

## THE FEDERAL ADVISORY COMMITTEE ACT

The Homeland Security Act authorized the Department of Homeland Security to create advisory committees that are exempt from the Federal Advisory Committee Act (FACA).<sup>1</sup> Since 1972, FACA has worked to limit the ability of special interest groups, acting through advisory committees, to influence public policy behind closed doors. FACA was enacted to ensure that Congress and the public were aware of the number, purpose, membership, and activities of advisory committees set up by the executive branch.<sup>2</sup> Under FACA, advisory committees must announce their meetings, hold them in public, provide for the representation of differing viewpoints, and make their materials available to the public.<sup>3</sup>

DHS advisory committees are now exempt from FACA's requirements under Section 871 of the Homeland Security Act. Although the Secretary of the DHS is still required to publish a notice in the Federal Register (announcing the establishment of such a committee and identifying its purpose and membership), the committees themselves can meet in secret. Their activities and reports will be shielded from congressional and public scrutiny. As FACA already contained exemptions for information relating to national security, it is not clear why its provisions could not have been applied in full to the new DHS.<sup>4</sup> As discussed in the next section, a recent dispute between members of Congress and the administration exemplifies the dangers of exempting the executive branch from FACA.

## INVESTIGATIVE ARM OF CONGRESS ABANDONS SUIT FOR RECORDS

In April 2001, the General Accounting Office (GAO), the investigative arm of Congress, launched an investigation into an energy task force established by President Bush. The task force was created "to develop a national energy policy" and was chaired by Vice President Dick Cheney. Claiming that all of the members of the task force were federal employees (and not private citizens), the task force did not abide by the requirements of FACA.<sup>5</sup>

The GAO was asked to investigate the energy task force in the wake of press reports that the task force had been secretly meeting with a group of insider lobbyists. According to these reports, the task group's meetings had included members of conservative interest groups, as well as energy executives who had made large contributions to President Bush's election campaign (including Enron officials). These lobbyists had reportedly been given secret, high-level access to the administration

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<sup>1</sup> See The Homeland Security Act of 2002, § 871.

<sup>2</sup> See 5 U.S.C. App. 2 (1972).

<sup>3</sup> See H.R. Rep. No. 107-609, p. 221 (2002).

<sup>4</sup> See *Ibid.* (noting that many agencies with homeland security missions, such as the DOJ and the FBI, operate under FACA without difficulty).

<sup>5</sup> See John W. Dean, "GAO v. Cheney Is Big Time Stalling: The Vice President Can Win Only If We Have Another *Bush v. Gore*-like Ruling," Part II, *FindLaw's Legal Commentary*, February 1, 2002, available at <http://writ.news.findlaw.com/dean/20020201.html> (accessed March 2, 2003).

officials who were deciding the country's energy policies — precisely the kind of scenario that FACA was designed to prevent.

Representatives Henry Waxman (D-CA) and John Dingell (D-MI), both ranking members of House committees, asked the GAO to investigate these reports.<sup>6</sup> Specifically, the GAO was to provide Congress with the names of the people the task force had met with; information on when and where those meetings took place; and an account of the subject matter of issues discussed.<sup>7</sup> In May 2001, the GAO requested a list of documents from Cheney in order to provide Congress with the requested information and determine whether the task force had broken any laws.<sup>8</sup> Cheney refused to hand over many of the documents, however, saying that to do so would “unconstitutionally interfere with the functioning of the executive branch.”<sup>9</sup>

The GAO eventually sued Cheney in federal district court in Washington, DC, the first time the GAO has ever filed suit against an executive official over the issue of access to information.<sup>10</sup> In the past, the executive branch has provided the information requested or has negotiated a compromise acceptable to all sides.<sup>11</sup> On February 22, 2002, the GAO released a statement explaining its decision to pursue disclosure of the documents through litigation:

We take this step reluctantly. Nevertheless, given [the] GAO's responsibility to Congress and the American people, we have no other choice. Our repeated attempts to reach a reasonable accommodation on this matter have not been successful. Now that the matter has been submitted to the judicial branch, we are hopeful that the litigation will be resolved expeditiously.<sup>12</sup>

