THE FEDERAL ADVISORY COMMITTEE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

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THE FEDERAL ADVISORY COMMITTEE ACT

WEDNESDAY, NOVEMBER 5, 1997

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2247, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn and Maloney.

Ex Officio present: Representative Waxman.

Staff present: J. Russell George, staff director and chief counsel; Robert Alloway and John Hynes, professional staff members; Andrea Miller, clerk; Matthew Ebert, staff assistant; David McMillen, minority professional staff member; and Ellen Rayner, minority chief clerk.

Mr. HORN. I apologize for being late. We had a vote on the floor, and we will have several more. Let me just explain for the benefit of the audience what we're going to be going through.

After this live quorum is fulfilled on the floor, and we have at least 218 people to do business with, there will be 13 minutes more of debate, and then we'll have a vote. So I'm hoping to get in a half hour starting now, and you'll just have to bear with us during the afternoon. Some of our friends on the other side might well have 20 votes for us to go through today, and we might well be here to midnight. But let me start in with reading a few remarks to open this hearing. Mrs. Maloney will be right behind me.

The Federal Advisory Committee Act of 1972 governs the activities of the advisory committees created by Government to obtain expert views and advice. The act was designed to address two major concerns.

One, advisory committees seemed to be disorganized at that time. They were duplicative, and generally in need of oversight. Since I've been a member of a number of advisory committees over 25 years, I can agree with that statement.

Two, committee activities often took place without public participation, making it hard to know whether the committees were really acting in the public interest.

The act addressed these concerns by requiring among other things, open meetings, involvement by government officials, balanced membership, and oversight located in the General Services Administration. It also established termination dates for committees unless their charters had been renewed.

The National Academy of Sciences is an independent organization of scientists and academics that was founded in 1863 in the midst of the Civil War, during the Lincoln administration. It frequently sets up committees that provide independent advice to the Government. The National Academy of Public Administration, of which I am a member, founded in 1967, is an independent organization chartered by Congress to assist Federal, State, and local governments on matters of efficiency and accountability.

Congress did not intend for the act to apply to either of these academies. This intent in relation to the Academy of Sciences was expressly noted during the deliberations on the legislation concerning advisory committees within the House of Representatives.

For the last 25 years, the administration, Congress, and the Academies have never questioned the applicability of this law. Now a U.S. appeals court decision applied the law to the National Academy of Sciences. Just this week the Supreme Court announced it will let the decision stand. The National Academy of Public Administration was not a party to the recent litigation, but it appears that the appeals court ruling would apply to this organization as well.

We are here today to review the implementation of the Federal Advisory Committee Act, and to consider legislative proposals that would return the National Academy of Sciences to the status and law that it held before the recent court rulings. There seems to be broad agreement on this goal. The administration, the House and the Senate, the majority and the minority, all agree that the academy should not be subject to the full process of the Federal Advisory Committee Act.

I've been informed by staff that the Senate is prepared to quickly consider legislation to address this issue before the end of this session. A letter supporting this effort from Frank Raines, Director of the Office of Management and Budget, will be entered into the record without objection at this point.

[The letter referred to follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

October 28, 1997

The Honorable Steven Horn
Chairman
Subcommittee on Government Management,
Information and Technology
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Horn:

This letter presents the views of the Administration on proposed legislation that would amend the Federal Advisory Committee Act, 5 U.S.C. App. 2, to clarify that the Act applies to committees that are subject to actual management and control by Federal officials.

The need for this legislation was created by the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Animal Legal Defense Fund, Inc. v. Shalala*, 114 F.3d 1209 (D.C. Cir. 1997), that FACA should apply to panels of the National Academy of Sciences. In so deciding, the court of appeals appears to have misinterpreted what Congress intended when it adopted FACA in 1972. The concept of extending FACA to privately managed and controlled organizations outside the Federal government such as the National Academy of Sciences was discussed and rejected when the FACA legislation was adopted by the House of Representatives. 118 Cong. Rec. 31,421 (1972). The Administration believes that Congress did not intend to apply FACA in this situation. The Executive Branch has consistently followed this interpretation of Congressional intent since 1973. The court decision is directly contrary to that longstanding interpretation.

Moreover, while the full impact of the court of appeal's decision remains to be clarified, implementing this decision may impose significant burdens on the Federal government. More than 450 NAS panels potentially could become subject to FACA. This is almost equal to the total number of discretionary committees (committees created under general agency authorization) that are now subject to FACA in all Federal agencies. Thus, implementation would almost double the number of discretionary committees subject to the FACA chartering requirements, almost double the number of discretionary committees that must be monitored by Federal officials, and significantly increase the administrative burdens on OMB and GSA in overseeing FACA committees. In addition, there is a risk that other entities outside the Federal government might subsequently be deemed "quasi-public" and thus subject to FACA.

As now written, FACA applies to advisory committees that are "established" or "utilized" by Federal agencies. 5 U.S.C. App. 2, section 3(2). Congress can remedy the problem created by the recent court decision by clarifying that a "utilized" committee means one that is subject to actual management and control by a Federal agency. This interpretation is consistent with decisions handed down by appellate courts prior to the 1997 decision in *Animal Legal Defense Fund*, which have held that FACA applies only when committees are subject to actual management and control by agency officials. See *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D C Cir 1994); *Food Chemical News v. Young*, 900 F.2d 328 (D.C. Cir.), *cert. denied*, 498 U.S. 846 (1990). Adoption of this language would also be consistent with administrative policy that the Executive Branch has followed for the past 25 years.

Sincerely,

Franklin D. Raines
Director

Identical Letter Sent To The Honorable Fred Thompson,
The Honorable Bill Frist, The Honorable John Glenn,
The Honorable Dan Burton, The Honorable Carolyn Maloney,
The Honorable Henry A. Waxman

"Strike Section 3(2)(C) and all that follows in Section 3(2) and insert in lieu thereof:

'3(2)(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such terms exclude:

(i) any committee created by an entity other than an agency or officer of the Federal Government and not subject to actual management and control by such agencies or officers, and

(ii) any committee composed wholly of full-time, or permanent part-time, employees of the Federal Government. The Administrator shall prescribe regulations for the purposes of this subsection'."

Mr. HORN. The General Services Administration and the General Accounting Office will testify as to their basic agreement. I understand that representatives of the National Academy of Sciences, in an attempt to address some of the issues that motivated the recent court ruling, have agreed to make certain changes in its processes.

The changes already agreed to are: One, post to the Internet for public comment the committee members' names, biographies, and brief conflict of interest disclosures when they are nominated. Two, invite public attendance at all data gathering committee meetings by posting notice to the Internet. Three, post to the Internet for the public record the names and biographies of reviewers of final committee reports. Four, for formal committee meetings that are not opened to the public, to make summary minutes available to the public.

These changes will benefit the public and the academies, and will also contribute to the quality and credibility of academy products. Proposals for additional changes must be considered, in light of their efficacy—Are they appropriate and necessary? Would they have a negative or a positive impact upon the quality and credibility of academy products?

I hope that the committee process changes that have been agreed to are implemented in a straightforward manner. Public participation points should be required in any contract that a Federal agency has with either the National Academy of Sciences or the National Academy of Public Administration.

The legislative proposals we will consider today should instruct the General Services Administration, which administers the Federal Advisory Committee Act to issue regulations detailing this requirement.

We're going to hear from two panels. On the first panel are representatives from the General Accounting Office, the programmatic review and audit review arm of the Congress; the General Services Administration; and the Office of Management and Budget, which represents the views of the President and the Presidency.

On the second panel are representatives from the National Academy of Sciences; the National Academy of Public Administration, the Animal Defense League Fund; and the Natural Resources Defense Council.

We thank you all for coming today, and we look forward to your testimony.

Let me note the process we follow here now in taking testimony for some of you who might be new to us. And that is: all witnesses before us, except Members of Congress, are sworn as to telling the truth—and that's in case perjury is committed. These are investigating committees, and we function the same as the full committee.

In addition, when we call on you to testify—and it's in the order in which it is on the roster for this hearing—your biography is automatically introduced, so it will just be a simple introduction I give. Your full testimony is automatically put into the record, and what I'd like you to do is, if you can, summarize your testimony in 5 to 10 minutes.

Now for major agencies, such as the General Accounting Office, obviously we give them leeway. They are our objective source to

overlook a lot of these issues, and we depend a lot on what they have to say. So I'm willing to stay here all day to midnight. I'm just going to have to run back and forth for 20 different votes, the way it's going with some of our friends.

[The prepared statements of Hon. Stephen Horn and Hon. Carolyn B. Maloney follows:]

Congress of the United States

House of Representatives

"The Federal Advisory Committee Act"

November 5, 1997

OPENING STATEMENT
REPRESENTATIVE STEPHEN HORN (R-CA)

Chairman, Subcommittee on Government Management, Information, and Technology

The Federal Advisory Committee Act of 1972 governs the activities of advisory committees created by the Government to obtain expert views and advice. The Act was designed to address two major concerns. One, advisory committees seemed to be disorganized, duplicative, and generally in need of oversight. Two, committee activities often took place without public participation, making it hard to know whether the committees were really acting in the public interest.

The Act addressed these concerns by requiring, among other things, open meetings, involvement by Government officials, balanced membership, and oversight located in the General Services Administration. It also established termination dates for committees unless their charters are renewed.

The National Academy of Sciences is an independent organization of scientists and academics that was founded in 1863. It frequently sets up committees that provide independent advice to the Government. The National Academy of Public Administration, founded in 1967, is an independent organization chartered by Congress to assist Federal, State, and local governments on matters of efficiency and accountability.

Congress did not intend for the Act to apply to either of these Academies. This intent in relation to the Academy of Sciences was expressly noted during the deliberations on the legislation in the House of Representatives. For the last twenty-five years the Administration, Congress, and the Academies have never questioned the applicability of this law. Now, a U.S. Appeals Court decision applied the law to the National Academy of Sciences. Just this week the Supreme Court announced it will let this decision stand. The National Academy of Public Administration was not a party to the recent litigation, but it appears that the Appeals Court ruling would apply to this organization as well.

We are here today to review the implementation of the Federal Advisory Committee Act and to consider legislative proposals that would return the National Academy of Sciences to the status under

the law that it held before the recent court rulings. There seems to be broad agreement on this goal. The Administration, the House and the Senate, the Majority and the Minority all agree that the Academies should not be subject to the full process of the Federal Advisory Committee Act. I have been informed by staff that the Senate is prepared to quickly consider legislation to address this issue before the end of this session. A letter supporting this effort from Frank Raines, Director of the Office of Management and Budget, will be entered into the record. The General Services Administration and the General Accounting Office will testify to their basic agreement.

I understand that representatives of the National Academy of Sciences, in an attempt to address some of the issues that motivated the recent court ruling, has agreed to make certain changes in its processes. The changes already agreed to are:

1. Post to the internet for public comment the committee members' names, biographies, and brief conflict of interest disclosures when nominated.

2. Invite public attendance at all data gathering committee meetings by posting notice to the internet.

3. Post to the internet for the public record the names and biographies of reviewers of draft committee reports.

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We are going to hear from two panels. On the first panel are representatives from the General Accounting Office, the General Services Administration, and the Office of Management and Budget. On the second panel are representatives from the National Academy of Sciences, the National Academy of Public Administration, the Animal Defense League Fund, and the Natural Resources Defense Council.

Thank you for coming today. We look forward to your testimony.

STATEMENT OF THE HONORABLE CAROLYN MALONEY
ON
THE FEDERAL ADVISORY COMMITTEE ACT
AND
THE NATIONAL ACADEMY OF SCIENCES

November 4, 1997

Thank you Mr. Chairman for holding this hearing. Each year the federal agencies spend nearly $150 million to purchase advice from the National Academy of Sciences. That advice is then used to develop public policy. In some cases that advice becomes public policy without change. But most of the time, developing that advice is done in secret. That should not be. If we are spending public funds, the public has a right to know what is going on.

The Federal Advisory Committee Act was designed to address just these kinds of cases, and the Court was correct to say that it should apply to the National Academy of Sciences. Clearly, the National Academy is in the business of advising federal agencies. The Federal Advisory Committee Act was passed by Congress to assure that advice to the government was done in the open -- not behind closed doors. It was also passed by Congress to make sure that special interests did not have undue influence on public policy. It is not a perfect law, but our government is better off with it that it would be without such a law.

I am concerned that some people think that the Appeals Court decision should be overturned by simply exempting the National Academy from the Act. That would be a mistake, and a disservice to the citizens that have prevailed in court. But more important, it would be a disservice to the National Academy of Sciences. If we address this problem carefully and seriously, we can craft a solution that allows the Academy to continue its excellent work, and at the same time provides public access to the process. That public access will bolster the Academy's claim that it provides honest and objective advice.

I have great respect for the work done by the National Academy. But not everyone in this House feels the same way. In my fight to assure a fair and accurate census, I am constantly told by those who oppose sampling that the National Academy panels that endorsed the use of sampling were manipulated to assure that recommendation. I, for one, would be glad to see the Academy process opened up so that those opponents of sampling could observe what goes on for themselves. If there is manipulation going on, I would like to know about it. Let's open the process and let the watchdog be someone who believe there is a conspiracy afoot.

Finally, Mr. Chairman, I am surprised that the same people who argued that the First Lady's committees of physicians to advise her on health care reform be subject to the Federal Advisory Committee Act are now clamoring to exempt these committees of scientists from the same act.

Congressman Waxman and I have been talking with the National Academy of Sciences and the litigants, as well as representatives from the Administration and other interested private sector groups. We are close to a set of principles that all agree would provide the relief from bureaucratic burdens desired by the Academy and GSA, provide the openness to the process that forced this issue to the courts in the first place, and protect the deliberative process that the Academy claims is central to their work. I hope that you will work with us to develop bipartisan legislation that has broad support from all involved.

Finally, Mr. Chairman, Congressman Waxman and I have received a number of letters from individuals and groups who support the open and free flow of ideas. I would like to ask that those letters, along with two reports on academy panels, be put into the record.

Mr. HORN. So with that, if the team that is here will stand, raise their right hands.

[Witnesses sworn.]

Mr. HORN. The clerk will note that all three witnesses have affirmed.

We will now begin in the order they are listed in the program. We have L. Nye Stevens, the Director of Federal Management and Workforce Issues, General Government Division, U.S. General Accounting Office. He's accompanied by staff, which I will ask him to introduce now for the record, with titles, so the transcriber has it straight, and I have it straight, and my colleagues have it straight.

Mr. Stevens.

STATEMENT OF L. NYE STEVENS, DIRECTOR, FEDERAL MANAGEMENT AND WORKFORCE ISSUES, U.S. GENERAL ACCOUNTING OFFICE; G. MARTIN WAGNER, ASSOCIATE ADMINISTRATOR FOR GOVERNMENT POLICY, GENERAL SERVICES ADMINISTRATION, ACCOMPANIED BY JAMES L. DEAN, DIRECTOR OF THE COMMITTEE MANAGEMENT SECRETARIAT

Mr. STEVENS. Yes, Mr. Chairman. I have several staff members who worked on the Federal Advisory Committee Act at this subcommittee's request for a number of months, and we're going to be reporting partial results of that work today.

Richard Caradine, who's the Assistant Director of the Federal Management Workforce Issues area; Ron Cormier, and Michael Tovares, who were evaluators in that.

Mr. HORN. Are they going to testify today?

Mr. STEVENS. No, sir.

Mr. HORN. OK. You want to introduce Mr. Wagner, Mr. Dean?

Oh, OK, you're here for the GSA. All right, fine. I thought maybe you had some of the usual team here—you're it.

Mr. STEVENS. I may have—it depends on the questions you ask, Mr. Chairman.

Mr. HORN. OK.

Mr. STEVENS. I may have to call on someone. But I'll really be very brief in view of the time here.

The major question that we've addressed for this committee is the extent to which the President's 1993 Executive order, which set forth a goal of reducing the overall number of advisory committees that the Government had to take care of, has been achieved. The goal was to reduce by at least one-third, by the end of fiscal year 1993, the number of discretionary advisory committees that were in existence. Also we have examined the extent to which that had made any difference in terms of the cost and numbers of committee members.

My written statement has an overview of GSA's process. I think I'll leave that to GSA in their statement, and we will touch briefly on the two bills that are before you today. The Office of Management and Budget, in providing guidance to agencies on the 1993 Executive order, established a maximum ceiling number, discretionary advisory committees for each agency, and a monitoring plan. Under the guidance, agencies were to report their committee levels annually to OMB, and request its approval before they created any new advisory committees. Later OMB dropped the re-

quirement for prior approval of new committees as long as agencies were beneath their approved ceiling.

By all accounts, until 1993 the overall number of advisory committees was on the rise. Although the President's goal of reducing the number of discretionary committees by one-third was not achieved in the timeframe he set forth, which was the end of that fiscal year, there certainly has been a response to the Executive order, and the number did start to drop in 1994 and has continued for the past 4 years.

During the overall 4-year period that we looked at, the number of discretionary committees dropped from 833 to 530 or a 36 percent decline. And the total number of advisory committees, including the discretionary and nondiscretionary dropped from 1,305 to exactly 1,000, or a 23-percent drop overall.

Almost all of the reduction in advisory committees, 303 out of the 305 total from fiscal year 1993 to 1996, was attributable to the cut in discretionary committees; the nondiscretionary ones stayed about even. Discretionary committees of course do not include advisory committees that are mandated by Congress and those created by the President. The 530 discretionary committees that existed during fiscal year 1996 were 4 fewer than the governmentwide OMB ceiling of 534, and we're told by GSA that the decline has been continuing through this year.

We also think it's notable that even though the overall number of advisory committees declined during this 4-year period, the cost and the number of committee members did not show any comparable decline. The number of members serving on committees actually increased about 4 percent, from 28,317 to 29,511, and the cost of committees also increased about 3 percent in nominal dollars. When you take inflation into account there was about a 4-percent decrease.

On the average the number of members per committee rose from 22 to 30, and the cost per committee rose from $110,000 to $148,000 during that 4-year period; slightly less when adjusted for inflation.

Now a plausible explanation for part of the increase in per committee cost is the number of the mergers that have taken place. And according to a GSA report and the implementation of the Executive order, agencies recommended 196 discretionary advisory committees for merger, which means moving some of the functions into new or existing committees.

Another possible explanation for some of the increase in cost is the increase in the number of advisory committee meetings over that period. It went up about 14 percent, from 4,386 to over 5,000. Although the number of meetings has risen, the percentage of open meetings has declined; 49 percent of the meetings were open in 1993 compared to 44 percent in the lastest fiscal year, 1996.

Now the focus of today's hearing, I realize, is a proposal to amend FACA to specify that the act does not apply to committees that are created by an entity other than an agency or Federal official, and they're not subject to actual management and control by Federal officials as the act provides.

This proposal of course is in response to the recent court decision that you mentioned, Mr. Chairman, which the Supreme Court de-

clined to review just this week, that the Federal Advisory Committee Act did apply to panels of the National Academy of Sciences.

This development hasn't really been the specific focus of our work today. I would like to make two observations that do arise from it, however. First, the extent to which these entities are included under FACA, will likely have an impact on GSA in that agency's oversight capacity.

Under the court of appeals decision, according to OMB, more than 450 National Academy of Science panels could potentially become subject to FACA, and therefore fall under the purview of GSA. The inclusion of the Academy of Science's panels and perhaps other similarly situated entities, including NAPA, could pose resource implications for GSA. We did a 1989 report, which we're updating for you, which showed that those were quite severe for GSA.

Second, and finally, the inclusion of additional entities under FACA might also affect Federal agencies that sponsor the panels. FACA requires that advisory committees be managed and controlled by a Federal agency. Management control generally means that meetings are to be chaired and attended by an agency employee that set the agenda, and certain meeting-related decisions, such as whether to open the meetings or close them to the public.

Agencies also have to provide administrative support to the committees, and certain costs would be incurred. We know from our analysis of GSA's records, that the average cost just for the Federal staff involved in the 1,000 advisory committees that exist today—or 1996—was about $75,000 per committee. And we're not suggesting that the possibility of additional cost is a reason for deciding whether or not to include certain entities under FACA, but certainly we believe it would be important for Congress to be aware of those costs as it deliberates on the matter.

I'll stop here, Mr. Chairman, and respond to any questions you might have.

[The prepared statement of Mr. Stevens follows:]

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss our work on federal advisory committees. Congress has recognized that when properly organized and managed, advisory committees can provide a useful source of expertise and advice. However, in 1972, because of its concern about the proliferation and lack of effective management of advisory committees, Congress enacted the Federal Advisory Committee Act (FACA). FACA is intended to keep the number of advisory committees to the minimum necessary by ensuring that (1) valid needs exist for establishing and continuing advisory committees, (2) the committees are properly managed and their proceedings are open to the public, and (3) Congress is kept informed of their activities. FACA directs the General Services Administration (GSA) to establish and maintain a Committee Management Secretariat to oversee advisory committee activities. In 1993, the President issued an executive order that directed agencies to reduce by at least one-third the number of discretionary advisory committees that they sponsored (those not mandated by Congress or established by the President) by the end of fiscal year 1993. FACA committees are either established under agency authority, authorized by Congress, mandated by Congress, or established by the President.

As agreed, we will focus our testimony today on (1) an assessment of whether Executive Order 12838, signed by the President on February 10, 1993, achieved its goal of reducing the number of discretionary advisory committees by at least one-third by the end of fiscal year 1993 and the extent to which the costs and number of committee members changed during the same period; and (2) an overview of GSA's oversight responsibilities under FACA. Also as agreed, we will continue our work on GSA's oversight of advisory committee activities and additional issues that you and Senator John Glenn asked us to review–advisory committee management, committee members' independence, and participation of outside parties. We will report on this work at a later date.

To assess whether the administration achieved its goal of reducing the number of discretionary advisory committees and the extent to which committees' costs and membership had changed, we analyzed the annual reports of the President on federal

advisory committees from fiscal years 1993 through 1996 and reviewed GSA historical data. To identify GSA's Committee Management Secretariat oversight responsibilities under FACA, we reviewed applicable laws, regulations, and GSA guidance to agencies regarding advisory committee activities and interviewed GSA's Committee Management Secretariat officials.

NUMBER OF ADVISORY COMMITTEES HAS DECLINED, BUT THE COSTS AND NUMBER OF MEMBERS PER COMMITTEE HAVE RISEN

According to the President's annual reports on advisory committees, the total number of advisory committees decreased from a high of 1,305 during 1993 to a low of 1,000 during 1996, the most recent year for which complete data were available. Nearly all of this reduction, 303 of the 305 drop, was due to cuts in the number of discretionary advisory committees. The reduction in the number of advisory committees since 1993 follows the President's 1993 executive order, which called for at least a one-third reduction in discretionary advisory committees. Discretionary committees do not include advisory committees mandated by Congress and those created by the President. Appendix I shows the number of advisory committees by the four establishment authorities during fiscal years 1993 through 1996.

The Office of Management and Budget (OMB), in providing guidance to agencies on the 1993 executive order, established a maximum ceiling number of discretionary advisory committees for each agency and a monitoring plan. Under the guidance, agencies were to report their committee levels annually to OMB and request its approval before creating any new discretionary committees. Later, OMB dropped the requirement for prior approval of new committees as long as agencies were beneath their approved ceilings. In a June 1994 memorandum to agency heads, the Vice President called for each agency to reduce advisory committee costs by at least another 5 percent beyond the savings achieved by the one-third reduction that resulted from implementation of the executive order.

According to GSA officials, and as reported in the President's annual reports, the overall number of advisory committees was on the rise before 1993, but in response to the 1993 executive order the number started to drop in 1994. (See app. II.) Almost all of the reduction in advisory committees (303 of 305) from fiscal year 1993 to 1996 was attributable to the cut in discretionary committees. Although the President's goal of reducing the number of discretionary committees by one-third was not achieved governmentwide by the end of fiscal year 1993,[1] the number of discretionary committees dropped from 833 to 530 (36 percent) during the 4-year period; and the total number of advisory committees dropped from 1,305 to 1,000 (23 percent). The 530 discretionary committees that existed during fiscal year 1996 were 4 less than the governmentwide OMB ceiling of 534 committees. According to GSA, the number of discretionary committees has continued to decline; and, as of mid-September 1997, the number was 479, 55 below the ceiling.

