Amending the Federal Advisory Committee Act to Protect Independent Scientific Expertise

*Amanda K. Rudat**

Advisory committees serve vital roles in the Environmental Protection Agency (EPA) and other federal agencies. At EPA, advisory committees review the scientific basis of the agency's decision making, revise air quality standards, and advise the agency on its research program, among other functions. In 2017, EPA issued a directive titled "Strengthening and Improving Membership on EPA Federal Advisory Committees" ("Directive"). The Directive announced that EPA would no longer allow EPA grant recipients to serve on the agency's advisory committees. This policy resulted in an apparent industry tilt on EPA scientific committees after grant-receiving academic scientists were removed and replaced with scientists with industry ties. The Directive was ultimately the subject of three separate lawsuits, all which resulted either in the Directive being struck down or in the reversal of a trial court decision in favor of EPA.

One of the most important statutes governing EPA's advisory committees is the Federal Advisory Committee Act (FACA). Under FACA, legislation establishing or authorizing advisory committees must require that they be fairly balanced and contain provisions to prevent them from being inappropriately influenced. Despite the Directive's impact on the composition of EPA's advisory committees, two court decisions relied on FACA largely for the finding that EPA had not followed proper procedures in issuing the Directive, rather than a substantive violation of FACA. The third decision did not rely on FACA at all and was likewise procedural. This Note argues that the judicial decisions concerning the Directive leaves future administrations a guide for legally reenacting the Directive's substantive mandate and that FACA is insufficient to stop a bar on grant recipient service. It then suggests an amendment to FACA

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that bars agencies from excluding highly qualified experts from the pool of candidates from which it selects its committee members. This amendment would create a more enforceable claim for plaintiffs challenging agency actions like the Directive, serve the underlying purpose of FACA, and support agency legitimacy.

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INTRODUCTION

Dr. Robyn Wilson is a professor of risk analysis and decision science in the School of Environment and Natural Resources at The Ohio State University.[1] Her expertise is in studying how individuals make decisions when faced with risk and uncertainty, and her current research is on "adaption to climate-

1. Marion Renault, *Ohio State Associate Professor Among Scientists Pushing Back Against EPA Ban*, COLUMBUS DISPATCH (Jan. 29, 2018, 6:23 AM), https://www.dispatch.com/news/20180129/ohio-state-associate-professor-among-scientists-pushing-back-against-epa-ban.

exacerbated hazards."[2] Dr. Wilson's experience in risk analysis makes her exactly the kind of person you would want on the Environmental Protection Agency's (EPA) Science Advisory Board (SAB), a committee tasked with evaluating the scientific basis of EPA's decisions and making recommendations, which often requires an understanding of risk analysis.[3] EPA agreed and appointed Dr. Wilson to SAB in 2015.[4] She was forced off the committee in 2017 because she had received an EPA grant to study harmful algae blooms.[5]

Dr. Elizabeth Anne Sheppard is a professor and assistant chair of environmental and occupational health sciences and professor of biostatistics at the University of Washington, an expert on the health effects of air pollution, and a member of EPA's Clean Air Scientific Advisory Committee (CASAC).[6] In 2017, because of her position on CASAC , she was forced to give up her role on a three-million-dollar EPA grant to study the effects of fine particulate matter pollution on cardiovascular health.[7] CASAC, which plays a critical role in formulating air quality regulations in the United States,[8] could have benefited from the knowledge Dr. Sheppard would have gained from participating in the grant-funded study.

Dr. Wilson and Dr. Sheppard's stories represent the choice that EPA grant recipients faced following a 2017 EPA directive titled "Strengthening and Improving Membership on EPA Federal Advisory Committees" ("Directive"), which announced the agency would no longer allow grant recipients to serve on its advisory committees.[9] Committee members were forced to choose between giving up their committee membership or their grant. Since grant recipients are typically academic researchers, the mandate fell almost exclusively on

2. *Robyn S. Wilson*, SENR: SCH. OF ENV'T & NAT. RES., https://senr.osu.edu/our-people/robyn-s-wilson (last visited Nov. 15, 2020).

3. *See, e.g.*, EPA SCI. ADVISORY BD. MERCURY REV. PANEL, EPA-SAB-11-017, REVIEW OF EPA'S DRAFT NATIONAL-SCALE MERCURY RISK ASSESSMENT (2011), https://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/BCA23C5B7917F5BF8525791A0072CCA1/$File/EPA-SAB-11-017-unsigned.pdf/.

4. Renault, *supra* note 1.

5. *See id.*; First Amended Complaint for Declaratory Relief, Injunctive Relief, and Vacatur at ¶ 12, Physicians for Soc. Resp. v. Wheeler, 359 F. Supp. 3d 27 (D.D.C. 2019) (No. 1:17-cv-02742-TNM), 2018 WL 3820040.

6. Complaint for Declaratory and Injunctive Relief at ¶¶ 15–18, Union of Concerned Scientists v. Wheeler, 954 F.3d 11 (1st Cir. 2020) (No. 19-1383), 2018 WL 527888; *see also Lianne Sheppard, PhD, SCm*, UNIV. OF WASH. ENV'T & OCCUPATIONAL HEALTH SCIS., https://deohs.washington.edu/faculty/lianne-sheppard (last visited Nov. 15, 2020).

7. *See* Declaration of Elizabeth Anne Sheppard in Support of Plaintiffs' Memorandum in Support of Opposition to Motion to Dismiss at ¶¶ 12–13, Union of Concerned Scientists v. Wheeler, 377 F. Supp. 3d 34 (D. Mass. 2019) (No. 1:18-cv-10129-FDS), ECF No. 32-6; *Multi-Ethnic Study of Atherosclerosis and Air Pollution*, UNIV. OF WASH. ENV'T & OCCUPATIONAL HEALTH SCIS., https://deohs.washington.edu/mesaair/mesa-air-study (last visited Nov. 15, 2020).

8. *See infra* Subpart I.A.1.

9. Directive from E. Scott Pruitt, Adm'r, EPA, Strengthening and Improving Membership on EPA Federal Advisory Committees (Oct. 31, 2017) [hereinafter Directive], https://perma.cc/VZM2-VBKQ.

academics.[10] The Directive had a pronounced effect on EPA's scientific review boards like the SAB and CASAC.[11] On these boards, the Directive resulted in an apparent industry bias after academic scientists like Dr. Wilson and Dr. Sheppard were replaced with scientists with industry ties or state and local representatives with less scientific expertise than the academics they replaced.[12] Ironically, EPA's purported purpose behind the Directive was to prevent the occurrence or appearance of conflicts of interest.[13]

The Directive was challenged in three lawsuits, each bringing a variety of claims. The Directive was ruled arbitrary and capricious, and thus illegal under the Administrative Procedure Act,[14] by the D.C. Circuit in *Physicians for Social Responsibility v. Wheeler*.[15] This holding was based on the finding that EPA did not explain why it was breaking with the long-standing EPA policy of allowing grant recipients to serve on committees.[16] The court also held that EPA failed to follow Office of Government Ethics (OGE) procedural requirements for issuing new ethics rules.[17] Similarly, in the second case on the subject, *Natural Resources Defense Council (NRDC) v. EPA*, the District Court for the Southern District of New York concluded that EPA did not adequately explain the reason for its change in policy.[18] The court also held that EPA should have made a prediction regarding the impact that the directive would have on committee composition under the Federal Advisory Committee Act (FACA).[19] Finally, in *Union of Concerned Scientists v. Wheeler*, the First Circuit, without ruling on the merits, reversed the district court's grant of EPA's motion to dismiss.[20] The court remanded the case to the district court for consideration of the plaintiff's claims that the Directive resulted in an imbalance in committee composition, a result which EPA had not visibly considered or attempted to justify, in violation of FACA.[21]

FACA authorizes and regulates all executive branch advisory committees,

10. *See* Andrew Taylor, Union of Concerned Scientists v. Pruitt *Can EPA Purge Its Academic Science Advisors?*, 48 Envtl. L. Rep. (Envtl. Law Inst.) 10,567, 10,573 (2018). State and local agencies also frequently receive EPA grants, but they were exempted from the Directive's mandate. *See id.* at 10,573.

11. *See infra* Subpart I.B.1.

12. *See id.*

13. Memorandum from E. Scott Pruitt, Adm'r, EPA, to Assistant Administrators, Regional Administrators, and Office of General Counsel 2 (Oct. 31, 2017) [hereinafter Pruitt Memorandum], https://perma.cc/J7E3-9LJZ.

14. Since FACA does not contain a private cause of action, all suits bringing FACA claims do so through the Administrative Procedure Act. Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 17 (1st Cir. 2020).

15. Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634, 644–46 (D.C. Cir. 2020).

16. *Id.*

17. *Id.* at 644.

18. Nat. Res. Def. Council v. EPA, 438 F. Supp. 3d 220, 231–34 (S.D.N.Y. 2020).

19. *Id.*

20. Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 17–20, 23 (1st Cir. 2020).

21. *Id.*

including the EPA's.[22] The statute imposes a set of procedural and substantive requirements on agency advisory committees.[23] Especially relevant here, and discussed in more detail in Subpart I.A.2, are the "fair balance" and "inappropriate influence" provisions of FACA. Under these provisions, legislation establishing or authorizing the establishment of an advisory committee must require that the committee's membership be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee,"[24] and "contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest."[25]

Despite the impact that the Directive had on composition of committees like SAB and CASAC, FACA's role in the decision concerning the Directive was limited. As discussed above, the D.C. Circuit's opinion did not rely on these provisions of FACA at all, but rather, relied on a lack of explanation from the agency and failure to follow OGE procedural rules.[26] The part of the Southern District of New York's decision that concerned FACA was largely procedural, relying on EPA's failure to make predictions regarding balance.[27] The First Circuit's remand was based on the allegation that the EPA did not acknowledge or offer a reasoned explanation for the Directive's alleged impact on balance.[28]

EPA can easily correct the deficiencies identified by these three cases and, if it makes those corrections, FACA's fair balance and inappropriate influence provisions may not be sufficient to block the Directive's substantive mandate. A facial challenge arguing that a ban on grant recipient service is per se illegal, without an argument based on actual resulting committee composition, would almost certainly fail. This is because the ban does not inevitably lead to a replacement of academic or other independent scientists with those affiliated with industry.[29] Moreover, challenges to individual committee composition would face issues of justiciability, deference, and courts' perception of science as viewpoint neutral.[30]

Therefore, to prevent EPA from enacting the ban on grant recipient service in the future, I propose a revision to FACA that would bar agency actions that

22. Federal Advisory Committee Act, 5 U.S.C. app. II §§ 1–16.

23. *Id.*

24. *Id.* § 5(b)(2).

