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## The Justiciability of Fair Balance under the Federal Advisory Committee Act: Toward a Deliberative Process Approach

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## NOTE

# THE JUSTICIABILITY OF FAIR BALANCE UNDER THE FEDERAL ADVISORY COMMITTEE ACT: TOWARD A DELIBERATIVE PROCESS APPROACH

Daniel E. Walters\*

*The Federal Advisory Committee Act's requirement that advisory committees be "fairly balanced in terms of the points of view represented and the functions to be performed" is generally considered either nonjusticiable under the Administrative Procedure Act or justiciable but subject to highly deferential review. These approaches stem from courts' purported inability to discern from the text of the statute any meaningful legal standards for policing representational balance. Thus, the Federal Advisory Committee Act's most important substantive limitation on institutional pathologies such as committee "capture" or domination is generally unused despite the ubiquity of federal advisory committees in the modern regulatory state.*

*This Note argues for a new reading of the Federal Advisory Committee Act's fair balance provision that would make the provision justiciable. Instead of reading the provision to require quantitative representational balancing of various interests—and thus asking courts to make political decisions—this Note contends that the text of the provision permits an alternative reading, which I call the "deliberative process" reading. Under this reading, courts would decide whether a committee's record airs all of the relevant viewpoints associated with the issue under the committee's consideration. This kind of review is familiar to courts in other administrative law contexts, so there would be no plausible argument that the provision is unreviewable for lack of meaningful standards. I argue that this deliberative process reading would enhance advisory outputs and ensure that this "fifth branch" of government is still under public control.*

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\* J.D. Candidate, May 2012. I would like to thank my parents for their ceaseless support and encouragement. Thanks as well to Nina Mendelson and Nicholas Bagley for their helpful comments on drafts of this Note. Special thanks to Peter Magnuson, Emily Huang, Theresa Romanosky, and Rob Boley, my note editors, for their helpful criticism. Finally, thanks to David Weimer and Stéphane Lavertu, who sparked my interest in advisory committees.

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#### INTRODUCTION

In 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act,<sup>1</sup> which explicitly gave authority to the Food and Drug Administration (“FDA”) to regulate tobacco.<sup>2</sup> The FDA took immediate action on a variety of fronts, including—seemingly least controversial of all—convening the Tobacco Products Scientific Advisory Committee (“TPSAC”).<sup>3</sup> The Act provides for a variety of committee studies of the addictive qualities of nicotine and requires the committee to advise the FDA.<sup>4</sup> The committee includes seven healthcare professionals, one government employee, and one representative of the “general public,” all of whom are to be voting members.<sup>5</sup> In addition, the Act provides for two nonvoting representatives of the tobacco manufacturing industry and one nonvoting representative of tobacco growers.<sup>6</sup>

By March 2010, the TPSAC was embroiled in controversy. First, Altria Group, Inc., the parent corporation of Philip Morris USA, submitted a letter to the FDA commissioner protesting the appointments of four voting members of the committee because of their alleged conflicts of interest.<sup>7</sup> While these members were experts, they were also routinely retained as expert

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1. Jeff Zeleny, *Occasional Smoker*, 47, *Signs Tobacco Bill*, N.Y. TIMES, June 23, 2009, at A15.

2. *Id.*

3. See News Release, FDA, Tobacco Control Act One Year Anniversary (June 22, 2010), available at 2010 WL 2546982 (MEDWATCH) (noting the launch of the TPSAC).

4. 21 U.S.C.A. § 387q(c) (West 2010).

5. 21 U.S.C.A. § 387q(b)(1)(A) (West 2010).

6. *Id.*

7. Letter from Denise F. Keane, Exec. Vice President & Gen. Counsel, Altria Group, Inc., to Margaret A. Hamburg, Comm’r of Food & Drugs, U.S. Food & Drug Admin., and Lawrence W. Dayton, Dir., Ctr. for Tobacco Prods. (Mar. 22, 2010), available at [http://www.altria.com/en/cms/About\\_Altria/federal-regulation-of-tobacco/regulatory-filings/pdfs/Letter-Announcement-of-TPSAC-Voting-Members-and-FDA-response.pdf.aspx](http://www.altria.com/en/cms/About_Altria/federal-regulation-of-tobacco/regulatory-filings/pdfs/Letter-Announcement-of-TPSAC-Voting-Members-and-FDA-response.pdf.aspx).

witnesses by plaintiffs in civil cases against tobacco companies and as consultants by pharmaceutical companies that manufacture smoking cessation products.<sup>8</sup> Soon after Altria's challenges, the nonpartisan but left-leaning political watchdog group Citizens for Responsibility and Ethics in Washington became a strange bedfellow of Altria, criticizing the FDA for its failure to resolve longstanding problems with pharmaceutical industry capture.<sup>9</sup> While some commentators concluded that the TPSAC was a "virtual smorgasbord of tobacco and pharmaceutical financial interests"<sup>10</sup> which might make even Nick Naylor blush,<sup>11</sup> others defended the FDA, noting that "this is not Coke versus Pepsi. . . . The tobacco companies are promoting products that kill half a million people a year. The pharmaceutical companies are trying to promote health."<sup>12</sup>

Federal advisory committees like the TPSAC are ubiquitous,<sup>13</sup> and, as the TPSAC story shows, they raise critical issues of accountability, credibility, and neutrality in policymaking. Of chief concern is the question of balance and the avoidance of capture or domination by well-organized and overrepresented groups.<sup>14</sup> Advisory committees are frequently homogenous

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8. *Id.*

9. Letter from Melanie Sloan, Exec. Dir., Citizens for Responsibility & Ethics in Wash., to Daniel R. Levinson, Inspector Gen., Dep't of Health & Human Servs. (June 7, 2010), available at [http://www.citizensforethics.org/page/-/pdfs/legal/investigation/CREW\\_Letter\\_to\\_HHS\\_IG\\_TPSAC\\_Conflicts\\_20100607.pdf?nocdn=1](http://www.citizensforethics.org/page/-/pdfs/legal/investigation/CREW_Letter_to_HHS_IG_TPSAC_Conflicts_20100607.pdf?nocdn=1).

10. Michael Siegel, *Four Members of FDA Tobacco Products Scientific Advisory Committee Have Received Pharmaceutical Money; Influence of Industry on FDA Grows*, THE REST OF THE STORY: TOBACCO NEWS ANALYSIS & COMMENT. (Mar. 2, 2010, 2:11 PM), <http://tobaccoanalysis.blogspot.com/2010/03/four-members-of-fda-tobacco-products.html>.

11. See THANK YOU FOR SMOKING (Fox Searchlight Pictures 2005).

12. Duff Wilson, *Group Objects to 2 Members of Tobacco Safety Panel*, N.Y. TIMES, June 8, 2010, at B3.

13. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-611T, FEDERAL ADVISORY COMMITTEE ACT: ISSUES RELATED TO THE INDEPENDENCE AND BALANCE OF ADVISORY COMMITTEES 1 (2008) [hereinafter INDEPENDENCE AND BALANCE], available at <http://www.gao.gov/new.items/d08611t.pdf> ("In fiscal year 2007, 52 agencies sponsored 915 active federal advisory committees with a total of about 65,000 members.").

14. "Regulatory capture" is a useful way of referring to the collection of arguments from public choice theory, highly influential in federal courts during the 1960s and 1970s, that regulatory agencies are particularly vulnerable to co-optation by industry or special interest groups and are thereby distracted or prevented from pursuing the public interest. See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-52 (1997). For specific examples of early capture theories, see MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 80, 87 (1955), and ROGER G. NOLL, BROOKINGS INST., REFORMING REGULATION 40-43 (1971). Classic capture theory argues, more narrowly, that well-organized interests have organizational advantages over a diffuse public when it comes to organizing votes, and that they use that advantage to deal with elected officials and to ensure that bureaucracy serves their interests. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284-85 (2006). Some scholars now argue that the rubric of "domination" is a more apt term for more subtle forms of industry orientation, including the relationship between agencies and interests in the information gathering process. See, e.g., Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 459 (1999).

and draw from select demographics.<sup>15</sup> Even worse, committees may simply be so beholden to their parent agencies that they become back doors through which capture-hungry parties can wield disproportionate influence before the public even has an opportunity to comment.<sup>16</sup> Thus, while the establishment and staffing of committees like the TPSAC may seem innocuous, the danger of capture, domination, and unaccountability is acute in the absence of sufficient safeguards.

Congress recognized these dangers when it passed the Federal Advisory Committee Act of 1972 (“FACA”).<sup>17</sup> FACA was a response to the proliferation of federal advisory committees and to concerns about the unaccountability, bias, and costs of the advisory process.<sup>18</sup> FACA imposed a number of accountability mechanisms, including procedural constraints on committees as well as oversight and reporting requirements for congressional committees, the General Services Administration (“GSA”), and the President.<sup>19</sup> Today, many of the same concerns that prompted FACA persist; they are recognized in popular media,<sup>20</sup> studied in scholarly literature outside of law,<sup>21</sup> and raised in the halls of Congress.<sup>22</sup>

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15. See Kevin D. Karty, *Membership Balance, Open Meetings, and Effectiveness in Federal Advisory Committees*, 35 AM. REV. PUB. ADMIN. 414, 417 (2005) (providing aggregate statistics on committee membership and noting that it is not at all uncommon for business interests to dominate particular advisory committees).

16. Cf. Frederick R. Anderson, *Improving Scientific Advice to Government*, 19 ISSUES SCI. & TECH. 34 (2003) (noting that the Scientific Advisory Board at the Environmental Protection Agency may be so close to the agency that its recommendations cannot be viewed as accountable).

17. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. §§ 1–16 (2006)).

18. Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 453 (1989) (“FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals . . .”).

19. *Cummock v. Gore*, 180 F.3d 282, 284–85 (D.C. Cir. 1999).

20. E.g., Robin Bravender et al., *New Policy on Lobbyists Could Spur Shake-Up for EPA Advisory Panel*, N.Y. TIMES, Dec. 4, 2009, <http://www.nytimes.com/gwire/2009/12/04/04greenwire-new-policy-on-lobbyists-could-spur-shake-up-fo-42663.html>; Gardiner Harris, *Advisers on Vaccines Often Have Conflicts, Report Says*, N.Y. TIMES, Dec. 18, 2009, at A28.

21. E.g., Kevin D. Karty, *Closure and Capture in Federal Advisory Committees*, 4 BUS. & POL. 213 (2002); Robert Steinbrook, *Science, Politics, and Federal Advisory Committees*, 350 NEW ENG. J. MED. 1454 (2004). Importantly, some political scientists have marshaled empirical evidence to show that concerns about numerical balance on at least one extant committee may be overstated. See Stéphane Lavertu et al., *Scientific Expertise and the Balance of Political Interests: MEDCAC and Medicare Coverage Decisions*, J. PUB. ADMIN. RES. & THEORY (2011). The legal literature has occasionally addressed FACA, but has generally steered away from the question of balance. See, e.g., Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997) (discussing the full range of issues that have come up under FACA).