Although the overall number of advisory committees declined during the 4-year period, their costs and the number of committee members increased. The number of members serving on the committees increased from 28,317 to 29,511 (4 percent), and the costs of committees increased in nominal dollars from $143.9 to $148.5 million (3 percent). However, in constant 1993 dollars, the costs decreased from $143.9 to $138.3 million (4 percent) for the 4-year period.

On average, the number of members per committee rose from 22 to 30, and the costs per committee rose from $110,276 to $148,519 from fiscal year 1993 to 1996. In constant 1993 dollars, the average costs per committee rose from $110,276 to $138,314 for the 4-year period. One possible explanation for part of the increase in per committee costs and members is mergers. According to a GSA report on the implementation of the 1993 executive order, agencies recommended 196 discretionary advisory committees for

[1]The fiscal year 1993 Annual Report of the President on Federal Advisory Committees shows that 28 of 64 (44 percent) executive departments, independent agencies, and other organizations either met or exceeded the one-third reduction.

merger. Mergers would include moving some of the functions and members to existing or new committees, according to GSA Committee Management Secretariat officials.

Another possible explanation for some of the increase in costs is the increase in the number of advisory committee meetings. During the same 4-year period, the number of advisory committee meetings increased from 4,387 to 5,008 (14 percent).

Although the number of meetings has risen, the percentage of open meetings compared to the percentage that were closed and partially closed has declined--49 percent of meetings were open in 1993 compared to 44 percent in 1996. Advisory committee meetings can be closed to the public if specific administrative procedures and specific provisions of the Government in the Sunshine Act (5 U.S.C. 552b) are followed. These provisions provide for closed meetings to protect, for example, matters that need to be kept secret in the interest of national security or foreign policy, trade secrets, and information of a personal nature, the disclosure of which would constitute an invasion of privacy. We did not examine the appropriateness of the decisions to close or partially close the FACA meetings. Appendix III shows a breakdown of the number of open, closed, and partially closed meetings from fiscal year 1993 to 1996.

GSA'S COMMITTEE MANAGEMENT SECRETARIAT OVERSIGHT ROLE

Under FACA and GSA regulations implementing FACA, GSA's Committee Management Secretariat is responsible for

- consulting with agencies on new and reauthorized advisory committees to ensure that FACA requirements are met;
- making comprehensive annual reviews of each advisory committee and making recommendations to the President and to the agency head or Congress on any action the Secretariat deems necessary, including abolishing the committee or merging it with another committee;

- preparing the President's annual report to Congress on the activities, status, and changes in the composition of advisory committees; and
- ensuring that follow-up reports are prepared on the status of recommendations made by presidential advisory committees.

For fiscal year 1997, GSA's Committee Management Secretariat had a budget of $645,000 and 8 employees.

Consultation on Advisory Committees

FACA and GSA regulations require that agencies consult with GSA before establishing new and reauthorized advisory committees. As part of this consultation, agencies are required to submit charters and justification letters, which must contain specific information. FACA outlines that agencies are to include 10 specific items in the charter, including the committee's objectives and scope of activities, the time period necessary to carry out its purpose, and the estimated annual staff years and costs. GSA regulations state that agencies must address three items in the justification letter, including why the committee is essential to conduct the agency's business, why the committee's functions cannot be performed by the agency or other means, and how the agency plans to attain balanced membership. GSA's role is to review agency proposals to establish advisory committees and determine whether FACA requirements are met. The regulations say that GSA is to review the proposals and notify the agency of its views within 15 days, if possible. However, GSA does not have the authority to stop the formation of an advisory committee.

GSA regulations also require that agencies publish a notice in the Federal Register when either new or reauthorized discretionary advisory committees are established. Committees mandated by Congress or established by the President are not required to issue such notices. New discretionary committee notices are required to address three of the specific items that must be contained in the charter and justification letter. These

items include a description of the nature and purpose of the committee, a discussion of the agency's plan to attain a fairly balanced membership, and a statement that the committee is necessary and in the public interest. Notices for reauthorized committees do not need to include these three items.

Comprehensive Annual Reviews

FACA requires GSA to make an annual comprehensive review of each advisory committee to determine whether it is carrying out its purpose, whether its responsibilities should be revised, and whether it should be abolished or merged with another committee. After completing the reviews, GSA is required to recommend to the President and to the agency head or Congress any actions GSA deems should be taken.

GSA regulations require that agencies prepare an annual report for each committee, including the agencies' recommendations for continuing, merging, or terminating committees. For continuing committees (not new or terminated), agencies are required to describe such things as how the committee accomplishes its purpose, the frequency of meetings and the reason for continuing the committee, and why it was necessary to have closed committee meetings if such meetings were held. The committee's annual reports also are to include the committee costs.

GSA procedures call for it to use the data it receives in the agencies' annual reports, including the agencies' recommendations to continue or terminate the committees, in conducting the comprehensive annual review and in preparing the President's annual report.

President's Annual Reports to Congress

The President is required to report annually to Congress on the activities, status, and changes in the composition of advisory committees. The annual reports are due to

Congress by December 31 for each preceding fiscal year. GSA prepares the annual reports for the President with information provided in agencies' annual reports on each advisory committee that existed during the fiscal year.

Follow-up Reports to Congress on Presidential Advisory Committee Recommendations

FACA requires the President, or his delegate, to report to Congress within 1 year on his proposals for action or reasons for inaction on recommendations made by a presidential advisory committee to the President. According to FACA's legislative history, these follow-up reports would help justify the investments in the advisory committees and provide accountability to the public and Congress that the recommendations are being addressed.

According to GSA regulations, the agency providing support to the advisory committee is responsible for preparing and transmitting the follow-up report to Congress. However, the regulations also state that the Secretariat is responsible for ensuring that the follow-up reports are prepared by the agency supporting the presidential committee and may solicit OMB and other appropriate organizations for help, if needed to ensure compliance.

RECENT PROPOSAL TO AMEND FACA

A focus of today's hearing is the proposal to amend FACA to specify that the act does not apply to committees that are created by an entity other than an agency or federal official and are not subject to actual management and control by federal officials. This proposal is in response to a recent decision by the U.S. Court of Appeals for the District of Columbia that FACA applied to panels of the National Academy of Sciences (NAS).

This development has not been the focus of our work and we have not assessed the merits of the issue. I would like to make two observations, however. First, the extent to

which these entities are included under FACA will likely have an impact on GSA in its oversight capacity. Under the Court of Appeals decision, according to OMB, more than 450 NAS panels could potentially become subject to FACA and therefore fall under GSA purview. The inclusion of NAS panels, and perhaps other similarly situated entities used by other organizations, could pose resource implications for GSA whose staff of 8 employees is currently responsible for overseeing about 1,000 advisory committees.

Second, the inclusion of additional entities under FACA in accordance with the Court of Appeals decision might also affect the federal agencies that sponsor the panels (albeit somewhat indirectly in the instance of the NAS.) FACA requires that advisory committees be managed and controlled by a federal agency. This has not been the case for those committees that were made subject to FACA pursuant to the Court of Appeals decision. Management and control generally means that meetings are to be chaired or attended by an agency employee and that certain meeting-related decisions–such as whether a particular meeting should be open or closed to the public–are to be made by the agency. Agencies also provide administrative support to their committees. It is unclear whether agencies would be required to provide the same active participation in the activities of NAS-type panels. If they did, certain costs would have be incurred. While we do not know what those costs might be, we know from our analysis of GSA records that the average annual cost for federal staff involved in the 1,000 advisory committees in existence during fiscal year 1996 was about $75,000 per committee. We are not suggesting that the possibility of additional costs is a reason for deciding whether or not to include certain entities under FACA. But, we do believe it is important for the Congress to be aware of such costs as it deliberates on the matter.

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Mr. Chairman, this concludes my statement. I will be pleased to answer any questions you or any Members of the Subcommittee may have.

DISTRIBUTION OF FEDERAL ADVISORY COMMITTEES BY ESTABLISHMENT AUTHORITY
DURING FISCAL YEARS 1993-1996

	Establishment authority			
	Discretionary committees		Nondiscretionary committees	
Fiscal year	Agency authority	Authorized by Congress	Mandated by Congress	Presidential directive
1993	401	432	444	28
1994	316	423	429	27
1995	325	318	438	29
1996	286	244	438	32

Source: Annual Reports of the President on Federal Advisory Committees.

FEDERAL ADVISORY COMMITTEE STATISTICS
DURING FISCAL YEARS 1993-1996

Fiscal year	Total number of committees	Number of discretionary committees	Total costs in millions (nominal dollars)	Number of members
1993	1,305	833	$143.9	28,317
1994	1,195	739	133.4	30,446
1995	1,110	643	157.0	29,766
1996	1,000	530	148.5	29,511

Source: Annual Reports of the President on Federal Advisory Committees.

TYPES OF FEDERAL ADVISORY COMMITTEE MEETINGS DURING FISCAL YEARS 1993-1996

Fiscal year	Type of meetings			
	Open	Closed	Partially closed	Total
1993	2,162	1,210	1,015	4,387
1994	1,826	1,502	781	4,109
1995	2,443	2,233	503	5,179
1996	2,208	2,379	421	5,008

Source: Annual Reports of the President on Federal Advisory Committees.

Mr. HORN. Well, we thank you very much, Mr. Stevens, and of course your full report is part of the record of the hearing automatically.

We now have Mr. G. Martin Wagner, the Associate Administrator for Governmentwide Policy of the General Services Administration. He's accompanied by Mr. James L. Dean, the director of the Committee Management Secretariat, who implement the advisory committee program.

Mr. WAGNER. Thank you, Mr. Chairman. Since my more detailed comments will be submitted in the record, I will briefly summarize some of the points from the written comments specific to the issue at hand.

Mr. Chairman, you have requested our views regarding an amendment to FACA which would clarify the term, "utilized", as used in section 3(2) of the act. The proposed language as originally drafted and commented upon by the Director of OMB on October 28, 1997, would clarify the circumstances under which the act's provisions would or would not apply to advisory committees directly created by non-Federal entities. I understand, as you mentioned earlier, that that letter will be submitted into the record.

The actual management and control test established by the proposed amendment is consistent with current case law construing FACA's scope. The amendment would thus make clear that the same actual management and control test that is currently applied to committees created by private entities and by governmental bodies not covered by FACA, such as the Sentencing Commission, should also be applied to committees created by the National Academy of Sciences and the National Academy of Public Administration. And that similar organizations, regardless of whether they are deemed private or quasi-public institutions.

The D.C. circuit's recent decision in *Animal Legal Defense Fund* v. *Shalala,* which established separate definitions of utilized committees, depending on whether they are created by quasi-public institutions, would be overruled, and a single harmonious and consistent construction of FACA's scope would be adopted.

Adoption of the proposed language is also consistent with the long-recognized understanding of that phrase—"established or utilized,"—that it does not include committees created by entities under a contract, grant, or similar arrangement. The amendment would make clear that this same construction applies regardless of whether the contracting entity is considered a private or quasi-public institution. The amendment would thus reaffirm that regardless of the creating entity's private or quasi-public character mere Federal funding of a committee's work, through the use of a government contract and/or the subsequent use of a committee's work product by an agency, do not constitute actual management and control.

In our view the proposed amendment—variations of which are contained in two discussion drafts under review by the subcommittee—would result in a clearer more consistent, and more workable interpretation of FACA. Accordingly, GSA supports the proposed language as drafted.

One of the alternative discussion drafts which we have reviewed departs from the above language by opening certain aspects of the

National Academy of Sciences' processes to the public. The administration would not oppose alternative approaches that would add sunshine provisions with respect to NAS or NAPA. The administration would, however, oppose broader legislation that might affect other committees and issues.

In short, we support reasonable alternatives to address the NAS situation, not alternatives that go beyond that specific issue. We would be pleased to offer our comments on these proposals during today's hearings.

Mr. Chairman and members of the subcommittee, that concludes my oral statement. Mr. Dean and I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Wagner follows:]

Mr. Chairman, Members of the Subcommittee, I am pleased to discuss with you today those responsibilities assigned to the General Services Administration (GSA) regarding implementation of the Federal Advisory Committee Act (FACA), as well as proposed amendments to the Act currently under consideration. I am accompanied by James L. Dean, Director of the Committee Management Secretariat. The Secretariat was established by section 7(a) of the Act.

OVERVIEW OF GSA RESPONSIBILITIES

The Act assigns the Secretariat a number of important governmentwide roles and responsibilities which, taken together with those specific functions reserved for the Congress and other Executive Branch Departments and agencies, are designed to improve the management of, and accountability for, advisory committees. The Act envisioned that the Secretariat would exercise its responsibilities as part of the policymaking process managed through the Office of Management and Budget (OMB), which was the case until it was transferred to GSA on November 20, 1977, by Executive Order 12024. Among the statutory responsibilities assigned to GSA are:

- Preparing the *Annual Report on Federal Advisory Committees* for consideration by the President, and transmittal to the Congress by December 31st of each year (section 6(c));
- Conducting an annual comprehensive review (ACR) covering the performance of, and need for, existing advisory committees (section 7(b));
- Issuing regulations, guidelines, and management controls (section 7(c));
- Providing for adequate notice to the public regarding committee meetings (section 10(a)(2)(3));

- Issuing guidelines on committee member compensation in conjunction with the Office of Personnel Management (section 7(d));
- Providing for follow-up reports on public recommendations of Presidential advisory committees (section (6(b)); and
- Assuring that advisory committees are established in accordance with the Act's requirements (section 9).

Responsibilities assigned to agencies which sponsor advisory committees subject to FACA include:

- Issuing and maintaining uniform administrative guidelines and management controls (section 8(a));
- Appointing a Committee Management Officer (CMO) to provide oversight of the agency's entire committee inventory (section 8(b));
- Consulting with the Secretariat regarding proposals to establish advisory committees (section 9(a)(2));
- Filing Charters with the Congress prior to initiating committee activities (section 9(c));
- Maintaining records, minutes, and reports covering closed meetings (section 10(b)(c)(d));
- Appointing a Designated Federal Officer (DFO) for each committee (section 10(e));
- Maintaining financial records (section 12(a));
- Providing support services (section 12(b));

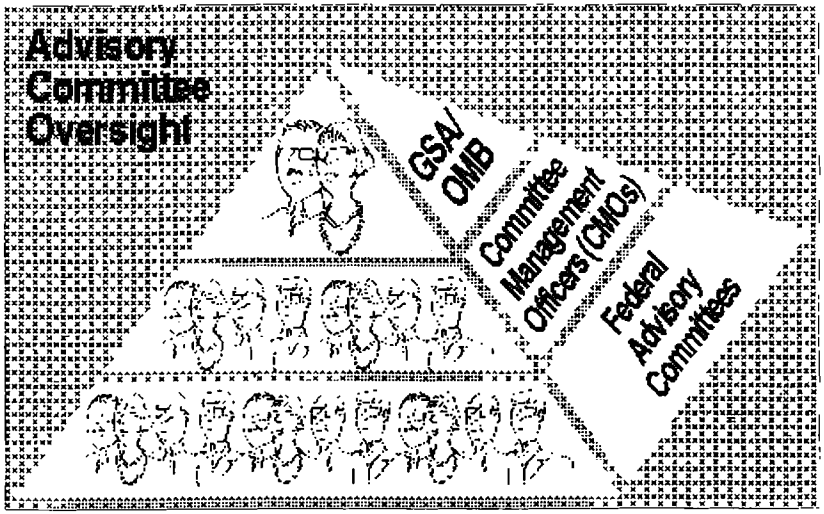
- Terminating advisory committees as appropriate, consistent with FACA (section 14(a)(1)(A)); and
- Taking appropriate action to renew advisory committees based on performance.

In addition, the Act provides that the Congress will conduct continuing reviews of advisory committees (section 5(a)), and provide for the issuance of committee reports, if any, with respect to committees mandated by statute.

THE SECRETARIAT'S POLICY AND OVERSIGHT ROLE

The Committee Management Secretariat's policy and oversight role has continued to emphasize its relationship with OMB, as well as the development of partnerships with agencies subject to FACA.

Beginning in March 1988, following a GSA-led study conducted for the President's Council on Management Improvement (PCMI), the Secretariat outlined a series of actions which were necessary to strengthen the Act's consistent application. Included among these actions were steps to more effectively evaluate existing advisory committees. This process resulted in a governmentwide comprehensive review of all existing committees, as directed by OMB Bulletin 89-08, dated December 23, 1988. Other PCMI recommendations were incorporated into GSA's Final Rule implementing FACA during October 1989.



Also, in tandem with recommendations received from the General Accounting Office (GAO) during October 1988, the Secretariat initiated actions to fulfill other agency needs such as the establishment of a quarterly training course (March 1989), issuance (during June 1990) of governmentwide guidance on follow-up reports by Presidential committees required by section 6(b), and the development of a new database to track committee transactions (1991). The latter improvement allowed GSA to issue a separate annual comprehensive review (ACR) of all committees, as required by section 7(b), during February 1992.

Additional efforts to fulfill FACA's requirement for an ACR have been undertaken under the aegis of Executive Order 12838, "Termination and Limitation of Federal Advisory Committees" (February 10, 1993), and its implementing instructions, OMB Bulletin 93-10 (April 1, 1993) and OMB Circular A-135, dated October 5, 1994.

The Secretariat is currently in the process of revising its regulations implementing FACA and plans to issue a Proposed Rule during January 1998.

RESULTS

The Secretariat has worked with OMB and the interagency community to take steps to assure that advisory committees are effectively managed and that the requirements of FACA and Executive Order 12838, are achieved. These actions have helped to assure that agencies will continue to emphasize those initiatives which will result in less bureaucracy and a more responsive and cost-effective government.

During fiscal year 1996, 59 Federal departments and agencies sponsored 1,000 advisory committees. A total of 29,511 (excluding 5,057 members not reported by the Department of Health and Human Services (HHS)) individuals served as committee members; 5,008 meetings were held (a 14 percent increase over fiscal year 1993); and 1,060 reports were issued. Federal departments and agencies reported spending a total of $148.5 million to operate advisory committees during fiscal year 1996 (excluding $3.9 million which were not reported properly by HHS). These costs included compensation of committee members, reimbursement for travel and per diem expenses, Federal member and staff support expenditures, consulting fees, and administrative overhead, including mail costs and meeting space.

Approximately $77.9 million, or 52.4 percent of all costs associated with supporting advisory committees during the year, were the result of indirect expenditures for Federal staff support and Federal member participation. A number of other committee costs, however, involve direct outlays by agencies. For example, Federal

agencies spent $28.3 million in fiscal year 1996 to cover travel and per diem expenses for committee members and staff.

Advisory committee costs are further reduced by terminating unnecessary or inactive groups. During the reporting period, 100 groups were terminated. Another 54 groups have been identified by sponsoring organizations for termination during fiscal year 1997, with associated combined savings of $7.7 million.

Compared with total reported expenses of $157.1 million during the previous year, total reported costs incurred during fiscal year 1996 or $148.5 million, reflects a 5.4 percent decrease in resources dedicated for this purpose. This decrease in costs in the operation and maintenance of advisory committees, when adjusted for inflation, continues a trend of more stable committee outlays over time. For example, from the period beginning in fiscal year 1993 to fiscal year 1995, reported costs increased by 3 percent but, when adjusted for inflation, actually decreased by 3.9 percent.

The number of advisory committees in existence at the end of fiscal year 1996, or 900 after terminations, reflects a 5.1 percent overall decrease below fiscal year 1995's net balance of 948. During the year, actions were taken to maintain the President's advisory committee limitation of 534. Consequently, 501 discretionary committees existed at the end of the reporting period, or 37 percent fewer than the total existing at the beginning of the Administration.

During the year, the Executive Branch supported a total of 526 discretionary advisory committees, including 51 groups which were terminated, with resulting savings of $2.5 million. In addition, 433 committees required by statute were also supported, at a total cost of $35.2 million.

5,008 advisory committee meetings were held during fiscal year 1996. Of that number, 2,629, or 52.5 percent of the total, were open or partially open to the public. However, agencies such as the Departments of Defense, Health and Human Services, and the National Science Foundation must appropriately schedule a significant number of closed meetings. Excluding the meetings appropriately closed by these agencies, the remaining number of meetings accessible to the public is approximately 90 percent.

Appendix 1 provides a summary of specific performance information regarding advisory committee activities, authorities, and costs.

MANAGEMENT IMPROVEMENTS

During fiscal year 1997, the Secretariat developed and delivered a new Internet-based reporting system to assist Federal agencies in providing annual data required by FACA. The first module of the system is tailored to producing *the Annual Report of the President on Federal Advisory Committees* within the statutory deadlines imposed by FACA. It is a secure database with graduated access and approval features corresponding to the role of each individual in compiling required information. See Appendix 2 for sample pages representing the Secretariat's new Home Page and database module.

Additional modules will be added during fiscal year 1998 to allow Committee Management Officers, Designated Federal Officials, and support staff to add data contemporaneously on committee costs, meetings, and subcommittee activities. These features will eliminate the need to prepare all required materials at the end of the fiscal year and will, accordingly, reduce the time required to complete the President's *Annual Report.*

LEGISLATIVE INITIATIVES

Since 1990, several legislative initiatives seeking to amend FACA, including S. 444 (October 1990) and S. 2039 (November 1991), were introduced in the Senate. FACA's coverage was extended to advisory committees formed under the Alternative Dispute Resolution Act (P.L. 101-552) and the Negotiated Rulemaking Act (P.L. 101-646). In addition, P.L. 104-4, the "Unfunded Mandates Reform Act of 1995," contained an exclusion from FACA for advisory committees consisting of intergovernmental and tribal officials acting in their official capacities.

Mr. Chairman, the Subcommittee has requested our views regarding an amendment to FACA which would clarify the term "utilized," as used in section 3(2) of the Act. The proposed language, as originally drafted and commented upon by the Director of OMB on October 28, 1997, would clarify the circumstances under which the Act's provisions would (or would not) apply to advisory committees directly created by non-Federal entities. The proposed amendment provides:

"Strike everything in section 3(2) beginning with "except" and insert in lieu thereof:

> *except that such term excludes (i) any committee created by an entity other than an agency or officer of the Federal Government and not subject to actual management and control by such agencies or officers, and (ii) any committee composed wholly of full-time, or permanent part-time, employees of the Federal Government. The Administrator shall prescribe regulations for the purposes of this subsection'."*

The "actual management and control" test established by the amendment is consistent with current case law construing FACA's scope. (See Washington Legal Found. v. United States Sentencing Commission, 17 F. 3d (D.C. Cir. 1994), Food Chemical News v. Young, (900 F. 2d 328 (D.C. Cir.), cert. denied, 498 U.S. 846 (1990)). Addition of the proposed language to the statute would make clear, however, that the "actual management and control" test applies regardless of what entity creates the committees. The amendment would thus make clear that the same "actual management and control" test that is currently applied to committees created by private entities and by governmental bodies not covered by FACA (such as the Sentencing Commission) should also be applied to committees created by the National Academy of Sciences (NAS), the National Academy of Public Administration (NAPA), and similar organizations, regardless of whether they are deemed private or "quasi-public" institutions. The D.C. Circuit's recent decision in Animal Legal Defense Fund v. Shalala, 104 F. 3d 324 (D.C. Cir. 1997), which established separate definitions of "utilized" committees, depending on whether they are created by a "quasi-public" institution, would be overruled, and a single, harmonious, and consistent construction of FACA's scope would be adopted.