25. *Id.* § 5(b)(3).

26. *See generally* Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634 (D.C. Cir. 2020).

27. *See* Nat. Res. Def. Council v. EPA, 956 F. Supp. 3d 220, 233 (S.D.N.Y. 2020); Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 17–20, 23 (1st Cir. 2020).

28. *Union of Concerned Scientists*, 954 F.3d at 17–20, 23.

29. This is discussed in more detail in Subpart II.A. To succeed in a facial challenge, a plaintiff must show that "there is 'no set of circumstances'" in which a policy "might be applied consistent with the agency's statutory authority." *See* Scherer v. U.S. Forest Serv., 653 F.3d 1241, 1243 (10th Cir. 2011) (quoting Reno v. Flores, 507 U.S. 292, 301 (1993)).

30. *See infra* Part II.

remove a class of highly qualified experts, in light of the agency's work, from the pool of individuals available to serve on that agency's advisory committees. In enacting this amendment, Congress should elaborate on which factors should be considered in determining the expertise of a class to assist agencies and courts. I would recommend previous recognition by the agency of a class's highly relevant expertise, such as the awarding of an agency grant, as one enumerated factor.

This amendment would create a more enforceable claim specifically tailored to the appointment process, serve the underlying purposes of FACA, and support the legitimacy of advisory committees' recommendations. The amendment would not dictate who EPA eventually puts on committees or change the requirement that the resulting composition of committees be fairly balanced. Importantly, I also am not suggesting that ethics rules for any potential advisory committee member be relaxed. EPA's current ethics regulations should be sufficient to prevent conflicts of interest in its advisory committee members, but EPA has failed to enforce them.[31]

This Note proceeds in four parts. Part I provides a background on EPA's advisory committees and their legal landscape, explains the Directive and its fallout, and discusses in more detail the legal challenges stemming from the Directive. Part II argues that a facial challenge to a future version of the Directive would likely fail and that challenges to individual committees' compositions face considerable obstacles. Part III proposes an amendment to FACA that would prohibit agencies from excluding entire classes of highly qualified experts from the pool of candidates for committee services and walks through the rationales for this amendment. Finally, Part IV details EPA's failure to properly implement its current ethics regime and argues that proper implementation would adequately resolve any true conflict of interest concern that motivated the Directive.

I. BACKGROUND: EPA ADVISORY COMMITTEES, THE DIRECTIVE, AND LEGAL CHALLENGES TO THE DIRECTIVE

A. EPA's Advisory Committees and Their Legal Landscape

EPA uses advisory committees to supplement its own expertise and support its mission of protecting human health and the environment.[32] These advisory committees and their members are subject to a number of federal laws and regulations. This Part gives an overview of EPA's advisory committees, focusing especially on its scientific committees and the laws that govern them.

31. *See infra* Part IV.

32. *See Our Mission and What We Do*, EPA, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Feb. 1, 2021).

1. The Role of EPA's Advisory Committees

EPA currently has twenty advisory committees[33] which collectively have over 700 members.[34] These committees serve a variety of functions in numerous topic areas, including children's health, environmental education, and scientific peer review. EPA may staff its committees with "scientists, public health officials, businesses, citizens, communities, and representatives of all levels of government," depending on the particular committee's work.[35]

Two well-known scientific committees particularly important to EPA's work are SAB and CASAC. SAB was established in 1978 pursuant to the Environmental Research, Development, and Demonstration Authorization Act.[36] SAB is required to have at least nine members,[37] who serve three-year terms,[38] and meets between six to eight times a year.[39] SAB's purpose "is to provide independent advice and peer review to EPA's administrator on the scientific and technical aspects of environmental issues."[40] SAB reviews and provides recommendations on "the adequacy and scientific basis of any proposed criteria document, standard, limitation, or regulation under" a number of environmental statutes, including the Clean Water Act, the Toxic Substances Control Act, and the Resource Conservation and Recovery Act.[41] SAB also reviews the quality of proposed EPA research and development plans and advises the agency on the relative importance of different pollution sources.[42]

CASAC is another one of EPA's statutorily mandated advisory committees and was established by the Clean Air Act.[43] The committee meets between twelve and fifteen times a year[44] and is required by the Clean Air Act to have at least seven members, including "at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution

33. *All Federal Advisory Committees at EPA*, EPA, https://www.epa.gov/faca/all-federal-advisory-committees-epa (last updated Jan. 4, 2021).

34. *About the Federal Advisory Committee Act (FACA) at EPA*, EPA, https://www.epa.gov/faca/about-federal-advisory-committee-act-faca-epa (last visited Feb. 1, 2021).

35. *Id.*

36. 42 U.S.C. § 4365.

37. *Id.* § 4365(b).

38. *EPA Science Advisory Board Staff Membership*, EPA, https://yosemite.epa.gov/sab/sabproduct.nsf/WebSABSO/ Membership%20Information?OpenDocument (last visited Feb. 14, 2020).

39. EPA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY CHARTER: SCIENCE ADVISORY BOARD (2019), https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/sabcharter/$File/SAB%202019%20Renewal%20Charter%20agency%20Final.pdf.

40. *Id.*

41. *Id.*

42. *Id.*

43. 42 U.S.C. § 7409(d).

44. EPA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY CHARTER: CLEAN AIR SCIENTIFIC ADVISORY COMMITTEE (2019) [hereinafter CASAC CHARTER], https://yosemite.epa.gov/sab/.nsf/WebCASAC/2019casaccharter/$File/CASAC%202019%20Renewal%20Charter%203.21.19%20-%20final.pdf.

control agencies."[45] Like SAB, CASAC members serve three-year terms.[46] CASAC reviews and makes revisions to the National Ambient Air Quality Standards (NAAQS), which set emissions limits for a number of air pollutants.[47] It also must advise the agency of any adverse public health, social, or economic effects that would result from various strategies for attaining and maintaining the NAAQS.[48] Where more information is needed to review the NAAQS, the committee advises EPA regarding what research would be necessary to acquire that information.[49] Finally, similar to SAB, CASAC must advise the administrator on the relative contributions of natural and anthropogenic activity to air pollution.[50]

2. Laws Governing Federal Advisory Committees

SAB and CASAC, like all of EPA's advisory committees, are subject to an array of external statutes and regulations. FACA is one of the most important statutes governing EPA's advisory committees. FACA was passed in 1972[51] in reaction to the proliferation of costly advisory committees[52] that were being used by special interests to inappropriately influence agency decision making.[53] There are therefore two concerns that motivated the passing of FACA.[54] One is efficiency and cost.[55] The other, which I call the "integrity concern," is focused on public input, transparency, accountability, and bias.[56]

FACA seeks to resolve both of these concerns by imposing a number of requirements on all executive branch advisory committees. Serving the cost and efficiency goals of Congress, FACA requires that new advisory committees be established only when necessary and that committees be terminated when they are no longer useful.[57] To address the integrity concern underlying FACA, the statute contains reporting[58] and public participations requirements,[59] as well as the "fair balance" and "inappropriate influence" provisions.

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45. 42 U.S.C. § 7409(d)(2)(A).

46. *See* News Release, EPA, Administrator Wheeler Reappoints Members to Clean Air Scientific Advisory Committee (Sept. 15, 2020), https://www.epa.gov/newsreleases/administrator-wheeler-reappoints-members-clean-air-scientific-advisory-committee.

47. *See NAAQS Table*, EPA, https://www.epa.gov/criteria-air-pollutants/naaqs-table (last visited Oct. 16, 2020).

48. CASAC CHARTER, *supra* note 44.

49. *Id.*

50. *Id.*

51. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770, 776 (1972) (codified at 5 U.S.C. app. II §§ 1–16).

52. S. REP. NO. 92-1098, at 3 (1972); H.R. REP. 92-1041, at 291–93 (1972).

53. S. REP. NO. 92-1098, at 2, 4; H.R. REP. 92-1017, at 276 (1972); H.R. REP. 92-1041, at 306.

54. *See* Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REGUL. 451, 460–62 (1997).

55. *Id.*; S. REP. NO. 92-1098, at 3; H.R. REP. 92-1041, at 291–93.

56. *See* S. REP. NO. 92-1098, at 5–6.

57. 5 U.S.C. app. II § 2.

58. *Id.* § 6.

59. *Id.* § 10.

The fair balance provision, section 5(b)(2) of FACA, requires that legislation establishing or authorizing a committee "require the membership of the advisory committee [] be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."[60] Section 5(b)(3), the inappropriate influence provision, requires that legislation establishing committees "contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment."[61]

While FACA focuses on advisory committees as a whole, individual committee members are subject to federal ethics laws as special government employees.[62] These ethics rules come from the OGE pursuant to two federal statutes. The Ethics in Government Act of 1978 charges OGE with providing "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency."[63] The unnamed federal conflict of interest statute, found at 18 U.S.C. § 208, instructs OGE to "provid[e] guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee."[64]

Pursuant to these two statutes, OGE issued the "Standards of Ethical Conduct for Employees of the Executive Branch," which identify when government employees like advisory committee members may have an ethics problem.[65] In interpreting and laying out exceptions to these regulations, OGE explicitly stated that a

> special government employee serving on an advisory committee within the meaning of [FACA] may participate in any particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment or non-Federal prospective employment, *provided* that the matter will not have a special or distinct effect on the employee or employer other than as part of a class.[66]

In other words, a committee member receiving agency funding "may ethically serve on advisory committees that affect an otherwise disqualifying interest so long as they limit their participation to topics of broad applicability."[67] The OGE allows agencies to supplement their uniform ethics rules but requires

60. *Id.* § 5(b)(2). Judicial opinions and academic scholarship have explicitly or implicitly interpreted the fair balance provision as directly requiring committee balance. *See, e.g.*, Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634, 639 (D.C. Cir. 2020); Croley & Funk, *supra* note 54, at 464.