22. See Federal Advisory Committee Act Amendments of 2009, H.R. 1320, 111th Cong. (2009); see also H.R. REP. NO. 111-135 (2009) (summarizing the main contributions of the proposed amendments).

Surprisingly, federal courts have let perhaps the most important substantive check on capture and domination in FACA lie essentially dormant. Section 5(b)(2) requires that the membership of federal advisory committees be “fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”<sup>23</sup> Several circuits have split on whether section 5(b)(2) provides any meaningful legal standard under which courts can police the representational balance of committees without making overtly political judgments: two circuits treat section 5(b)(2) as nonjusticiable<sup>24</sup> under the Administrative Procedure Act (“APA”),<sup>25</sup> while at least two other circuits treat the provision as justiciable.<sup>26</sup> Even where section 5(b)(2) is found justiciable, courts invariably hold that they must give agencies substantial deference in composing committee membership.<sup>27</sup> Underlying all of these decisions is an assumption that representation under section 5(b)(2) requires, if anything, direct representation by directly affected interests.<sup>28</sup>

This Note argues that the “fairly balanced” provision of FACA is justiciable under the APA, but under a different reading of the statute than the one currently used by courts. Part I examines the reasons offered by the differing circuits for their respective approaches. It argues that the unifying feature among section 5(b)(2) cases is the courts’ representational reading of the statute. Part II then argues that this representational reading creates four

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23. Federal Advisory Committee Act § 5(b)(2), 5 U.S.C. app. (2006). This lack of enforcement is not due to a lack of suits. Indeed, the TPSAC episode ultimately resulted in the filing of a suit based in part on section 5(b)(2). See Duff Wilson, *Lorillard and Reynolds Sue F.D.A.*, N.Y. TIMES, Feb. 26, 2011, at B7.

24. See, e.g., *Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of the U.S. Trade Representative*, 540 F.3d 940, 942 (9th Cir. 2008); cf. *Pub. Citizen v. Nat’l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 426 (D.C. Cir. 1989) (Silberman, J., concurring) (laying out the case for nonjusticiability that courts in the District of Columbia Circuit have subsequently followed).

25. Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06 (2006). Under the APA, a delegation of administrative authority that is so broad as to be considered “committed to agency discretion by law” is unreviewable in court. *Id.* § 701(a)(2). Courts consider this requirement to be met only when a statute is “drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). However, such commission to agency discretion is generally to be avoided, as there is a presumption of reviewability. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967); *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000). Typically, the courts refer to statutes with “no meaningful” standard as “unreviewable,” but most courts refer to them as nonjusticiable in the FACA context.

26. See, e.g., *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1232–34 (10th Cir. 2004); *Cargill, Inc. v. United States*, 173 F.3d 323, 334 (5th Cir. 1999); cf. *Alabama-Tombigbee Rivers Coal. v. Dep’t of Interior*, 26 F.3d 1103 (11th Cir. 1994) (upholding a district court’s decision to issue an injunction under section 5(b) but not clarifying which specific provisions within section 5(b) were violated, strongly suggesting that section 5(b)(2) is justiciable).

27. See, e.g., *Cargill*, 173 F.3d at 335 n.24.

28. Indeed, the Eleventh Circuit paraphrased the requirements of section 5(b)(2) as requiring a “fair and balanced composition of the committee.” *Alabama-Tombigbee Rivers Coal.*, 26 F.3d at 1106 (emphasis added).

difficulties that plague section 5(b)(2) cases and leaves the provision effectively unenforceable. Part III examines a potential alternative reading that would look to the robustness of the process of deliberation in advisory committees. It argues that this alternative reading is not only textually plausible but also accords with the overall purpose of FACA. Finally, Part III concludes by briefly addressing some of the most important concerns about the implementation of the deliberative process standard.

### I. CIRCUIT TREATMENT OF THE JUSTICIABILITY OF THE "FAIRLY BALANCED" PROVISION

The federal courts of appeals have failed to converge on a universal approach for dealing with section 5(b)(2). The courts are split on the issue of the justiciability of the provision under the APA.<sup>29</sup>

#### A. *Nonjusticiability*

The Court of Appeals for the District of Columbia Circuit had several early chances to resolve the question of the justiciability of section 5(b)(2) but failed to offer any definitive interpretation. The court at first noted in dicta that the question of fair balance might be justiciable,<sup>30</sup> but it divided deeply on that question when it was squarely presented in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*.<sup>31</sup> At issue in that case was the U.S. Department of Agriculture's ("USDA") staffing of its National Advisory Committee on Microbiological Criteria for Foods, a committee formed to assess the safety and wholesomeness of food.<sup>32</sup> The charter of the committee provided that members were to be selected for expertise in food service, microbiology, or other relevant disciplines.<sup>33</sup> The final committee roster included two academics, one state department of agriculture official, one consumer services official also from the state department of agriculture, two food researchers employed by research firms, six employees of federal agencies, and six individuals employed in the food industry.<sup>34</sup> The plaintiffs-appellants alleged that the committee was unbalanced under section 5(b)(2) because it did not have a consumer representative with public health expertise and was in fact stacked with members who had industry ties.<sup>35</sup> The court issued a per curiam opin-

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29. See *supra* notes 24–26 and accompanying text.

30. See *Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir. 1983) (affirming the district court's dismissal of the claims but engaging the merits of the fair balance claim in dicta).

31. 886 F.2d 419 (D.C. Cir. 1989).

32. See *Microbiological Criteria*, 886 F.2d at 420 (Friedman, J., concurring).

33. *Id.*

34. *Id.*

35. *Id.* at 420–22.

ion, and two of the three judges on the panel wrote separately to express their view that the district court did not err in dismissing the suit.<sup>36</sup>

The lasting legacy of *Microbiological Criteria* is its articulation of the rationale for nonjusticiability. Judge Silberman, in his partial concurrence, claimed in stark terms that section 5(b)(2) was nonjusticiable on its face. He reasoned that, taking the language of FACA literally, it is “quite artificial and arbitrary” for judges to try to “reduce point of view to a few categories” in order to facilitate a balancing of viewpoints.<sup>37</sup> Moreover, doing so poses a risk of politicization, he argued, because the only manageable way to reduce the number of categories is to treat viewpoints “as if they were political parties.”<sup>38</sup> Pointing to the ostensibly benign claim of the plaintiffs that consumers must have a representative on the committee,<sup>39</sup> Judge Silberman noted that even defining “consumer representative” poses problems for judges, because that category typically includes representatives of “one philosophical, ideological, and political view of consumer welfare” urging “greater governmental regulation of the production of goods or services in the marketplace.” That definition excludes the kind of antiregulatory ideologies that might still largely be theories of consumer well-being.<sup>40</sup> Judge Silberman concluded that the language of FACA provides no *legal* basis for determining fair balance<sup>41</sup> and thus fails the “no meaningful law to apply” standard.<sup>42</sup>

The other two opinions in *Microbiological Criteria* were more receptive to justiciability. First, in agreeing that the case was properly dismissed, Judge Friedman offered a compromise standard for justiciability, noting that the definition of fair balance “necessarily lies largely within the discretion of the official who appoints the committee.”<sup>43</sup> While cognizant of concerns about capture or domination,<sup>44</sup> Judge Friedman’s standard suggested a high bar: only when industry is the sole group represented on the committee can a

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36. *Id.* at 419–20 (per curiam).

37. *See id.* at 426–27 (Silberman, J., concurring).

38. *See id.* at 427.

39. *Id.* at 428.

40. *Id.* at 429.

41. *Id.* at 429–30.

42. *See supra* note 25.

43. *Microbiological Criteria*, 886 F.2d at 419. Judge Friedman’s approach thus draws a distinction between the question of justiciability and the question of balance on the merits in order to set aside these difficult questions for a later time. *See Reply Brief for Plaintiffs-Appellants at 2–5, Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of the U.S. Trade Representative*, 540 F.3d 940 (9th Cir. 2008) (No. 06-16682), 2007 WL 649145 (“Whether a committee is actually imbalanced and, if so, how to remedy that imbalance goes to the merits of the claim, whereas the question here is the justiciability of the fair balance provision.”). This approach seems only to delay the inevitable.

44. *Microbiological Criteria*, 886 F.2d at 424 (Friedman, J., concurring) (“One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns.”).



claim of lack of fair balance proceed.<sup>45</sup> Thus, while Judge Friedman did not actually say that section 5(b)(2) is nonjusticiable, his highly deferential standard of review is tantamount to holding as much.

In contrast, Judge Edwards cautioned against the tendency toward judicial abdication, noting that Judge Silberman's opinion failed to give sufficient weight to the standard presumption in favor of judicial review.<sup>46</sup> As Judge Edwards noted in arguing for unconditional justiciability, "[i]t does not matter that the 'fairly balanced' requirement falls short of mathematical precision in application, or that it may involve some balancing of interests by the agency. The presumption in favor of judicial review is not altered in the face of a diffuse statutory directive."<sup>47</sup>

*Microbiological Criteria* is long on reasoning but short on practical guidance for lower courts. Though the *Microbiological Criteria* court did not issue a holding on the justiciability issue, Judge Silberman's opinion appears to have carried the day in the D.C. district court, where judges regularly dismiss section 5(b)(2) cases after finding the provision unreviewable<sup>48</sup>—sometimes with the explicit approval of the court of appeals<sup>49</sup> as well as of the scholarly literature.<sup>50</sup> Courts in the circuit have occasionally hinted that a more specific statute or regulation with language analogous to that of section 5(b)(2) could be justiciable,<sup>51</sup> but more recent cases seem to foreclose even this option.<sup>52</sup>

Almost twenty years after *Microbiological Criteria*, the Court of Appeals for the Ninth Circuit also held in favor of nonjusticiability. The case concerned fair balance in the membership of an industry trade advisory

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45. *Id.* at 425 (describing another committee "where the only individuals who met with government officials were representatives of industry" and concluding that the membership in the case at hand "cannot properly be so described").

46. *Id.* at 432–33 (Edwards, J., dissenting in part and concurring in part) (noting that there is a presumption of reviewability under the APA).

47. *Id.* at 434.

48. *See, e.g., Fertilizer Inst. v. EPA*, 938 F. Supp. 52, 54 (D.D.C. 1996); *Doe v. Shalala*, 862 F. Supp. 1421, 1430 (D.D.C. 1994).

49. *See, e.g., Claybrook v. Slater*, 111 F.3d 904, 906 n.4 (D.C. Cir. 1997) (noting approvingly the district court's indication that it would follow Judge Silberman's nonjusticiability reasoning).