The case was heard before Judge John Bates, a Bush appointee who had been confirmed a year earlier (and previously worked for Independent Counsel Kenneth Starr during the Whitewater investigation).<sup>13</sup> On December 9, 2002, Judge Bates dismissed the GAO's lawsuit out of hand, holding that David Walker, the Comptroller General of the United States (and head of the GAO), lacked standing to sue because he had not personally suffered a sufficiently concrete injury.<sup>14</sup> Judge Bates noted that the GAO's

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<sup>6</sup> See Dana Milbank and Ellen Nakashima, “Cheney Rebuffs GAO's Records Request,” *Washington Post*, August 4, 2001.

<sup>7</sup> See Byron York, “GAO vs. Cheney: Coming Soon,” *National Review*, February 20, 2002, available at <http://www.nationalreview.com/york/york022002.shtml> (accessed February 2, 2003).

<sup>8</sup> See Paul Courson, “GAO Files Unprecedented Suit Against Cheney,” CNN News, February 22, 2002.

<sup>9</sup> See Dana Milbank and Ellen Nakashima, “Cheney Rebuffs GAO's Records Request,” *Washington Post*, August 4, 2001.

<sup>10</sup> See Marcia Coyle, “GAO is Hit with Setback to Power,” *National Law Journal*, December 16, 2002.

<sup>11</sup> See Stuart Taylor, Jr., “A Victory Gone Too Far,” *Legal Times*, December 16, 2002.

<sup>12</sup> General Accounting Office, “GAO Statement Concerning Litigation,” February 22, 2002, available at <http://www.gao.gov/press/gaostatement0222.pdf> (accessed March 2, 2003).

<sup>13</sup> See “Biography of Judge John D. Bates,” available at <http://www.dcd.uscourts.gov/bates-bio.html> (accessed March 2, 2003).

<sup>14</sup> See *Walker v. Cheney*, Civil Action No. 02-0340 (JDB), U.S. District Court for the District of Columbia, available at <http://www.dcd.uscourts.gov/02-340.pdf> (accessed March 2, 2003).

standing to sue derives from its status as an agent of Congress, and emphasized that no congressional committee had issued a subpoena for Cheney's records. Minority members cannot issue subpoenas, however, as they do not control congressional committees — and it has traditionally been members of the minority who rely on the independent GAO to conduct investigations, especially when the majority party controls both the executive and the legislature.<sup>15</sup>

On February 7, 2003, the U.S. Comptroller General announced that the GAO would not appeal the district court's decision.<sup>16</sup> Walker emphasized that he strongly disagreed with the decision, but said that the GAO could not invest the resources necessary to launch an appeal.<sup>17</sup> Walker then made the following appeal to the administration:

Based on my extensive congressional outreach efforts, there is a broad and bi-partisan consensus that GAO should have received the limited and non-deliberative ... information that we were seeking without having to resort to litigation. While we have decided not to pursue this matter further in the courts, we hope the Administration will do the right thing and fulfill its obligations when it comes to disclosures to the GAO, the Congress, and the public, not only in connection with this matter but all matters in the future.<sup>18</sup>

Faced with continuing executive resistance and an unfavorable district court decision, the GAO simply abandoned its suit and decided to rely on the administration's good faith. The GAO's decision exemplifies a new, post-September 11 dynamic: a Congress that strives to be deferential to the executive branch; and an administration that is not only distrustful of the legislature, but hostile to any attempts at oversight.

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<sup>15</sup> See Stuart Taylor, Jr., "A Victory Gone Too Far," *Legal Times*, December 16, 2002.

<sup>16</sup> See Dana Milbank, "GAO Backs Off Cheney Lawsuit," *Washington Post*, February 7, 2003.

<sup>17</sup> See United States General Accounting Office, "GAO Press Statement on Walker v. Cheney," February 7, 2003, available at <http://www.gao.gov/press/w020703.pdf> (accessed March 2, 2003).

<sup>18</sup> *Ibid.*