Adoption of the proposed language is also consistent with the long-recognized understanding that the phrase, "established or utilized," does not include committees created by entities under a contract, grant, or similar arrangement. (See Food Chemical News, supra.) The amendment would make clear that this same construction applies, regardless of whether the contracting entity is considered a private or "quasi-public"

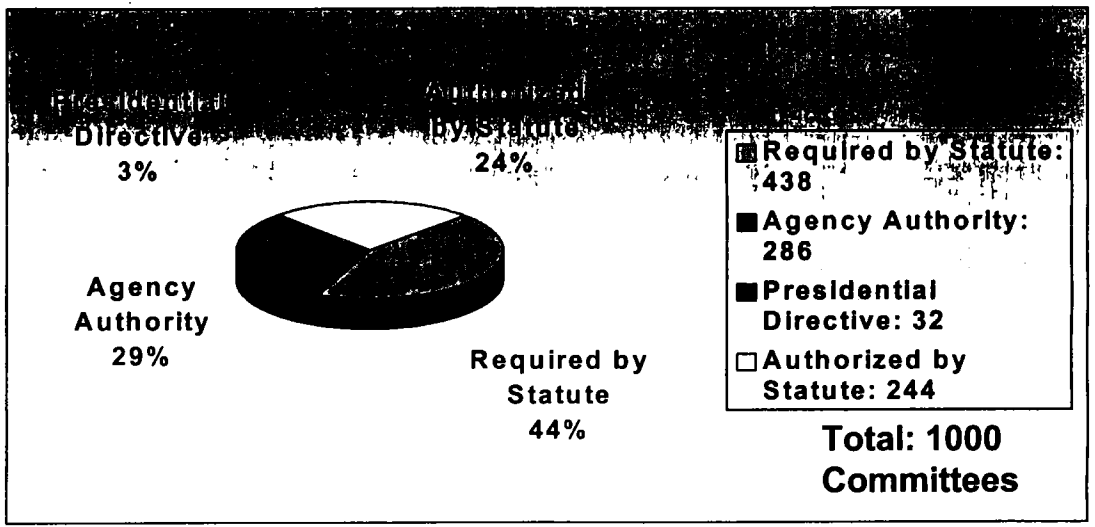
institution. The amendment would thus reaffirm that, regardless of the creating entity's private or "quasi-public" character, mere Federal funding of a committee's work through the use of a government contract and/or the subsequent use of a committee's work product by an agency do not constitute "actual management and control."

In our view, the proposed amendment would result in a clearer, more consistent , and more workable interpretation of FACA. Accordingly, GSA supports the proposed language as drafted.

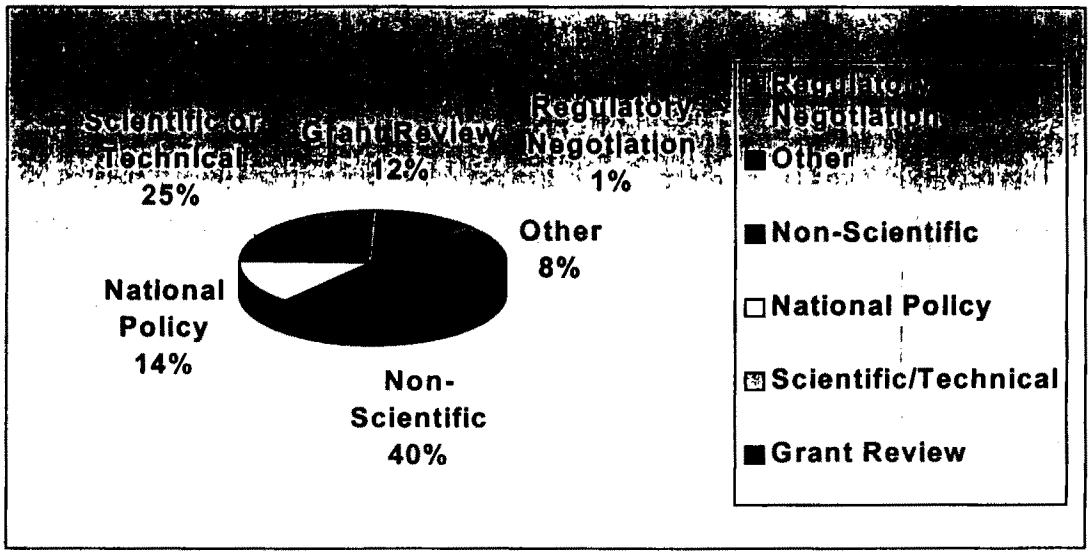
We understand that the Subcommittee is currently considering alternative discussion drafts which would depart from the above language. The Administration would not oppose alternative approaches that would add "sunshine" provisions with respect to NAS or NAPA. The Administration would, however, oppose broader legislation that might affect other committees and issues. In short, we support reasonable alternatives to address the NAS situation, not alternatives that go beyond that specific problem. We would be pleased to offer our comments on these proposals during today's Hearing.

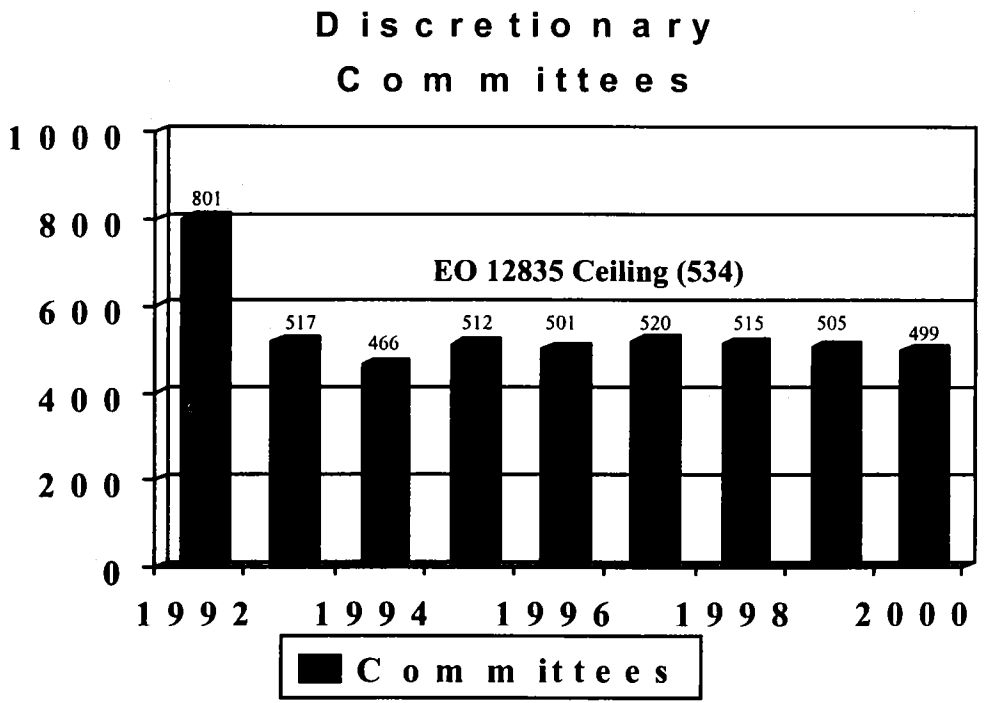
Mr. Chairman, Members of the Subcommittee, that concludes my prepared statement. I would be pleased to answer any questions you may have.

Distribution of Committees by Establishment Authority

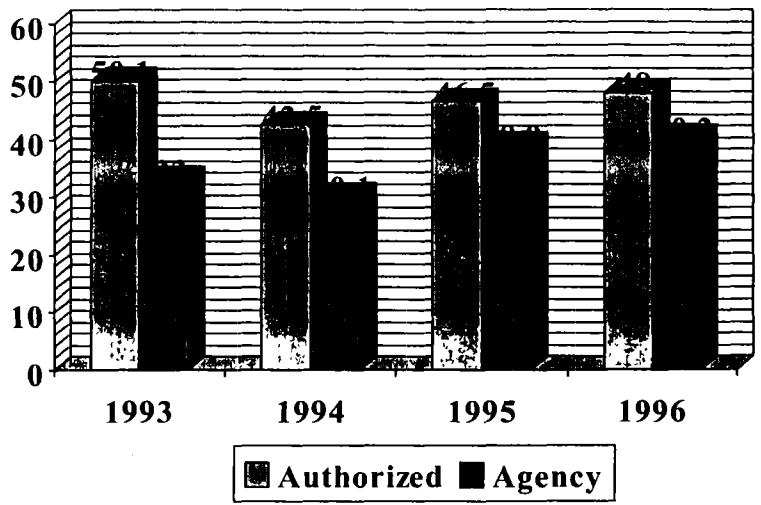


Distribution of Committees by Function



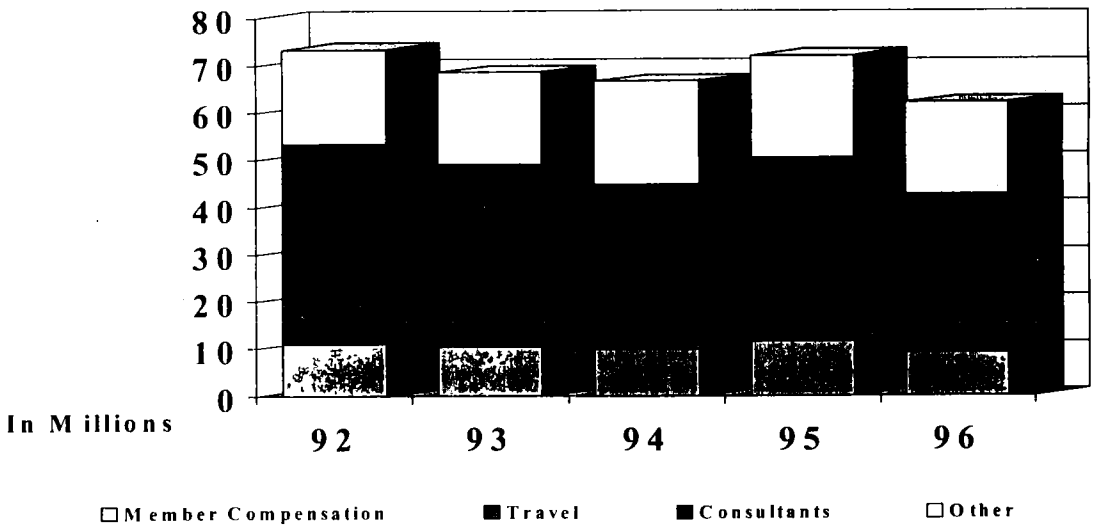

Discretionary
Committees
1000
800
600
400
200
0
801
517
466
512
501
520
515
505
499
EO 12835 Ceiling (534)
1992
1994
1996
1998
2000
Committees

Discretionary Costs in Millions

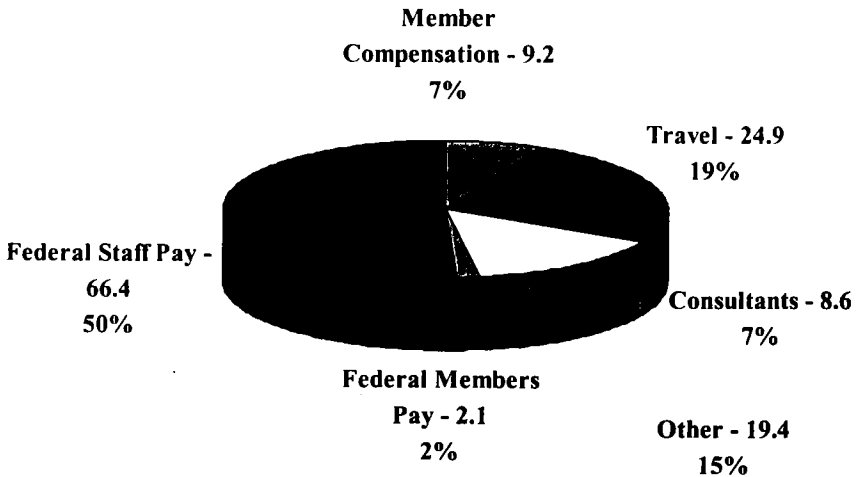


Source: Annual Report of the President on Federal Advisory Committees - 1996

Marginal Cost Trends
(Adjusted for Inflation)

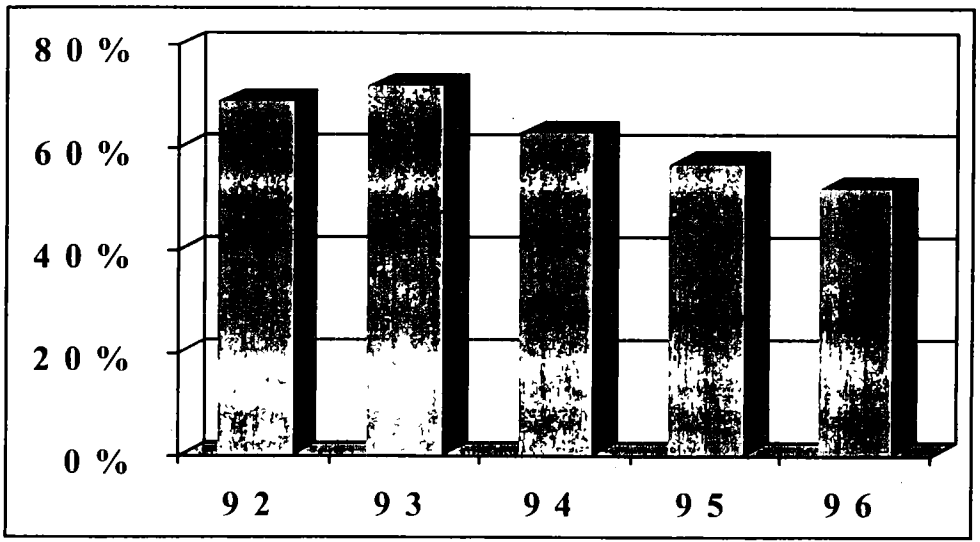


Distribution Of Committee Costs
in Millions in 1996

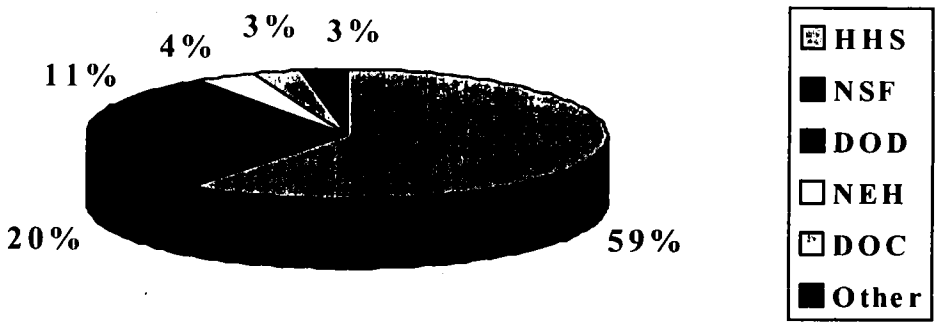


Source: Annual Report of the President on Federal Advisory Committees-1996

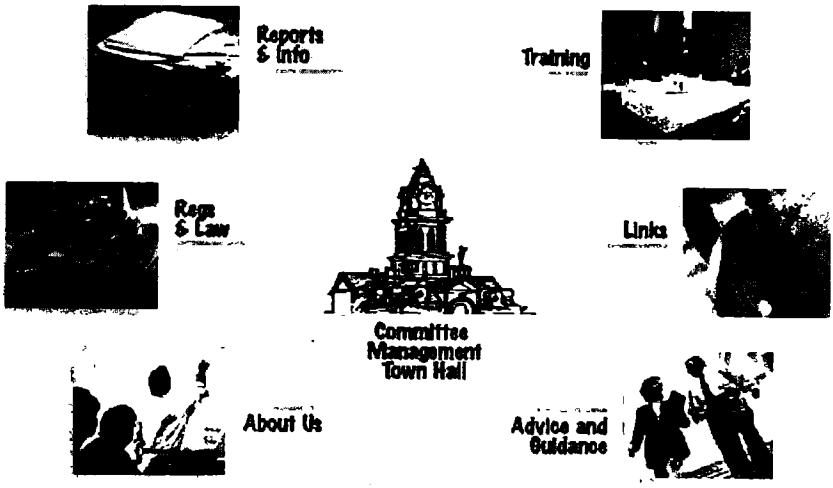
Open Meetings



Closed Meetings (1996)



Source: Annual Report of the President on Federal Advisory Committees-1996



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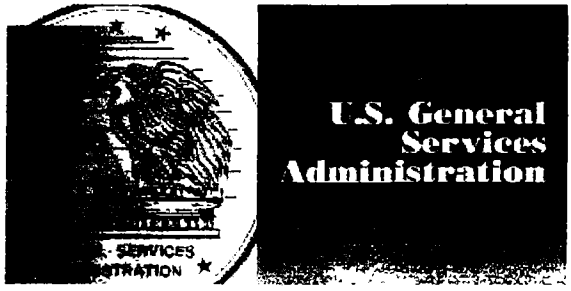

Committee Management System (1.0)

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Web Development: 80/20 Data Company

Web Hosting: WEB Integration Systems

Current Filter: HHS-Department of Health and Human Services

4. Number of New Committees	9
8a. Number of Terminated Committees	2
11a. Required by Statute	0
11b. Authorized by Statute	164
11c. Agency Authority	3
11d. Presidential Directive	6
14a. Ad Hoc	2
14b. Continuing	240
14c. Presidential	10
15a. National Policy/Issue	17
15b. Non-Scientific	10
15c. Scientific/Technical	94
15d. Grant Review	83
15e. Regulatory Negotiations	0
15f. Other	38

<< < > >> Requery

Reports Menu

Record:

Current Filter: Acquired Immunodeficiency Syndrome Research Review Committee

1. Department Or Agency	HHS
2. Fiscal Year	1997
3a. Committee Name	Acquired Immunodeficiency Syndrome Research Review Committee
3b. GSA Committee ID	762
4. New Committee?	○ Yes ◉ No
5. Current Charter Date	8/8/96
6. Expected Renewal Date	
7. Expected Termination Date	8/9/98
8a. Terminated This FY?	○ Yes ◉ No
8b. Specific Termination Authority	42 U.S.C. 282(b)(6)
8c. Actual Termination Date	
11. Establishment Authority	Authorized by Law
12. Specific Establishment Authority	42 U.S.C. 282(b)(6)
13. Effective Date Of Authority	11/20/85
14a. or 14b. Committee Type	Continuing
14c. Presidential?	○ Yes ◉ No
15. Description Of Committee	Grant Review

<< | < | > | >> | Requery | Menu | Recommendations

Record:

Filter | Reports Menu | Exit

Current Filter: HHS-Department of Health and Human Services

#	CID	CommitteeName	DFODate	GFODate	CMODat
1	762	Acquired Immunodeficiency Syndrome Research Review Committee			10/29/97
2	763	Acrylonitrile Study Advisory Panel			
3	80	Advisory Board on Child Abuse and Neglect			
4	1994	Advisory Board on Welfare Indicators			
5	36	Advisory Commission on Childhood Vaccines			
6	5170	Advisory Commission on Consumer Protection and Quality in the Health Care Industry			
7	765	Advisory Committee for Energy-Related Epidemiologic Research			
8	1964	Advisory Committee for Injury Prevention and Control			
9	878	Advisory Committee for Pharmaceutical Science			
10	871	Advisory Committee for Reproductive Health Drugs			

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Mr. HORN. Well, thank you very much for that very thorough statement.

Let me ask you, on page 5 under results, you noted "During Fiscal Year 1996, 59 Federal departments and agencies sponsored 1,000 advisory committees. A total of 29,511 individuals served as committee members." Now you have in parens, "excluding 5,057 members not reported by the Department of Health and Human Services."

What's that all about?

Mr. WAGNER. Mr. Dean, I think would be better qualified to answer that question.

Mr. DEAN. Sure.

Mr. Chairman, during our work with the General Accounting Office during the past few months, we've discovered that the Department of Health and Human Services and in particular the National Institutes of Health has erroneously reported information to us. They've undercounted, by the number mentioned in our testimony, members that serve on special emphasis panels that do peer review. We're taking steps to make sure that this doesn't happen during the coming reporting period.

Mr. HORN. How long has that gone on?

Mr. DEAN. As best we can determine this has been happening for the past two reporting cycles.

Mr. HORN. So it hasn't gone for 10 or 20 years?

Mr. DEAN. No.

Mr. HORN. Are these mostly NIH committees?

Mr. DEAN. Yes, they're all NIH committees.

Mr. HORN. So they did report them over the years, except for the last two, is that it?

Mr. DEAN. That's my understanding.

Mr. HORN. Is that deliberate?

Mr. DEAN. No, I think it's a misunderstanding on the part of NIH, and I did have a discussion with the HHS committee management officer, and they were unaware of the issue also.

Mr. HORN. Unaware?

Mr. DEAN. Unaware.

Mr. HORN. Great—great—over in HHS. Let's make it smaller, and maybe they'll know what's going on.

Mr. DEAN. It's a big agency.

Mr. HORN. Yes, I know it is. It's bigger than everything.

Mr. DEAN. Yes.

Mr. HORN. OK. That's all I really had on the details of your testimony as I read it.

Let me yield to Mrs. Maloney, 5 minutes for questioning. And then after another 5—or when she's done we're going to go over and vote, and come back.

Mrs. MALONEY. We're caught in between votes. I'd like to have my opening testimony and memorandum put in the record as read, along with some supporting documentation.

Mr. HORN. Yes. Without objection it will be put at the beginning right after my statement, as read.

Mrs. MALONEY. I just would like to note that each year the Federal agencies spend nearly $150 million to purchase advice from the National Academy of Sciences, and that advice is then used to

develop public policy. And sometimes that public policy is developed in secret, and I personally think that should not be done, and if we are spending public funds, the public certainly has a right to know what is going on.

I believe that the court's decision was correct; that it should be applied to the National Academy of Sciences, the open meetings legislation.

And I'd just like to ask you, I have circulated to you, Mr. Wagner, my own draft bill, the price to draw a balance with this problem. Do you see any additional administrative burden in the draft legislation that I've circulated to you?

Mr. WAGNER. Let me have Mr. Dean answer that question.

Mr. DEAN. Are you referring to section 2 of the draft bill, Congresswoman Maloney?

Mrs. MALONEY. I'm talking the one that I circulated, yes.

Mr. DEAN. Yes.

Mrs. MALONEY. Yes, uh-huh.

Mr. DEAN. With respect to the National Academy of Sciences?

Mrs. MALONEY. Yes, exactly.

Mr. DEAN. I think from our point of view at GSA I think we would rather defer to the National Academy as to how that would impact their process. To be quite honest, I am not really familiar with how they operate.

The one provision at the end of the bill, which would require Federal agencies to assign staff to implement those requirements would obviously result in more resources being devoted for that purpose. Whether or not that's a problem for those agencies, I cannot speak for them.

Mrs. MALONEY. Well, it really says that the meetings should be open, but it could be closed for certain reasons, particularly those for the freedom of information reasons, national security, and others, and have minutes on their deliberations.

I tell you, one of the things that we've been debating in this Congress, is really sampling. And a lot of people on the other side have really attacked the National Academy, that maybe they haven't really seriously looked at the data or come up with the proper conclusion. And I for one think that it would have been helpful if this information was made open and to the public.

Mr. Stevens, you have some experience with the census from 1990, is that correct?

Mr. STEVENS. Yes.

Mrs. MALONEY. And do you believe that the census panels, chaired by Charles Schultz and Norman Bradburn were stacked to achieve a particular conclusion?

Mr. STEVENS. No. Certainly I don't believe that was their purpose, and I think they provided a very constructive source of advice to decisionmakers, including Congress.

Mrs. MALONEY. Well, would a more open appointment process quell some of the criticisms of the Academy panels?

Mr. STEVENS. A more open appointment process?

Mrs. MALONEY. More open—open meetings and open appointments, and open meetings, so that the public could have seen——

Mr. STEVENS. I don't think there would have been much harm to it, and——

Mrs. MALONEY. It probably would have helped public debate, wouldn't you say, if it had been open to the public?

Mr. STEVENS. In that particular case I think it probably would have.

Mrs. MALONEY. Mr. Stevens, you testified about the burden on GSA that will result from the court ruling, if we limit our attention to conflict of interest and openness, and exempt the National Academy from the chartering and administration parts of the Federal Advisory Committee Act.

Would that address your concerns?