50. *See, e.g., Croley & Funk, supra* note 21, at 530 (arguing that the GSA should create additional regulations to provide courts with law to apply when determining whether the "fairly balanced" requirements of section 5(b)(2) have been met).

51. *Compare Fertilizer Inst.*, 938 F. Supp. at 55 (suggesting in dicta that the minimum number of industry representatives specified in the committee's charter "does appear to provide a clearer standard for review"), *with Shalala*, 862 F. Supp. at 1424, 1430–31 (giving little consideration to the substantially detailed requirements imposed by the organic statute that included, among other things, a requirement that there be "at least one attorney, one ethicist, one practicing physician, one theologian, and no fewer than 1/3 but no more than 1/2, of 'scientists with substantial accomplishments in biomedical or behavioral research'" (quoting 42 U.S.C. § 289a-1(b)(5)(C))).

52. *See, e.g., Gamble v. Zoellick*, No. 01CV0018, 2001 WL 1823812, at \*4–5 (D.D.C. May 8, 2001) (finding the provisions of the Trade Act pertaining to committee appointments nonjusticiable).

committee (“ITAC”) convened by the United States Trade Representative and the United States Department of Commerce.<sup>53</sup> The ITACs are part of a public-private partnership designed to “ensure industry has a voice in formulating the trade policy of the United States.”<sup>54</sup> They are commissioned pursuant to the authority of the Trade Act, which simply provides that ITACs “shall, insofar as is practicable, be representative of all industry, labor, agricultural, or service interests (including small business interests) in the sector or functional areas concerned.”<sup>55</sup> The Center for Policy Analysis on Trade and Health claimed that the ITACs lacked any members with public health backgrounds and therefore violated section 5(b)(2) of FACA.<sup>56</sup>

The Ninth Circuit held that neither the Trade Act nor FACA supplied any meaningful standard by which to judge compliance with section 5(b)(2), and so held the provision nonjusticiable as applied to the ITACs.<sup>57</sup> In doing so, the court acknowledged that it was theoretically possible that the Trade Act could allow for review of section 5(b)(2) claims by providing sufficiently reviewable specificity about composition.<sup>58</sup> But the court found no such specificity here: “[The Trade Act] provides no standards to allow us to determine when it is, or when it is not, practicable to appoint a certain interest onto one of the ITACs.”<sup>59</sup> Similarly, the court recognized that hypothetical regulations promulgated by a parent agency to provide additional specificity about the requirements for balance on a committee might allow for a fair balance claim. But again, the court noted that there were no such regulations in the case before it.<sup>60</sup>

Ultimately, the court somewhat misleadingly claimed that it was not holding section 5(b)(2) nonjusticiable in all circumstances.<sup>61</sup> In effect, however, the court did hold that section 5(b)(2), standing alone, is nonjusticiable in all circumstances by declaring that “FACA does not, for example, articulate what perspectives must be considered when determining if the advisory committee is fairly balanced.”<sup>62</sup> If a section 5(b)(2) claim is to go forward in the Ninth Circuit, it will only be because additional statutes or regulations, acting alongside the requirements of section 5(b)(2), provide enough specificity about a particular committee’s proper balance to provide meaningful

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53. *Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of the U.S. Trade Representative*, 540 F.3d 940 (9th Cir. 2008).

54. *History of the Industry Trade Advisory Committees*, INT’L TRADE ADMIN., <http://trade.gov/itac/history.asp> (last visited Aug. 24, 2011).

55. *CPATH*, 540 F.3d at 942 (quoting 19 U.S.C. § 2155(c)(2)) (internal quotation marks omitted).

56. *Id.* at 943.

57. *Id.* at 945.

58. *See id.*

59. *Id.*

60. *Id.* at 947 (reasoning that “additional regulations might, in some circumstances, be sufficient to result in a reviewable controversy under the APA,” but holding that “no such regulations exist in this case”).

61. *Id.*

62. *See id.* at 945.

standards by which judges can evaluate agency action. The court was entirely silent, though, about what kind of statutory or regulatory context would be needed to support a section 5(b)(2) claim. All that the court offered were conclusory remarks that the Trade Act provided “no meaningful standards to apply.”<sup>63</sup> The Ninth Circuit is thus solidly in the nonjusticiability camp.<sup>64</sup>

### B. Justiciability

In contrast with the D.C. Circuit and the Ninth Circuit, the Court of Appeals for the Fifth Circuit held that section 5(b)(2) of FACA is justiciable standing alone. In *Cargill, Inc. v. United States*,<sup>65</sup> the court considered whether the Board of Scientific Counselors (“BSC”) under the National Institute for Occupational Safety and Health (“NIOSH”) was fairly balanced in compliance with section 5(b)(2) of FACA. BSC’s mandate was to “provide . . . advice from experts in diesel exhaust, diesel exposure assessment, and the mining environment.”<sup>66</sup> A group concerned about the balance of the BSC and the possibility that its study would lead to unnecessarily stringent regulation of diesel exposure to mine workers brought suit to enjoin the agency from further relying on the BSC.<sup>67</sup>

The *Cargill* court’s analysis, while brief, represents the most expansive view in the federal courts of the justiciability of section 5(b)(2). The court drew a distinction between “functional” balance claims and “point-of-view” balance claims,<sup>68</sup> and, in both instances, summarily rejected the government’s nonjusticiability claims.<sup>69</sup> The court simply noted that the “weight of the caselaw” was in favor of justiciability.<sup>70</sup> On the functional balance claim, the *Cargill* court followed the D.C. Circuit’s approach in an older case, under which fair balance depends on the function to be performed by a particular committee at a particular time.<sup>71</sup> The *Cargill* court confronted a

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63. *Id.*

64. *But see* *Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868, 879 (D. Idaho), *order clarified*, CV 08-394-S-BLW, 2009 WL 3806371 (D. Idaho Nov. 9, 2009) (“Typically, a close examination of each requirement, contrasted against the circumstances in a particular case, is warranted when determining whether a FACA violation occurred.”).

65. 173 F.3d 323 (5th Cir. 1999).

66. *Cargill*, 173 F.3d at 328.

67. *Id.*

68. *Id.* at 335–38. No other court has made such a distinction. The court appeared to frame “functional” balance claims as questions concerning whether a committee is sufficiently numerically balanced to fulfill its specific function. “Point-of-view” balance questions, to the court, simply ask whether the numerical balance of the committee indicates a bias.

69. *Id.* at 335, 337.

70. *Id.* at 334. Of course, this characterization is incomplete. *See supra* Section I.A (describing the D.C. Circuit’s equivocal treatment of section 5(b)(2)).

71. *Id.* at 336 (“In considering whether a committee is fairly balanced in terms of function, courts naturally have looked first at the functions to be performed.” (citing *Nat’l Anti-Hunger Coal. v. Exec. Comm. of the President’s Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983) (holding a committee unbalanced in light of new functions assigned to it)).

situation in which the committee's function had changed organically over time.<sup>72</sup> The court noted that, as committee function changes, compliance with the fair balance provision may very well change with it.<sup>73</sup> Under this view, courts will have to make (perhaps repeated) ad hoc adjustments to determine whether a committee has evolved enough to justify judicial review of the committee's composition.<sup>74</sup> As for point-of-view balance, the court held that plaintiffs "must make some kind of *prima facie* showing that the membership of the committee is biased in its point of view."<sup>75</sup>

Though *Cargill* held that section 5(b)(2) is justiciable standing alone, the court also cautioned that its holding was not a green light for unfettered judicial review. The court emphasized that "[a]gencies have considerable discretion to determine whether an advisory committee is functionally balanced and adequately staffed."<sup>76</sup> While it is not clear where the *Cargill* court believed deference should end,<sup>77</sup> it is worth noting that the facts of the case and the statutory background were not measurably more judicially manageable than the facts and statutory background in the cases where the D.C. Circuit and the Ninth Circuit found the provision nonjusticiable.

In *Colorado Environmental Coalition v. Wenker*,<sup>78</sup> the Court of Appeals for the Tenth Circuit joined the Fifth Circuit in finding section 5(b)(2) justiciable. The case involved three resource advisory councils ("RACs") that were to provide "advice and recommendations" to the secretary of the interior and the Bureau of Land Management ("BLM") concerning the management of 8.3 million acres of public lands and 27.3 million subsurface acres of mineral development areas.<sup>79</sup> BLM promulgated regulations mirroring section 5(b)(2)<sup>80</sup> and requiring the secretary of the interior to provide for "balanced and broad representation" from within each of three

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72. *Id.* at 328 (noting that the NIOSH did nothing more than circulate a letter indicating its intent to refocus the function of the BSC).

73. *Id.* at 336 ("[T]he addition of peer review functions to BSC's duties *could have* caused it to fail to meet the functional balance requirement of § 5. . . . Under FACA, agencies should not be permitted to assign advisory committees functions that the committee members do not have the expertise to perform. Otherwise, an agency could easily evade FACA by listing, in its advisory committee's charter, functions that are so broad as to be meaningless or are simply different from the functions actually assigned."); *cf.* Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control, 566 F. Supp. 1515, 1074-76 (D.D.C. 1983) (finding that the committee was balanced in light of its clearly defined function).

74. Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1075 (D.C. Cir. 1983) (approving the district court's effort of "characterization" of the nature and tasks of the committee at issue).

75. *Cargill*, 173 F.3d at 338.

76. *Id.* at 336.

77. *See* Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of the U.S. Trade Representative, 540 F.3d 940, 946 (9th Cir. 2008) ("[T]he *Cargill* decision offers little explanation of *why* FACA's fairly balanced requirement is justiciable.").

78. 353 F.3d 1221 (10th Cir. 2004).

79. *Wenker*, 353 F.3d at 1225.

80. 43 C.F.R. §§ 1784.0-1 to 1784.6-2 (1995).

general groups of member types.<sup>81</sup> The regulations also specified three model schemes for achieving balance.<sup>82</sup>

The *Wenker* court began its analysis with the conclusion that both the Fifth Circuit and the D.C. Circuit had found section 5(b)(2) justiciable standing alone, and that “no court of appeals has held to the contrary.”<sup>83</sup> Noting the parallel between section 5(b)(2) and the BLM regulations, the court determined that if section 5(b)(2) were justiciable, any additional specificity offered by the regulations must be enough to make the regulations justiciable.<sup>84</sup> The court appeared to interpret the suit as targeting compliance with the regulations instead of with section 5(b)(2);<sup>85</sup> however, it strongly suggested in dicta that it saw section 5(b)(2) as justiciable even standing alone.<sup>86</sup>

## II. THE REPRESENTATIONAL READING: LEGAL AND POLICY IMPLICATIONS

A common thread unites all of these seemingly conflicting cases: a representational reading of section 5(b)(2). The starting point for all section 5(b)(2) cases is a definition of the elements of the provision, and courts seem to agree implicitly that the key elements—representation and fair balance—involve a numerical balance of delegates. Under this view, these cases pose the question whether “persons or groups *directly affected* by the work of a particular advisory committee would have *some* representation on

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81. *Id.* § 1784.6-1(d). The three general categories included the following groups:

(1) [P]eople with interests in federal grazing permits, transportation or rights-of-way, outdoor recreation, commercial timber operations, or energy and mineral development; (2) people representing nationally or regionally recognized environmental groups, ‘dispersed recreational activities,’ archeological and historical interests, or nationally or regionally recognized wild horse and burro interest groups; and (3) persons who hold state, county or local elected office, are employed by state natural resources agencies, represent local Indian tribes, are employed as academics in natural resource management or the natural sciences, or represent the affected public-at-large.