61. *Id.* § 5(b)(3).

62. *See* 41 C.F.R. § 102-3.105(h) (2019). The full definition of a "special government employee"—a temporary, part-time employment categorization—is given in 18 U.S.C. § 202.

63. 5 U.S.C. app. § 402(a).

64. 18 U.S.C. § 208(d)(2)(B).

65. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2365 (2020).

66. 5 C.F.R. § 2640.203(g) (2020).

67. Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634, 641 (D.C. Cir. 2020).

that agencies submit proposed additions to the OGE for approval and joint issuance.[68]

B. "Strengthening and Improving Membership on EPA Federal Advisory Committees"—A Threat to Independent Expertise

In October 2017, EPA enacted a major change to the way it governed advisory committee membership by issuing the Directive. Issued by then-Administrator Pruitt, the Directive announced that EPA would no longer allow EPA grant recipients to serve on its advisory committees.[69] The Directive was quickly challenged in multiple lawsuits, all of which EPA lost at various points of litigation. This Subpart begins by detailing the Directive and its impact on EPA's advisory committees. It then examines the legal actions that followed, focusing on *Physicians for Social Responsibility v. Wheeler*.

1. The Directive

The Trump administration and Republican lawmakers in Congress have consistently targeted science at EPA and other agencies that work on environmental issues. Republican lawmakers have repeatedly introduced bills targeting the use of "secret science" within the EPA, which, by requiring that study data be made available to the public, would block EPA from using studies that do not allow disclosure of private health data.[70] The Trump EPA proposed a similar policy for itself in 2018.[71] As EPA Administrator, Scott Pruitt proposed "red-team, blue-team" public debates of climate science that Trump reportedly supported.[72] Trump also "nominated or appointed non-scientists to positions that [by statute] require scientific expertise or have traditionally been held by scientists."[73] The Directive was a key piece of this larger attack on the role of science in government. Though EPA under President Reagan had a "hit list" of scientific advisors it wanted to remove from advisory boards[74] and EPA under

68. 5 C.F.R. § 2635.105 (2020).

69. Directive, *supra* note 9.

70. *See, e.g.*, Secret Science Reform Act of 2014, H.R. 4012, 113th Cong. (2014) (Introduced by Rep. David Schweikert); Secret Science Reform Act of 2015, H.R. 1030, 114th Cong. (2015) (Introduced by Rep. Lamar Smith). Neither of these bills became law.

71. Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768 (proposed Apr. 30, 2018) (to be codified at 40 C.F.R. pt. 30).

72. Lisa Friedman & Julie Hirschfeld Davis, *The E.P.A. Chief Wanted a Climate Science Debate. Trump's Chief of Staff Stopped Him.*, N.Y. TIMES (Mar. 9, 2018), https://www.nytimes.com/2018/03/09/climate/pruitt-red-team-climate-debate-kelly.html. Critics, including climate scientists, argued it was inappropriate to use a system set up for adversarial debate, where one side attacks the other, to discuss well-established scientific research already subject to rigorous peer review. *Id.*; *see also* Albert C. Lin, *President Trump's War on Regulatory Science*, 43 HARV. ENV'T L. REV. 247, 257–61 (2019).

73. Lin, *supra* note 72, at 262. For example, Trump nominated Sam Clovis, "a former economics professor and talk radio host with no science background," to a position in the U.S. Department of Agriculture that must be filled by a "distinguished scientist[] with specialized training or significant experience in agricultural research, education, and economics." *Id.*; *see also* 7 U.S.C. § 6971(b).

74. Lin, *supra* note 72, at 266.

President George W. Bush increased industry-funded representation on committees,[75] the Directive was perhaps the most obvious attempt to remove leading scientists from advisory committees in one fell swoop.

The Directive announced four "principles and procedures" that EPA would apply to advisory committee membership, one of which was labeled "Strengthen Member Independence."[76] This principle stated that "[m]embers shall be independent from EPA, which shall include a requirement that no member of an EPA federal advisory committee be currently in receipt of EPA grants . . . or in a position that otherwise would reap substantial direct benefit from an EPA grant."[77] The principle did not apply "to state, tribal, or local government agency recipients of EPA grants,"[78] meaning that the Directive almost exclusively impacted academic researchers.[79]

The Directive was accompanied by a memorandum explaining that the new rule was meant to prevent "the appearance or reality of potential interference" with committee members' "ability to independently and objectively serve" on the committee.[80] Neither the Directive nor its accompanying memorandum pointed to any instance in which a committee member's receipt of a grant actually led to a conflict of interest, explained why existing ethics laws were not sufficient if such a conflict existed, or explained why the memorandum's reasoning did not extend to other classes of advisory committee members like local government grant recipients.[81] The Directive also did not explain why EPA felt the need to break with its previous practice of "not consider[ing] a prospective or current member's receipt of an agency or other federal research grant to create the basis for a financial conflict of interest," which was in line with OGE's stance regarding grant recipients.[82]

EPA does not seem to have been uniform in implementing the Directive, and scientific advisory councils like SAB and CASAC felt the worst of its impact.[83] A report from the OGE found that the number of SAB committee members affiliated with academic institutions dropped by 27 percent,[84] while amici curiae in *Physicians for Social Responsibility v. Wheeler* report that

75. *See infra* Subpart B.2.
76. Directive, *supra* note 9.
77. *Id.*
78. *Id.*
79. *See* Taylor, *supra* note 10, at 10,573.
80. Pruitt Memorandum, *supra* note 13.
81. *See generally id.*; Directive, *supra* note 9.
82. *See* OFF. OF INSPECTOR GEN., EPA, REP. NO. 13-P-0387, EPA CAN BETTER DOCUMENT RESOLUTION OF ETHICS AND PARTIALITY CONCERNS IN MANAGING CLEAN AIR FEDERAL ADVISORY COMMITTEES 9–10 (2013).
83. *See* Sean Reilly, *Uneven Enforcement Follows Pruitt Edict on Science Panels*, E&E NEWS (Sept. 21, 2018), https://www.eenews.net/stories/1060099261.
84. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-280, EPA ADVISORY COMMITTEES: IMPROVEMENTS NEEDED FOR THE MEMBER APPOINTMENT PROCESS 23 (2019) [hereinafter GAO 2019 REPORT].

industry-funded representation tripled.[85] Regarding SAB, a Pruitt spokesperson said that "[t]he administrator believes we should have people on [the] board who understand the impact of regulations on the regulated community."[86] CASAC, which until 2017 was composed mostly of university researchers, suddenly saw most of its members come from state and local agencies.[87] Critics argue that these members lacked the expertise of the academic scientists they replaced.[88] In addition, the Board of Scientific Counselors, which advises EPA's research program, saw its number of academic members decrease by 45 percent.[89]

2. The Impact of Industry Influence and Lack of Expertise on Agency Decision Making

Although "[i]t is difficult to draw an irrefutable connection between advice from a particular committee and a flawed policy or decision"[90]—let alone between the composition of a specific committee and a policy decision—there is evidence that stacking committees with industry-friendly representatives can have real impacts on environmental and health policies.[91] These impacts fall most heavily on low-income communities and communities of color.[92] For example, in the 1990s, after President George H. W. Bush replaced three leading lead poisoning experts on the Advisory Committee on Childhood Lead Poisoning Prevention with individuals who had ties to the lead industry, the Lead and Copper Rule[93] was not revised in light of new science for nearly a decade.[94] One commentator argues that this failure to act contributed to the Flint, Michigan water crisis.[95]

As another example of the influence industry ties can have on the integrity

85. Brief for the State of Washington, et al. as Amici Curiae Supporting Appellants at 2, Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634 (D.C. Cir. 2020) (No. 19-5104), 2019 WL 6916010.

86. Coral Davenport, *E.P.A. Dismisses Members of Major Scientific Review Board*, N.Y. TIMES (May 7, 2017), https://www.nytimes.com/2017/05/07/us/politics/epa-dismisses-members-of-major-scientific-review-board.html.

87. Sean Reilly, *EPA Gives Up on Barring Grantees from Science Advisory Panels*, SCIENCE (June 25, 2020, 2:15 PM), https://www.sciencemag.org/news/2020/06/epa-gives-barring-grantees-science-advisory-panels.

88. *See, e.g.*, *id.*; Lin, *supra* note 72, at 265 ("CASAC has come to be dominated by state regulators who have little background in research on the health effects of air pollution and who hail from states that have been hostile to stringent air pollution rules.").

89. GAO 2019 REPORT, *supra* note 84, at 24.

90. Robert Steinbrook, *Science, Politics, and Federal Advisory Committees*, 350 NEW ENG. J. MED. 1454, 1457 (2004); *see also* SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS 97 (1990) (describing how SAB's "impact on policy remains surprisingly difficult to measure, largely because of the institutional limitations on the timing and character of the advice that the board offers to EPA").

91. Brie D. Sherwin, *The Upside Down A New Reality for Science at the EPA and Its Impact on Environmental Justice*, 27 N.Y.U. ENV'T L.J. 57, 62 (2019).

92. *Id.*

93. Subpart I – Control of Lead and Copper, 40 C.F.R. §§ 141.80–141.91.

94. Sherwin, *supra* note 84, at 65; *see also* Vipin Bhardwaj, *Question & Answer Lead and Copper Rule Revisions*, 68 J. ENV'T HEALTH 46, 46 (2005).