Mr. STEVENS. Yes. All we were pointing out is that under the existing responsibilities that GSA has for its committees under the act, there would be a burden. But you have exempted a number of more perhaps onerous administrative provisions, and I wouldn't think there would be any comparability there.

Mrs. MALONEY. OK——

Mr. STEVENS. In other words, the Government would not need to be nearly as involved as FACA required.

Mrs. MALONEY. Mr. Wagner, you said in your testimony that you would not oppose language which added, "sunshine to the National Academy of Sciences panel." And the proposed legislation that I'm circulating really tries to strike a balance between the need for openness and the protection that the National Academy seeks. And do you think that that balance that's in this legislation is reasonable?

Mr. HORN. I might say, before you answer the committee, we'll stand in recess once you complete that answer, and Mrs. Maloney, we can go back to it when we come back. We'll be in recess after your answer.

Mr. WAGNER. Mr. Dean will answer, but I may expand on his answer.

Mr. DEAN. I think I can answer that question for you.

Mrs. MALONEY. OK.

Mr. DEAN. Our initial concern with the draft that we reviewed was not so much with the basic requirements—many of which were in some way related to what in fact it requires now—but rather the open-ended definition of what constitutes an independent advisory committee subject to these requirements.

It seemed to us that the definition, taken in conjunction with the definition of a utilized committee would open the door to laying those requirements upon many organizations other than the National Academy of Sciences and the National Academy of Public Administration. I do think that the administration would not support such a broad definition, as we last saw it, unless it's changed since I did last see it.

Mrs. MALONEY. Well, let's pull it back to just the concrete example of the National Academy of Sciences. Did it seem like that was a reasonable balance for them, not talking about expanding it to other people, but to them?

Mr. DEAN. I really haven't had a chance to sit down and talk with the National Academy of Sciences to determine what would work best for them. One observation I could offer though is, while some of the basic conceptual requirements contained in that section are similar to FACA, there are some procedural differences. For ex-

ample, in the number of days required for meeting notices, and so forth. We may want to work together to see if we can't standardize those specific administrative requirements.

Mrs. MALONEY. I just have to go vote now. I just want to conclude by saying that I'm surprised at some of the same people that argued that the First Lady's committee of physicians to advise her on her health care reform, people argued that her committee should be subject to the Federal Advisory Committee Act, yet they're now clamoring to exempt these committees of sciences from the same act, and it just didn't seem to make sense.

But I'm going to miss a vote on the IRS before I can get back to the National Academy.

[Recess.]

Mr. HORN. We resume the hearing.

Let me just ask a few questions, gentlemen. And as you know one of our routines to save your time and our time is to send you the questions that we don't get to. And if you would just give us an answer, we'll put it in the record at this particular point. And it will save you and us a lot of time in the hearing.

[The information referred to follows:]

General Services Administration
Office of Congressional and
Intergovernmental Affairs
Washington, DC 20405

February 3, 1998

Honorable Stephen Horn
Chairman
c/o Dr. Robert Alloway
Subcommittee on Government Management,
Information, and Technology
Committee on Government Reform
and Oversight
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Dr. Alloway:

Please find enclosed the responses to questions submitted to G. Martin Wagner, Associate Administrator for Governtwide Policy of the General Services Administration from the hearing held November 5, 1997, before the Subcommittee on Government Management, Information and Technology on the Federal Advisory Committee Act.

If I can be of further assistance, please do not hesitate to contact me on (202) 501-0563.

Sincerely,

William R. Ratchford

William R. Ratchford
Associate Administrator
for Congressional Affairs

Enclosures

Hearing before the House Committee on Government Reform and Oversight, Subcommittee on Government Management, Information and Technology (November 5, 1997) on "The Federal Advisory Committee Act."

(Note: The answers to the following questions pertain to H.R. 2977, which was the subject of GSA testimony before the Subcommittee on November 5, 1997. An amended version of the Bill was subsequently enacted as Public Law 105-153, and signed by the President on December 17, 1997.)

1. **GSA has been the administrator of FACA since 1977. During this 20-year period, GSA has prepared an Annual Comprehensive Review for OMB and the President. Have the Presidents or OMB Directors during this period accepted these reports or required GSA to expand them to include any committees of NAS or NAPA?**

   Since 1977, GSA has implemented FACA's requirements for an Annual Comprehensive Review (ACR) in conjunction with a variety of initiatives supported by OMB. However, the ACR has never encompassed committees created by the NAS or NAPA because such groups were not considered to fall within the Act's scope.

2. **In 1988 the President's Council on Management Improvement (PCMI) conducted a study and identified a number of recommendations to improve FACA. Did the study recommend inclusion of NAS or NAPA?**

   The 1988 review of Federal advisory committee management sponsored by the PCMI and led by GSA did not recommend inclusion of groups created by the NAS or NAPA within the scope of the Federal Advisory Committee Act (FACA). None of the PCMI recommendations contained in the report addressed the status of NAS or NAPA committees.

3. **Since 1990 several legislative initiatives seeking to amend FACA were introduced. Did any of these initiatives include NAS or NAPA?**

   No. Since 1990, several legislative initiatives seeking to amend FACA, including S. 444 (October 1990) and S. 2039 (November 1991), were introduced in the Senate. Neither of these Bills included language that would have extended FACA's coverage to the NAS or NAPA.

4. **One of the legislative alternatives before us today specifies that GSA write a regulation for Federal Agencies that applies when they contract with NAS or NAPA. Is GSA capable of performing this function properly?**

   Yes. GSA is currently in the process of updating its regulations that implement FACA. This effort can be easily expanded to include any specific requirements relating to committees created by the NAS or NAPA.

5. **OMB could not be here today, so GSA is the representative of the Administration. In that capacity, could you please comment on the Administration's position, as reflected in the letter from the Director of OMB?**

   GSA's position is reflected in OMB Director Raines' letter of October 28, 1997, to the Committee. GSA would not oppose alternative approaches that would add "sunshine" provisions with respect to NAS or NAPA. OMB and GSA would, however, oppose broader legislation that might affect other committees and issues. In short, we support reasonable alternatives to address the NAS situation, not alternatives that go beyond that specific problem.

6. **Mr. Wagner, we have circulated draft legislation. What additional administrative burden, if any, does the proposed amendment to the Federal Advisory Committee Act pose for the General Services Administration?**

   GSA is currently responsible for managing FACA's application to approximately 1,000, Federal advisory committees. The resources required to support this function and its related activities are directed toward ensuring compliance, providing training and support, and maintaining current policies and regulations. In addition, GSA is responsible for producing the *Annual Report of the President on Federal Advisory Committees* for transmittal to the Congress.

   While the proposed legislation would exempt the NAS and NAPA from FACA, thus avoiding the need to charter and administer perhaps 400 committees with attendant administrative costs, GSA expects some short-term impacts to occur. We will, for example, need to write regulations implementing the new requirements. It is also expected that we will be asked to answer many questions regarding the new legislation and to provide training where possible.

7. **Mr. Wagner, does the proposed legislation result in any new expense for your Federal Advisory Committee Act operations?**

   Any new expenses will relate to short-term requirements covering new regulations, training, and preparation of a one-time report to the Congress on progress in implementing the legislation's provisions.

8. **Mr. Wagner, you said in your testimony that you would not oppose language which added "sunshine" to the National Academy of Sciences' panels. The proposed legislation seeks to strike a balance between the need for openness and the protection the National Academy seeks. Do you find that balance reasonable?**

   On the whole, GSA agrees with the concepts underlying the proposed legislation. While we had some concerns regarding the definition of "independent advisory committees" contained in section 2 of the proposal, we are confident that these issues will be resolved by the Subcommittee prior to introduction of the Bill.

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

December 15, 1997

The Honorable Stephen Horn
Chairman
Subcommittee on Government Management,
Information, and Technology
Committee on Government Reform and Oversight
House of Representatives

Dear Mr. Chairman:

As a follow-up to our November 5, 1997, testimony before the House Subcommittee on Government Management, Information, and Technology on the Federal Advisory Committee Act, you asked us to respond to additional questions for the record. Enclosed are our responses to the questions.

Please call me on (202) 512-8676 if I can be of further assistance.

Sincerely yours,

L. Nye Stevens
Director
Federal Management and
Workforce Issues

Enclosure

ENCLOSURE ENCLOSURE

GAO RESPONSE TO QUESTIONS FOR THE RECORD
HEARING ON THE FEDERAL ADVISORY COMMITTEE ACT
NOVEMBER 5, 1997

Question: GAO is certainly "utilized" by the federal government. GAO writes guides all the time. Do they have the force of law or regulation, do agencies have to do as you recommend?

Answer: GAO's product line distinguishes between general guidance to agencies and reports, many of which contain recommendations. An example of general guidance was a document we issued in 1996 entitled Executive Guide: Effectively Implementing the Government Performance and Results Act (GAO/GGD-96-118, June 1996). Among other things, this document identified key steps that agencies needed to take toward implementation of the Government Performance and Results Act, along with a set of practices that could help make that implementation a success. As suggested by its title, the document was intended as guidance only. Agencies were not compelled to follow it.

GAO reports often contain recommendations to agencies. These do not have the force of law or regulation, and agencies do not have to implement the recommendations. However, the head of a federal agency is required by 31 U.S.C. 720 to submit a written statement on actions taken on our recommendations to the Senate Committee on Governmental Affairs and the House Committee on Government Reform and Oversight not later than 60 days after the date of the report. A written statement must also be sent to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report. In addition, sometimes a GAO recommendation may be given the force of law through incorporation into a law passed by Congress and signed by the President.

ENCLOSURE ENCLOSURE

Question: GAO gathers data, deliberates on recommendations, and issues guidance. If GAO were subject to FACA regulations, would this improve the quality of data you gather within agencies, your deliberations, and your guidance?

Answer: Generally, the FACA regulations apply to meetings to obtain advice from non-government individuals. We have no reason to believe that the quality of the data we collect, the recommendations we make, or the guidance we issue would improve if GAO were subject to FACA. Most of the substance of our work is carried out by GAO employees and involves meetings or obtaining information from other federal employees, and that work is subject to an internal GAO review process to ensure that it meets our standards for quality. Occasionally, audit teams may consult individual experts outside of the federal government or convene a group of such experts to provide input to, for example, strategic planning for our work. If experts are consulted as a part of an individual assignment, that fact and their role is disclosed in the Objectives, Scope, and Methodology section of the report. Further, in conformance with generally accepted government auditing standards, we seek the audited organization's views during the course of our work. We view these efforts as helping to ensure that our work is accurate, complete, and objective, and that our recommendations are reasonable and likely to correct disclosed problems.

Question: GAO will not publish drafts or even final recommendations until they go through your internal clearance process, why are these steps secret?

Answer: Our internal report review process is not secret. These processes are clearly described in GAO's Policy Manual which is a publicly available document. As a professional auditing and evaluation organization, GAO has established standardized job processes which include a systematic internal review of products to ensure that they are accurate, objective, and complete, and can be issued as an institutionally supported

product. In addition, consistent with generally accepted government auditing standards, we also offer agencies the opportunity to comment on our products and we incorporate the views of agency officials in the final report. At the time reports are sent to an agency for comment, Congressional requestors are entitled to a copy of the draft upon request.

Question: There are two alternative legislative versions before us today. The long one specifies procedures for NAS, the short one specifies that these procedures shall be embodied by GSA in regulations for federal agencies when contracting with NAS. Does GAO prefer either one?

Answer: As stated during the hearing, GAO has no position on either proposal.

Question: Mr. Stevens, you testified about the burden on GSA that will result from the court ruling. If we limit our attention to conflict of interest and openness, and exempt the National Academy from the chartering and administration parts of the Federal Advisory Committee Act, would that address your concerns?

Answer: The short answer is yes. Conflict of interest and open meetings issues under FACA are primarily the responsibilities of the agencies and, in this case, the National Academy of Sciences and the National Academy of Public Administration. GSA in its oversight role capacity would not appear to be burdened with these matters.

ENCLOSURE ENCLOSURE

Mr. Stevens, you have some experience with the census from 1990. Do you believe that the census panels chaired by Charles Schultze and Norman Bradburn were stacked to achieve a particular conclusion? Would a more open appointment process quell some of the criticisms of Academy panels?

Answer: In response to the Decennial Census Improvement Act of 1991, the National Academy of Sciences National Research Council organized two studies on the census in the year 2000. Both were convened on the premise, which was consistent with the act, that the manner in which the census was taken needed to be changed.

The Panel to Evaluate Alternative Census Methods, chaired by Professor Norman Bradburn of the University of Chicago, focused on the technical issues of implementation and evaluation of promising methodologies. It included 13 members with expertise in statistics, survey methods and design, decennial census operations, field organization of large-scale data collection, demography, small-area statistics, and respondent behavior chosen from universities (6), research institutes (2), commercial survey concerns (2), Statistics Canada (2), and a former chief of the Statistical Research Division of the Census Bureau (1).

The second panel, chaired by Charles Schultze of the Brookings Institution, considered questions of cost structure and census data use, including the rationale for users' needs for census information and whether those needs could be met by some means other than the census itself. Its 15 members included 8 from universities, 4 from research institutes, 2 from state and local community planning agencies, and the head of Statistics Canada.

We do not know how these individuals were selected. However, their resumes indicate that they were qualified and credible experts in areas dealt with in the panels' reports. We have no basis to conclude whether a more open appointment process would have

resulted in the selection of different members, whether different members would have produced different conclusions and recommendations, or whether different conclusions and recommendations would have generated less criticism.

Question: Mr. Stevens, in one of the headlines in your testimony you say that the number of advisory committees has decreased but the cost has gone up. A bit later in your testimony you say that the cost in inflation adjusted dollars has gone down. Do you believe unadjusted dollars are a better measure to use to compare costs across time, and if not, why do you use them in your headline?

Answer: GAO's policy, as a general rule, is that using constant–rather than nominal–dollars is more meaningful when comparing dollar values across time. My statement shows costs in both nominal and constant dollars. It points out that overall costs increased slightly in nominal dollars and decreased slightly in constant dollars. However, the average costs per committee have risen substantially in both nominal and constant dollars. The caption in my testimony is correct in that it refers only to costs per committee.

Mr. HORN. But one of the legislative alternatives before us today specifies that GSA write a regulation for Federal agencies that applies when they contract with either the National Academy of Sciences or the National Academy of Public Administration, or a similar body; scholarly academy. Is the General Services Administration capable of performing this function properly in your judgment?

Mr. WAGNER. Mr. Chairman, yes, but Mr. Dean can expand on this.

Mr. DEAN. We are fully capable and willing to look at that task, Mr. Chairman. That would be probably a matter of working with the academies and the affected agencies to make sure that our approach to the regulation would in fact be consistent with the requirements.

Mr. HORN. The Office of Management and Budget could not be here today. Is the General Services Administration representing the administration?

Mr. WAGNER. Yes.

Mr. HORN. Can you comment on the administration's position as reflected in the letter from the Director of OMB? Do you have any comments on that?

Mr. WAGNER. Jim, would you like to add anything?

Mr. DEAN. I think the statement is quite clear. I think that the administration is strongly supportive of any effort that we can undertake to clarify the definition of utilize, which I think is the original language that Director Raines addressed, and also in the two discussion drafts we've seen, both of those approaches are acceptable.

Mr. HORN. I take it General Services was in on the development of that position.

Mr. DEAN. We've been helpful in this process.

Mr. HORN. Very good.

There are two alternative legislative versions before us today. The long one specifies procedures for the National Academy of Sciences. The short one specifies that these procedures shall be embodied by the General Services Administration and regulations for Federal agencies when contracting with the National Academy of Sciences.

Does the General Accounting Office prefer either one of those, and I would ask the same of the General Services Administration?

Mr. STEVENS. No, Mr. Chairman, we really don't have a position.

Mr. HORN. On either one?

Mr. STEVENS. Yes.

Mr. HORN. Does GSA have a position on either one?

Mr. DEAN. Mr. Chairman, I don't think that I've seen the revised language that you just mentioned. However, in general, we would prefer that the legislation lay out a broad mandate; that we would then write specific regulations to implement the detail, and provide more flexibility, and we think that's better.

Mr. HORN. Does the gentlewoman from New York have any further questions she'd like to ask?

Mrs. MALONEY. Just—you said you would be open for some sunshine. Specifically what kind of sunshine? In your statement earlier. Mr. Wagner said that.

Mr. WAGNER. Yes. I think our basic concern would be if a sunshine approach that makes sense to the National Academy of Sciences we would certainly support that.

Mrs. MALONEY. You're deferring to their judgment.

Mr. WAGNER. Right. Our major concern is that in working out an appropriate arrangement with the National Academy of Sciences, it leads to an approach that does not have consequences across all the organizational arrangements—the different agencies that the Government have. That's where our concern lies.

Mrs. MALONEY. But not necessarily. You could write legislation that have treated different areas differently. How one area is treated doesn't necessarily mean everyone else is treated that way.

Mr. WAGNER. And to the extent that a specific approach is specific to the National Academy of Sciences, that would alleviate many of our concerns with regard to other areas.

Mrs. MALONEY. Thank you.

Mr. HORN. I have no further questions. Mrs. Maloney does not have any further questions. You've done a fine job. Thank you for coming, and if you want to stay, you're welcome, and if you want to say anything at the end of the hearing, you're welcome. Or you might just review the transcript, and file any comments you wish to file. So we'll make it easy for you either way. So thank you very much.

We now will have panel 2 come forward. Dr. Bruce Alberts is the president of the National Academy of Science. Eric Glitzenstein, the attorney for Meyer & Glitzenstein, has been an active advocate in the case law on this situation. Valerie Stanley, staff attorney, for the Animal Legal Defense Fund, has also been an advocate. R. Scott Fosler is president of the National Academy of Public Administration. And he is accompanied by Peter Szanton, the chairman of the Board of Trustees National Academy of Public Administration, and Dwight Ink, former Acting Administrator for the General Services Administration, and a member of the academy. Christopher Paine is a senior research associate, National Resources Defense Council.

So we're delighted to welcome you seven witnesses, and if you came in late, the routine is, when we introduce you, your full résumé goes in the record, your full statement goes in the record, and we'd appreciate it if you could summarize your statement by looking us in the eye for 5 or 10 minutes, and get to the essences of it, since we've had a chance to read most of the statements. And we would welcome that thought.

But in the meantime, let's take the oath, which we also have as a tradition.

[Witnesses sworn.]

Mr. HORN. The clerk will note that all seven witnesses have affirmed, and we'll just go down the line in the order in the roster, which is Dr. Bruce Alberts, president of the National Academy of Sciences.

Dr. Alberts.

STATEMENTS OF BRUCE ALBERTS, PRESIDENT, NATIONAL ACADEMY OF SCIENCE; ERIC GLITZENSTEIN, ATTORNEY, MEYER & GLITZENSTEIN; VALERIE STANLEY, STAFF ATTORNEY, ANIMAL LEGAL DEFENSE FUND; R. SCOTT FOSLER, PRESIDENT, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION; PETER SZANTON, CHAIRMAN, BOARD OF TRUSTEES, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION; DWIGHT INK, FORMER ACTING ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION; AND CHRISTOPHER PAINE, SENIOR RESEARCH ASSOCIATE, NATURAL RESOURCES DEFENSE COUNCIL

Mr. ALBERTS. Mr. Chairman, thank you for the privilege of being here today. We appreciate your attention to this matter, and look forward to working with you obviously.

Since 1863—I think as you said in your opening remarks—the Academy's most valuable contributions to the Federal Government and the public has been to provide unbiased, high-quality scientific advice on controversial, complex issues. If it's not complicated, we don't get asked. We're a private organization, and our independence from the Government has been essential for our credibility.

The processes by which the academy conducts its work are designed to ensure its independence, both from political pressures and from the sponsoring agency that's paying for the study. This is the only way we can be doing this, is independent.

Briefly, committees of volunteer experts are appointed by the academy to help prepare draft reports. These reports are then revised based on a rigorous and anonymous peer review process. They are then finalized and released to the sponsoring agency and the public at the same time, providing that they meet the standards of quality and objectivity that are set by the Academy. One of the review criteria is that the evidence of the statements must be in the report, so there's nothing secretive about how we arrived at our conclusions.

There's much talk here about secrecy. I want to emphasize as much as possible we don't do anything secret. All of our reports would be public. The full text of 1,700 reports at this moment are available for free on the World Wide Web anywhere in the world, and they can be printed out for free. All of our meetings where they're meeting with somebody other than the committee itself—that is, where they are gathering information in the early stages of their studies before Congress provides it—all those meetings are widely advertised and open to the public, and they're posted on the World Wide Web.

As you have said, Mr. Chairman, in 1972, with the original passage of the FACA legislation, there was a full debate on the House floor by the committee Chair that Congress does not intend this act to apply to the National Academy of Sciences. Now an unfortunate misinterpretation of the original intent of Congress has led to the court decision, finalized last Monday, that applies the Federal Advisory Committee Act to our committees. If this is left standing, it will not only be extremely damaging to the Academy, but I honestly believe it will also harm the government and the American people.

Today we're asking your committee to reassert the exemption for the Academy, thereby restoring the original intent of Congress. Often we hear that the issue is whether the deliberative meetings of our committees will be opened up to the public, and I want to emphasize that opening up those deliberative meetings is only one of several major consequences of submitting all our studies to FACA regulation.

Broadly speaking, I want just to talk about the two kinds of major adverse impacts. The first is the way to deal with the fundamental loss of credibility by the fact that the Academy's independence will be compromised with the FACA current situation. Currently, once a study is requested and a contract is negotiated and signed, the Academy creates an expert study committee. Under FACA, the committee can be created only after receiving permission of the government in the form of a charter from the General Services Administration, and this is a process that generally takes 6 to 8 months. Many of our studies are requested by Congress and we don't have enough time to wait 6 or 8 months. Right now we're doing several studies that are just beginning that ask for interim reports in 3 to 6 months. We couldn't even start these studies under the chartering type of arrangement.

The second point, especially at the National Academy of Sciences, I appoint all academy committees that are used by the academy in conducting studies. In contract, under FACA, the appropriate balance in committee membership must be certified by the Government agency requesting the study.

The third point: The academy manages and controls the committees. Under FACA, as we've said, the Government manages and controls, as witnessed by the requirements of the Government. First, it must approve each meeting and its agenda, chair or attend each meeting, and adjourn the meeting whenever that official determines that adjournment is in the public interest.

The fourth point: The academy makes all the information-gathering meetings, but not the deliberative meetings, of its committees open to the public. Under FACA, of course, all meetings are required to be open to the public. So why does this matter to us? We close our deliberative meetings to protect our study process from pressure that would likely be applied by the sponsoring agencies and others when they are seeking a desired outcome. We've already had certain problems with this in the past in sponsored meetings when the Government was always there.

Finally, using reviewers that it appoints, we can't really conduct confidential and rigorous peer review of draft reviews that are prepared by our committees, and these reports are always extensively revised before they're finalized. The final report is only exposed to the public and the sponsoring agency when it meets our standard of quality and evidence. Under FACA, there is no formal review of the report and the contents of the final report are determined by the committee alone, not by a peer review process that we would manage.

I just want to stress the central point: Operating under FACA's rules would seriously erode our value to the Government, both the executive and legislative branch, simply because it would be difficult to convince the public that the Government did not have any

influence over our findings. Under our current system, once a study task is agreed upon, the Government has no means or mechanisms to affect the outcome of the report, and the sponsor only gets the report in its final form.

I want to emphasize that our reports are very often critical of the agency that's paid for them. This is, in fact, why Congress often asks us to do reports. You've asked us to do cryptography, paid for by the Department of Defense, in a position directly opposite that of the administration. The issue is still very much in play, as you know.

At the beginning, I mentioned two broad types of impacts, and the second type of impact has to do with plain old red tape. This translates into time and expense. The problem is represented by establishing and managing more than 400 Academy under FACA would be significant and costly to the Government, as we've heard. Each committee would require a charter, making it impossible for us to respond quickly to Congress' demands. I told you about the fact that we are more and more asked to act quickly and have information back within 3 to 6 months, at least of the preliminary sort.