*Wenker*, 353 F.3d at 1225.

82. *Wenker*, 353 F.3d at 1234.

83. *Id.* at 1232. The court cited both *Cargill* and *Microbiological Criteria* as persuasive authority for the point. *Id.* The court also noted that the Eleventh Circuit had seemingly weighed in on the question. *Id.* (citing *Alabama-Tombigbee Rivers Coal. v. Dep’t of Interior*, 26 F.3d 1103 (11th Cir. 1994)).

84. *Id.* at 1233 (“Compared to the statutes at issue in *Overton Park* and *Microbiological Criteria*, which provided ‘law to apply’ even though they required ‘ill-defined weighing of interests,’ the BLM regulations provide a more precise standard for determining what constitutes a fair balance of interests on the RACs.”).

85. *See id.* (“We therefore adopt the reasoning of the Fifth and D.C. Circuits and apply it to the fair balance requirement of 43 C.F.R. §§ 1784.2-1(a) and 1784.6-1(d).”).

86. *Id.* at 1232. It is unclear whether, in finding that section 5(b)(2) was justiciable, the court merely pointed to other circuits as persuasive precedent or actually came to its own conclusion on the matter.

the committee.”<sup>87</sup> Of course, there are variations (for example, opinions have also held that entitlement to representation of *every* directly interested party does not follow from this reasoning<sup>88</sup>), but all of the cases in some manner conceive of the question as involving a numerical or proportional balance of directly affected interests. This reading, supposedly based on a true reading of legislative history,<sup>89</sup> may not be the only reasonable reading of the statute.<sup>90</sup> More importantly, a look at the colloquy across circuits reveals that the representational reading entangles courts in at least four separate potential or actual difficulties.

### A. Unpredictability and Uncertainty

The representational reading does not itself provide consistent, predictable, workable standards. Thus, though some courts have found section 5(b)(2) justiciable under that reading’s assumptions, their task still entails taking on a series of analytical conundrums, which results in dissensus and uncertainty across circuits. First, courts must decide whether a particular litigant is part of a class of persons with interests directly affected by the work of the committee in question. The danger is that, in review, “courts would be obliged to make an arbitrary decision as to how attenuated an interest must be before it should be classified as ‘indirect.’”<sup>91</sup> Second, the directly affected interest approach detracts attention from an equally troubling question—how much is *some* representation?<sup>92</sup> And more fundamentally, why *some* representation and not *equal* representation? As an empirical matter, the “some representation” approach often leads to inexplicable and seemingly arbitrary results.<sup>93</sup> The pervasive emphasis on

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87. Nat’l Anti-Hunger Coal. v. Exec. Comm. of the President’s Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) (emphasis added).

88. *E.g.*, Pub. Citizen v. Nat’l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 423 (D.C. Cir. 1989) (Friedman, J., concurring).

89. See S. REP. NO. 92-1098, at 9 (1972); H.R. REP. NO. 92-1017, at 6 (1972). *But see* MARK B. BROWN, SCIENCE IN DEMOCRACY 94–97 (2009) (complicating the simple history offered by the courts).

90. See *infra* Section III.A for an argument that the representational reading is in fact not the only reasonable reading. See also *infra* Section III.B for an argument that the representational reading is not readily discernible in the rather uninformative and convoluted history of FACA.

91. *Microbiological Criteria*, 886 F.2d at 427 (Silberman, J., concurring). Judge Silberman further suggests that “interests” could be divided into economic, ideological, and intellectual interests (at least), none of which would intuitively make any more sense than any other category for the purposes of line drawing. *Id.*

92. *Id.*

93. Compare Nat’l Anti-Hunger Coal. v. Exec. Comm. of the President’s Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 (D.C. Cir. 1983) (denying relief even though the advisory committee was composed entirely of industry representatives), and *Sanchez v. Pena*, 17 F. Supp. 2d 1235 (D.N.M. 1998) (finding the balance question nonjusticiable in the context of a committee with at least “some” representation of a plaintiffs’ point of view), with *Nw. Ecosystem Alliance v. Office of the U.S. Trade Representative*, No. C99-1165R, 1999 WL 33526001 (W.D. Wash. Nov. 9, 1999) (“The court, therefore, orders the USTR to make a good

interest representation is also disconcerting, given the extensive conflict-of-interest screening processes built into FACA.<sup>94</sup>

Looking to congressional or agency delimitation of the function and relevant interests of a committee would theoretically make it easier to determine what the directly affected interests are, but the approach has proven unworkable. This solution seems attractive, since U.S. General Services Administration regulations require agencies to take such action themselves.<sup>95</sup> But even courts agreeing with this basic idea come to drastically different conclusions. For instance, the Ninth Circuit in *CPATH* appeared to endorse both *Wenker's* and *Cargill's* general reasoning that agency regulations, organic statutes, and committee charters may make judicial review possible.<sup>96</sup> Nevertheless, the court distinguished the case before it on the basis that the Trade Act failed to provide guidance specific enough to allow for judicial review,<sup>97</sup> despite the fact that the Trade Act provided fairly specific membership guidelines.<sup>98</sup> The differences between the statutory guidance in *CPATH* and the regulatory guidance in *Wenker* and *Cargill* were in fact negligible. *CPATH* thus illustrates that, without any serious attempt by a court to explain its reasoning, future litigants are left taking shots in the dark.

### B. Practical Unenforceability

Even when courts do allow section 5(b)(2) claims to go forward, they issue stern warnings to future reviewing courts to afford considerable deference to agencies' staffing of committees.<sup>99</sup> Thus, even where courts reach the merits of a case, they leave the provision without any real bite. In *Cargill*, for instance, the Fifth Circuit followed its articulation of an expansive view of the judicial role in section 5(b)(2) cases with an exhortation for

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faith effort to expedite the appointment of *at least one* properly qualified environmental representative to each of the forest product ISACs as soon as possible." (emphasis added)).

94. See generally Croley & Funk, *supra* note 21, at 495–501.

95. 41 C.F.R. § 102-3.60(a)(3) (2010) (requiring agencies to consult with the secretariat regarding a "plan to attain fairly balanced membership," which must ensure that "the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee").

96. Ctr. for Policy Analysis on Trade & Health (*CPATH*) v. Office of the U.S. Trade Representative, 540 F.3d 940, 947 (9th Cir. 2008) ("We therefore find *Wenker* persuasive only to the extent that it suggests that additional regulations might, in some circumstances, be sufficient to result in a reviewable controversy under the APA.").

97. *Id.*

98. *CPATH*, 540 F.3d at 945.

99. See, e.g., *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1233 (10th Cir. 2004) (quoting *Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 434 (D.C. Cir. 1989) (Edwards, J., concurring in part and dissenting in part)); *Cargill, Inc. v. United States*, 173 F.3d 323, 335 n.24, 342 (5th Cir. 1999).

deference, and then summarily disposed of the challenger's arguments.<sup>100</sup> These are mixed signals, but one reasonable interpretation of them is that even when courts are convinced that they should not be abdicating the judicial role, they are still uncomfortable making the actual determinations about which interests deserve representation and when balance is achieved. A simple rule of deference provides an easy way out of this dilemma, but only at the cost of leaving the provision effectively unenforced.

### *C. Perverse Incentives*

Courts may be encouraging a move away from open and accountable agency action when they hold that statutory or regulatory material specifying the function or the relevant interests for a given committee may make section 5(b)(2) justiciable as applied to the committee. The message is clear: litigation can be avoided by agencies that decline to narrow the function and the categories of affected interests explicitly. Of course, it is a well-established principle of administrative law that nonjusticiable provisions can become justiciable when agencies take official action to limit their own discretion, since agency action amounts to the meaningful standard needed to avoid nonjusticiability.<sup>101</sup> Nevertheless, the incentives furthered by this principle veer away from the good-government purposes of FACA. First, the approach penalizes agencies that are forthcoming about their committees' functions and composition by subjecting them to judicial review. Second, the approach leaves the most egregiously black-box committees unchecked. Third, the approach reflexively validates and reifies potentially illegitimate decisions by agencies (themselves potentially captured or biased) about appropriate purposes and relevant interests. In this sense, the functional approaches advanced by some courts in recent cases undermine the purposes of FACA more than simply letting section 5(b)(2) lie dormant.

### *D. Dichotomization of Science and Politics*

Courts show deeply rooted, somewhat antiquated beliefs about the proper purpose of advisory committees when they follow the representational reading and decline to review committee balance. The classic narrative treats advisory committees as sources of scientific or other technical expertise for a government otherwise unable to find neutral, competent, and cost-effective information and advice.<sup>102</sup> An extreme version of this technocratic view of committees is Adrian Vermeule's argument that agencies ought to be

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100. See *Cargill*, 173 F.3d at 337 (rejecting an argument that the committee needed particularized expertise, and instead finding, under a posture of deference, that the presence of scientific generalists was sufficient).

101. *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988).

102. See, e.g., Joe G. Conley, *Conflict of Interest and the EPA's Science Advisory Board*, 86 TEX. L. REV. 165, 165 (2005) ("[S]ince scientific assessments by agencies are often surrounded by heated politics, science advisory boards are viewed as a key mechanism for independent and neutral scientific review that is insulated from political pressure.").



bound by the decisions rendered by a majority vote of expert committees.<sup>103</sup> Especially during the Bush administration, popular commentary was replete with accusations of scientific impurity in the advisory complex, and that commentary often advocated for an objective, neutral, and technocratic view of the role of science in policymaking.<sup>104</sup> Scholars, too, have strongly criticized the logic of representation vis-à-vis advisory committees<sup>105</sup> and even expressed skepticism about the idea that “balance” requires balancing scientific disciplines in committee representation. In short, the prevailing view of the advisory process has little tolerance for the kind of overtly political representational balancing that section 5(b)(2) might seem to mandate.