95. Sherwin, *supra* note 91, at 65.

of peer review, an EPA peer-review panel stacked with members with industry ties approved a 2004 report from EPA that found that hydraulic fracturing, commonly known as "fracking," posed "little or no threat" to drinking water supplies.[96] The study was heavily criticized by an EPA engineer who later sought whistleblower protection[97] and by members of Congress who felt that politics had infected the scientific process.[98] Congress used the report to justify an amendment to the 2005 Energy Policy Act that exempted fracking from regulation under the Safe Drinking Water Act.[99] A high-level EPA official later acknowledged that the study had gone too far in stating the safety of fracking,[100] and a 2016 EPA report recognized the dangers fracking poses to drinking water.[101]

Removing serving academic scientists and replacing them with scientists with industry ties was one of several anti-science actions taken by the Reagan administration that together resulted in a serious decrease in the efficacy of EPA.[102] The agency was found to have a 'hit list' of science advisors, and "more than fifty scientists were dismissed from EPA technical advisory boards in Reagan's first two years."[103] More scientists doing environmental work were dismissed at the Department of the Interior, Department of Agriculture, and Food and Drug Administration.[104] The dismissals and general hostility at EPA created a morale problem that, "combined with steep budget cuts[,] ultimately led to the hollowing out of the agency."[105] The agency lost 20 percent of its staff and 89 percent of EPA regulations were "delayed, postponed, or behind schedule."[106]

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96. OFF. OF GROUND WATER AND DRINKING WATER, EPA, EPA 816-R-04-003, EVALUATION OF IMPACTS TO UNDERGROUND SOURCES OF DRINKING WATER BY HYDRAULIC FRACTURING OF COALBED METHANE RESERVOIRS ES-1 (2004). Though this was not a long-standing advisory committee like SAB or CASAC, it is illustrative of the impact industry influence can have on decision-making and policy outcomes.

97. Tom Hamburger & Alan C. Miller, *Halliburton's Interests Assisted by White House*, L.A. TIMES (Oct. 14, 2004, 12:00 AM), https://www.latimes.com/archives/la-xpm-2004-oct-14-na-frac14-story.html.

98. *See id.*; Abrahm Lustgarten, *Former Bush EPA Official Says Fracking Exemption Went Too Far; Congress Should Revisit*, PROPUBLICA (Mar. 9, 2011, 12:21 PM), https://www.propublica.org/article/former-bush-epa-official-says-fracking-exemption-went-too-far.

99. Abrahm Lustgarten & Sabrina Shankman, *Congress Tells EPA to Study Hydraulic Fracturing*, PROPUBLICA (Nov. 11, 2009), https://www.propublica.org/article/congress-tells-epa-to-study-hydraulic-fracturing-hinchey-1110.

100. Lustgarten, *supra* note 98.

101. *See* OFF. OF RSCH. & DEV., EPA, EPA-600-R-16-236Fa, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES ES-46 to 47 (2016).

102. Leif Fredrickson et al., *History of US Presidential Assaults on Modern Environmental Health Protection*, 108 AM. J. PUB. HEALTH 595, 597 (2018).

103. Emily Berman & Jacob Carter, Policy Analysis, *Scientific Integrity in Federal Policymaking Under Past and Present Administrations*, J. SCI. POL'Y & GOVERNANCE, Sept. 2018.

104. *Id.*

105. *Id.*

106. *Id.*

In addition to the effects of altering the balance of advisory committees during previous administrations, the Trump EPA's shakeup of CASAC's membership already had experts worried about the committee's ability to review the NAAQS in 2019. Dr. Jonathan M. Samet of the Colorado School of Public Health testified that, without an epidemiologist or statistician on the committee, CASAC lacked critical expertise needed for a proper review.[107] These concerns proved well founded, since in 2019 a majority of the new CASAC broke with EPA career staff and voted to leave national fine particle standards unchanged.[108]

3. Physicians for Social Responsibility v. Wheeler *and Other Legal Challenges to the Directive*

The first legal challenge to the Directive, *Physicians for Social Responsibility v. Wheeler*, was filed in the District Court for the District of Columbia on December 21, 2017 by a group of plaintiffs that included Physicians for Social Responsibility, the National Hispanic Medical Association, and the International Society for Children's Health and the Environment.[109] Former EPA advisory committee members Edward Avol, Dr. Robyn Wilson, and Dr. Joseph Arvai were also plaintiffs.[110] The plaintiffs brought four claims for relief, alleging the Directive was arbitrary and capricious in violation of the Administrative Procedure Act since it violated the OGE's uniform ethics rules, the OGE's procedural requirements for supplementing the uniform ethics rules, the "fair balance" and "inappropriate influence" provisions of FACA, and statutory membership requirements of certain advisory committees.[111]

The district court dismissed the complaint in its entirety, finding all of the plaintiffs' claims either nonjusticiable or meritless.[112] Judge Trevor McFadden found that the Directive did not substantively violate OGE's uniform ethics rules since OGE allows individual agencies to promulgate more restrictive rules.[113] The court also dismissed plaintiffs' second claim since it read the OGE regulations requiring agencies to submit such supplemental rules to OGE for

107. *EPA Advisory Committees How Science Should Inform Decisions Joint Hearing Before the Subcomm. on Env't & Subcomm. on Investigations & Oversight of the H. Comm. on Sci., Space, & Tech.*, 116th Cong. (2019) (statement of Jonathan M. Samet, Dean and Professor, Colorado School of Public Health); *see also* Joe Goffman & Laura Bloomer, *The Legal Consequences of EPA's Disruption of the NAAQS Process*, HARV. ENV'T & ENERGY L. PROGRAM (Sept. 30, 2019), https://eelp.law.harvard.edu/2019/09/the-legal-consequences-of-epas-disruption-of-the-naaqs-process/ (discussing how the Directive and other changes within EPA had the potential to disrupt the NAAQS review process and interfere with EPA's ability to meet its statutory obligations).

108. Reilly, *supra* note 87.

109. Complaint for Declaratory Relief, Injunctive Relief, and Vacatur at ¶¶ 7–9, Physicians for Soc. Resp. v. Wheeler, 359 F. Supp. 3d 27 (D.D.C. 2019) (No. 1:17-cv-02742), 2017 WL 6557412. Andrew Wheeler became the plaintiff after he succeeded Pruitt as EPA Administrator.

110. *Id.* at ¶¶ 10–12.

111. First Amended Complaint for Declaratory Relief, Injunctive Relief, and Vacatur at ¶¶ 3, 124–60, *Physicians for Soc. Resp.*, 359 F. Supp. 3d 27 (No. 1:17-cv-02742-TNM).

112. *See generally Physicians for Soc. Resp.*, 359 F. Supp. 3d 27.

113. *Id.* at 39–42.

approval and joint issuance as precluding judicial review.[114] In the alternative, the court determined that the Directive was not an additional ethics requirement but rather a statement of how the EPA administrator would exercise his discretion under FACA, meaning that the OGE's procedural requirements did not apply.[115]

Plaintiffs' third and fourth claims proved equally unsuccessful. The district court dismissed their FACA claim after finding that both the fair balance and inappropriate influence provisions were nonjusticiable since they failed to "provide a meaningful standard against which to judge the agency's exercise of its discretion."[116] The court held that there was "no principled basis" for a court to determine which views deserve representation on fairly balanced committees or to determine whether those views were adequately represented.[117] It also expressed concern that treating plaintiffs' FACA claim as justiciable would require ongoing oversight of each advisory committee's membership by the court.[118] Finally, the court rejected the plaintiffs' argument that the Directive violated a "statutory directive to recruit the most qualified scientists" and "make subject matter expertise the principal factor in determining membership" since there was no such explicit requirement in the statutes governing EPA's advisory committees and that, in any case, determining who was most qualified to committee service was a discretionary decision for the agency.[119] Plaintiffs did not allege a violation of any "explicit statutory requirements," and "[u]nder the Directive there remain[ed] a universe of qualified scientists, academics, physicians, and experts capable of conducting the scientific decision-making EPA needs."[120]

In an opinion written by Judge David Tatel, the D.C. Circuit reversed the district court's holding.[121] Although the D.C. Circuit also dismissed plaintiffs' claim that the Directive substantively violated OGE regulations, it held that the Directive was an arbitrary and capricious departure from previous EPA policy and was "procedurally flawed because EPA failed to submit it to OGE for approval."[122] The court recognized that EPA historically had "not consider[ed] a prospective or current member's receipt of an agency or other federal research grant to create the basis for a financial conflict of interest," and that this view "comported with the view of OGE" that grant recipients could advise on matters

114. *Id.* at 42–43. The OGE regulation states that "[a] violation of this part . . . does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers, or any other person." 5 C.F.R. § 2635.106(c) (2020).

115. *Physicians for Soc. Resp.*, 359 F. Supp. 3d at 43.

116. *Id.* at 43–47.

117. *Id.* at 45.

118. *Id.* at 46.

119. *Id.* at 48–49.

120. *Id.*

121. *See generally* Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634 (D.C. Cir. 2020).

122. *Id.* at 644.

of general applicability.[123] The Directive represented a "major break from the agency's prior policy," and since EPA did not acknowledge, much less explain, its sudden about-face, it was arbitrary and capricious.[124] Notably, the D.C. Circuit did not address whether the Directive violated FACA since that argument was not raised by the plaintiffs on appeal.[125] As a result, the D.C. Circuit's holding rests entirely on EPA's failure to explain its change in policy and follow OGE procedural requirements.

The Directive also triggered lawsuits in the Second and First Circuits. In *NRDC v. Wheeler*, the Southern District of New York also found that the Directive was arbitrary and capricious due to the EPA's failure to explain its change in policy.[126] The court also found that the fair balance and inappropriate influence provisions of FACA were justiciable, and EPA "failed to explain how the Directive would affect the balance of advisory committee membership."[127]

In *Union of Concerned Scientists v. Wheeler*, the First Circuit came to the same conclusion regarding the justiciability of the FACA provisions and, without ruling on the merits, remanded to the district court based on plaintiffs' allegations that the Directive skewed committee composition in favor of industry and the fact that EPA did not acknowledge or offer a rational reason for upsetting the balance of committees.[128] I interpret the First Circuit's remand instructions regarding skewed committee composition as requiring of the district court the same analysis as a challenge to individual committees, rather than as a facial challenge to the Directive, since it would require information and analysis about individual committee composition rather than a discussion of whether the Directive is per se invalid.[129]

On June 24, 2020, with all of these cases at different stages, EPA announced it would not appeal the decision of the Southern District of New York.[130] The Directive is no longer EPA policy, and EPA is now free to appoint grant recipients to its advisory committees.[131] Still, those who had been forced off

123. *Id.* at 644–46.