In launching the House Science Committee's major study on science policy 2 weeks ago, the Speaker of the House gave a speech in which he emphasized the importance of Congress getting science and technology advice directly from the Nation's best experts. The finest resources that the academy provides the Nation is the thousands of experts who sit on our committees without any pay every year. These include many hundreds of academy members. There are extremely busy, sought-after people trying to serve the Nation as a patriotic duty and without any compensation. If FACA makes the process difficult and protected, we will no longer get many of the same people to volunteer.

Finally, unless the law is changed, we're concerned that many of our past and existing studies will become subject to court challenges. Unfortunately, this would further immobilize us and probably convince the Government that requesting a National Academy of Sciences study is not worth the trouble.

In summary, conducting studies for the Government, the academy insists on, first of all, managing and controlling our own committees; second, retaining complete control over the membership of our committees; and third, requiring that the deliberations of the committees and the draft reports prepared by these committees, as well as the reviewers' comments, remain confidential and closed to the funders as well as to the public.

In this context, I want to emphasize that we are working hard, as you know, to increase public access to everything we do. We're very well aware of the public view that, if they can't see something, something must be wrong with it. So we're doing everything we can, as you said in your introductory remarks, to let as much sunshine in as we can without changing the basic independent nature of the advice that we give.

I would like to thank you for this opportunity to talk this afternoon, and I certainly look forward to working with you and your committee in seeking a means of resolving this problem into one that is suitable for all of us.

Thank you.

[The prepared statement of Mr. Alberts follows:]

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I am Bruce Alberts, President of the National Academy of Sciences. In this capacity, I also serve as Chair of the National Research Council. I am also speaking today on behalf of Dr. William A. Wulf, President of the National Academy of Engineering, and Dr. Kenneth I. Shine, President of the Institute of Medicine. We appreciate the opportunity to testify this afternoon on the impact of applying the Federal Advisory Committee Act (FACA) to the National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council.

Since 1863, the Academy's most valuable contribution to the federal government and to the public has been to provide unbiased, high-quality scientific advice on controversial, complex issues. As a private organization, our independence from the government has been essential for our credibility. The processes by which the Academy conducts its work ensures its independence from potential outside influences and political pressures from government officials, lobbying groups, or others. Committees of volunteer experts are appointed by the Academy to help prepare draft reports. These reports are then revised based on a rigorous internal peer review process and

are finalized and formally released only after meeting the standards of quality and objectivity set by the Academy. The full text of each of our reports is made publicly available; in fact, today more than 1700 of these reports can be read and/or printed out without charge by anyone with access to the World Wide Web.

In 1972, during the final debate on passage of FACA, the Chair, Mr. Chet Holifield, and Ranking Minority Member, Mr. Frank Horton, of the House Goverment Operations Committee made clear that Congress intended that the Academy was to be exempt from the Act. This exemption was expressed during a colloquy on the House floor and withstood repeated examination until last January. Now an unfortunate misinterpretation of the original intent of Congress has led to a recent Court of Appeals ruling that applies the Federal Advisory Committee Act to a committee of the National Academy of Sciences. If left standing, this decision, which could affect more than 400 Academy committees, would generally prevent the National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council from carrying out independent and objective committee studies for the government, including the Congress. This

result will not only be extremely damaging to the Academy; it will also harm the government and the American public.

Today we are asking this Committee to reassert that exemption for the Academy, thereby restoring the original intent of Congress.

The application of this statute to the Academy causes two types of damaging impacts:

First, meeting the requirements of FACA would seriously erode the independence of the Academy by placing a number of government controls on our studies. As I have already stated, the credibility of Academy studies is based in large part on their independence from the government and political considerations. This credibility would be severely compromised if the Academy loses its independence in carrying out our studies.

Second, meeting the requirements of FACA would tie up Academy operations and render us unresponsive to the government generally, and to the Congress in particular.

We recognize that the issue before us today is most often discussed in terms of whether or not the deliberative meetings of our committees will be opened to the public. While that change is certainly an important component of the impact of FACA, as I will discuss shortly, it is only one of several implications of submitting all of our studies to FACA regulation.

Before we discuss the impacts, a brief review of our legal situation is in order. After this committee stated its intention in 1972 to exempt the Academy from FACA, that legislative history was accepted by the Congress, the Executive Branch and the Courts for two decades. In 1989, the public interest group Public Citizen brought suit against the Government and the American Bar Association (A.B.A.), claiming that the committees which rated the fitness of candidates for the federal bench should be subject to FACA. The Supreme Court held for the Government and the A.B.A., but Justice Brennan's majority opinion contained dicta in which he stated that, while FACA was not intended to apply to private organizations such as the A.B.A., it was intended to apply to "...quasi-public organizations such as the National Academy of Sciences." This reference came from language in a 1970 House report in the

Congress prior to the one that passed FACA. In fact, the 1970 House report was superseded by the colloquy on the House floor in 1972.

This 1989 dicta by the Supreme Court largely served as the basis for the current challenge. If one reads the opinion by the D.C. Court of Appeals, it is clear that the Court felt that this dicta outweighed the floor colloquy between Chairman Holifield and Ranking Minority Member Horton in 1972.

In August, we submitted a petition for certiorari before the Supreme Court. Numerous agencies and offices of the federal government, including the Office of Management and Budget and the White House Office of Science and Technology Policy, urged the Justice Department to take the case. However, because of the concern of the Justice Department about other possible ramifications of a rehearing of FACA before the Supreme Court, the Solicitor General declined to join in our petition for cert.

On Monday, the Supreme Court denied our petition for cert., a result that we anticipated once the government did not join our petition. As a consequence, Academy studies are now in considerable jeopardy, including almost every

study we are doing at the request of the Congress. This is the reason that we are before you today.

Let me return to the two types of impacts that I mentioned earlier. The first set of impacts has to do with the fundamental incompatibility of FACA and the Academy's independent advisory role, as illustrated by the following comparisons:

- Currently, once a study is requested, a contract is negotiated and signed. Shortly thereafter, the Academy creates its expert study committee. Under FACA, a committee can be created only after receiving the permission of the government in the form of a charter from the General Services Administration, a process which takes 6-8 month. Many of our studies are requested within strict time frames -- to help inform policy-makers who are grappling with urgent matters.

- The President of the National Academy of Sciences, who serves as Chair of the National Research Council, appoints all Academy committees that are used by the Academy in conducting studies. In contrast, under the

regulations implementing FACA, the appropriate balance of a committee's membership must be certified by the government agency requesting the study.

- The Academy independently manages and controls its committees. Under FACA, however, the government manages and controls advisory committees -- as indicated by the requirement that a government official must approve each meeting and its agenda, chair or attend each meeting, and adjourn the meeting whenever that official determines that adjournment is in the public interest.

- The Academy makes all of the information-gathering meetings, but not the deliberative meetings, of its committees open to public. Under FACA, all meetings are required to be open to the public. The Academy closes its deliberative meetings to protect the independence of its study process from pressure that would likely be applied by the sponsoring agencies when they are seeking a desired outcome.

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Using reviewers that it appoints, the Academy conducts a confidential, rigorous peer review of draft reports prepared by its committees which are then revised. A final report is issued only after the Academy has determined that it meets the Academy's standards of quality and evidence. Under FACA, there is no formal review of a committee's report, and the contents of the final report are determined by the committee alone rather than through a peer review process managed by the Academy.

We believe that keeping the committee deliberations and our review process closed and confidential is fundamental for ensuring the independence of our studies and the scientific quality of our reports, enabling our recommendations and findings to be based on science rather than politics. A frank, confidential discussion of the merits of a committee draft during review is our most effective quality assurance mechanism. Moreover, if drafts are available to the public, the first draft becomes the enduring impression of that report, regardless of any changes one makes later.

Most importantly, operating under FACA's rules would seriously erode our value to the government, both executive and legislative, simply because it would be difficult to convince the public that the government did not have any influence over our findings. Under our current system, once the study task is agreed upon, the government has no means or mechanism to affect the outcome of a report, and the sponsor only gets the report in its final form.

The second form of impact has to do with plain old red tape, which translates into time and expense. While we are sure that most government employees who supervise the implementation of FACA are able and dedicated, the problem of scope represented by establishing and managing more than 400 Academy committees under FACA would be significant and costly to the government. Each committee would require a charter, making it very unlikely that the Academy could respond quickly to Congressional studies, which often require the most alacrity. Today, we are beginning studies for the Congress on topics that range from assessing priority-setting of the National Institutes of Health to the tagging of gunpowder by law enforcement agencies. Studies requested by Congress often have due dates of less than a

year. If we were to have to fulfill a chartering requirement, rapid studies would become impossible.

In launching the House Science Committee's major study on science policy two weeks ago, the Speaker of the House emphasized the importance of Congress getting its science and technology advice directly from the nation's best experts. The finest resource that we provide to the nation is the thousands of experts who sit on our committees without compensation each year, including many hundreds of Academy members. All of our volunteers work for the Academy as a public service, being reimbursed only for their travel expenses. They are currently able to have frank discussions as they work out their differences to achieve scientific and technical consensus. The inevitable pressure that would be brought to bear on these participants, if everything is required to be held in an open forum, would surely be a heavy disincentive for participation in our process. These are extremely busy, sought-after people trying to serve the nation as a patriotic duty. If FACA makes the process difficult and protracted, we will no longer get the same people to volunteer.

Finally, unless the law is changed, we are concerned that many of our past and existing studies will become subject to court challenges. This could further immobilize us, and convince the government that requesting a National Academy of Sciences study is not worth the trouble.

In conducting studies for the government, the Academy insists on: (1) managing and controlling its committees, (2) retaining complete control over the membership of its committees, and (3) requiring that the deliberations of its committees, the draft reports prepared by its committees, and reviewers' comments on its draft reports remain confidential and closed to funders and to the public. The Academy will continue to increase public access to its process, but it will not compromise on these procedures that ensure its independence. If FACA is applied to Academy studies, the likely outcome is that the Academy will be conducting far fewer studies, because the Academy will not create FACA-regulated committees.

Mr. Chairman, I thank you for the opportunity to present our case to your committee this afternoon, and I would be happy to answer any questions.

Mr. HORN. We very much appreciate your testimony. We're going to go down the line with your six colleagues here, and then have a dialog and basic questions that maybe a lot of you would want to respond to.

So our next witness is Eric Glitzenstein, the attorney for Meyer and Glitzenstein, who as I mentioned in noting the panelists, has been very active in the court cases related to this particular area of inquiry.

Mr. Glitzenstein.

Mr. GLITZENSTEIN. Thank you, Mr. Chairman. I should say at the outset, having been involved in a number of FACA cases over the years, and being in a very small and select group of FACA litigators, that with feasts like this, we would all starve pretty rapidly, if this was in fact what we were relying upon as a major source of business. The truth of the matter is that over the years there really has been a remarkably small amount of FACA litigation. But in one case that has come up—a case about 10 years ago in the Supreme Court—the court did specifically construe what the word, "utilize"—we've all been talking about, what is a "utilized" advisory committee.

One point I'd really like to try to focus on in the few minutes that I have is the distinction between what did Congress hand back in 1972—which I think NAS has tried to argue to this subcommittee as if it were a court—and what should be the policy now. I think it would be well advised for this subcommittee to try to keep those issues separate.

Because the fact of the matter is that the courts have construed what the word "utilize" means, and contrary to the notion that the most recent decision was some kind of renegade judicial activism, the three judges in this most recent decision—which Judges Silerman, Judge Douglas Ginsberg, and Judge David Sentelle, were three appointees by the Reagan and Bush administrations. These are judges who are not generally accused of going out and just reading statutes and creating new policies. What they were doing was reading a 1989 Supreme Court case, which specifically said the following in construing what the word "utilize" means in the statute. After looking at all the legislative history, and the entire statute, the Supreme Court concluded that that word was intended to encompass groups formed indirect by quasi-public organizations such as the National Academy of Sciences, for public agencies as well as by such agencies themselves.

And in our testimony we've collected the six or seven specific references, and that Supreme Court decision to the National Academy of Science. So let there be no doubt about it. When you're talking about overturning a judicial decision, you're talking about overturning the Supreme Court's only construction of the Federal Advisory Committee Act in the entire history of the statute. That is what is really at issue here.

In the 1997 decision of the D.C. circuit, these three Reagan-Bush appointed judges simply said, "this is what the Supreme Court has said the Advisory Committee Act was intended to cover." And in light of all that what does the Academy focus on? It focuses on a single colloquy between two Representatives on the floor of the House shortly before the statute was voted on. And the courts have

looked at that. They looked at that in the context of all the legislative history, and the plain language of the statute, and the courts have said—correctly I submit—that this single colloquy does not override the plain language of the statute, and it does not override all the other legislative history which refers to the National Academy of Sciences.

I think it's a little ironic and useful to keep in mind, frequently people criticize judges for being activists, but please take a look at the Federal Advisory Committee Act. It has exceptions for committees with the CIA, it has exceptions for committees which are composed of full-time Federal officials, and it has exceptions for a number of other advisory entities. It has no exceptions for committees formed by the National Academy of Sciences. And when judges look at laws, that's what they look at—What does the law say and what is the surrounding context?

And finally on that colloquy—I really do not think you should entertain this subject any longer—if you look carefully at what Chairman Holifield said, there's nothing in his statement which says that when a National Academy of Sciences committee is formed for a Federal agency with Government money—which is what we're talking about with these committees, hundreds of thousands of dollars in Government funds being spent—that that committee should not be required to be public and be subject to the access requirement of the Advisory Committee Act. The most that he was saying, as far as I can discern—and I think the courts correctly characterized his statement as a—the most he was saying is that the Academy as a whole would not be a committee subject to the act, with which I completely agree.

No one, I think, at this table has ever argued otherwise. The question is: When a committee is formed which performs public business with public money, should the basic minimal access requirements of the statute come into play?

Now let me turn to what I think obviously is the proper use of this subcommittee, which is what should the policy be for the National Academy of Science and its committees. And it seems to me that we are all generally tending to converge on a consensus, as I understand the panel that went before, and even with what Dr. Alberts has said, and what I think the rest of the folks up here will say. That is that we have to find some way of having the academy comply with the basic public access requirements, in which there is I think an overriding public interest of what the academy does—without unnecessarily subjecting the academy to bureaucratic requirements that may not serve the public good.

And I believe that some of the proposals try to arrive at that kind of consensus. I do have a concern that if you're going to adopt any kind of legislation on this point, and say that academy committees shall be open, except for meetings which discuss the final report—which is one of the—I think it's in the legislation that Congresswoman Maloney and Congressman Waxman were circulating. I understand the concept there, but I am fearful that that could wind up essentially taking up everything that a committee does. To be characterized as everything a committee does, because in theory an advisory committee does no more than analyze what should be

in a final report. And I think you might wind up creating an exception which becomes the rule.

What we have suggested, which I think, quite frankly, is a more straightforward way of going about it, is simply subjecting the committees to the requirements of section 10 of FACA, which is the openness provision of the statute. This will include the existing exemptions in the law, which include, as Congresswoman Maloney pointed out, national security, personal privacy, trade secrets, and other exemptions which the Congresswoman has already looked at and said, "these are legitimate areas of secrecy."

That is a well-established area of the law. If we take that and make the committee subject to those requirements, and get them out of the chartering and other kinds of bureaucratic procedures, I think we'd arrive at a result which would accomplish much of what the academy is concerned about, but also preserve the core right of public access, which I think we should all be concerned about. Thank you.

[The prepared statement of Mr. Glitzenstein follows:]

TESTIMONY OF ERIC R. GLITZENSTEIN BEFORE THE HOUSE SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION AND TECHNOLOGY

I appreciate the opportunity to testify regarding the Federal Advisory Committee Act ("FACA") and the recent court decisions bearing on the applicability of FACA to committees established for federal agencies by the National Academy of Sciences ("NAS").

In seeking to exempt *all* of its committee operations from *all* of the public access and accountability requirements of FACA, NAS is attempting to overturn a long line of judicial precedent -- first, a Supreme Court construction of FACA which was issued in 1989 and which declared that NAS committees are the "paradigmatic" advisory bodies which Congress intended to cover by the law; second, a 1997 decision by the U.S. Court of Appeals in Washington which applied the Supreme Court's ruling to an NAS committee which was essentially delegated binding regulatory authority over the treatment of laboratory animals and which the Supreme Court just declined to review on Monday of this week; and, most recently, a district court ruling which enjoined the Department of Energy from relying on the work of an NAS committee which advocated the construction of a billion dollar nuclear weapons project but was riddled with serious financial conflicts of interests and produced its report largely in secret. I was counsel for the public-interest organizations which brought all of these cases, and thus I have a unique vantage point on NAS's efforts to overturn them legislatively.

Having lost in the Courts, NAS has now turned its focus to Congress, in an effort to amend FACA -- a statute which has gone largely untouched by Congress for more than two decades -- so that the public has no opportunity to observe the enormous influence which NAS itself claims to have on federal policy on a broad spectrum of issues. In seeking this special treatment, NAS has distorted the courts' rulings on FACA, as well as the

implications of NAS's compliance with the Act. In an effort to set the record straight, I will first briefly review FACA and the cases applying it to NAS committees. Then, I will suggest a concrete approach to the problem before the Subcommittee -- an approach which would preserve a modicum of public access to NAS committees while, at the same time, assuring NAS that its independence from government will not be threatened by compliance with FACA.

FACA's Requirements

Congress passed FACA in 1972 to "control the growth and operation of the 'numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers of the Federal Government.'" Ass'n of American Physicians and Surgeons v. Clinton, 997 F.2d 898, 902-03 (D.C. Cir. 1993), quoting 5 U.S.C. App. II § 2(a). The Act defines an "advisory committee" to mean:

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . ...

5 U.S.C. App. II § 3(2) (emphasis added).

FACA requires that committees hold their meetings in public except for those closed or partially closed pursuant to specified exemptions, 5 U.S.C. App. II § 10(a)(1), that they keep minutes of each meeting, see id. at § 10(c), and that records not exempt under the provisions of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), be made available to the public. 5 U.S.C. App. II § 10(b). As summarized in a recent Presidential report to Congress on implementation of FACA:

> These provisions are designed to ensure that the ebb and flow of information to and from an advisory committee is

maximized, and that committees are accountable to the public, two of the underlying rationales of FACA

Twenty-Fourth Annual Report of the President on Federal Advisory Committees 1 (Fiscal Year 1995) ("President's FACA Report").

In seeking a special exemption from FACA coverage, NAS has sought to argue that such coverage somehow undermines the "independence" of advisory committees. That is precisely the opposite of what Congress intended when it enacted the statute. Congress believed that public access and accountability would help insulate committees from domination by special interests and the government itself. Thus, FACA specifically requires that agencies seeking advice should not "inappropriately influence[]" advisory committees but, rather, that any recommendations should be the "result of the advisory committee's independent judgment." 5 U.S.C. App. II § 5(b)(3) (emphasis added).

The Supreme Court's Ruling in Public Citizen

In its 1989 ruling on FACA, Public Citizen v. Department of Justice, the Supreme Court was called on to analyze what FACA means by a committee that is "utilized" but not "established" by the federal government. In that case, which involved the American Bar Association's Standing Committee on Federal Judiciary, the Court embarked on a detailed "[c]onsideration of FACA's purposes and origins" and paid "[c]lose attention to FACA's history" to "ascertain the intended scope of the term 'utilize.'" 491 U.S. at 455, 456.

This "careful review" of the Act's history, id. at 464, led the Court to conclude that "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals . . .." Id. at 453. In conducting its review of the legislative history, the Court focused on a 1970 House Report "which instigated the legislative efforts that culminated in FACA." 491 U.S. at 460.

That Report "complained that committees 'utilized' by an agency (as opposed to those established directly by an agency) rarely complied with the requirements of Executive Order 11007," a pre-FACA Order which regulated government advisory committees. As the Court observed, the House "Report's paradigmatic example of a committee 'utilized' by an agency for purposes of Executive Order 11007" -- and which Congress therefore intended to ensure was covered by FACA -- "was an advisory committee established by a quasi-public organization in receipt of public funds, such as the National Academy of Sciences." 491 U.S. at 460 (emphasis added).

Based on these and similar statements, the Court reasoned that the phrase "or utilized" was added to FACA's definition of advisory committee "to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves." Id. at 462 (emphasis added). This review of FACA's history was indispensable to the Court's holding that the ABA committee was not being "utilized" by the Justice Department because, in sharp contrast to NAS committees, it was not "formed by . . . some semiprivate entity the Federal Government helped bring into being," such as NAS. Id. at 463 (emphasis added).

The Supreme Court was plainly correct in labeling NAS the "paradigmatic example" of a "quasi-public" or "semi-private entity the Federal Government helped bring into being" for the precise purpose of furnishing federal agencies with advice. 491 U.S. at 460, 462, 463 (emphasis added). Indeed, NAS was created by a Congressional charter, which provides that the "academy shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of

science or art . . .." 36 U.S.C. § 253 (emphasis added). Congress further provided that the "academy shall receive no compensation whatever for any services to the Government of the United States," but that the "actual expense of such investigations, examinations, and reports" are "to be paid from appropriations . . .." Id. In other words, Congress has required that NAS furnish advice to the government upon request, and that the federal government pay for that advice.

While NAS now insists to this Subcommittee that it is not a "quasi-public" entity with a special status distinct from that of purely private organizations, this assertion is completely at odds with NAS's own longstanding description of itself. In its own publications, the Academy has declared that it has a "has a mandate that requires it to advise the federal government on scientific and technical matters." NAS, Report Review: Guidelines for Committees and Staff 1. In addition, NAS has stated that it has a "a special relationship with the U.S. government because of its congressional charter and its long history of support to the government as a quasi-independent ally." NAS, The Policy Partnership With the U.S. Government 17 (emphasis added). As the Academy has also observed, because "NAS was created by the federal government to be an adviser on scientific and technological matters," it is not surprising that the "great majority of the studies carried out by the Academy complex are at the request of government agencies," and "usually are funded out of appropriations made available to federal agencies." NAS, Questions and Answers About the National Academy of Sciences 1.

The D.C. Circuit Decision Applying The Supreme Court's Analysis of FACA

In seeking its special exemption from FACA coverage, NAS has suggested that several federal judges have run amok in applying

FACA's openness requirements to several specific NAS committees. In reality, these courts have faithfully applied the Supreme Court's careful analysis of FACA to find that FACA's purposes would be served by applying the statute's public access requirements to specific NAS committees.

In Animal Legal Defense Fund v. Shalala, three conservative members of the U.S. Court of Appeals for the D.C. Circuit -- Judges Laurence Silberman, Douglas Ginsburg, and David Sentelle, all of whom were appointed to the bench by Judges Reagan or Bush -- concluded that FACA's requirements are applicable to an extraordinarily influential NAS committee, which establishes binding federal policy regarding an extremely controversial subject, i.e., the conditions under which animals used in research should be kept.

For over four decades, committees of NAS have produced, for the federal government, the Guide for the Care and Use of Laboratory Animals (the "Guide"), which, as the title suggests, sets forth detailed advice and recommendations for the treatment of animals used in research. As explained by an NIH official during court proceedings, the Guide is widely regarded as the "most important single document used by Federal agencies with respect" to the care of research animals.

For example, HHS requires institutions who receive funding from NIH to use the Guide to develop and implement programs for activities involving animals. In fact, government regulations specifically define the "Guide" as the "1985 Edition" -- the version that preceded the one at issue -- "or succeeding revised editions," 48 C.F.R. § 380.202(e) (emphasis added), so that as soon as the Guide is revised, the updated version of the recommendations is automatically incorporated into federal regulatory policy without any independent agency review of its content. There is no separate notice and comment process in

which the public may participate before NAS's Guide becomes, in effect, binding federal law.

Even more sweepingly, an interagency committee consisting of representatives of all federal agencies that use animals in research -- known as the Interagency Research Animal Committee -- has expressly incorporated the Guide into government-wide "Principles for the Utilization and Care of Vertebrate Animals Used in Testing, Research and Training." In short, as characterized by NAS itself, the "[t]he Guide serves as the basis for policy on research animal care and use for all federal agencies," and is heavily relied on by "regulators in development of federal standards on research animal care and use." NAS, Organization and Members 227 (1994). Yet the public has had virtually no opportunity to observe the process by which NAS committees have produced the Guide, or to comment on the document before it set the rules on the conditions under which animals in research would be used.