Courts in section 5(b)(2) cases have implicitly made an analogous assumption that the idea of “balance” on an expert committee is somehow inappropriate. For example, function-based approaches resolve the problem of representational balance by limiting the scope of a committee’s mandate to a narrow, technical task that can be accomplished with a more homogenous advisory committee. Courts’ bias toward scientific purity is particularly palpable when they themselves seek to define the parameters of a committee’s mission in scientific terms, as the court did in *Cargill*. As that court stated, “The task of the committee—providing *scientific* peer review—is politically neutral and technocratic, so there is no need for representatives from the management of the subject mines to serve on the committee.”<sup>106</sup> It is worth recalling that the committee in *Cargill* was convened to provide scientific studies with direct implications for regulations on mining operations and that the committee was severely criticized by scientists affiliated with the challenging group.<sup>107</sup> Given these facts, the court’s treatment of the question of representation seems rather flippant and dismissive. Similarly, in *Microbiological Criteria*, Judge Friedman overlooked the science-neutral language of section 5(b)(2) and simply noted that “[s]ince the Committee’s function in this case involves highly technical and scientific studies and recommendations, a ‘fair balance’ of viewpoints can be achieved even though the committee does not have any members who are consumer advocates or proponents of consumer interests.”<sup>108</sup>

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103. Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231 (2009).

104. See, e.g., BROWN, *supra* note 89, at 3 (describing the “[p]ublic debate over the Bush administration’s use and abuse of expert advisory committees” as “unusually intense”); CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 227–28 (2005) (noting that the Bush administration’s manipulation of advisory committees was “a sweeping and unprecedented threat to the role of science in policymaking, and even to the legitimacy of science itself”).

105. See BRUCE L.R. SMITH, *THE ADVISERS: SCIENTISTS IN THE POLICY PROCESS* 199 (1992) (discussing the challenges to finding unbiased advisors); see also Anderson, *supra* note 16, at 35–36 (arguing that the existing selection process discourages participation by unbiased scholars and that balancing appointees by interests is inappropriate, but showing some openness to balancing appointments by discipline).

106. *Cargill, Inc. v. United States*, 173 F.3d 323, 337 (5th Cir. 1999).

107. *Id.* at 328.

108. *Pub. Citizen v. Nat’l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 423 (D.C. Cir. 1989) (Friedman, J., concurring).

These judicial opinions follow the federal advisory committee guidelines, which distinguish special government employees (“SGEs”), who sit on advisory committees for their technical or scientific expertise, from representative members, who sit on advisory committees for advocacy of particular points of view.<sup>109</sup> In response to concerns that federal advisory committees were being stacked with politically slanted representatives, the recently suggested amendments to FACA propose ramping up this somewhat artificial distinction between SGEs and representative appointees to make the politicization of committees more visible and open to criticism.<sup>110</sup>

However, purging politics from advisory committees to render them purely technical or scientific works only if one assumes, against the weight of much modern scholarship, that science is a decisively apolitical thing. After conducting several case studies of federal advisory committees, Sheila Jasanoff concluded that scientists often carry with them nonscientific values that color the advice they give.<sup>111</sup> Sometimes, the politicization of science is more instrumental.<sup>112</sup> The modern response—and the one clearly endorsed by the GSA<sup>113</sup> and the courts<sup>114</sup>—is to purge committees of conflicts of interest and balance out residual biases through representative appointments.<sup>115</sup> This “proceduralization” of federal advisory committee membership requirements “may well end up diluting the quality” of advice rendered by committees, as it deters some of the most qualified potential members from serving.<sup>116</sup>

Instead of rehabilitating the sterile technocratic view, Jasanoff suggests that advisory committees, even when designed to provide scientific advice,

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109. BROWN, *supra* note 89, at 99–100 (noting the differences between these two groups).

110. See Federal Advisory Committee Act Amendments of 2009, H.R. 1320, 111th Cong. (2009).

111. SHEILA JASANOFF, *THE FIFTH BRANCH* 230 (1994) (“Studies of scientific advising leave in tatters the notion that it is possible, in practice, to restrict the advisory process to technical issues or that the subjective values of scientists are irrelevant to decisionmaking.”). Scholarship in the sociology of science shows that scientific legitimacy is not simply a matter of referring to neutral and objective criteria; rather, it is a complex quasi-political dance known by scholars as the project of “boundary work.” See THOMAS F. GIERYN, *CULTURAL BOUNDARIES OF SCIENCE* 23 (1999) (“Boundary-work is strategic practical action. As such, the borders and territories of science will be drawn to pursue immediate goals and interests of cultural cartographers, and to appeal to the goals and interests of audiences and stakeholders. Insider scientists use boundary-work to pursue or protect several different ‘professional’ goals.”).

112. See, e.g., MARK E. RUSHEFSKY, *MAKING CANCER POLICY* (1986) (arguing that uncertainty and lack of clear information can be selectively wielded by competing interests to slow down regulation or otherwise further the interest groups’ objectives).

113. See Croley & Funk, *supra* note 21, at 495–99 (outlining GSA regulations concerning conflicts of interest in advisory committee appointments).

114. See *supra* Part I (describing the case law surrounding section 5(b)(2) as refusing to review the representational appointment schemes created by agencies).

115. Anderson, *supra* note 16, at 35–36.

116. *Id.*

should conduct their work as a “hybrid activity that combines elements of scientific evidence and reasoning with large doses of social and political judgment.”<sup>117</sup> The case studies make clear that the advisory process works best when there is vibrant deliberation between scientists and the lay public.<sup>118</sup> What is needed, then, is a standard of review that would facilitate this kind of deliberation, and a culture of information more generally, by examining committee work product—not a standard that regresses to the artificial distinction between experts and representatives. But the problem with such an aspiration is obvious: it is simply contrary to the avoidance strategies courts have developed.<sup>119</sup>

### III. BEYOND REPRESENTATION: A DELIBERATIVE PROCESS STANDARD

The common thread in section 5(b)(2) cases—the representational reading—points the way to an alternative approach. This approach, which I call the “deliberative process approach,” would (1) give circuits inclined to find section 5(b)(2) nonjusticiable another way to enforce the statute, and (2) provide courts that have found the provision justiciable an alternative approach that does not raise as many vexing policy problems. The first section below lays the textual foundation for the alternative standard; subsequent sections consider open legal questions about the alternative standard as well as the practical implications of such a form of review.

#### A. *The Deliberative Process Standard*

Section 5(b)(2) provides that any legislation “establishing, or authorizing the establishment of any advisory committee”<sup>120</sup> must “require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”<sup>121</sup> That the provision imposes a requirement on the makeup of committees—the assumption of the representational reading—might seem to be the only intuitively correct interpretation. But the text of section

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117. JASANOFF, *supra* note 111, at 229; *cf.* BROWN, *supra* note 89, at 245 (“Structuring the process to assess and balance the social and professional perspectives of advisory committee members, rather than according to separate standards for experts and interest group representatives, promises to help improve the effectiveness and legitimacy of government advisory committees.”).

118. JASANOFF, *supra* note 111, at 234 (“Regulatory practices at EPA and FDA support the thesis that negotiation—among scientists as well as between scientists and the lay public—is one of the keys to the success of the advisory process.”).

119. *See supra* Part I.

120. Federal Advisory Committee Act § 5(b)(2), 5 U.S.C. app. (2006). Though the text of section 5(b)(2) refers only to legislatively formed committees, courts consider the provision applicable to executively formed committees as well. *See, e.g.,* Nat’l Anti-Hunger Coal. v. Exec. Comm. of President’s Private Sector Survey on Cost Control, 711 F.2d 1071, 1073 & n.1 (D.C. Cir. 1983) (holding that section 5(c) of FACA makes section 5(b)(2) applicable to executively formed committees despite the language in section 5(b)(2)).

121. § 5(b)(2), 5 U.S.C. app.

5(b)(2) also can be understood to impose an ongoing requirement that the membership of the committee act or have acted as a fairly balanced committee. This alternative reading follows from two major ambiguities in the statute.

First, the provision is ambiguous because of the phrases “to be . . . balanced” and “represented.” If the language is read statically, or synchronically, it suggests that members with discrete representational viewpoints must be balanced at one point in time—namely, at the formation of the committee.<sup>122</sup> Interpreted this way, “balanced” is a participial adjective, synchronically describing a characteristic of a compliant committee at the outset of its work, and “represented” is also a participial adjective, describing points of view held at the time. Alternatively, if the language is read dynamically, or diachronically, it suggests that members of a committee need not be representatives of fixed viewpoints determined at a discrete point in time; legislation would be perfectly compliant with the language of the statute if it requires that committee viewpoints represented in the course of the committee’s work are fairly balanced over time. In that case, “balanced” and “represented” have the properties of participial verbs, diachronically referring to ongoing actions.

This observation is merely suggestive of a problem with the limited way in which courts have conceptualized the nature of the obligation imposed by section 5(b)(2). Its implication, however, is that a dynamic reading of the statute expands the possibilities of judicial review beyond any one moment and treats advisory committees as evolving institutions. If the statute is read synchronically, the requirement of representation *must* be a narrow one, approximating a delegation model. Under a diachronic reading, there may be more possibilities.

A second ambiguity in the language of section 5(b)(2) sharpens the case for a potential nonrepresentational reading. The idea of “points of view represented” might naturally suggest a representational paradigm, in which the committee comprises atomistic actors with exogenously determined ideal preferences. But in a strictly textual analysis, there is no reason to insist on that reading over a reading in which “points of view represented” are fairly balanced during deliberation *by the membership of the committee as a whole* (if the word “membership” is read as a unified singular collective noun). A committee composed entirely of Ralph Naders could, in a truly deliberative institution, be “fairly balanced in terms of points of view represented and function to be performed,” provided that the Ralph Naders on the committee were able to consider and present a fair balance of viewpoints. In other words, the statute can be read to impose a requirement that the memberships of committees meet a substantive standard of deliberative quality, where members simply put forth a fair balance of points of view.

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122. By *synchronic*, I mean that the definition of “balanced” is static and keyed to one point in time. By contrast, *diachronic* is used to describe an understanding of “balance” as an ongoing requirement through time.