124. *Id.*

125. *See generally id.*; Final Opening Brief of Appellants, *Physicians for Soc. Resp.*, 956 F.3d 634 (No. 19-5104), 2019 WL 6916011 (making only the arguments that the Directive procedurally and substantively violated OGE rules and was arbitrary and capricious); *see also* Final Brief for Appellee at 22, *Physicians for Soc. Resp.*, 956 F.3d 634 (No. 19-5104), 2019 WL 6895452 ("As the district court held, and as plaintiffs no longer appear to dispute, [FACA] does not provide any judicially manageable standards for reviewing the agency's judgments concerning the composition of its advisory committees.").

126. Nat. Res. Def. Council v. EPA, 438 F. Supp. 3d 220, 231–34 (S.D.N.Y. 2020).

127. *Id.* at 229–30, 233.

128. Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 17–20, 23 (1st Cir. 2020).

129. *See id.*

130. News Release, EPA, EPA Will Not Appeal Adverse SDNY Decision Regarding October 31, 2017 Federal Advisory Committee Directive (June 24, 2020), https://www.epa.gov/newsreleases/epa-will-not-appeal-adverse-sdny-decision-regarding-october-31-2017-federal-advisory.

131. *Id.* ("[T]he Agency will continue to follow the relevant policies as they existed before issuance of the 2017 Directive."). When the agency considered SAB appointments for fiscal year 2021, the Directive did not apply. Reilly, *supra* note 87.

committees were not automatically reinstated.[132] And some industry-friendly members appointed in the wake of the Directive, such as Tony Cox, who had accepted funding from the American Petroleum Institute,[133] remained on committees into the early months of the Biden administration.[134]

II. FACA'S INABILITY TO PREVENT THE IMPLEMENTATION OF FUTURE VERSIONS OF THE DIRECTIVE

Though the country has moved past the Trump administration, *Physicians for Social Responsibility*, *NRDC*, and *Unions of Concerned Scientists* collectively leave EPA and other federal agencies a blueprint for how to legally bar grant recipients from advisory committee service. First, in any future version of the Directive, the agency should offer an explanation for the agency's change in policy. Second, the agency should either acknowledge that a change in the balance of committees could occur and offer an explanation as to why that change is justified, or the agency should state that the Directive does not necessarily lead to imbalance. Third, the agency should submit the new rule to OGE for joint issuance. There is evidence that this is the lesson EPA learned from these lawsuits: in the same press release in which EPA announced it would not appeal the decisions, the agency said that in the future "any blanket prohibition on the participation of EPA grant recipients as special government employees in EPA advisory committees should be promulgated as supplemental ethics regulation with the concurrence of the [OGE]."[135] Despite losing three lawsuits, the Trump EPA did not rule out trying again, and a future administration may try to pick up where the Trump administration left off.

The cases concerning the Directive leave open the question of whether FACA could stop a second, more refined attempt to enact the Directive's substantive mandate that follows the above steps. I argue that there is a very real risk it could not. First, a facial challenge to a directive that follows the three rules

132. *See* Reilly, *supra* note 87 (reporting that Dr. Robyn Wilson, whose story of being forced off SAB opened this Note, would be willing to serve again, implying she had not been given her position back).

133. Scott Waldman, *EPA Science Advisor Allowed Industry Group to Edit Journal Article*, SCIENCE (Dec. 10, 2018, 9:55 AM), https://www.sciencemag.org/news/2018/12/epa-science-adviser-allowed-industry-group-edit-journal-article. In addition to accepting research funding, Cox allowed the American Petroleum Institute to "proofread and copy edit his findings before they were published." *Id.*

134. *Compare* Sean Reilly, *EPA Unveils New Industry-Friendlier Science Advisory Boards*, SCIENCE (Nov. 3, 2017, 1:30 PM), https://www.sciencemag.org/news/2017/11/epa-unveils-new-industry-friendlier-science-advisory-boards, *with Members of the Science Advisory Board*, EPA, https://web.archive.org/web/20210128033534/https://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalCommitteeRosters?OpenView&committee=BOARD&secondname=Science%20Advisory%20Board (SAB membership as of January 27, 2021). In March 2021, EPA Administrator Michael Regan removed all members of SAB and CASAC, a move which EPA referred to as a "reset." News Release, EPA, Administrator Regan Directs EPA to Reset Critical Science-Focused Federal Advisory Committees (Mar. 31, 2021), https://www.epa.gov/newsreleases/administrator-regan-directs-epa-reset-critical-science-focused-federal-advisory.

135. News Release, EPA, *supra* note 130.

established by the cases would likely be unsuccessful. The fair balance provision is focused on the final composition of committees and simply asks whether the assembled committee is fairly balanced in terms of the points of view represented and the functions to be performed by the committee members—the provision does not govern the appointment process beyond the end result.[136] Although as-applied challenges to a refined version of the Directive—in other words, challenges to specific committee compositions—are more likely to be successful, they would also face significant obstacles.

A. The Likely Failure of a Facial Challenge

By definition, a facial challenge to a rule depends on it per se leading to a certain unacceptable result, a standard that would likely not be satisfied in challenging an agency policy barring grant recipients from agency advisory committees.[137] In the case of the Directive, EPA did not ban all academic scientists, but only those who receive grants from the agency.[138] Since there are academic scientists that a court would likely see as representing the same views or functions as grant recipients, EPA can theoretically still appoint academic scientists, or simply scientists without industry ties, to committees to achieve whatever quota would constitute "balance." FACA does not consider that those scientists might lack the same level of expertise that grant recipients have. With FACA's limited focus, a facial FACA challenge would very likely fail.[139] For this same reason, when following the mandates of *NRDC* and *Union of Concerned Scientists*—that the agency predict any upset in balance when issuing future versions of the Directive—EPA could easily argue that it does not necessarily foresee a revised version of the Directive causing imbalance or inappropriate influence.

B. Barriers to Successful Individual Committee Challenges

In light of the unlikelihood of a successful facial challenge, a plaintiff hoping to challenge a future version of the Directive would likely need to rely on challenges to individual committees. However, even when challenging the composition of specific committees, it has proven difficult to enforce the fair balance and inappropriate influence provisions of FACA for a number of reasons. Circuits and individual judges have questioned and ultimately taken opposing positions on whether either provision is justiciable. Even where courts

136. *See* 5 U.S.C. app. II § 5(b)(2).

137. *See* Scherer v. U.S. Forest Serv., 653 F.3d 1241, 1243 (10th Cir. 2011) (explaining that, to succeed in a facial challenge, a plaintiff must show that "there is 'no set of circumstances' in which" a challenged policy "might be applied consistent with the agency's statutory authority" (quoting Reno v. Flores, 507 U.S. 292, 301 (1993)).

138. *See* Directive, *supra* note 9.

139. Sharon B. Jacobs, *Advising the EPA The Insidious Undoing of Expert Government*, HARV. L. REV.: BLOG (Dec. 6, 2017), https://blog.harvardlawreview.org/advising-the-epa-the-insidious-undoing-of-expert-government/.

reach the merits of fair balance and inappropriate influence claims, plaintiffs face a significant obstacle in the form of judicial deference to agency. Plaintiffs challenging the composition of science boards also face unique challenges in many courts' views of science and other practical difficulties.

1. Challenges Facing a Fair Balance Claim

There is a prominent debate about whether the fair balance provision of FACA provides a sufficiently manageable standard to be justiciable under the Administrative Procedure Act. Justiciability refers to whether a court can decide a case. The provisions of the Administrative Procedure Act that govern judicial review have been interpreted to preclude judicial review where a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[140] There is significant disagreement over whether the fair balance provision provides a meaningful standard for courts to apply in determining whether a committee is balanced or whether a court would simply be making arbitrary, value-based decisions in any one case.[141]

There is currently a circuit split on whether the fair balance provision is justiciable, though more courts are landing on the side of it being justiciable. Courts in the First, Second, Fifth, and Tenth Circuits have held that the fair balance provision is justiciable, finding that concepts of balance and fairness are not foreign to the judiciary and can provide enforceable outer boundaries.[142] The Ninth Circuit, as well as the District Court for the Middle District of Florida in the Eleventh Circuit, have found the provision nonjusticiable.[143] The D.C. Circuit attempted to answer the question in *Public Citizen v. Microbiological Criteria for Foods*, but its fractured opinion left many guessing as to the controlling holding,[144] and has led that circuit's district courts to conflicting conclusions.[145] The district court's decision to dismiss the plaintiffs' FACA

140. Heckler v. Chaney, 470 U.S. 821, 830 (1985).

141. *See* Physicians for Soc. Resp. v. Wheeler, 359 F. Supp. 3d 27, 43–46 (D.D.C. 2019); *see also* Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 426 (D.C. Cir. 1989) (Silberman, J., concurring) (per curiam) ("[T]he judgement as to what constitutes an appropriate or 'fair' balance of . . . views must be a political one.").

142. *See* Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 19–20 (1st Cir. 2020); Nat. Res. Def. Council v. U.S. Dep't of the Interior, 410 F. Supp. 3d 582, 603–06 (S.D.N.Y. 2019); Colo. Env't Coal. v. Wenker, 353 F.3d 1221, 1233 (10th Cir. 2004); Cargill, Inc. v. United States, 173 F.3d 323, 334 (5th Cir. 1999).

143. *See* Ctr. for Pol'y Analysts on Trade & Health v. Off. of the U.S. Trade Representative, 540 F.3d 940, 945–47 (9th Cir. 2008) (finding the fair balance provision nonjusticiable but limiting its decision to the context of the Trade Act of 1974, making justiciability in future cases dependent on standards provided by other statutory or regulatory authorities); Nat'l Parks Conservation Ass'n v. U.S. Dep't of the Interior, No. 2:11–CV–578–FtM–29SPC, 2012 WL 3589804, at *8 (M.D. Fla. Apr. 12, 2012).

144. *See generally Microbiological Criteria*, 886 F.2d 419; *see also* Daniel E. Walters, Note, *The Justiciability of Fair Balance Under the Federal Advisory Committee Act Toward a Deliberative Process Approach*, 110 MICH. L. REV. 677, 684 (2012) (noting that *Microbiological Criteria* is "long on reasoning but short on practical guidance for lower courts").