The Guide was first published in 1963 and has been revised on several occasions over the past three decades. Each such revision has been undertaken with taxpayer money, has identified a federal agency as the sponsor of the report, and has been prepared by an advisory committee of experts empaneled for the government by a subdivision of NAS/NRC known as the Institute of Laboratory Animal Resources. However, contrary to NAS's claim of total "independence" in furnishing advice to the government, the production of the most recent version of the Guide reflects an extremely cozy, interdependent -- albeit largely secret and publicly unaccountable -- relationship between NAS and federal agencies.

In November 1991, NAS officials met with representatives of federal agencies which had previously relied on the Guide in establishing federal policy, including "past sponsors" -- i.e.,

NIH and the Public Health Service -- as well as the "Agriculture [Department] and others who look to the Guide for guidance in their animal care and use programs." At that meeting, NAS and federal officials discussed virtually every aspect of the Guide's production, including the composition of the committee that would create it, the kind of issues that would be addressed, the timing of its production, and how the federal government would fund it. The federal and NAS officials even discussed the "content" of the recommendations to be devised by the Committee and the "initial charge to the revision committee" regarding the specific issue of appropriate cage sizes for laboratory animals.

After NAS and the federal government agreed on all of these points, NAS submitted a "grant" application to NIH for federal funds to set up the committee. This mechanism was chosen so that NAS would not have to subject the proposal to competitive bidding and other cost control requirements that ordinarily apply to federal contracts. See 48 C.F.R. § 2501 et seq. The grant application sought more than $ 400,000 in federal funds.

One month after the grant was awarded, NAS asked fifteen individuals to become members of the "Committee to Revise the Guide for the Care and Use of Laboratory Animals," which, the prospective members were told, "serves as the basis for policy on research animal care and use for all federal agencies," and is used "by regulators in development of federal standards on research animal care and use." The majority of Committee members were scientists who use animals in their research, -- i.e., *they are individuals who must comply with the very federal standards they were being asked to develop.* To emphasize -- the task of writing federal standards for the treatment of animals in research was essentially turned over to the very individuals who have a vested interest in the substance and rigor of those regulations.

Despite this extraordinary delegation of a federal policy making role to self-interested individuals, members of the public were denied access to the meetings at which the Committee deliberated on, and devised, its recommendations for the care and use of animals in research -- meetings which, if the Committee were subject to FACA, would have been open to the public under section 10(a)(1) of the Act. The federal government and NAS also refused to provide respondents and other members of the public with transcripts or minutes of Committee meetings, or with other "record[s] prepared for or by" the Committee, as required by section 10(b) of FACA. Because of this refusal to afford even the most elementary public access, the Animal Legal Defense Fund and other groups brought suit in federal court in Washington.

As noted above, given these egregious facts, even a panel of conservative judges had little difficulty holding that this is exactly the kind of advisory relationship which FACA was designed to cover. In an opinion written by Judge Silberman, and joined in full by Judges Ginsburg and Sentelle, the Court ruled that "under Public Citizen, the Guide Committee must be regarded as utilized by HHS because it relies on the Committee's work product and because it was formed by the NAS, a quasi-public entity."

Judge Silberman first noted that the Committee is plainly covered by the ordinary meaning of the word "utilized," since "[i]t is quite obvious that the Committee was and is used by HHS." He further explained that, in Public Citizen," the Supreme Court "indicated quite explicitly in an extensive discussion . . . that advisory committees formed by the NAS were precisely the sort of advisory committees that would be covered by the Act." Id. In particular, he highlighted the language from Public Citizen that "NAS Committees were the 'paradigmatic example'" of "utilized" committees because the "NAS is a 'quasi-public organization in receipt of public funds.'" Judge Silberman

further noted that, if NAS committees are not covered by the statute, then it is difficult to imagine what kinds of committees would be "utilized" within the meaning of the statute and hence subject to the law's access and accountability requirements.

NAS subsequently sought Supreme Court review on the grounds that compliance with FACA -- a law expressly designed to make advisory committees *more* valuable to the government -- would somehow have the opposite effect on NAS's committees. However, the government itself -- through a brief filed by the U.S. Solicitor General -- opposed Supreme Court review. In response to NAS's alarmist rhetoric about FACA coverage, the government explained that some of FACA's provisions (such as those requiring balanced committee membership) might not even apply to NAS committees under current law, and that the "practical effects of the court of appeals' decision thus can be ascertained only as the Academy and federal agencies assess their operating procedures in light of that decision, and as the court of appeals is given the opportunity to clarify the scope and impacts of its ruling."

Also in direct contradiction to the Academy's plea for a special exemption from FACA, the government told the Supreme Court that "[w]e do not, however, concur in the Academy's assertion . . . that the presence of a government employee at most meetings must compromise the quality, independence, or objectivity of the Academy's work." Indeed, "[government scientists and other experts have frequently offered distinguished service to Academy committees, with none of the untoward consequences that the Academy predicts." To be sure, as the Solicitor General also pointed out, the Guide Committee "invited six federal officials to its first meeting."

The Supreme Court denied review on November 3 -- obviously not persuaded that it had misread Congress's intent in Public

Citizen, or that the wheels of government would come grinding to a halt if NAS's committee operations were exposed to greater public access. Having lost in the courts, NAS asks this Subcommittee to create a new wholesale exemption under which NAS committees like the Guide committee would be subject to none of FACA's safeguards. NAS has essentially proffered two justifications for their exemption -- first, that the courts were wrong in reading Congress's original intent and, second, that application of FACA would be devastating to NAS operations. On inspection, there is no concrete basis for either of those claims.

The Supreme Court and D.C. Circuit Were Right In Their Reading of Congress's Original Intent.

As the foregoing discussion makes clear, NAS's effort to paint the D.C. Circuit's ruling as an act of judicial activism by a renegade Court is absurd. In truth, NAS is seeking to overturn the Supreme Court's definitive construction of FACA in that Court's only ruling on the statute -- a ruling which carefully canvassed FACA's legislative history and found a wealth of evidence that Congress intended the phrase "or utilized" in FACA specifically to encompass NAS committees. Even a few excerpts from the Supreme Court's ruling should be sufficient to dispel any claim that the Court's references to NAS committees were incidental or accidental:

> -- "the [1970 House] Report's paradigmatic example of a committee "utilized" by an agency for purposes of Executive Order No. 11007 was an advisory committee established by a quasi-public organization in receipt of public funds, such as the National Academy of Sciences." 491 U.S. at 460 (emphasis added);
>
> -- "'The National Academy of Sciences was created by Congress as a semi-private organization for the explicit purpose of furnishing advice to the Government. This is done by the use of advisory committees.'" Id. at 460 n. 11 (quoting 1970 House Report) (emphasis added);

-- "the examples the Senate Report offers [including] . . . 'advisory councils to the National Institutes of Health and committees of the national academies where they are utilized and officially recognized as advisory to the President, to an agency, or to a Government official,' ibid. -- are limited to groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status." 491 U.S. at 461, quoting S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972) (emphasis added);

-- "The phrase 'or utilized' therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves." 491 U.S. at 462 (emphasis added);

-- "Read in this way, the term 'utilized' would meet the concerns of the authors of House Report No. 91-1731 that advisory committees covered by Executive Order No. 11007, because they were 'utilized by a department or agency in the same manner as a Government-formed advisory committee' -- such as the groups organized by the National Academy of Sciences and its affiliates which the Report discussed -- would be subject to FACA's requirements." Id. at 462-63 (emphasis added).

As these passages demonstrate, the Supreme Court defined "utilized" committees as those formed for the use of a federal agency "by some semiprivate entity the Federal Government helped bring into being." Id. at 463. Thus, the exemption for which NAS is advocating here would reverse the Supreme Court's analysis of the word "utilized" in FACA and replace it with nothing.

While this subcommittee, and Congress as a whole, can certainly debate the policy merits of subjecting NAS committees to FACA, it should not, I respectfully submit, reassess the *legal* questions definitively resolved by the Courts -- i.e. whether Congress *originally* intended to subject NAS committees to FACA coverage. Congressional intent in that regard has now been construed by the Supreme Court and three judges of the D.C.

Circuit, and NAS has offered no reason why their careful analysis of Congress's *original* intent should be second-guessed.

In fact, all of the legal arguments which NAS is now advancing to this Subcommittee were made in NAS's unsuccessful petition to the Supreme Court. The unavoidable fact is that Congress did not, in 1972, create an exemption for NAS committees, although it certainly knew about NAS and also knew how to create exemptions to FACA -- for example, it did expressly exempt such bodies as the Commission on Government Procurement, the Advisory Commission on Intergovernmental Relations, and committees to the CIA and FBI. Nevertheless, it in no way exempted NAS committees from the plain terms of the Act. As the Courts have recognized, under elementary rules of statutory construction, that fact alone is dispositive of Congress's intent. See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 109 (1980) ("If Congress had intended to exclude FOIA disclosures from § 6(b)(1) [of the Consumer Product Safety Act] it could easily have done so explicitly in this section as it did with respect to the other listed exceptions.").

Moreover, while suggesting that the Supreme Court's reading of FACA's legislative history was somehow in error, NAS cannot cite even one sentence regarding NAS in a House, Senate, or Conference report which Public Citizen did not address in its extensive discussion of FACA's background and purposes. Instead, NAS has relied on an isolated colloquy on the House floor which would be entitled to little, if any, weight as a matter of overall Congressional intent under any circumstances. See Bath Iron Workers v. Director, Office of Workers' Compensation Programs, 506 U.S. 153, 166 (1993) ("we give no weight to a single reference by a single Senator during floor debate").

In fact, as Judge Silberman noted, "this form of parliamentary dialogue is not the most reliable form of

legislative history" because most members of Congress have little, if any, idea as to the context of the colloquy, the extent to which it may depart from the actual language of the legislation they are voting on, or even precisely what is meant by the floor statements.

Moreover, the statement by Rep. Hollifield on which NAS has so heavily relied is an especially slender reed on which to hang a wholesale amendment to the statute. As the D.C. Circuit noted, the statement is "something of a non sequitur" and it certainly does not say, as NAS has misleadingly suggested, that NAS *committees* could avoid FACA's requirements -- an exemption which, as noted above, appears nowhere in the statute itself.

Rather, the most that this remark signifies is that one member of Congress did not believe that NAS *itself* would be subject to FACA. See 118 Cong. Rec. 31421 (1972). Crucially, however, Public Citizen did not say that NAS itself is an advisory committee that is subject to FACA whenever it enters into an arrangement with a federal agency.

Instead, the public-interest groups who have pursued litigation have relied on the far narrower proposition announced by the Supreme Court -- and not undercut by any legislative history cited by NAS -- that, when NAS forms an advisory committee "for" a federal agency *with taxpayer money*, that committee is "utilized" within the meaning of FACA. See 491 U.S. at 462.

Simply put, the federal courts, including the Supreme Court, have resoundingly rejected NAS's arguments regarding Congress's *original* intent, and the federal courts were right in doing so. NAS's desire for a special exemption from FACA coverage can be debated as a matter of policy, but it should not be granted on the basis of legal arguments which have been fully and correctly explored by federal courts, including the U.S. Supreme Court,

over the last ten years.

NAS's Fears of FACA Compliance Have Little Basis In The Law As Written.

In insisting that compliance with FACA will somehow destroy their ability to provide federal agencies with valuable advice, NAS has vastly overstated the meaning and difficulty of compliance with FACA's procedural requirements. Indeed, NAS and the federal agencies which rely on it have yet to attempt to comply with FACA's public access requirements -- requirements with which hundreds of other influential expert advisory committees manage to comply each year with little difficulty. See President's FACA Report at 1 (indicating that 948 advisory committees complied with FACA during fiscal year 1995).

Thus, while NAS has put forward much alarmist rhetoric about the evils that will occur if NAS were forced to open its deliberations, that stance is based almost entirely on self-serving surmise and supposition, not on any concrete effort to actually comply with FACA's elementary procedures. Moreover, the district court in the Animal Legal Defense Fund made a specific factual finding that NAS "would suffer minimal harm at most" if the Committee at issue were required to comply with FACA. In coming to that conclusion, U.S. District Judge Gladys Kessler observed that:

> Decision-making bodies, whether located in the public or private sector, invariably object to the presence of outsiders and complain about restrictions on open discussion and uninhibited statements of views. In practice those fears are rarely well founded. There is nothing in the record to suggest that confidential or proprietary information will be disclosed if plaintiffs attend . . . In short, the Court sees at most some minor logistical inconvenience to be suffered by the defendants, and here I am referring to perhaps making arrangements to ensure adequate seating.

Judge Kessler further found that the "public interest would

be furthered by the public's attendance at and observation of the committee's analysis and discussion and consideration of these very important issues," and, moreover, that "public scrutiny is particularly important and gives credibility and legitimacy to the ultimate conclusions which will be reached by the Guide Revision Committee." Especially in light of those findings, NAS should at least attempt to comply with FACA before it seeks a special exemption from all of FACA's safeguards. Indeed, contrary to NAS's stance that FACA compliance will impair the government's ability to obtain valuable advice, the President's recent report to Congress on FACA reaffirmed that Act's basic assumption that a modicum of public access and accountability makes governmental advisory bodies more, rather than less, valuable to federal agencies and the public. See President's FACA Report at 1.

In seeking its extraordinary exemption from the public accountability requirements with which other government advisory committees must comply, NAS has stressed the enormous influence that its committees have had on a myriad of issues of national importance. But, as recognized by the courts, this simply highlights the importance of ensuring that NAS committees comply with FACA's provisions for public access and accountability.

In the case of the Guide Committee, for example, federal agencies largely delegated to an NAS committee their authority under federal law to promulgate binding federal standards for the treatment of animals in laboratories throughout the nation. Yet, despite the Committee's vast influence on government policy -- and its expenditure of nearly $ 400,000 in public funds -- the public was denied the opportunity to see, through access to meetings and documents, how the committee arrived at these regulatory standards.

In short, this and other NAS committees surely are the

"paradigmatic" FACA arrangement, not only because the Supreme Court said so, but because they implicate the core purposes why Congress enacted FACA in the first place. Conversely, NAS's contention that applying FACA to NAS committees will impair the government's ability to obtain "independent" advice from NAS flies in the face of FACA itself, which, as noted above, demands that agencies not "inappropriately influence[]" advisory committees, and instead requires that any recommendations be the "result of the advisory committee's independent judgment." 5 U.S.C. App. II § 5(b)(3) (emphasis added). Plainly, if such bodies as the Advisory Committee on Human Radiation Experiments, the Defense Base Closure and Realignment Commission, and the Bipartisan Commission on Entitlement Reform could manage to provide valuable advice while complying with FACA's openness requirements, see President's FACA Report at 4, there is no reason why NAS committees could not do so as well.

Nor is there any substance to NAS's position that FACA compliance would compel NAS to relinquish control of its own committees to Government officials. As the Supreme Court made clear in Public Citizen, NAS may continue to form and manage committees "for" federal agencies, so long as they meet the minimum public access and accountability requirements with which thousands of other influential advisory committees have complied.

At an Absolute Minimum, Congress Should Preserve Rudimentary Public Access To NAS Committee Operations And Should Ensure That The Public Is Informed About Conflicts of Interest.

While NAS has not, to date, justified why any special exemption from FACA coverage is appropriate, if this Subcommittee entertains any such exemption, it should at least ensure that the minimum requirements of public access and accountability are preserved. Along with representatives of the Natural Resources

Defense Council and the Animal Legal Defense Fund -- the groups which were involved in the most recent litigation -- and in consultation with other public-interest groups, we have drafted a "compromise" provision which would allow NAS to avoid what it has described as the more cumbersome FACA procedures -- such as the requirement that federal employees attend each meeting.

On the other hand, except for the legitimate exemptions written into current law (such as for national security, personal privacy, trade secret material) and an additional exemption for discussion of as yet unpublished research data (which, we understand, NAS has suggested is a specific concern), meetings and documents pertaining to NAS committees which advise federal agencies at taxpayer expense would continue to be accessible to the public, as they should be. Our specific proposal is set forth as an Addendum to this testimony.

The bottom line rationale for this proposal is that since the public pays the bill when federal agencies obtain advice from NAS committees on a wide range of important issues that affect the public, then the public has a basic right to observe how their money is being spent and whether special interests are using the advisory process to advance their own ends. As the 1972 House Report confirmed, "[o]ne of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns," and their is a grave "danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). I respectfully submit that this concern is just as valid today as when this landmark open government legislation was enacted twenty-five years ago and that it overwhelmingly counsels against creation of

the gaping loophole in FACA coverage which NAS is seeking.

ADDENDUM: PROPOSED "COMPROMISE" AMENDMENT

(1) Committees formed by the National Academy of Sciences ("NAS") for the purpose, in whole or in part, of providing advice or recommendations to one or more federal agencies are not subject to the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), except that such committees shall comply with the provisions of section 10(a)(1), 10(a)(2), 10(a)(3), 10(b), 10(c), and 10(d) of FACA with the following modifications:

a. notice of meetings of such NAS committees shall either be published in the Federal Register, as required by section 10(a)(2) of FACA, or, in the alternative, NAS shall provide for other types of effective public notice to insure that interested persons are notified in a timely manner before such meetings, including but not limited to use of the Academy's web site, written, e-mail, or phone notification of persons requesting notice as to meetings of particular committees or categories of committees;

b. the determinations in section 10(d) may be made by the Chairman of NAS rather than the head of an agency, except with regard to any action based on national security grounds;

c. in addition to the ten specific grounds for closure of meetings or portions of meetings referenced in section 10(d), committees formed by NAS to furnish advice to federal agencies may close to the public any specific portions of meetings at which the committee will discuss drafts of articles, reports, or studies which have been submitted to peer-reviewed journals but have not yet been published or accepted for publication. Such studies also need not be available for public review pursuant to section 10(b).

2. With regard to each committee formed to furnish advice or recommendations to a federal agency, NAS shall, at the time of the committee's formation, provide a statement to the public identifying any actual or potential financial or other conflicts of interests of committee members, as well as an explanation as to how the committee is sufficiently balanced, as to function and viewpoint, to accomplish the particular advisory role assigned to

it. Before any such committee's first meeting, NAS shall afford interested members of the public an opportunity to apprise NAS as to actual or potential conflicts of which NAS may otherwise be unaware, as well as to suggest any functions or viewpoints which are not adequately represented on the committee.

3. Any interested member of the public may bring an action in federal court to enforce the foregoing provisions and the United States District Courts shall have jurisdiction to resolve such disputes.

Mr. HORN. Thank you. Very succinct statement.

Now our third witness is Valerie Stanley, the staff attorney for the Animal Legal Defense Fund.

Ms. Stanley.

Ms. STANLEY. I would like to tell you what I think will happen with the National Academy of Sciences and the Federal Government if some sunshine provisions are not preserved. My position basically is that the Supreme Court was correct in Public Citizen. They did a thorough, exhaustive analysis and review of the legislative history. We heard earlier there are some 400 committees advising the Federal Government. That in my viewpoint is not a reason for closing those committees, it is the reason for opening those committees. With such an extent of advice on every policy issue affecting the American public, the public has the right to be involved and know what's going on.

Our case that led to *Animal Legal Defense Fund* v. *Shalala,* involved a committee that was set up by the National Academy of Sciences to revise what is called "The Guide for the Caring Use of Laboratory Animals". That committee and its predecessors for 40 years had been writing the requirements the Government had for treating laboratory animals.

Every entity that gets Federal funding from NIH must comply with the guide. So the guide not only serves as the basis for policy on research animal care and use for all Federal agencies, but it is used by regulators in the development of Federal standards on research, animal care, and use. In other words, other agencies look to the guide and say this is put forth by a panel of the National Academy of Sciences, and we ought to look to it. Many times they will go no further than what that committee recommends.

The problem is that committee was about 12 people, and half of them were receiving funds—grants from NIH to advise NIH on the very subjects that they were put on the committee for. And in essence, they were writing the standards that were going to govern their conduct and subject them to NIH oversight, doing it in secret. None of their recommendations has ever been put out for notice and comment. So it's a small handful of the people who are very regulated—who are regulated by their own proposals, writing policy that then serves as a basis for the Government's regulation in this area.

One of the concerns we have—we found out later after we had brought the case—is that the National Academy of Sciences had communicated with the Federal agency that was sponsoring the committee. And they had communicated with—actually they communicated with USDA in 1993, before the committee even came up with its final recommendations. In essence, they were saying to the committee—they were saying to USDA, preserve the regulations that you have. They're consistent with the guide. This committee that's going to be meeting now is going to come up—is not going to recommend anything different, so don't you change anything. That letter is submitted as an exhibit to my testimony.

If we have committees meeting in secret like this, you're going to have those things running rampant. And in areas where the committees of the National Academy of Sciences are advising Fed-

eral agencies on what should be regulations, what should be policy. If you have it closed to the public, really it jeopardizes the public.

One other thing I'd like to respond to. Dr. Alberts talked about the fact that, if everything that the National Academy of Sciences has done is subject to the FACA, this will slow their processes down, and they will not be able to advise the Federal Government rapidly. And I submit that that would not be true.

We found out during discovery that the National Academy of Sciences has cooperative agreements with NIH, for example. I imagine they have them with other Federal agencies. These cooperative agreements are for the purpose of the Federal agencies receiving rapid—what they call "rapid online advice." They are not subject to—they don't have committees that advise the Federal Government on these issues. They're basically I guess where the Federal Government calls up NAS and ask them something about a technical question, they can get rapid online advice.

So even if FACA was still applying to the National Academy of Sciences, this would not in any way jeopardize the National Academy of Sciences' ability to provide the Federal Government with rapid online advice. Thank you.

[The prepared statement of Ms. Stanley follows:]

My name is Valerie Stanley and I am the staff attorney for the Animal Legal Defense Fund (ALDF). Thank you for the opportunity to address the subcommittee on why it is important to have committees of the National Academy of Sciences subject to the openness and other requirements of the Federal Advisory Committee Act ("FACA")

ALDF is a nationwide non-profit organization of lawyers, law professors, law students and paralegals who are dedicated to ensuring that the laws enacted for animals' protection and benefit are actually enforced in a manner that benefits the animals.

First, I would like to describe why the ALDF was concerned about the National Academy of Sciences' committee that was convened to make recommendations to NIH and other federal agencies concerning how animals used in experimentation should be treated. The Animal Legal Defense Fund has been extensively involved in all efforts to protect animals that are used in laboratory testing and experimentation. Towards that end, the Animal Legal Defense Fund has been monitoring the United States Department of Agriculture's (USDA's) enforcement of the Animal Welfare Act (AWA) and USDA efforts to implement regulations called for by the 1985 amendments to the Animal Welfare Act. Because the majority of funding for animal research comes from the National Institutes of Health (NIH) , ALDF has also been monitoring NIH's historic failure to cut off funding to institutions that ignore the very basic recommendations concerning veterinary care, provision of pain relief, appropriate euthanasia and other topics addressed in the Guide for the Care and Use of Laboratory Animals. --- an action NIH is required by law to take if noncompliance with guidelines is not corrected. Any entity receiving federal funds from the Public Health Service must send in an "assurance" to NIH once every five years that they will comply with the Guide. Public Health Service Policy on Humane Care and Use of Laboratory Animals Web Tutorial," Exhibit 1. Now this might not be so bad if the Guide had specific requirements on certain topics crucial to the lives of animals used in experimentation but the Guide contains no such specifics. Every topic addressed in the Guide is couched in terms of *recommendations* and recommendations alone which, of course, are not binding and unenforceable.