It might be argued that the phrase “points of view represented” is simply incompatible with a deliberative process approach, because it is impossible for any individual to represent more than one viewpoint. But this assumption does not accord with the polysemous nature of the verb *represent*, which can mean (1) “to serve as the official and authorized delegate or agent for,” (2) “to describe or present in words; set forth,” or (3) “to present clearly to the mind.”<sup>123</sup> The latter two definitions permit multiple representations to be made simultaneously.<sup>124</sup> The inclusion of the phrase “points of view represented” in section 5(b)(2) thus does not necessarily mean that the people who espouse the points of view in the course of a committee’s business firmly adhere to them. Rather, it means that the membership, acting as a body, presents, depicts, or otherwise airs a fair balance of viewpoints. The deliberative process reading here does not require members to be blank slates when they arrive for a meeting—in fact, deliberation will benefit from members having some position on the issue under consideration, because more information will come in as a consequence. The only requirement for the representation of points of view, then, is a demonstrated open mind. A nonrepresentational reading thus accords with the lessons drawn from some empirical studies of ideal advisory processes, which praise situations where members of committees are protean.<sup>125</sup>

This textual analysis counsels for a judicial standard that treats the question not as whether the membership of a committee is balanced *ex ante* under a representational logic but as whether the membership of the committee, taken as a whole, acts or has acted as a fairly balanced body. Courts can conduct judicial review under this reading of the statute by looking at the work product of a committee instead of its composition. In doing so, they can avoid the danger of crass politicization entailed by judicial calibration of representational balance. Moreover, the deliberative process standard is based solely on section 5(b)(2), so circuits adopting such an interpretation would have no need to refer to statutory or regulatory delimitation of function or relevant interests, thus avoiding several of the problems raised in Part II.

The alternative reading proposed here does not preclude the representational reading implicitly adopted by the courts, but this alternative

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123. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1480 (4th ed. 2000). Other dictionaries define *represented* in similarly divergent ways. *See, e.g.*, NEW OXFORD AMERICAN DICTIONARY 1437 (Erin McKean ed., 2d ed. 2005) (defining *represent* as to (1) “[a]ct as a substitute for (someone), esp. on an official or ceremonial occasion,” (2) “[o]f a group or type of person or thing) be present or found in something, esp. to a particular degree,” or (3) “[d]escribe or depict (someone or something) as being of a certain nature”).

124. Indeed, the Supreme Court has in another context refused to adopt the narrow definition of “representative” as “delegate.” *See* *Chisom v. Roemer*, 501 U.S. 380, 410–11 (1991) (Scalia, J., dissenting) (arguing, to no avail, that “representatives” under the Voting Rights Act cannot include judges since they do not act on behalf of anybody as delegates).

125. *See* JASANOFF, *supra* note 111, at 243 (“The most valued expert is one who not only transcends disciplinary boundaries and synthesizes knowledge from several fields but also understands the limits of regulatory science and the policy issues confronting the agency.”).

deliberative process reading is also undeniably plausible. It thus presents an alternative theory to supplement the arsenal available to plaintiffs seeking to hold advisory committees accountable.

Even if one is convinced that there is a textual basis for the deliberative process reading, one might argue that this does not mean that the deliberative process reading can coexist with what appears to be an equally plausible representational reading. Such an argument takes issue with the idea that a court could recognize and choose between both meanings of section 5(b)(2) when deciding whether and how to review claims under that provision. After all, it is “*emphatically the province and duty of the judicial department to say what the law is,*”<sup>126</sup> and that duty does not permit courts to endorse two meanings simultaneously.

The legal justification for enforcing the alternative deliberative process reading is rather modest and does not even require a court to resolve the textual debate with finality. Recall that the debate about section 5(b)(2) is largely over preclusion of judicial review under the APA, and that in that analysis there is a presumption of judicial review.<sup>127</sup> Even assuming that the deliberative process reading is not a better reading than the representational reading,<sup>128</sup> the presumption of judicial review supports choosing the second-best reading when the best reading provides no law to apply. First, courts utilize a variety of interpretive methods before deciding that a statute is unreviewable, including looking to text and purpose<sup>129</sup> and even to “pragmatic considerations” to draw the lines.<sup>130</sup> Second, courts may limit findings of unreviewability to *parts* of statutes or agency actions.<sup>131</sup> In short, the standard practice is to honor the presumption in favor of reviewability by conducting a rather searching review for any possible way to use statutory text, legislative history, legislative purpose, and even pragmatic considerations to confirm that reviewability.

In light of the serious legal and policy problems that have emerged as a result of the representational reading, the issue of interpretation is not nearly as simple as it would be in a strictly textual legal world. Section 5(b)(2) sits

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

127. See *supra* note 25 and accompanying text.

128. See *infra* Sections III.B–C for extratextual arguments that suggest that the deliberative process reading is the best reading of the statute.

129. See, e.g., *Cnty. of Esmeralda, Nev. v. U.S. Dep’t of Energy*, 925 F.2d 1216, 1218–19 (9th Cir. 1991); *Int’l Longshoremen’s & Warehousemen’s Union v. Meese*, 891 F.2d 1374, 1378 (9th Cir. 1989).

130. 4 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 12:12 (3d ed. 2011). It should be noted, however, that some circuits have backed away from that approach in light of the Supreme Court’s decision in *Webster v. Doe*, 486 U.S. 592, 599–601 (1988), which suggested that courts should not go beyond the statutory text in deciding whether there are meaningful standards. *Id.*

131. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 701–02 (1990). The APA encourages this kind of limitation by providing that the chapter allowing judicial review of agency action “does not apply to the extent that . . . agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a) (2006) (emphasis added).

dormant and practically unenforced in the courts, thereby rendering a portion of the law effectively nugatory. Moreover, not only is the deliberative process reading textually plausible and desirable on policy grounds, but it also finds support in the legislative history and purpose of FACA.

### B. *Consistency with the Purpose of FACA*

Review of the legislative history of FACA shows that Congress did not foreclose the deliberative process reading. In the 1950s, Congress considered several proposals to address industry capture of federal advisory committees.<sup>132</sup> These early efforts eventually matured in both houses during the Ninety-First Congress into full-fledged consideration of regulatory packages aimed at federal advisory committees.<sup>133</sup> In 1970, Congress considered a bill protecting certain interest groups' representation on advisory committees in the Bureau of the Budget.<sup>134</sup> Soon thereafter Senator Metcalf proposed a bill that would have applied to all advisory committees and watered down the previous bill's quota approach by requiring that one-third of members be "public" (nonindustry) representatives.<sup>135</sup> Congress also considered two other proposed bills in the Senate and another, the Monagan bill, in the House.<sup>136</sup> Ongoing disputes about the details yielded a "clean bill" in the Senate,<sup>137</sup> which incorporated the "best features" of the three Senate bills and, importantly, "dropped the explicit formulas for promoting representativeness of membership."<sup>138</sup> Instead the bill read, "[L]egislation shall . . . require that membership of the advisory committee shall be representative of those who have a direct interest in the purpose of such committee as described in such legislation . . ."<sup>139</sup> After unanimous approval of the compromise bill in the Senate and approval of the Monagan bill by voice vote in the House, the two chambers entered reconciliation proceedings.<sup>140</sup> The conference committee's language was approved without controversy by voice vote in both chambers and signed into law by Presi-

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132. See CONG. RESEARCH SERV., FEDERAL ADVISORY COMMITTEE ACT (PUBLIC LAW 92-463): SOURCE BOOK 3 (1978) [hereinafter FACA SOURCE BOOK] (noting that the concern in the 1950s centered on "potential encouragement of antitrust violations" by industry-dominated advisory committees).

133. *Id.* at 7; see also BROWN, *supra* note 89, at 94-97 (reviewing portions of the lengthy legislative history of FACA's "fairly balanced" provision and concluding that it was only after passage that its meaning transformed into an explicitly "liberal-rationalist" provision).

134. FACA SOURCE BOOK, *supra* note 132, at 7-8.

135. *Id.* at 10.

136. *Id.* at 9-12. The Monagan bill comes close to the current language of section 5(b)(2), requiring "fair representation of different viewpoints on every committee." *Id.* at 13.

137. *Id.* at 15 (quoting S. REP. NO. 92-1098, at 4 (1972)).

138. *Id.* at 15-16.

139. S. 3529, 92d Cong. § 5(b) (1972).

140. FACA SOURCE BOOK, *supra* note 132, at 17-18.

dent Nixon on October 6, 1972.<sup>141</sup> Despite the critical differences between the Monagan bill and the Senate's compromise bill with respect to the use of membership quotas, the Joint Explanatory Statement of the Conference Committee did not include any mention of the subject of the "fairly balanced" provision among its numerous explanations of compromises between the Senate and the House in the final bill.<sup>142</sup> Neither did Congress provide any definition of any of the key terms of the provision.

Though the complete history of FACA is replete with conflicting signals, courts in section 5(b)(2) cases zeroed in on a Senate Report<sup>143</sup> accompanying S. 3529 to support the representational reading. From this single report, the D.C. Circuit concluded that, as the "legislative history makes clear, the 'fairly balanced' requirement was designed to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee."<sup>144</sup> But this Senate Report refers to S. 3529, which had very different language from the Monagan bill that eventually became FACA after reconciliation. The court also referenced a House Report on the Monagan bill<sup>145</sup> that does not raise the same problems, but which is also far less supportive of the representational reading.<sup>146</sup> The statement cited in the House report in support of the representational reading is as opaque as the language of section 5(b)(2) of FACA itself.

The legislative material does shed light on Congress' overall purpose in passing the "fairly balanced" provision, and that purpose is consistent with the deliberative process reading. The House Report on the Monagan bill broadly states that the purpose of the provision is to protect against the danger that special interests might use their membership on committees to "promote their private concerns."<sup>147</sup> As scholars have similarly noted, FACA as a whole is about promoting "even-handedness" or "impartiality."<sup>148</sup> This broad aspiration is all that the language of the bill and the legislative history can definitively support. Ultimately, the drafters of section 5(b)(2) left the door open for alternatives to the direct interest representation model, and neither practice nor practicality requires shutting that door now.

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141. *Id.* at 19.

142. H.R. REP. NO. 92-1403 (1972) (Conf. Rep.), reprinted in 1972 U.S.C.C.A.N. 3508.

143. S. REP. NO. 92-1098, reprinted in FACA SOURCE BOOK, *supra* note 132, at 159 ("[L]egislation shall . . . require that membership of the advisory committee shall be representative of those who have a direct interest in the purpose of such committee . . .").

144. Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983).

145. *Id.* at 1073 n.1 (citing H.R. REP. NO. 92-1017 (1972)).

146. FACA SOURCE BOOK, *supra* note 132, at 276. The report complains about a particular committee meeting where only industry representatives were present. This is simply anecdotal evidence of the kind of imbalance that Congress was worried about and cannot be interpreted to compel a representational means to solve the problem, let alone to exclude other interpretive glosses on the bare language of the Monagan bill.

147. *Id.* at 276.