145. *Compare* Physicians for Soc. Resp. v. Wheeler, 359 F. Supp. 3d 27, 43–47 (D.D.C. 2019) (citing *Microbiological Criteria* to find that FACA's fair balance provision was nonjusticiable), *with*

claims as non-justiciable in *Physicians for Social Responsibility*—a part of the court's order that was not addressed by the D.C. Circuit—illustrates the importance of this debate.[146]

Even when courts find the fair balance provision justiciable, though, agencies are given substantial discretion in managing their advisory committees. FACA charges the General Services Administration with developing uniform standards for the operation of advisory committees that are applicable to all agencies.[147] In response, the General Services Administration has largely left appointments to the heads of individual agencies, stating that "[u]nless otherwise provided by statute, Presidential Directive, or other establishment authority advisory committee members serve at the pleasure of the appointing or inviting authority," and that the terms of their membership "are at the sole discretion of the appointing or inviting authority."[148] Courts are faced with difficult questions of what viewpoints ought to be present on any one committee and how much representation for each of those viewpoints is sufficient to achieve balance.[149] These questions, which are uncomfortable for the judiciary, mean that "even where courts reach the merits of the case, they leave the provision without any real bite."[150]

Those challenging the composition of scientific committees like SAB and CASAC face another potential barrier in many courts' view of science as being viewpoint neutral. In many instances, courts do not see scientists are as bringing 'viewpoints' to the table since the scientists are dealing with highly technical, rather than political, issues. This leaves courts with the question of what there is to balance. The Fifth Circuit in *Cargill v. United States*, for example, rejected a fair balance claim since "[t]he task of the committee—providing *scientific* peer review—is politically neutral and technocratic, so there [was] no need for representatives from [the impacted industry] to serve on the committee."[151] President Reagan vetoed a bill that would have required fair balance on SAB specifically, stating that scientific peer review "must remain above interest group politics."[152]

NAACP Legal Def. & Educ. Fund, Inc. v. Barr, 496 F. Supp. 3d 116, 133–37 (D.D.C. 2020) (citing *Microbiological Criteria* to find that FACA's fair balance provision was justiciable).

146. *See Physicians for Soc. Resp.*, 359 F. Supp. 3d at 43–47; *see generally* Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634 (D.C. Cir. 2020).

147. 5 U.S.C. app. II § 7(c).

148. 41 C.F.R. § 102-3.130(a) (2019).

149. *See Physicians for Soc. Resp.*, 359 F. Supp. 3d at 45; Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 424 (D.C. Cir. 1989) (Friedman, J., concurring) (per curiam) ("The determination of how the 'fairly balanced' membership of an advisory committee, in terms of the points of view represented and the functions the committee is to perform, is to be achieved, necessarily lies largely within the discretion of the official who appoints the committee.").

150. *See* Walters, *supra* note 144, at 690.

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

152. Lars Noah, *Scientific "Republicanism" Expert Peer Review and the Quest for Regulatory Deliberation*, 49 EMORY L.J. 1033, 1063 (2000).

2. Challenges Facing an Inappropriate Influence Claim

The inappropriate influence provision faces its own, albeit similar, justiciability and deference issues. Courts disagree over whether FACA's requirement for "appropriate provisions" that ensure a committee's decisions will not be "inappropriately influenced" provides sufficient standards for a reviewing court to make non-arbitrary decisions.[153] Courts have split on whether they can determine what influence reaches the level of being "inappropriate,"[154] and on whether they can determine what provisions regarding that influence are "appropriate."[155] And even though the inappropriate influence provision may appear to involve less normative decision making than the fair balance provision, agencies are still given substantial deference by courts willing to reach the merits of inappropriate influence claims.[156]

In addition to these challenges, the practical usefulness of the inappropriate influence provision is potentially limited by the fact that, even when it is found justiciable, it is on its face procedural, only requiring that legislation establishing committees contain *provisions* to ensure that they not be inappropriately influenced.[157] Judge Laurence Silberman of the D.C. Circuit, in his influential concurring opinion in *Microbiological Criteria*, said that he "doubt[ed] very much that [the inappropriate influence provision] has any applicability to a committee's *membership*. Indeed, the provision presupposes that an advisory committee is already in existence and 'fairly balanced' in accordance with section 5(b)(2)."[158]

Under this conception, a plaintiff could not directly bring a challenge that a

153. *See* 5 U.S.C. app. II § 5(b)(3).

154. *Compare* W. Org. of Res. Councils v. Bernhardt, 362 F. Supp. 3d 900, 912 (D. Mont. 2019) (finding the inappropriate influence provision nonjusticiable and stating that the plaintiff's "argument for the justiciability of this claim is even weaker than its claim under the [fair balance provision]"), *and* Physicians for Soc. Resp. v. Wheeler, 359 F. Supp. 3d 27, 46–47 (D.D.C. 2019), *and* Colo. Env't Coal. v. Wenker, 353 F.3d 1221, 1231 (10th Cir. 2004) ("The problem we have with this claim centers on the word 'inappropriate.'"), *with* NAACP Legal Def. & Educ. Fund v. Barr, 496 F. Supp. 3d 116, 137 (D.D.C. 2020) ("courts routinely apply statutes that require 'appropriate' conduct"), *and* Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 19 (1st Cir. 2020) ("The concept[ ] of . . . influence [is] not foreign to courts.").

155. *Compare Physicians for Soc. Resp.*, 359 F. Supp. 3d at 47 ("The Court declines to craft [such provisions] from whole cloth with no guidance from the statute."), *with* Nat. Res. Def. Council v. U.S. Dep't of the Interior, 410 F. Supp. 3d 582, 607–08 (S.D.N.Y. 2019) (finding the inappropriate influence provision justiciable at least to the extent that the court could determine "whether [the] agency had established *any* provisions relating to the decisional independence of an advisory committee."), *and NAACP*, 496 F. Supp. 3d at 136–37.

156. *See* Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 425 (D.C. Cir. 1989) (Freidman, J., concurring) (per curiam) (rejecting inappropriate influence claim regarding a USDA committee charged with developing criteria for food safety where six of eighteen members were employed by the food industry and others had done consulting work); *Cargill, Inc.*, 173 F.3d at 339 (finding potential conflicts of interest among a few members "not strong enough to cause [the committee] to be inappropriately influenced").

157. *See* 5 U.S.C. app. II § 5(b)(3).

158. *Microbiological Criteria*, 886 F.2d at 430 (Silberman, J., concurring).

committee was being inappropriately influenced by the presence or absence of certain members, but would rather need to focus on procedural mechanisms put in place by legislation or agencies[159] when creating a committee to protect the committee from undue influence. This view is supported by the Tenth Circuit's decision in *Colorado Environmental Coalition v. Wenker*, which found section 5(b)(3) to be nonjusticiable and reasoned that "[p]laintiffs' concern about inappropriate influence arising from an interest group sponsoring a disproportionate number of nominees" should instead be brought through a fair balance challenge.[160]

There is not clear consensus on how to apply the inappropriate influence provision, though. The First Circuit in *Union of Concerned Scientists* stated that "if the agency announced that only persons paid by a regulated interested business could serve on a committee, we would expect that FACA's . . . inappropriate influence standard[] would supply a meaningful tool for reviewing such a new policy."[161] With the applicability of the inappropriate influence provision to committee membership unclear, a challenge to committee composition in response to a future version of the Directive may need to fall back on the fair balance provision and its attendant challenges in place of the inappropriate influence provision.

3. A Practical Consideration

In addition to legal obstacles, there is a practical reason to avoid using individual committee challenges as a primary litigation strategy. Where agency policy does not necessarily lead to imbalance, as was the case with the Directive, individual committee challenges cannot be brought until committee members have been removed and replaced. This is true even when the overarching political context makes it somewhat easy to predict that imbalance will result. The requirement that plaintiffs wait to litigate until an agency forms an imbalanced committee means that during the litigation process, that committee is able to carry on its business, which may have serious policy impacts. And, in the case that a court finds the committee is in violation of FACA, committee activity halts while the parties figure out how to move forward, impeding the agency's work.[162]

159. "To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee." 5 U.S.C. app. II § 5(c).

160. Colo. Env't Coal. v. Wenker, 353 F.3d 1221, 1232 (10th Cir. 2004). For an argument that *Colorado Environmental Coalition*'s reading of the inappropriate influence provision was incorrect, see generally Joshua W. Abbott, Note, *Checks and Balance on the Fifth Branch of Government* Colorado Environmental Coalition v. Wenker *and the Justiciability of the Federal Advisory Committee Act*, BYU L. REV. 1047 (2005).

161. Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 19 (1st Cir. 2020); *see also Cargill, Inc.*, 173 F.3d at 339.

162. *See* NAACP Legal Def. & Educ. Fund, Inc. v. Barr, 496 F. Supp. 3d 116, 145 (D.D.C. 2020).

III. AMENDING FACA WOULD CREATE A MORE ENFORCEABLE CLAIM, SERVE THE UNDERLYING PURPOSE OF FACA, AND SUPPORT AGENCY LEGITIMACY

Recognizing that a facial challenge to a future version of Directive would likely fail and that individual committee challenges are far from sure successes, I recommend a revision to FACA's fair balance provision that explicitly focuses on the appointment process. In analyzing the Directive, the court in *Physicians for Social Responsibility* stated that "[t]he question, of course, is not whether the Directive, in fact, shrinks EPA's pool of experts."[163] Though under the current legal framework the court was surely correct, I argue that this *should* be the question we ask in response to an action like the Directive. To bring that question to the judicial table, Congress should amend FACA to include a clause barring agency actions that remove a class of highly qualified experts[164] from the pool of individuals available to serve on that agency's advisory committees. Within that broad mandate, Congress should list factors that they would consider in their idea of expertise to avoid repeating the justiciability and deference issues that have plagued the current provisions. I recommend that one factor be previous recognition by the agency of the class members' highly relevant expertise. In a situation like that arising under the Directive, that past recognition would be the award of an agency grant.