The process that led to the formation of the committee to revise the Guide was secret, the

deliberations of the committee were secret; there was not a single person on the committee who was not either involved in the use of animals in research or the recipient of grants from NIH on the very topics for which they were to provide NIH with recommendations. The secrecy involved in this process is egregious because the persons on this committee were essentially drafting the very regulations that they themselves and their institutions would be governed by. In essence, they each believed in the importance of the non-regulation of the very industry they were involved in. Thus, while the Preface to the Guide states that is it is "to assist institutions in caring for and using animals in ways judged to be scientifically, technically and humanely appropriate," Preface to the Guide, there was not a single person on the committee who represented the interests of the very beings to whom the Guide is focused. See Exhibit 2, Description of the Guide committee and committee members.

When I became aware in 1991 that the National Academy of Sciences was putting together a committee to revise the Guide for the Care and Use of Laboratory Animals, I wrote to NIH requesting they open the committee to the public, to have the documents that the committee relied on or reviewed open to the public, and I also requested NIH to balance the committee. The reasons for my doing so was a 1989 Supreme Court case Public Citizen v. Department of Justice in which the Supreme Court said that committees such as the National Academy of Sciences are subjected to the Federal Advisory Committee Act (FACA). NIH and NAS denied my request and the request of every other animal welfare group that asked to have either one of its members placed on the committee, or to be able to suggest other scientists with professional experience in animal welfare to be put on this committee. See Exhibit 3.

The Guide is critical because it serves not only as the bible for how animals are treated in laboratories governed by NIH funding, but other agencies look to the Guide in terms of coming up with their own regulations. For example, USDA has routinely referred to the Guide because it is under a statutory duty to come up with regulations and standards for the care of animals used in research. This is why it was absolutely essential that the process that resulted in such a critical document be fair and open.

The other critical fact about the Guide is that it is just that, a guide. It is not set any requirements for the handling or treatment of animals in laboratories. It does not prohibit

anything. It does not require anything. It is merely a set of recommendations but often USDA will not set any standards that go beyond what the Guide suggests.

The reason that NIH and NAS routinely give for why the Guide contains few "musts" but many "shoulds" on the various topics of animal care and use is that allowances must be made for "professional judgment" of the persons conducting the experiment or involved in caring for the animals. Another synonymous term for "professional judgment" that NIH, NAS and the Guide committee routinely use is "performance standards." In other words, NIH is committed to the use of what it calls "performance standards," and it states it is a cornerstone of its policy of ***"enforced self regulation,"*** Public Health Service Policy on Humane Care and Use of Laboratory Animals Web Tutorial," at 11, attached hereto as Exhibit 1. NIH and NAS state that "performance standards" are supposed to give the entities it funds flexibility in terms of providing care to animals. "Performance standards," in essence, however, are standardless, subjective and vague proscriptions that an entity can never violate. "Performance standards" give such flexibility that non-compliance is difficult to detect and even harder to remedy. But it is not only NIH that is committed to such deregulation by using "performance standards" in the area of animal use in experimentation. NAS is a full-fledged partner in this endeavor. In fact, in April 23, 1993, some eight months before the Guide revision committee had its first meeting where it took public comment, and long before it had come out with its recommendations, the President and President-elect of the National Academy of Sciences wrote to then USDA Secretary Espy urging him to keep his agency's regulations in the same "performance standards" format that the Department of Health and Human Services was committed to. They stated that they expected not only the Guide but two other NAS reports --- *none of which were yet in final form* --- to continue to maintain this self-regulatory direction. See Exhibit 4.

In summation, the Guide serves as wonderful window dressing for letting the public believe that animals are protected in research laboratories. However, nothing could be farther from the truth. See Exhibit 5, "Deficiencies in the NIH's Guidelines for the Care and Protection of Laboratory Animals." This is why ALDF deemed it absolutely critical that the public be able to be present during the deliberations of this committee that came up with the Guide. The whole story surrounding the formation of this committee and its deliberations, and its effect on the very

beings whose quality of life it depends on, highlights and underscores why committees of the National Academy of Sciences should be open to the public.

One wonders how an investigating or enforcement agency would ever find a research facility using animals to be in violation of the Guide when all the Guide contains is a recommendation. The answer is, one can either almost never be in violation of the Guide or NIH will not usually find anyone in violation of the Guide. Entities subject to the Guide and receiving federal grants from NIH must send an assurance to NIH every five years that they will follow the Guide. This is tantamount to sending in a letter to the state police every five years stating that you will not drive over 55 m.p.h. on any highway. Indeed, NIH states publicly that it considers its relationships with those who receive their grants to be one of trust. In other words, NIH monitors how regulated entities say they are complying with recommendations. Such a regulatory scheme would be considered comical if it were not tragic for laboratory animals.

The truth is that NIH has, in its entire history of resorting to the Guide, only on a handful of occasions ever revoked federal funding for not being in compliance with the Guide. First of all, when there is an allegation made that a regulated entity is not in compliance with the Guide, NIH's response is to let the offending agency conduct its own investigation of whether it violated recommendations in the Guide. NIH then takes into account the internal investigation conducted by the alleged violator and essentially , for the most part, will close the investigation once it hears from the offender.

Therefore, what the Animal Legal Defense Fund, the Association of Veterinarians for Animal Rights, and the Psychologists for the Ethical Treatment of Animals wanted, at the very basic, was to have access to how these "recommendations" come to the federal agency. Interestingly enough, the committee that makes these recommendations that form the basis of "enforced self regulation" that almost never cause the agency any action against the violator was made up primarily of persons who would be subject to their own recommendations. At least six members of the committee were currently, had in the past, or were currently receiving funds from NIH to advise NIH on the very topics that they were put on the committee for. All of the people on the committee were well known to NIH and were well known to the National Academy of Sciences. NIH is governed by the determination that the very researchers its funds do not need to

have any oversight, they determine that they need to be free, that includes using the ability to use animals in almost any way and never be held accountable for it. We wanted access to this committee to see how this committee was carrying out what we knew was the will of NIH. NIH met with the committee before the committee began its deliberations and said, "you will be under a lot of pressure to increase cage sizes. Please consider carefully whether you will do this or not." Interestingly enough, cage sizes, which is one of the most important aspects of an animal in a laboratory's existence, NIH is still using the cage sizes that were put into place by in 1965 for animals. And then, those recommendations from the committee that published the 1965 Guide, were only based on what the members that committee said were currently being used.

When NAS tells Congress and others that it is independent from the government, that it wants to maintain its independence from the government, in our case that has proved not to be correct. In discovery that we took in our case against NIH, the National Academy of Sciences disclosed that it was in such alliance with the government that it knows the government's needs before the government knows it has those needs. The Supreme Court has closely examined FACA and it has determined that NAS committees were the right hand of government, if you will. For that reason, NAS committees should be open to the public and should be accountable to the public as well.

PUBLIC HEALTH SERVICE POLICY ON HUMANE CARE AND USE OF LABORATORY ANIMALS WEB TUTORIAL

A tutorial for new animal care and use committee members, institutional administrators, investigators, animal care personnel, veterinarians, or others who are interested in learning about the PHS Policy on Humane Care and Use of Laboratory Animals.

SECTION ONE - INTRODUCTION

- Health Research Extension Act of 1985
- Office for Protection from Research Risks
- Applicability of the PHS Policy

SECTION TWO - RELEVANT DOCUMENTS

- *Guide for the Care and Use of Laboratory Animals*
- United States Government Principles for the Utilization and Care of Vertebrate Animals
- Animal Welfare Regulations
- Report of the AVMA Panel on Euthanasia

SECTION THREE - TERMS AND CONCEPTS

- Program of Animal Care and Use
- Institutional Official
- Animal Welfare Assurance
- Enforced Self-Regulation

SECTION FOUR - PROGRAM OF ANIMAL CARE AND USE

- The Institutional Animal Care and Use Committee
- IACUC Procedures
- Veterinary Care
- Personnel Qualifications and Training
- Occupational Health and Safety
- Animal Facilities and Husbandry

SECTION FIVE - THE INSTITUTIONAL ANIMAL CARE AND USE COMMITTEE

- Membership
- Semiannual Program Reviews and Facility Inspections
- Protocol Review
- Addressing Animal Welfare Concerns
- Suspension of Animal Activities

SECTION SIX - REPORTING AND RECORD KEEPING

- Annual Reports to OPRR
- Reporting Noncompliance, *Guide* Deviations, and Suspensions
- Where to Send Reports and Assurances
- Maintaining IACUC Records

SECTION SEVEN - ACRONYM GLOSSARY AND ADDITIONAL RESOURCES

Comments and suggestions about this tutorial are welcome and should be sent to:oprr@od6100m1.od.nih.gov

Note: Some of the links in this tutorial are to documents that reside on servers outside the NIH. The NIH is not responsible for the accuracy or content of documents that do not reside on NIH servers.

SECTION ONE - INTRODUCTION

Health Research Extension Act of 1985
Office for Protection from Research Risks
Applicability of the PHS Policy

Health Research Extension Act of 1985

The Health Research Extension Act of 1985 (Public Law 99-158) provides the legislative mandate for the PHS Policy. It directs the Secretary of Health and Human Services to establish guidelines for the proper care and treatment of animals used in research, and for the organization and operation of animal care committees. The law requires that the guidelines address appropriate use of tranquilizers, analgesics, anesthetics, paralytics, and euthanasia, and appropriate pre-surgical and post-surgical veterinary medical and nursing care for animals. The requirements for reporting minority views of animal care committee members, for Animal Welfare Assurances, and for instruction or training in methods that limit the use of animals or limit animal distress, are all embodied in this Act. The PHS Policy implements the Health Research Extension Act of 1985.

Office for Protection from Research Risks

The OPRR, or Office for Protection from Research Risks, implements the PHS Policy. While OPRR is located organizationally at the National Institutes of Health in Bethesda, Maryland, OPRR's responsibility for laboratory animal welfare extends beyond NIH to all PHS supported activities involving animals.

Specific OPRR responsibilities include:

- implementation of the PHS Policy;
- interpretation of the PHS Policy;
- negotiation of Animal Welfare Assurances;
- evaluation of compliance with the PHS Policy; and
- education of institutions and investigators receiving PHS support.

From time to time OPRR issues policy guidance, interpretation, or general notices through "Dear Colleague" letters, also known as OPRR Reports. These letters are mailed to Assured institutions, and also posted on the OPRR home

page under Document Library - Laboratory Animal Welfare.

OPRR staff periodically author articles that address or interpret specific provisions of the PHS Policy, or answer commonly asked questions. The published articles, and an Index to the articles, are also posted on the OPRR home page under Document Library - Laboratory Animal Welfare.

Another educational OPRR activity is the cosponsorship of animal welfare workshops that are held in different locations across the country each year. Information about upcoming workshops may be found on the OPRR home page under Schedules of OPRR Workshops.

Applicability of the PHS Policy

The PHS Policy applies to the use of live, vertebrate animals in any activity supported or conducted by the Public Health Service (PHS). PHS agencies include:

- Agency for Health Care Policy Research;
- Agency for Toxic Substances and Disease Registry;
- Centers for Disease Control and Prevention;
- Food and Drug Administration;
- Health Resources and Services Administration;
- Indian Health Service;
- National Institutes of Health; and
- Substance Abuse and Mental Health Services Administration.

SECTION TWO - RELEVANT DOCUMENTS

Guide for the Care and Use of Laboratory Animals
United States Government Principles for the Utilization and Care of Vertebrate Animals
Animal Welfare Regulations
Report of the AVMA Panel on Euthanasia

Compliance with the PHS Policy requires familiarity with each of these documents. This section describes each one and its relevance to the PHS Policy.

Guide for the Care and Use of Laboratory Animals

The *Guide for the Care and Use of Laboratory Animals* is a widely accepted primary reference on animal care and use. The seventh and latest edition of the *Guide*, published in 1996, was written under the auspices of the Institute of Laboratory Animal Resources of the National Academy of Sciences.

The 1996 *Guide* demonstrates a shift toward performance standards which emphasize outcomes, as opposed to engineering standards which are prescriptive and may not allow sufficient flexibility or professional judgment to deal with unique circumstances. Recommendations in the *Guide* are based on published data, scientific principles, expert opinion, and experience with methods and practices that are consistent with high-quality, humane animal care and use. Extensive references found at the end of each chapter are key features of the *Guide*.

The *Guide* is intended to assist institutions in caring for and using animals in ways judged to be scientifically, technically, and humanely appropriate. Included in the *Guide* are descriptions of institutional responsibilities and professional standards. Institutional responsibilities include monitoring animal care and use, provisions for veterinary care, training for personnel, and the establishment of an appropriate occupational health and safety program. Professional standards encompass the animal environment, animal husbandry and management, veterinary care, and design and construction of animal facilities.

Familiarity with the standards and recommendations of the *Guide* is important because the PHS Policy mandates that institutions use the *Guide* as a basis for developing and implementing an animal care and use program.

United States Government Principles for the Utilization and Care of Vertebrate Animals Used In Testing, Research, and Training

The PHS Policy implements nine U.S. Government Principles that are the foundation for humane care and use of laboratory animals in this country. These principles were developed by the Interagency Research Animal Committee and adopted in 1985 by the White House Office of Science and Technology Policy. The principles are:

I. The transportation, care, and use of animals should be in accordance with the

Animal Welfare Act (7 U.S.C. 2131 et. seq.) and other applicable Federal laws, guidelines, and policies.*

II. Procedures involving animals should be designed and performed with due consideration of their relevance to human or animal health, the advancement of knowledge, or the good of society.

III. The animals selected for a procedure should be of an appropriate species and quality and the minimum number required to obtain valid results. Methods such as mathematical models, computer simulation, and in vitro biological systems should be considered.

IV. Proper use of animals, including the avoidance or minimization of discomfort, distress, and pain when consistent with sound scientific practices, is imperative. Unless the contrary is established, investigators should consider that procedures that cause pain or distress in human beings may cause pain or distress in other animals.

V. Procedures with animals that may cause more than momentary or slight pain or distress should be performed with appropriate sedation, analgesia, or anesthesia. Surgical or other painful procedures should not be performed on unanesthetized animals paralyzed by chemical agents.

VI. Animals that would otherwise suffer severe or chronic pain or distress that cannot be relieved should be painlessly killed at the end of the procedure or, if appropriate, during the procedure.

VII. The living conditions of animals should be appropriate for their species and contribute to their health and comfort. Normally, the housing, feeding, and care of all animals used for biomedical purposes must be directed by a veterinarian or other scientist trained and experienced in the proper care, handling, and use of the species being maintained or studied. In any case, veterinary care shall be provided as indicated.

VIII. Investigators and other personnel shall be appropriately qualified and experienced for conducting procedures on living animals. Adequate arrangements shall be made for their in-service training, including the proper and humane care and use of laboratory animals.

IX. Where exceptions are required in relation to the provisions of these Principles, the decisions should not rest with the investigators directly concerned but should be made, with due regard to Principle II, by an appropriate review group such as

an institutional animal care and use committee. Such exceptions should not be made solely for the purposes of teaching or demonstration.

*For guidance throughout these Principles, the reader is referred to the *Guide for the Care and Use of Laboratory Animals* prepared by the Institute of Laboratory Animal Resources, National Academy of Sciences.

Animal Welfare Regulations

The Animal Welfare Act (AWA), initially enacted in 1966 and amended in 1970, 1976, 1985, and 1990, is the principal Federal statute governing the sale, handling, transport and use of animals. The United States Department of Agriculture (USDA), Animal and Plant Inspection Service (APHIS)/Animal Care (AC) implements the AWA through the Animal Welfare Regulations found in the Code of Federal Regulations, Title 9, Chapter 1, Subchapter A, Parts 1, 2, and 3.

The AWA applies to all species of warm blooded vertebrate animals used for research, testing, or teaching, except farm animals used for agricultural research. The Animal Welfare Regulations that implement the AWA currently also exempt birds, rats of the genus *Rattus*, and mice of the genus *Mus*.

The 1985 amendments to the AWA (Public Law 99-198, the Improved Standards for Laboratory Animals Act) were considered a watershed for laboratory animal welfare because for the first time the AWA addressed humane care, minimization of pain and distress, consideration of alternatives, institutional animal care and use committees, psychological well-being of primates, and exercise for dogs.

Compliance with the Animal Welfare Regulations, as applicable, is an absolute requirement of the PHS Policy.

Through a formal Memorandum of Understanding, USDA, FDA and OPRR cooperate with one another to facilitate implementation of, and foster institutional compliance with, the Animal Welfare Regulations and the PHS Policy.

Report of the AVMA Panel on Euthanasia

The PHS Policy requires that euthanasia be conducted in a manner that is consistent with the professional guidance for relieving pain and suffering of animals found in the Report of the American Veterinary Medical Association

(AVMA) Panel on Euthanasia (Report). This Report is updated from time to time; the most recent version was published in 1993.

The Report discusses only methods and agents supported by data from scientific studies. It emphasizes professional judgment, technical proficiency, and humane handling of the animals. Deviations from the Report are permitted by the PHS Policy only if the IACUC determines that they are justified for scientific reasons.

SECTION THREE - TERMS AND CONCEPTS

Program of Animal Care and Use
Institutional Official
Animal Welfare Assurance
Enforced Self-Regulation

Program of Animal Care and Use

The PHS Policy not only addresses the humane use of animals, but the entire institutional *program of animal care and use.* There are many components to a program and, although no two institutional programs are identical, all programs are expected to include:

- designation of an Institutional Official;
- appointment of an Institutional Animal Care and Use Committee (IACUC);
- administrative support for the IACUC;
- standard IACUC procedures;
- arrangements for a veterinarian with authority and responsibility for animals;
- adequate veterinary care;
- formal or on-the-job training for personnel that care for or use animals;
- an occupational health and safety program for those who have animal contact;
- maintenance of animal facilities; and
- provisions for animal care.

Section Four describes in detail each component of a program of animal care and use.

Institutional Official

The *Institutional Official* is a formally designated senior official with the authority to administer the program of animal care and use, and to make commitments on behalf of the institution to ensure compliance with the PHS Policy.

The Institutional Official relies on the IACUC to oversee the program, to develop plans to correct program deficiencies, to address concerns that may arise regarding the institution's use of animals, and to make recommendations with regard to the program. Through semiannual reports to the Institutional Official and open channels of communication, the IACUC keeps the Institutional Official informed of the status of the program and alerts the Official to potential noncompliance with the PHS Policy.

Documents submitted to OPRR, such as an Animal Welfare Assurance, annual report, or reports of noncompliance, are submitted by the IACUC, through the Institutional Official, and should bear his or her signature as the official responsible for animal welfare at the institution.

Animal Welfare Assurance

Before the PHS may award a grant or contract that involves the use of animals, the recipient institution and all performance sites involving or using animals must have on file with OPRR an approved Animal Welfare Assurance.

The Assurance is the cornerstone of a trust relationship between the institution and the PHS. Included in the Assurance are:

- a commitment that the institution will comply with the PHS Policy, with the *Guide for the Care and Use of Laboratory Animals*, and with the AWA and the Animal Welfare Regulations;
- a description of the institution's program for animal care and use; and
- the designation of the Institutional Official responsible for compliance.

Sample Assurances are available to aid institutions in developing an Assurance in accord with the PHS Policy. Assurances should only be submitted to OPRR upon receipt of a request from OPRR.

Enforced Self-Regulation

The PHS Policy is based on a concept of *enforced self-regulation*. Once an institution has prepared an Animal Welfare Assurance and the Assurance has been approved by OPRR, the institution is in a position to regulate itself. This concept is described as *enforced self-regulation* because if the institution fails to self-regulate, the approval of the Assurance may be restricted or withdrawn by OPRR.

The concept of enforced self-regulation encompasses:

- institutional commitment through an Assurance;
- the designation of an Institutional Official authorized to assume the obligations imposed by the PHS Policy;
- regular monitoring of the program for animal care and use by an Institutional Animal Care and Use Committee (IACUC);
- IACUC review of research protocols;
- institutional identification and correction of deficiencies;
- institutional reporting to OPRR;
- performance standards wherever possible; and
- use of professional judgment.

SECTION FOUR - PROGRAM OF ANIMAL CARE AND USE

The Institutional Animal Care and Use Committee
IACUC Procedures
Veterinary Care
Personnel Qualifications and Training
Occupational Health and Safety
Animal Facilities and Husbandry

A program of animal care and use includes multiple components that work synergistically to support activities involving laboratory animals. This section includes descriptions of each of the six different components that collectively constitute a program of animal care and use.

ORGANIZATION AND MEMBERS 1994

National Academy of Sciences
National Academy of Engineering
Institute of Medicine
National Research Council

Washington, D.C.

13/5B Committee on Well-being of Nonhuman Primates*

Organized: 1992

The task of the committee originates from legislation, passed by Congress as an amendment to the Animal Welfare Act (P.L. 99-198, the Food Security Act of 1985). The committee will conduct an 18-month study and prepare a report with the following objectives: (a) evaluate the environmental variables that are most influential in affecting the well-being of nonhuman primates; (b) evaluate behavioral and psychological measures which are objective indices of the effects of these environmental variables; (c) produce recommendations and procedures for use by institutions in developing plans consistent with federal law; and (d) suggest priorities for future research.

Chairman, IRWIN S. BERNSTEIN, University of Georgia

Christian R. Abee	Gisela Epple	Duane M. Rumbaugh
Kathryn A. L. Bayne	Dorothy Fragaszy	Paul W. Schilling
Thomas M. Butler	William A. Mason	Elwyn L. Simons
Judy L. Cameron	Klaus A. Miczek	Charles T. Snowdon
Christopher L. Coe	Melinda A. Novak	
W. Richard Dukelow	Martin L. Reite	

Staff Officer: Thomas L. Wolfle

*Terms end September 30, 1994.

13/5C Committee on Rodents*

Organized: 1992

The committee's task is to revise and combine 2 ILAR documents, "Laboratory Animal Management: Rodents (1977)" and "Long-Term Holding of Laboratory Rodents (1976)," into a report entitled "Laboratory Animal Management: Rodents." The committee's report will supplement and complement the "Guide for the Care and Use of Laboratory Animals" by providing greater detail on rodents. Included in the report will be current information on housing, environmental control, nutrition, sanitation, identification and records, veterinary care, disease prevention, and euthanasia. New sections will be added on microenvironment, use of hazardous agents, design and construction of facilities, recognition and alleviation of pain and distress, and ethical considerations.

Chairman, BONNIE J. MILLS, Baxter Healthcare Corporation

Anton M. Allen	Frank Lilly	William J. White
Lauretta W. Gerrity	George M. Martin	Norman S. Wolf
Joseph J. Knapka	Gwendolyn Y. McCormick	
Arthur A. Like	Larry E. Mobraaten	

Staff Officer: Dorothy D. Greenhouse

*Terms end August 31, 1994.

3/5D Committee on Occupational Safety and Health in Research Animal Facilities*

Organized: 1993

The committee will develop guidelines for establishment of occupational safety and health programs for employees in institutions with research animals. Issues to be addressed include immunization schedules for employees working in diverse environments; considerations of environmental hazards found in laboratory animal facilities; chemicals, air, accidents, and safe working practices, with suggestions for assessing hazards and minimizing risks; the storage of blood samples taken from employees; informing employees about potential industrial, environmental, and biological hazards; precautions and considerations of simian

B-virus, hepatitis, tuberculosis, Q-fever, and others; and human health considerations of experimentally induced biohazards, such as transgenic mice carrying the human AIDS virus.

Chairman, W. EMMETT BARKLEY, Howard Hughes Medical Institute

Rebecca Bascom	Janet C. Gonder	James H. Stewart
Robert K. Bush	Andrew Wallace Hayes	Wayne R. Thomann
Diane O. Fleming	Julia K. Hilliard	
Peter J. Gerone	Christian E. Newcomer	

Staff Officer: Thomas L. Wolfle

*Terms end September 29, 1994.

13/5E Committee to Revise the Guide for the Care and Use of Laboratory Animals*

Organized: 1993

The committee will revise the Guide for the Care and Use of Laboratory Animals as the 7th Edition. The Guide serves as the basis for policy on research animal care and use for all federal agencies, their grantees, and public and private biomedical research organizations. Over 300,000 copies have been distributed since first published in 1963. It establishes the tone and identifies the programmatic areas of importance for a strong research animal program used by grantees in assuring compliance with the Public Health Service Policy on Humane Care and Use of Laboratory Animals, by the American Association for Accreditation of Laboratory Animal Care, and by regulators in development of federal standards on research animal care and use.