148. See Croley & Funk, *supra* note 21, at 452-53.



### C. Postenactment History

Many agencies *do* currently implement FACA as narrowly read to require interest representation. As mentioned before, the GSA formally distinguishes SGEs from representative members.<sup>149</sup> Enabling legislation “sometimes uses the term *represent* to mean *speak for* a particular constituency, such as labor or business, and sometimes to mean *stand for* a particular body of knowledge or scientific discipline.”<sup>150</sup> The FACA fair balance cases are not terribly out of step with current practice, then, when they assume that what must be balanced are these kinds of representatives of directly affected interests.<sup>151</sup>

But despite this tradition of using the representational reading,<sup>152</sup> some government actions have still assumed that FACA was designed to battle the dangers of capture and domination specifically by promoting deliberation. Most notably, the National Academy of Sciences (“NAS”) has “emphasize[d] the epistemic rather than partisan reasons for including lay perspectives” on its committees.<sup>153</sup> The NAS—the parent agency of many federal advisory committees—categorically denies that direct interest representation has any role to play on committees: “[N]o one is appointed by the institution to a study committee to represent a particular point of view or special interest.”<sup>154</sup>

Recent GSA regulations also support the notion that at least one major purpose of advisory committees is to foster deliberation. For instance, the GSA noted in 2001 that, while it believed that subcommittees of parent advisory committees are not subject to the requirements of FACA, it did believe that subcommittee advice is subject to FACA if the parent committee does not *deliberate* over the advice offered by the subcommittee.<sup>155</sup> The implication is that a committee that does not deliberate is not a true committee. Moreover, the final rule imposes an affirmative duty on committee members to act with the goals of the committee and the parent agency in mind,<sup>156</sup> as well as to seek ways to encourage participation by promoting

149. BROWN, *supra* note 89, at 99–100.

150. *Id.* at 102.

151. *Id.* at 97 (“The dominant approach [of courts] . . . has interpreted the balance provision through a liberal-rationalist lens, conceiving fair representation in terms of a split between expert knowledge and citizen interests.”).

152. *See supra* Part II.

153. BROWN, *supra* note 89, at 242.

154. *Id.* at 242 (emphasis omitted) (quoting NAT’L ACADS., POLICY ON COMMITTEE COMPOSITION AND BALANCE AND CONFLICTS OF INTEREST (2003), available at <http://www.nationalacademies.org/coi/index.html>).

155. Federal Advisory Committee Management, 66 Fed. Reg. 37,727, at 37,729 (July 19, 2001) (to be codified at 41 C.F.R. pts. 101–02).

156. 41 C.F.R. § 102-3.95(b) (2009) (“Advisory committee members and staff should be fully aware of the advisory committee’s mission, limitations, if any, on its duties, and the agency’s goals and objectives. In general, the more specific an advisory committee’s tasks and the more focused its activities are, the higher the likelihood will be that the advisory committee will fulfill its mission.”).

openness.<sup>157</sup> Both of these aspirations are consistent with a deliberative process model.

The Office of Legal Counsel (“OLC”) has similarly weighed in on the question by considering whether agencies and committees may claim a Freedom of Information Act waiver when the public seeks to obtain committee documents.<sup>158</sup> In denying that an exemption applies in most circumstances, OLC repeatedly refers to the working materials of committees as “deliberative materials.”<sup>159</sup>

Perhaps most telling is the General Accounting Office (“GAO”) report that federal advisory committees frequently abuse FACA by appointing almost all representatives (advocates) and very few SGEs (experts).<sup>160</sup> This practice, along with insufficient vetting of prospective committee members for conflicts of interest and for viewpoints, led the GAO to conclude in 2004 that federal advisory committees were severely lacking in the kind of independence necessary for effective advising.<sup>161</sup> The GAO reconfirmed these problems in 2008.<sup>162</sup> Notably, the 2004 report emphasized that it is important that committees be *perceived* as balanced if they are to function effectively.<sup>163</sup> Numerical balancing is one way to create the perception of balance, but both litigants and the public tend to be skeptical of the formal credentials and biases even of expert committee members.<sup>164</sup> From this perspective, numerical balancing is likely to be insufficient to advance the purposes of FACA. Evidence that an agency deliberated over all of the relevant viewpoints on the record more directly addresses the concerns of imbalance by at least placing concrete evidence of consideration on the record.

Courts themselves have also confirmed that a major purpose of section 5(b)(2) and of FACA in general is to foster deliberation.<sup>165</sup> First, in response to a complaint that the Clinton administration “had formed the [White House Commission on Aviation Safety and Security] simply to obtain rubber-stamp endorsement of a predetermined policy agenda, rather than to

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157. *Id.* § 102-3.95(d) (“In addition to achieving the minimum standards of public access established by the Act and this part, agencies should seek to be as inclusive as possible. For example, agencies may wish to explore the use of the Internet to post advisory committee information and seek broader input from the public.”).

158. *See* Disclosure of Advisory Comm. Deliberative Materials, 12 Op. O.L.C. 73 (1988), 1988 WL 391003 (O.L.C.).

159. *See id.* at 73, 75, 79.

160. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-04-328, FEDERAL ADVISORY COMMITTEE ACT: ADDITIONAL GUIDANCE COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE AND BALANCE 7 (2004) [hereinafter ADDITIONAL GUIDANCE], available at <http://www.gao.gov/new.items/d04328.pdf>.

161. *Id.*

162. *See generally* INDEPENDENCE AND BALANCE, *supra* note 13.

163. ADDITIONAL GUIDANCE, *supra* note 160, at 5.

164. *See, e.g.*, Letter from Melanie Sloan, *supra* note 9, at 2–3 (criticizing the business interests of two doctors appointed to the TPSAC).

165. *See* *Cummock v. Gore*, 180 F.3d 282, 291 (D.C. Cir. 1999).

facilitate genuine deliberations,”<sup>166</sup> the government argued that membership on a committee “accords no real right to participate in committee proceedings.”<sup>167</sup> Although the case was technically not a section 5(b)(2) case,<sup>168</sup> the D.C. Circuit nevertheless used the opportunity to elaborate on the purposes of FACA. The court argued that FACA was designed to ensure not only openness but also “fair deliberations.”<sup>169</sup> In suggesting that FACA was passed to protect committees as deliberative institutions, the court connected this abstract discussion of the purposes of FACA with sections 5(b)(2) and 5(b)(3).<sup>170</sup> Judge Edwards noted “a committee might be nominally balanced, because an individual was appointed to represent certain views, but effectively unbalanced, because that individual was precluded from meaningful participation.”<sup>171</sup> A second example is *Judicial Watch, Inc. v. Clinton*,<sup>172</sup> in which the D.C. Circuit considered whether a trust instituted to offset legal expenses incurred by President Clinton and First Lady Hillary Clinton was an advisory committee under the Act. The court rejected the claim that FACA embraced such a trust, arguing on the basis of sections 5(b)(2) and 5(b)(3) that the Act governs committees that “provide varying points of view” on “debatable policy issues.”<sup>173</sup> The court therefore viewed advisory committees as sites of deliberation, in which multiple points of view must be demonstrated.<sup>174</sup>

#### D. A Manageable Standard?

Even if a deliberative process standard is legally justified, the question remains whether it can helpfully guide courts in reviewing the record. In practice, the deliberative process standard would require plaintiffs to allege that a committee substantively ignored mainstream viewpoints on the subject matter of a committee meeting. Courts would then have to identify the subject matter of a meeting, decide what the important viewpoints on the

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166. *Id.* at 287.

167. *Id.* at 291.

168. *See id.* at 289. The only claims that the appeals court heard were that the plaintiff was denied access to information relied upon by the commission and that this affected her ability to effectively dissent from commission findings. *Id.*

169. *Id.* at 291.

170. *Id.* (citing Federal Advisory Committee Act, § 5(b)(2)–(3), 5 U.S.C. app. (2006) (“[T]he advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest.”)). Section 5(b)(3) has been interpreted to serve as a buffer around committees. *See Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1232 (10th Cir. 2004).

171. *Cummock*, 180 F.3d at 291.

172. 76 F.3d 1232, 1233 (D.C. Cir. 1996).

173. *Judicial Watch*, 76 F.3d at 1233 (emphasis omitted).

174. Indeed, taken to a logical extreme, the language used by the court *compels* a deliberative process approach. One could imagine a committee fairly balanced in terms of representation but wholly in agreement on the matter at hand. The language in *Clinton* suggests that this “committee” would not really be a committee because there was no exchange of ideas.

issue are, and review the record to see if there is evidence that the committee considered the major viewpoints or if it myopically focused on a limited subset of them. Courts can handle this task, for they have long engaged in practically the same kind of review in certain species of administrative law cases.

The clearest analogy is to informal rulemaking under the APA.<sup>175</sup> The term “informal” in this context is a bit of a misnomer, as courts have layered both procedural and substantive requirements onto the process over the years. Many of these additional requirements are explicitly designed to encourage deliberation and public participation, as well as to give judges a metric by which to assess agency compliance.<sup>176</sup> First, under the APA, agencies must give notice of proposed rulemakings, opportunity for comment, and a statement of basis and purpose.<sup>177</sup> Courts typically require much more than this sparse statutory language suggests. Especially on the D.C. Circuit, the notice requirement requires agencies to include sufficient detail to facilitate a fully developed consideration of the issues at stake.<sup>178</sup> The D.C. Circuit’s encouragement of deliberation on this point is explicit.<sup>179</sup> Similarly, review under the statement of basis and purpose provision requires agencies to respond to significant comments.<sup>180</sup> That such review should facilitate deliberation was plainly the goal of the court.<sup>181</sup>

After an agency promulgates a regulation, courts review the process by which the agency came to a final conclusion under “hard look review,”<sup>182</sup>

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175. 5 U.S.C. § 553 (2006).

176. See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 276 (4th ed. 2007) (explaining that, in the post-1968 era, “[t]he participation of interested parties in rulemakings is seen both as an end in itself and as a means by which flaws in the agencies’ thinking can be brought to the attention of the agencies—and, eventually, to the reviewing court”).

177. 5 U.S.C. § 553(b)–(c).

178. See, e.g., *United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (holding that the notice requirements in the APA “are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review”); *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (interpreting the notice requirements as applied to a proposed EPA rule).

179. See *HBO, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“[T]here must be an *exchange* of views, information, and criticism between interested persons and the agency. Consequently, the notice required by the APA . . . must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.”).

180. E.g., *Reytblatt v. U.S. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997) (“An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.”).

181. See *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (“[I]f the judicial review which Congress has thought it important to provide is to be meaningful, the ‘concise general statement of basis and purpose’ . . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” (emphasis added)).