The idea of regulating the advisory committee appointment process in addition to the resulting committee composition is not unheard of—in 2008, the Government Accountability Office suggested that Congress amend FACA to require agencies to "identify the processes used to formulate committees."[165] This recommendation was incorporated into several bills proposing amendments to FACA, though none of these bills became law.[166]

Regulating the appointment process through my proposed amendment would have several important benefits. First, by including previous agency recognition of expertise as a factor, the amendment would improve the ability of plaintiffs to keep political influences out of the appointment process and avoid many of the enforcement issues that have been present in lawsuits brought under

163. Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634, 647 (D.C. Cir. 2020).

164. Whether an individual should be considered a highly qualified expert depends on the agency's work. 'Expertise' in a certain subject area does not have a uniform value across agencies, and who is 'highly qualified' for service in one agency may not be so for another. For example, a toxicologist may be highly qualified to contribute to EPA's work but likely is not highly qualified to assist the Federal Trade Commission.

165. *Examining the Federal Advisory Committee Act – Current Issues and Developments Hearing Before the Subcomm. on Info. Pol'y, Census, & Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 8, 22–23 (2008) [hereinafter *Current Issues and Developments*] (statement of Robin Nazzaro, Director, Natural Resources and Environment, Government Accountability Office).

166. *See* Federal Advisory Committee Act Amendments of 2008, H.R. 5687, 110th Cong. § 4(a)(4) (2008) (proposing amendments to Section 11(a)(2)); Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. § 4(a) (2019) (proposing amendments to Section 11(a)(2)); Federal Advisory Committee Act Amendments of 2019, S. 1220, 116th Cong. § 4(a) (2019) (proposing amendments to Section 11(a)(2)).

the current fair balance and inappropriate influence provisions. Second, ensuring the inclusion of experts like grant recipients in the pool of experts available to the agency also serves FACA's underlying purpose of limiting the misuse of advisory committees by special interests. Finally, regulating the appointment process to ensure that agencies cannot exclude politically inconvenient scientific experts would support the legitimacy of advisory committees and subsequent agency decision making.

A. A More Enforceable Claim

From the perspective of those trying to ensure the integrity of federal advisory committees, one of the main problems with the fair balance and inappropriate influence provisions is the difficulties in enforcing them. First, because the fair balance and inappropriate influence provisions are endpoint-based requirements, they are not suited to facial challenges, and individual committee challenges must wait until the agency actually stacks committees. And though the obstacles vary slightly from circuit to circuit and judge to judge, the fair balance and inappropriate influence provisions present issues of justiciability and agency deference that impede lawsuits.[167] With scientific committees, these challenges are enhanced by the courts' view of science as viewpoint neutral and that scientific committees therefore do not require balancing.[168] In light of these uncertainties, creating a claim that is more likely to get to the merits of the challenge at issue and creates the capacity to more closely scrutinize the agency's choices should be a priority of any amendment to FACA.

The proposed amendment to FACA would allow plaintiffs to bring a facial challenge to a rule like the Directive without having to wait for the harm of imbalance to occur. Unlike the endpoint-based requirements already existing in FACA, the amendment I propose is explicitly focused on managing the appointment process and designed to respond to the exclusion of valuable viewpoints from the pool of experts available to serve on the agency's advisory committees. How the amendment would have impacted the reaction to the Directive illustrates its utility.

Plaintiffs like Physicians for Social Responsibility could have challenged the directive on its face since it excluded a class of experts—grant recipients—whose expertise EPA had previously recognized by awarding them grants. With the amendment in place, plaintiffs would not have needed statistics on the composition of the committees at issue to support their argument, which essentially required plaintiffs to make much of the same analysis as an individual committee challenge would have required. They could have brought the challenge immediately, and since the composition of the resulting committee

167. *See supra* Subpart II.B.
168. *See supra* text accompanying notes 151–152.

would not be relevant to the amendment's mandate regarding the appointment process, EPA would no longer be able to argue in defense that it believed the Directive would not impact committee balance. This means that the court could get straight to the substantive question at issue: *Did EPA exclude an entire class of highly qualified experts from its advisory committee appointment process?*

Once that is the question asked, Congress, by defining expertise through enumerated factors like the one I propose, should be able to avoid many of the justiciability issues that have characterized the current provisions. Courts that have found the current provisions nonjusticiable have done so because they felt that FACA did not provide them with standards to use in judging agencies' actions.[169] The obvious way to overcome this issue is by providing standards, which is why I suggest that Congress should create a list of factors that it would want courts and agencies to consider when determining whether a class of people has expertise that should not be excluded from the appointment process. And on a more structural level, shifting the focus from whether the agency has struck the correct balance of various viewpoints, which inherently involves normative decisions, to simply whether the agency has or has not taken a certain action creates a question that the judiciary is likely to be more comfortable answering.

The amendment to FACA would also control the amount of deference given to agencies and remove the problem of courts viewing science as viewpoint neutral. The enumeration of clear factors to consider in determining the expertise of a group would restrict the deference given to an agency, though not completely eliminate it, since it would empower the courts to make determinations for themselves with those factors. And by focusing on the agency's action rather than the balance of the committee, the amendment would make the judiciary's view of science as viewpoint or politically neutral irrelevant. This would avoid the risk that, even in the case a court finds the fair balance and inappropriate influence provisions justiciable, it feels that there is nothing to balance because viewpoints are not present.

B. Underlying Purpose of FACA

Though the amendment I propose focuses on the appointment process rather than the composition of the resulting committee, it would serve the integrity purpose of FACA by helping to prevent the repeat of a scenario that resulted in the replacement of highly qualified academic scientists with industry ties. This is not to say that industry has no role to play on advisory committees, but rather that an increase in individuals with industry ties at the expense of those without those ties goes against the concept of balance at the core of the fair balance and inappropriate influence provisions. This shift represents the slide toward industry

169. *See, e.g.*, Physicians for Soc. Resp. v. Wheeler, 359 F. Supp. 3d 27, 43–47 (D.D.C. 2019); Ctr. for Pol'y Analysts on Trade and Health v. Off. of the U.S. Trade Representative, 540 F.3d 940, 947 (9th Cir. 2008).

capture that motivated Congress to pass FACA in the first place.[170] This purpose was reiterated by Congress in 2008 when the House Committee on Oversight and Government Reform held a hearing on current issues and developments regarding the Act.[171]

Keeping grant-receiving academic scientists, or any other sort of expert who is likely highly qualified for committee service, in the pool of potential committee members would force the agency to consider their inclusion on the committee and potentially explain their reasons for passing them over if they choose to do so.[172] The amendment would make it more difficult to exclude academic scientists in a wholesale way that would allow widespread replacement with a different group, in this case individuals with industry ties, that was already adequately represented on committees. By making imbalance and undue influence more difficult to achieve, the amendment serves the intentions of the legislators who created and passed FACA.

Amending FACA would also protect balance in a sense that is not currently explicitly recognized by the Act. Since FACA has been applied in a way that focuses on quota-like representation, it does not consider the adequacy of that representation.[173] Our concept of balance should go beyond surface-level representation—individuals less qualified than EPA grant recipients they replace will be less equipped to fully push back against industry-funded committee members with opposing views. When that is the case, the committee is not truly balanced. This faux balancing could be seen in the composition of CASAC after the Directive. The committee, once composed primarily of academic researchers, suddenly found that most of its members came from state and local agencies.[174] Some of these members "acknowledged that they cumulatively lack the full range of expertise needed to carry out their duties,"[175] and commentators noted that CASAC "lack[ed] scientific horsepower compared to prior years."[176] The Amendment would protect balance by ensuring that EPA has to consider those most capable of engaging in a robust back and forth, hopefully creating a

170. *See* S. REP. NO. 92-1098, at 2, 4 (1972); H.R. REP. 92-1017, at 276 (1972); H.R. REP. 92-1041, at 306 (1972).

171. *See Current Issues and Developments*, *supra* note 165, at 3–5 (opening statement of Rep. Lacy Clay, Chairman, Info. Pol'y, Census, & Nat'l Archives Sub. Comm.).

172. EPA guidelines call for agency staff to prepare documents called draft membership grids that reflect the staff's "recommendations on the best qualified and most appropriate candidates for achieving balanced committee membership" and their rationale for recommending a candidate. *See* GAO 2019 REPORT, *supra* note 84, at 10–13. However, in 2018 EPA often failed to follow this guidance when appointing candidates to SAB and CASAC. *Id.* at 17–18.

173. *See* Walters, *supra* note 144, at 688–89 (arguing that a common thread uniting cases dealing with the fair balance and inappropriate influence provisions is a representational reading of those provisions focused on a numerical balance of committee members).

174. Reilly, *supra* note 87.

175. *Id.*

176. H. Christopher Frey, *A Rush to Judgment The Trump Administration is Taking Science out of Air Quality Standards*, THE CONVERSATION (Nov. 26, 2018, 6:38 AM), https://theconversation.com/a-rush-to-judgment-the-trump-administration-is-taking-science-out-of-air-quality-standards-106507.

committee where no party is at an advantage over the other in terms of knowledge or experience. This concept should appeal to all interested parties—neither grant recipients nor scientists with industry insights would be per se kept off of advisory committees.

Had the Directive not been struck down, it may have also negatively affected recruitment of qualified committee members, exacerbating the immediate impacts of replacing academic experts with less qualified individuals and individuals with industry ties. EPA's policy may have discouraged scientists who had not already received grants, but who hoped to apply for EPA grants in the future, from serving on EPA advisory committees (since they would have to eventually choose between giving up their committee service if they received a grant or giving up applying for EPA grants). Professor Deborah Cory-Slechta, who studies environmental medicine and pediatrics, characterized forgoing eligibility for EPA grants as "a significant professional handicap."[177] It is unlikely that many academics would be willing to accept that setback. The plaintiffs' district court brief in *Physicians for Social Responsibility* points to how grant recipients' "dismissal and ongoing disqualification seriously damages EPA's ability to recruit the most qualified scientists."[178] If these scientists remove themselves from the pool of experts available to serve on EPA's advisory committees, that creates even more space for EPA to fill with industry-affiliated or less-qualified individuals. Amending FACA to bar an action like the directive would prevent EPA from creating this undesirable disincentive.

