excluded should be made so available. Super availability could be a form of injunctive relief. A court could grant a party wrongfully excluded to assist such parties in their attempts to influence the agency post-negotiation. This type of relief could greatly alleviate the information problem that typically faces such parties. For case law supporting this type of remedy see *Braniff Master Executive Council of the Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 693 F.2d 220 (D.C. Cir. 1982) (holding that release of transcripts is the remedy for violating the Sunshine Act). This may not sufficiently meet the excluded parties' needs if there is no adequate transcript available, or if there is a transcript, but the excluded party is left only with the possibility of challenging the rule after it has been adopted by the agency.

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**the benefits of effective negotiation of closed meetings. The proposal has a sound legal basis and could either be employed by an agency or enforced through statutory interpretation by the courts.**

*David Faure*