182. “Hard look review” is a term scholars have used to describe this species of review, though the term itself does not appear in many cases. See, e.g., Mark Seidenfeld, *Demystifying*

and here again, deliberative aspirations emerge. Some scholars divide hard look review into “prescriptive” and “evaluative” varieties.<sup>183</sup> The former looks at whether an agency “relied on the wrong factors or failed to consider an important aspect of the problem,” and the latter looks at whether the agency’s technical explanation of its rule is implausible.<sup>184</sup> In both cases, but especially in the prescriptive variety of review, courts look to the record primarily to gauge whether the agency acted in good faith to consider a fair balance of viewpoints on the question at issue. Today, that task sometimes leads courts even to take a hard look at an agency’s reason for *not* regulating.<sup>185</sup>

If courts are willing to look at the record in detail at various stages of the informal rulemaking process to determine whether the agency has sufficiently considered important viewpoints, then there is little reason to deny that kind of review in FACA cases.<sup>186</sup> That courts have the ability to determine which comments are significant enough to compel an agency response suggests that courts could make the threshold determination of what viewpoints matter in FACA cases. The judicial function in APA informal rulemaking cases is virtually indistinguishable from the kind of review suggested

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*Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 490–91 (1997). For a classic application, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851–52 (D.C. Cir. 1970) (“The function of the court is to assure that the agency has given *reasoned consideration* to all the material facts and issues.” (emphasis added)). The general thrust of hard look review was endorsed by the Supreme Court in 1983. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (clarifying that a rule will be set aside as arbitrary if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”).

183. Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 540–41 (1997).

184. *Id.*

185. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

186. The cases are not precisely analogous because the rulemaking record is a paper hearing and FACA activities are primarily conducted in in-person meetings. Hence, the deliberative process standard, to be workable, might impose a heavy burden on agencies by requiring them to produce a paper record of in-person meetings. But advisory committees already have to take positive steps toward timely release of committee records and committee work product. See Federal Advisory Committee Act, § 10(b), 5 U.S.C. app. (2011) (requiring records, reports, transcripts, minutes, etc., to be made available to the public); *Food Chem. News v. Dep’t of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992) (requiring agencies to comply with section 10(b) of FACA by releasing certain documents at the meeting and generally holding that compliance with section 10(b) should be timely so as to further the purpose of meaningful public participation); Memorandum for Committee Management Officers (Mar. 14, 2000), available at <http://www.gsa.gov/portal/content/100785> (prohibiting delay in release of non-exempt documents under the Freedom of Information Act’s request and review process and generally requiring “maximum timely availability” of committee materials).

here.<sup>187</sup> The only difference is that the advisory process is broader in scope than informal rulemaking: advisory committees are generally formed to consider a wider range of issues than any single rulemaking will ever consider. If anything, then, the nature of the advisory process makes judicial review of advisory committees' breadth of consideration and deliberation more fitting.

### *E. Potential Problems*

It is worthwhile to reflect on the potential limits of the deliberative process standard. First, although the analogy to APA informal rulemaking is clear, not all administrative law scholars favor the courts' behavior in APA cases, and their objections would be equally applicable here. Second, the real benefit of the deliberative process approach is that it forces advisory committees to think publicly about the full range of arguments on a given regulatory issue. These kinds of procedural requirements do not always yield optimal results, though, and federal advisory committees may not respond well to judicial prodding. Finally, although the deliberative process standard avoids the nonjusticiability problem, it may yield an apparent absurdity: that a committee could be compliant with section 5(b)(2) and be homogenous in membership.

As for the first problem, scholarly opinion is deeply divided on the propriety of the extratextual standards imposed by courts in the last fifty years,<sup>188</sup> but the fact that there is substantial disagreement may suggest that extension of this kind of judicial review to FACA cases is feasible from a policy perspective. Furthermore, the very fact that advisory committee action is not the end of the line in the regulatory process makes review less problematic than aggressive review of final rules. The potential dangers of ossification of agency rulemaking through judicial review are particularly acute because the review comes so late in the process, when agencies have already spent tremendous time, money, and energy. Indeed, informational requirements applicable late in the process are objectionable because they

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187. As a practical matter, these cases would probably be brought under the APA, as some cases find federal advisory committee action, such as issuing reports, to be final agency action under APA section 704 even though such action is not directly connected to an agency rule. *See, e.g., Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868, 872–73 (D. Idaho 2009) (holding that operation of a committee is itself final agency action even if it is not a preliminary step toward any concrete action of the parent agency), *order clarified*, CV 08-394-S-BLW, 2009 WL 3806371 (D. Idaho Nov. 9, 2009).

188. Some argue that the courts have unnecessarily “ossified” agency rulemaking and thwarted the legislative victories of progressive majorities by bogging down the agencies in a Sisyphean task. *See, e.g., McGarity, supra* note 183, at 528–29. Others believe that aggressive judicial review is necessary to prevent capture or domination of agencies. *See Merrill, supra* note 14, at 1070–74 (describing the ways in which more judicial-review-friendly scholars responded to public choice); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1547–50 (1992). Recent empirical evidence suggests that the ossification thesis is generally somewhat overblown. *See Jason Webb Yackee & Susan Webb Yackee, Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making “Ossified”?*, 20 J. PUB. ADMIN. RES. & THEORY 261 (2010).

contribute to what scholars have termed “information capture” and “filter failure.”<sup>189</sup> Those concerns are not present to the same degree in the context of FACA.<sup>190</sup> Flagging deficiencies earlier in the process would probably streamline, not obstruct, the regulatory process.

The second potential problem—compliance with the deliberative mandate—is more troubling. The success of procedural requirements designed to force bureaucratic agencies to consider certain factors depends on a variety of other contextual factors, and it may be that the deliberative process approach will not be effective in the specific context of federal advisory committees. Because the deliberative process standard requires only that the members of a committee consider all possible perspectives or viewpoints, courts will have no way to ensure that there was actual deliberation except to review the transcripts of meetings. Unbalanced but savvy committees may become expert at simply going through the motions and creating the illusion of deliberation in the transcripts. Alternatively, as in some other contexts in which statutes impose deliberative duties on agencies,<sup>191</sup> agencies may simply ignore the requirements outright.<sup>192</sup>

These objections are unconvincing for three reasons. First, while it may be true that courts will miss an actual lack of deliberation in a fair number of cases, this danger of false negatives is hardly damning of the form of review. There is no reason to believe that false negatives are any more likely with the deliberative process approach than with the representational approach, and, indeed, virtually any cause of action is subject to the problem of false negatives. Second, the objection misses the purpose of the deliberative process standard. Fostering deliberation is a laudable goal because it tends to create better decisionmaking on the whole.<sup>193</sup> Advisory committees are just that—advisory. To the extent that the threat of judicial review forces committees to pay attention to various viewpoints, the process of decisionmaking when the agency actually promulgates a rule will benefit from a

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189. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1329 (2010) (describing how constituencies either strategically or inadvertently use information to “wear [agencies] down enough to cause them to throw in their towels and give in”).

190. In fact, Professor Wagner argues that greater reliance on federal advisory committees could ameliorate information capture and filter failure problems in informal rulemaking. See *id.* at 1422–24.

191. See, e.g., Exec. Order No. 13,132, § 2, 64 Fed. Reg. 43,225, 43,255–56 (Aug. 4, 1999). If followed, the order would require agencies to “generate information relevant to the decision to preempt” state law through regulation. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727, 765 (2008).

192. Cf. Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 779–86 (2004) (noting statistics showing that agencies only conduct formal federalism impact analyses in fewer than one in a hundred cases).

193. See David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority*, in DELIBERATIVE DEMOCRACY 173, 173 (James Bohman & William Rehg eds., 1997).

richer informational environment.<sup>194</sup> Moreover, even if members originally raise an issue simply to avoid judicial review, it does not follow that they will not learn from the deliberation and perhaps change their minds.<sup>195</sup> Finally, as for the danger that agencies and committees may simply ignore the requirements, there is good reason to discount that possibility. Studies of the effectiveness of deliberative approaches confirm that compliance is determined mainly by institutionalization of the capacity to process the new information.<sup>196</sup> Institutionalization makes it difficult for an organization to ignore procedural requirements even when courts are not able to police every possible violation.<sup>197</sup> There is no way to be sure that the deliberative process standard as applied to federal advisory committees will lead to more deliberation, as the answer to that question will likely depend on the institutional characteristics of specific advisory committees. Yet federal advisory committees are already convened to consider specific questions; imposing a deliberative process requirement on these committees does not throw in a radically new variable separate from the issues under consideration. Even the most fundamentally numerically unbalanced committee will be aware of and competent to analyze most of the potential angles on an issue, and concern about judicial review should carry enough deterrent effect to convince its members to review those angles and thereby augment the information gathering process.

The third potential problem is not really a problem at all. Substituting a deliberative process standard for a representational standard would mean that committees could be compliant without appointing a single member from certain important groups. As counterintuitive as this result might seem, we must guard against romanticizing the legacy of the representational reading. All of the circuits that have thus far decided section 5(b)(2) cases have either found the provision nonjusticiable, adopted such a deferential standard of review that few cases could ever succeed, or simply punted on the issue. In some of these cases, the committees were strikingly homogenous,

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194. See Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 624–26 (1999) (arguing that informational regulation lowers informational barriers to citizen participation in regulation).

195. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (“Simply by focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”).

196. The National Environmental Policy Act (“NEPA”) has been a success despite the relatively onerous nature of its requirements largely because agencies institutionalized the expertise needed to consider every potential angle of every potential environmental problem and because outside interests mobilized to monitor agency compliance. See SERGE TAYLOR, *MAKING BUREAUCRACIES THINK* 251 (1984). On the other hand, Executive Order 13,132 failed to change agency consideration of the federalism implications of regulatory preemption because agencies have not internalized the specialized expertise necessary to carry out that mandate. See, e.g., Mendelson, *supra* note 192, at 781–86.

197. TAYLOR, *supra* note 196, at 252 (defining the sociological concept of “institutionalization” and noting that the institutionalization of “precarious organizational values” often depends on the “interplay between internal and external factors”).



and yet the representational reading has provided no answer with which courts are universally comfortable. It would be inconsistent to criticize the deliberative process standard for allowing what is already allowed by the current approaches. Moreover, compliance with the deliberative process standard would, as a practical matter, likely encourage agencies to staff committees heterogeneously (thus meeting the requirements of the representative model), as that would be the easiest way to ensure that important angles on issues are considered.

#### CONCLUSION

It is worth returning to the TPSAC episode and considering what is gained by acknowledging a deliberative process reading of section 5(b)(2). The tobacco industry's accusations of overrepresentation of pharmaceutical industry interests on the committee, and public interest groups' accusations of overrepresentation of industry interests in general, simply cannot be resolved neatly, if they can be resolved at all. Even if the committee toggles its membership to accommodate the concerns of its critics, new imbalances of interests, perhaps unforeseeable at the moment, may emerge. Courts have thus far rightly stayed out of these battles about numerical balance by finding section 5(b)(2) either nonjusticiable or justiciable and subject to substantial deference. But the problems of capture and domination are real even if representational imbalance is an imprecise and problematic measure of them. If courts are worried about capture or domination of the advisory process—and they should be—then they should adopt a deliberative process approach to section 5(b)(2) cases.