C. Legitimacy

Part of FACA's function is to "enhanc[e] the legitimacy of the administrative state."[179] Some view agencies as facing "pressure to justify agency rulemaking, enforcement, and adjudication in a system where all of those powers are expressly assigned to coordinate branches of government" by the Constitution.[180] Concerns around legitimacy are one of the reasons that agencies

177. Declaration of Deborah Cory-Slechta at ¶ 12, Physicians for Soc. Resp. v. Wheeler, 359 F. Supp. 3d 27 (D.D.C. 2019) (No. 1:17-cv-02742-TNM), ECF No. 31-9; *see also* Declaration of Joseph Árvai at ¶ 3, *Physicians for Soc. Resp*., 359 F. Supp. 3d 27 (No. 1:17-cv-02742-TNM), ECF No. 31-10 (stating that choosing committee service over the opportunity to apply for EPA grants in the future entailed "significant loss of professional opportunity for [him] and [his] graduate students").

178. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 10–11, Physicians for Soc. Resp. v. Wheeler, 359 F. Supp. 3d 27 (No. 1:17-cv-02742-TNM), 2018 WL 3820045.

179. Croley & Funk, *supra* note 54, at 527.

180. *See* Louis J. Virelli III, *Science, Politics, and Administrative Legitimacy*, 78 MO. L. REV. 511, 515 (2013). Professor Nicholas Bagley has discussed how this view of the administrative state is "deeply embedded in our legal culture[,]" but is "overdrawn—indeed, it is largely a myth." Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 348–49 (2019). For another discussion of how this view is problematic and "misdiagnoses the administrative state's constitutional status," see Gillian E. Metzger, *Foreword 1930s Redux The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017). While I agree with Professors Bagley and Metzger, I discuss legitimacy because of how embedded it is as a theme

like EPA seek out the advice and expertise of external scientists.[181] EPA's scientific committees, staffed by experts, are used to defend EPA's decisions since they allow EPA to claim an informational advantage over other units of government.[182]

Because of the important role that advisory committees play in the administrative state, government officials have said that it is "essential that membership be and, just as importantly, be perceived as being free from conflict of interest and balanced as a whole."[183] Public perception that industry enjoys special access to the government through disproportionate representation in the pool of candidates for committee service, and consequentially on EPA's committees, erodes trust in committees' recommendations and EPA's decisions.[184] Additionally, considering academics in general but not leading experts is a threat to legitimacy in its own right. When EPA uses specialized knowledge and expertise as a justification for its actions, particularly high-profile actions, its "not appointing the leading experts," much less not considering them for appointment, "could prompt committee legitimacy concerns."[185]

Aside from endangering the legitimacy of EPA's immediate decisions, removing highly qualified experts like grant recipients from the pool of potential advisory committee members has the potential to erode public trust in science itself.[186] This could in turn undermine the effectiveness of agencies like EPA that rely on science to perform work that benefits the general public.[187] Amending FACA would protect the legitimacy of and public trust in EPA's

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of administrative law and because in this case it is closely tied to the larger concept of public trust in government.

181. Noah, *supra* note 152, at 1051; Jacobs, *supra* note 139 (stating, in discussing EPA's reasons for employing outside experts, that "[t]he modern administrative state was built on the promise of expertise").

182. *See* Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2192 (2011) ("Congress oversees agency decision making through hearings, budget decisions, and ultimately legislation. But congressional oversight is limited by the same lack of time, knowledge, and expertise that led Congress to delegate power to the agency in the first place."). In addition to an advantage over Congress, consultation with outside experts helps agencies develop the advantage of expertise that justifies judicial deference. *Id.* at 2195–96.

183. *Current Issues and Developments*, *supra* note 165, at 7 (statement of Robin Nazzaro, Director, Natural Resources and Environment, Government Accountability Office).

184. *See* Jacob R. Straus et al., *Restricting Membership Assessing Agency Compliance and the Effects of Banning Federal Lobbyists from Executive Branch Advisory Committee Service*, 45 PRESIDENTIAL STUD. Q. 310, 317 (2015); Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1602, 1609–13 (2008) (discussing how scientific integrity is "essential to accurate and legitimate policy choices"); *see generally* Caitlin Drummond et al., *Public Perceptions of Federal Science Advisory Boards Depend on Their Composition*, 117 PROCS. NAT'L ACAD. SCIS. 22,668 (2020). *But see generally* Joseph Árvai et al., *Industry-Dominated Science Advisory Boards Are Perceived to be Legitimate . . . But Only When They Recommend More Stringent Risk Management Policies*, RISK ANALYSIS, June 2020.

185. Straus et al., *supra* note 184, at 319.

186. *See* Sherwin, *supra* note 91, at 88–90.

187. *Id.* at 70 ("If the executive branch has the power to undermine scientific integrity to suit its ideological agenda, then agencies arguably become[] nothing more than political arms of an administration, incapable of carrying out their missions and purposes.").

decisions by ensuring the most qualified experts are considered for committee service.

IV. EXISTING ETHICS RULES, PROPERLY ENFORCED, WOULD BE SUFFICIENT TO PREVENT CONFLICTS OF INTEREST

When EPA issued the Directive, it did so for the purported reason of preventing conflicts of interest.[188] Preventing conflicts of interest is a worthy goal. The Directive was illogical, however, in part because its fundamental concern with conflicts of interest could be extended to other groups, such as state or local agency grant recipients who were excluded from its impact, and committee members with industry ties who come with their own, perhaps even more pronounced, conflicts of interest. Moreover, the Directive was simply an unnecessary response to an ethics problem that EPA did not show existed.

Grant recipients are already not allowed to work on committee matters that would directly and uniquely affect their work.[189] OGE regulations offer examples to illustrate this principle. One example describes how a university professor could not serve on an advisory committee charged with evaluating that specific university's performance under a grant from the agency.[190] However, a chemist at a pharmaceutical company working on developing an AIDS vaccine could serve on an advisory committee established to develop recommendations for new AIDS vaccine trial standards since the company "will be affected . . . only as part of the class of all pharmaceutical companies."[191] Under this rule, an EPA grant recipient would clearly not be able to evaluate their performance under their own grant, or any other matter uniquely tied to their grant. Advisory committee members are all "given a conflict of interest form to fill out for each separate issued discussed. If a conflict is identified, the member is immediately recused."[192] It is not clear, therefore, what conflict of interest EPA was trying to address that it didn't already have a mechanism to resolve.

Should EPA truly wish to improve ethics at the agency, it should begin by properly implementing its existing ethics regime. In 2019, a Government Accountability Office report found that EPA has not been consistent in ensuring that committee members follow established procedures for identifying conflicts of interest.[193] EPA's ethics office had also failed to conduct periodic audits of special government employees' compliance with ethics rules as required by OGE regulations.[194] OGE also has a role to play here, as the office conducts periodic

188. Pruitt Memorandum, *supra* note 13, at 2.
189. *See* 5 C.F.R. § 2640.203(g) (2020).
190. *Id.*
191. *Id.*
192. Jacobs, *supra* note 139.
193. GAO 2019 REPORT, *supra* note 84, at 19–20.
194. *Id.* at 20–21.

audits of agency ethics programs to ensure their compliance with federal law.[195] OGE should ensure that EPA is implementing its ethics rules and that it is doing so even-handedly. EPA should properly implement its existing ethics regulations instead of issuing new mandates that make little sense from an ethical perspective and inexplicably target only one class of committee members.

CONCLUSION

The integrity of advisory committees is key to EPA and other federal agencies making legitimate and factually well-grounded policy choices. When EPA injects political bias into the scientific review process, it undercuts its own effectiveness in a way that has the potential to cause real harm to the American people. A per se exclusion of grant recipients, individuals who EPA has recognized as having highly relevant expertise in a competitive application process, from advising the agency is an example of such political interference. Previous administrations' creation of imbalance on advisory committees like SAB resulted in dangerous delays in decision making that had serious environmental and health consequences.

Though EPA's attempt to bar grant recipients from committee service was eventually struck down in court, those decisions leave gaps that should not be ignored. FACA's fair balance and inappropriate influence provisions, with their justiciability and deference issues, may not be enough to plug those gaps should a future administration attempt to reinstate the Directive's substantive mandate. An amendment to FACA that would bar agencies from keeping highly qualified experts out of the pool of candidates available to serve on federal advisory committees would help solve this issue.

An amendment governing the appointment process would have its limitations, though, and the one I propose is not intended to be all encompassing. It is rather one step in a series of many that are needed to protect the integrity of advisory committees. Even when grant recipients are included among available candidates, there is no guarantee that they will be appointed, though EPA may be under more pressure to explain its decision for not appointing such individuals. And even if grant recipients are placed on committees, in most cases there is no guarantee EPA will follow the committees' advice. If Congress feels that changing either of these dynamics is desirable, it will need to alter FACA or statutes establishing specific committees in a way that is beyond the scope of this Note.

In a broader sense, it is important to remember that scientific involvement in policy making is not a cure-all, and treating it as such is "particularly problematic when agency expertise is substituted for the participation of

195. *See Current Issues and Developments*, *supra* note 165, at 16 (statement of Robin Nazzaro, Director, Natural Resources and Environment, Government Accountability Office).

powerless and excluded groups."[196] Scientific analysis may omit public values that are not easily quantified, and regulators should be mindful of that when relying on science to create policy.[197]

However, when science is necessary for decision making, it is critical that it be accurate and not unduly influenced by special interests, which is why maintaining the integrity of scientific advisory boards is so important. There is no single way to create 'good' policy, and EPA should combine fairly balanced scientific advisory boards with robust avenues for public participation. A good step toward ensuring fairly balanced scientific advisory boards is to amend FACA to ensure that, under even the most hostile administration, agencies cannot remove a swath of the most highly qualified experts from consideration for committee service.

196. *See* Eileen Gauna, *The Environmental Justice Misfit Public Participation and the Paradigm Paradox*, 17 STAN. ENV'T L.J. 3, 32 (1998).

197. *See generally* Tseming Yang, *Melding Civil Rights and Environmentalism Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENV'T L. REV. 1 (2002).