Chairman, J. DERRELL CLARK, University of Georgia

Ranso-n L. Baldwin	Judith K. Gwathmey	Jo Ann D. Steggerda
Kathryn A. L. Bayne	Michale E. Keeling	John G. Vandenbergh
Marilyn J. Brown	Dennis F. Kohn	William J. White
Gerald F. Gebhart	J. Wesley Robb	Sarah Williams-Blangero
Janet C. Gonder	Orville A. Smith	

Staff Officer: Thomas L. Wolfle

*Terms end August 31, 1995.

13/6 U.S. National Committee of the International Union of Biological Sciences

Organized: 1925

The USNC/IUBS organizes the U.S. biological community in its participation in the International Union of Biological Sciences, particularly in its triennial general assemblies and scientific programs. The current interests of the committee are the IUBS programs on Biodiversity, and Reproductive Biology of Aquaculture.

Chairman, MARVALEE H. WAKE ('94), University of California at Berkeley
Vice Chairman, G. CARLETON RAY ('94)

Michael J. Balick ('99)	Dorothy J. Feir ('94)	Jean H. Langenheim ('94)
Roger N. Beachy ('97)	J. Frederick Grassle ('97)	Michael A. Little ('94)
Barry Chernoff ('99)	Gary H. Heichel ('98)	Martin P. Schreibman ('94)
Julie Sloan Denslow ('98)	George B. Johnson ('94)	Boyd R. Strain ('94)

Member-at-large: Barbara A. Block ('99)

Ex officio members: Thomas D. Pollard, Otto T. Solbrig, Donald E. Stone, James B. Wyngaarden

Staff Officer: Roberta A. Schoen

NATIONAL RESEARCH COUNCIL
COMMISSION ON LIFE SCIENCES
2101 Constitution Avenue Washington, D.C. 20418

INSTITUTE OF LABORATORY ANIMAL RESOURCES

Telephone: (202) 334-2590
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COMMITTEE TO REVISE THE *GUIDE FOR THE CARE AND USE OF LABORATORY ANIMALS*

J. Derrell Clark, D.V.M., D.Sc.
(*Chairman*)
Animal Resources
College of Veterinary Medicine
University of Georgia

Ransom L. Baldwin, Ph.D.
Department of Animal Science
University of California

Kathryn Bayne, M.S., Ph.D., D.V.M.
National Institutes of Health

Marilyn Brown, D.V.M.
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College of Medicine
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Comparative Medicine
Baxter Healthcare Corporation

Judith K. Gwathmey, V.M.D., Ph.D.
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College of Physicians & Surgeons
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ANIMAL LEGAL DEFENSE FUND

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December 7, 1993

Dr. Thomas L. Wolfle
Executive Director
Institute for Laboratory Animal Resources
National Research Council
National Academy of Sciences
2101 Constitution Avenue, N.W.
Washington, D.C. 20418

Dear Dr. Wolfle:

The Animal Legal Defense Fund (ALDF) appreciated the opportunity to address suggested revisions to the Guide for the Care and Use of Laboratory Animals last week.

A number of speakers suggested that it would be appropriate to appoint several representatives of animal protection organizations to the Committee that has begun revising the Guide. To that end, ALDF wishes to recommend the individuals on the attached list. The persons on this list possess extensive knowledge regarding the care and use of animals in laboratories and would make valuable contributions to the Committee's deliberations, writing and revising efforts.

Very truly yours,

Valerie J. Stanley
Valerie J. Stanley

Attachment

LIST OF PERSONS PROPOSED FOR MEMBERSHIP ON THE ILAR COMMITTEE TO REVISE THE GUIDE FOR THE CARE AND USE OF LABORATORY ANIMALS

Michael Fox, D.V.M.
Vice President, Farm Animals
The Humane Society of the United States
2100 L Street, N.W.
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(202) 452-1100

F. Barbara Orlans, Ph.D.
Kennedy Institute of Bioethics
Georgetown University
Washington, D.C. 20057
(202) 687-8099

Professor Bernard Rollin
Philosophy Dept.
Colorado State Univesity
Ft. Collins, CO 80523
(303) 491-6315

Kenneth Shapiro, Ph.D.
Executive Director
Psychologists for the Ethical Treatment of Animals
P.O. Box 1297
Washington Grove, MD 20880
(301) 963-4751

Martin Stephens, Ph.D.
Vice President, Laboratory Animals
The Humane Society of the United States
2100 L Street, N.W.
Washington, D.C. 20037
(202) 452-1100

Christine Stevens
President
The Animal Welfare Institute
P.O. Box 3650
Washington, D.C. 20007
(202) 337-2332

Stephen Zawistowski, Ph.D.
Vice President, Education and Science
American Society for Protection from Cruelty to Animals
424 East 92nd Street
New York, NY 10128
(212) 876-7700

NATIONAL ACADEMY OF SCIENCES

2101 CONSTITUTION AVENUE, NW WASHINGTON, D. C. 20418

OFFICE OF THE PRESIDENT

April 23, 1993

The Honorable Mike Espy
Secretary of Agriculture
United States Department of Agriculture
Administration Building, Room 200A
14th Street and Independence Avenue, SW
Washington, D.C. 20250

Dear Mr. Secretary,

We write to call your attention to the possible adverse effects of the ruling of U.S. District Judge Charles S. Richey on February 25, 1993 that sets aside the regulations promulgated by the Department of Agriculture (USDA) under the Improved Standards for Laboratory Animals Act. For over forty years the National Research Council's Institute of Laboratory Animal Resources (ILAR) has evolved guidelines that provide rational guidance to federal agencies and investigators in regard to the humane care nd use of research animals. ILAR's best known report, the Guide or the Care and Use of Laboratory Animals (Guide), and numerous other Laboratory Animal Management documents, serve as the basis for compliance with the Public Health Service's Policy on Humane Care and Use of Laboratory Animals and as a basis for accreditation by the American Association for Accreditation of Laboratory Animal Care.

In developing the current Animal Welfare Regulations subsequent to the 1985 Amendment to the Animal Welfare Act, the USDA made a carefully considered change from highly prescriptive engineering standards for the construction of housing for research animals to more flexible performance standards developed over many years through scientific inquiry and broadly accepted by professionals in the field.

Although there has been limited scientific study of the effects of space, exercise, environment, and enrichment on the physical, psychological, social and mental well-being of animals, three broad generalizations have strongly emerged: (1) it is not clear how to define or measure animal well-being, (2) the determination of well-being depends on human (professional) judgement, and (3) there are significant differences in the needs of different species and between individuals in a species.

Because no single standard can provide the same quality of are for each animal, the most important objective for those responsible for caring for animals should be to achieve an overall high level of care and well-being as judged by observing

the animals, rather than conforming rigidly to specific standards without consideration of their effects on the animals. Simply increasing required cage space may benefit some dogs, but harm others. For example, for dogs somewhat fearful of people, a larger cage can enhance their fear and become a major stressor and variable in the research in which they are used. As is the case with dogs, individuals within each of the over forty primate species have different needs.

The USDA collaborated with the Department of Health and Human Services during the writing of the Regulations, and ILAR's guidelines provided much of the rationale for the existing standards. The Guide is in the process of revision, a new edition of Laboratory Animal Management: Dogs is soon to be released, development of a report on Psychological Well-being of Nonhuman Primates is underway, and revision of Laboratory Animal Management: Nonhuman Primates is in preparation. It is expected that each of these documents will continue to base its recommendations on the best science and experiences of veterinarians and behavioral scientists and will differ philosophically and pragmatically from an engineering approach to animal welfare.

We encourage you to do everything possible to retain the current standards. They are based on the best available, empirical scientific data and professional knowledge. Having been in place for two years, your Department's regulations have been widely accepted by those subject to their provisions and most importantly have proven to be enforceable and effective in enhancing the welfare of laboratory animals.

The economic burden of changing the regulations is not trivial. As assessed by the Department and published in the Federal Register on March 15, 1989, implementation of the proposed engineering standards was estimated to cost $1.75 billion dollars.

It is our opinion that standards for animal management that are not based on science and professional judgement will deter scientific inquiry and lead to an erosion of the advances made in animal welfare in this country. If the National Academy of Sciences can be of assistance in any way, please call upon us.

Sincerely,

Bruce Alberts
Bruce M. Alberts
President-elect

Frank Press
Frank Press
President

Mr. HORN. Well, we thank you. That's an interesting perspective.

Next is R. Scott Fosler, the president of the National Academy of Public Administration, who's accompanied by Peter Szanton, chairman of the Board of Trustees of the National Academy of Public Administration, and Dwight Ink, former Acting Administrator for the General Services Administration.

I'm informed that 50 years ago, next April, Dwight Ink first testified before Congress, and I know you were about 10 then, weren't you?

I tried to testify, my friend, when I was 17, and Senator Saltenstall patted me on the head, and said, "Well, maybe you'd want to wait a little more." Well, here I am in Congress; the only way I ever get to testify.

Mr. INK. I didn't say my testimony was impressive, but I did testify.

Mr. HORN. Yes. Mr. Fosler.

Mr. FOSLER. Thank you very much, Mr. Chairman, and let me say that we very much appreciate the invitation to testify before you today.

Let me stress that the National Academy of Public Administration supports the general principles of FACA and other sunshine legislation. Our reports and the names of panel members and staff who've produced them are all made public. We require the disclosure of conflicts of interest of panel members, and we generally support this as a way of achieving more effective government.

However, it's clear to us that FACA was not intended to apply to the National Academy of Public Administration. To do so would undermine the independence of our reports, reduce our ability to elicit candid comments from people in the agencies we're striving to help, add an enormous burden of red tape, and drastically reduce our capacity to draw upon the experience and the wisdom of the best people in our field. In other words, we do not believe we could fulfill the mission Congress gave us in our charter should we be required to comply with all aspects of FACA.

When it was granting NAPA's charter in the early 1980's, Congress had to be persuaded that we would eventually not become a typical government advisory committee, so it would be ironic if now Congress through incorporating us in the FACA legislation, were to require us to start down the road toward an agency advisory committee, which we originally pledged that we would not become.

We appreciate the efforts of the chairman, members of this committee, and the staff, to avoid the negative consequences of some of these proposed changes to FACA. I know that there are several versions of the bill now under consideration, which in different ways will clearly exempt our organization from full compliance with FACA, but which entail various other public disclosure requirements. None of these proposals I should note result from any problem with the functioning of this academy, and no one has raised any such problem.

We continue to believe that the best legislative change to FACA would be to specifically exempt NAPA from coverage, and we believe that this exemption would be fully consistent with congressional intent when the act was enacted in 1972. Short of simply ex-

cluding us from FACA, it is difficult to completely avoid negative consequences of the amending legislation.

Our major concern is the unintended consequences of requirements which will impede our capacity to provide meaningful assistance to agencies and to congressional committees who request our services. For example, limiting the option for closed meetings to those with deliberations concerning the final report would substantially impair our ability to get candid testimony and ensure confidentiality.

In the work that we do on the organization and management of government, fact-finding is not just a matter of assembling so-called hard data, it's extremely qualitative. It also involves interviewing public employees and others, who may not agree with their supervisor's so-called party line on what is troubling an agency. If we cannot guarantee confidentiality, it is unlikely that we can penetrate that veil, and get to the real facts that we need to deliberate and to reach sound conclusions.

The quality of the academy's assistance to agencies and to Congress could be undermined by other provisions as well, such as those concerning the categorizing, making, posting, and storing of panel minutes, and all related correspondence and communiques with predetermined time periods. We're concerned about the administrative and cost burden that this would impose on us and the agencies, but we're particularly concerned that such provisions not impair our ability to guarantee actual confidentiality and the confidentiality of people in agencies, including public employees, to be able to speak candidly on what the concerns are.

Mr. Chairman, there appears to be widespread consensus that NAPA is working well to help Congress and Government agencies improve government performance. There is no problem here, none that anyone has raised. We hope that the Congress will not impede our ability to continue to provide that assistance in keeping with the charter you've given us, and with the urgent need to improve government performance.

We appreciate your inviting us to testify. We look forward to working with you and the staff to come up with language that's satisfactory to everyone, and in keeping with the public interest. And my colleagues and I would be happy to answer any questions that you may have.

[The prepared statement of Mr. Fosler follows:]

Mr. Chairman and Members of the Committee

I am R. Scott Fosler, President of the National Academy of Public Administration (NAPA). Thank you, Mr. Chairman, for giving me the opportunity to be here today in order to provide the Committee testimony related to proposed amendments to the Federal Advisory Committee Act (FACA). I am joined today by the Chair of our Board of Trustees, Peter Szanton, and one of our Fellows, Dwight Ink, former Acting Administrator of the General Services Administration, who was involved with FACA at its inception.

The National Academy of Public Administration supports the general principles of FACA and other "sunshine" legislation. We have operated for years under the premise that our reports and the names of panel members and staff who produced them should be made public, except where national security or other laws might limit such disclosure. We have long believed that conflicts of interest of panel members should be disclosed and avoided, and we have guidelines to accomplish these ends.

However, it is clear to us that the Federal Advisory Committee Act was not intended to apply to the National Academy of Public Administration. To do so would undermine the independence of our reports, reduce our ability to elicit candid comments from various levels of the agencies we are striving to help, add an enormous burden of red tape, and drastically reduce our capacity to draw upon the experience and wisdom of the best people in our field. In other words, we do not believe we could fulfill the mission Congress gave us in our charter, should we be required to comply with all aspects of FACA.

In fact, I should note that when it was granting NAPA's charter in the early 1980's, Congress had to be persuaded that we would not eventually become a typical advisory committee. It would be ironic if now Congress, through incorporating us in the FACA legislation, were to require us to start down the road toward an agency advisory committee which we originally pledged we would not become.

We appreciate the efforts of the chairman, and members of this committee and its staff, to avoid such consequences. I understand that several versions of a bill are now under consideration which, in different ways, will clearly exempt our organization from full compliance with FACA but which entail various other public disclosure requirements. It is important to note that none of these proposals results from any problem with the functioning of this Academy. We continue to believe that the best legislative change to FACA would be to specifically exempt NAPA from coverage. Short of simply excluding us from FACA, it is difficult to completely avoid negative consequences of any amending legislation.

The two proposed bills we have reviewed are significantly different, although both create a category called "independent advisory group." One bill stipulates that the Administrator of General Services shall issue regulations covering the public disclosure

requirements to pertain when a federal agency "utilizes" such an "independent advisory group." By contrast, the second bill spells out numerous specific requirements to be followed by the establishing entity, such as NAPA.

Either approach presents substantial problems. The former version would seem to present the fewest initial problems, but with the passage of time, could ensnare us in as many, if not more difficulties as the latter. Our major concern in both cases is the unintended consequences of requirements which will impede, to varying degrees, our capacity to undertake studies which provide meaningful assistance to the agencies and to the congressional committees who request our services.

I would now like to address some of the specific provisions of the second proposed bill, and illustrate some of those unintended consequences. Incidentally, I would note in passing that the term "independent advisory group" is exceedingly broad and would seem to encompass numerous organizations which the Committee may or may not wish to include.

We are concerned about limiting the option for closed meetings to those with "deliberations concerning the final report," since so many of our meetings combine both fact-finding and deliberative components. One of our greatest concerns is the dampening effect this requirement would have on the ability of NAPA to elicit candid views of individuals interviewed by our panels and staff. As you know, our expertise lies in the areas of organization and management which draw heavily upon perceptions and judgments in addition to "hard data." Ascertaining management's "party line" in a troubled agency or program is not difficult, but it is not likely to fully reveal the true nature of the problem. In order to provide the requesting agency – or the Congress-- with sound conclusions and recommendations, we need to be able to penetrate below the "party line" and get the candid views and information from those who take a different position.

Many of our panels function in areas where there may be tensions between organizational levels, between political and career personnel, or where sensitive turf wars are being waged. To be effective, our panels have to be trusted to protect a variety of individuals immersed in these complex and dynamic environments who have sharply conflicting views. Our panels must have access, as they now do, to the confidential views and experience of people at various levels without those people fearing that their participation will trigger retaliation or other problems with their supervisors. Neither do we want the public airing of these individual views to exacerbate internal agency conflict which may already exist. Most of the panel meetings following the organizing session are both fact-finding and deliberative. Theoretically, we could utilize the "final deliberations" exception to close parts of many meetings. However, doing so would probably create an unnecessary image of secrecy, and could put us in the position of seeming to skirt the spirit, if not the letter, of the law.

Another concern is the 20 day advance notice period for panel member appointments. Although we have never kept the names of panel members secret, and their names are on the report that is made public, the 20 day advance public notice of their appointment is one of a number of provisions being proposed which could have the cumulative effect of reducing the number of the best people in the field who would otherwise be willing to serve. Our situation is very different from those which gave impetus to the enactment of FACA, namely the abuse that arose out of individuals serving on advisory panels who had a vested interest, or their institution had a vested interest, in the subject matter being considered, such as health or education grants. In these cases, people are often extremely anxious to serve on such committees.

Our Fellows rarely have such vested interest in the panels on which they serve. They participate in an effort to be of help. Often it is not easy to draw them away from their busy schedules to serve on panels. The more we impose upon them the type of procedural steps now envisioned, the more difficult it will be for us to provide agencies with the judgment of the most experienced and prestigious people in public management.

Further, because we strive for balance on the panels, we intentionally draw upon people with divergent backgrounds and perspectives. Thus, we are extremely concerned about the proposed requirement in the bill "to certify the lack of an alternative to a member having a conflict of interest." To get the views of divergent stakeholders, it is sometimes necessary and appropriate to involve individuals who have some level of vested interest, as long as that interest is fully disclosed.

These are some of the substantive ways in which the quality of the Academy's assistance to agencies and to Congress will likely be undermined by the longer version of the proposed legislation. In addition, there are numerous requirements which will impose significant administrative and cost burdens on us. The provisions concerning the categorizing, making, posting and storing of panel minutes, and all related correspondence and communiqués within pre-determined time periods, are especially troublesome.

Requiring us to make all such documents physically available to the public for copying for free in our offices is a true burden. We have no available facilities for public copying or for the storage and display of this documentation. Requiring us to keep particular types of materials for release in 30 years is potentially a serious problem.

We have difficulty with the various specified timeframes in the proposed bills. The most worrisome for us are the 20 day comment period on proposed panelist names and the 20 day advance notice of all meetings. The inclusion of all these mandatory timeframes seriously impacts our ability to provide responsive assistance to the agencies and drives up the costs that the agencies (and the taxpayers) must pay.

Lastly, I would like to point out that we use formal peer reviews only occasionally. Thus, the requirement to list all reviewer names in the report could be read

to require a listing of anyone who commented on a draft, no matter in how limited a fashion.

In conclusion, I want to emphasize our concern that the mere fact that both of the proposed bills would now incorporate NAPA in FACA itself raises the danger we will be drawn into more and more red tape either immediately or as the law undergoes future modification. This would reduce our ability to be responsive to agencies and to Congress in the way Congress intended when it granted our charter. None of these proposals result from any problem with the functioning of NAPA. Indeed, the apparently unanimous view of all who have examined these issues is that NAPA is working very well indeed to fulfill the mission of its Congressional charter to help improve the performance of government. It would ironic if in imposing constraints that derive from situations quite unrelated to NAPA, Congress would now undermine our ability to carry out that mission.

Thank you, Mr. Chairman, for inviting me to testify. My colleagues and I would be happy to answer your questions.

Mr. HORN. Mr. Szanton, would you as chairman of the Board of Trustees, like to make any additional comments at this point?

Mr. SZANTON. Mr. Chairman, I'd appreciate a chance to illustrate, very briefly, one of the points that Mr. Fosler has made.

Scott Fosler has made clear that one of the requirements for the successful completion of this academy's work is receiving in candor the comments of persons who may in some cases be putting their jobs at risk by being candid. I want to illustrate that point from the last panel in which I was engaged.

I've not served on any NAPA panels while I've been chair of the Board of Trustees, but before becoming chair, I was the vice chair of the panel that produced a review of GAO. The study had been requested by the Senate Committee on Government Affairs and it produced two most significant conclusions.

The first was that the GAO was seeking and accepting assignments to which its skills and resources were not adequate. The evidentiary basis for that conclusion was a number of examples given by GAO employees as to the inability of GAO to do authoritative work on problems that took it beyond its skills in audit and evaluation.

The second main conclusion, which is rather delicately phrased, and which I will therefore read you, was that,

> Congressional requestors of GAO work should not put GAO role and reputation as impartial and objective auditor and evaluator in jeopardy, by posing research questions that inevitably place GAO in areas of conflict over policy priorities and values, without a solid factual base or objective standards for review.

Again, the evidentiary basis for that conclusion was drawn in large part from statements of congressional staff and of GAO employees, who in many cases were expressing views at odds with the expressed written policy of the GAO. It is simply unlikely that we would have received in those cases, as in many others, the degree of candor and frankness, and the kind of information that was necessary to support, simply a peripheral finding, but the central findings of a report.

Mr. HORN. Mr. Ink, do you have any comments you'd like to add?

Mr. INK. Yes, thank you.

First of all, at the time FACA was passed I supported some type of legislation. I had chaired the White House Task Force on Education, for President Johnson, and I found in the Office of Education the advisory committees being used in ways that I thought constituted corruption, and so I reported that to President Johnson. I felt then, and I feel today that some legislation was necessary to deal with those abuses.

When Congress was developing this legislation, I was in the OMB, and none of our discussions with Congress contemplated the National Academy of Science or Academy of Public Administration being covered. To the contrary, my discussions—and I had a number of them with Mr. Holifield, among others, who was not just a Member of Congress, but was chair of the Government Operations Committee, and with Mr. Horton was the ranking minority reflected the opposite view. These were key people in the congressional consideration of FACA, and none of them suggested the academies be exempted. Also there was never in our discussions any suggestion whatsoever that they wanted everything in the

academies to be covered, except the organization itself. I never heard that approach before today.

Second, I chaired the task force that worked with Congress on establishing the charter for the National Academy of Public Administration. The other two members were Mr. Wegman, who you know, and Elmer Staats, who you recall was controller general. And we went to great lengths as Mr. Fosler said, to assure Members of Congress that we in the academy would not develop over time into another advisory committee. And I want to stress that for us to be drawn back in the position that we assured Congress and pledged Congress we wouldn't go, I think is ironic and very, very unfortunate.

I am also reluctant to see legislation moved more in the direction of extending Federal regulations in—as Mr. Fosler said—the absence of a demonstrated problem. I don't know why we have to find solutions to a problem that we haven't found to exist. And it does seem to me, in closing, that this is the kind of creeping redtape, the kind of creeping regulatory system to which the mood of the public today is opposed. Thank you.

Mr. HORN. Well, we thank you.

Our last witness on this panel is Christopher Paine, senior research associate, the Natural Resources Defense Council. Mr. Paine.

Mr. PAINE. Mr. Chairman, members of the subcommittee, thanks very much for the opportunity to present the views of the Natural Resources Defense Council. NRDC is an informed and interested consumer of NRC reports, and our technical and legal staff have served on both NRC and FACA committees.

Mr. Chairman, we are not opposed to a carefully crafted exemption of NRC committees from the provisions of FACA that mandate direct Federal agency oversight of the advisory committee membership, meetings, and the agendas. But we feel the essential public access provisions and accountability provisions of FACA under section 10 must be preserved, if not by application of FACA itself to the academy, then by some other legislative vehicle.

In other words, the NRC should continue to appoint, screen, and manage its own committees. We agree that is the baseline. But the composition and the deliberations of these committees should be subject to the same minimum statutory standards for openness, balance, and accountability that have long applied to other Federal advisory committees. We feel that failure of the Academy to apply these standards should be subject to judicial review, so that the citizens can seek redress in the courts, as we recently did for the occasional—and I stress occasional—egregious failures that occur in the Academy's internal system of controls.

I will turn now to one recent instance of such a failure, the NRC's 1996–97 committee for the review of DOE's Inertial Confinement Fusion Program, henceforth referred to as the NRC ICF Committee.

In September 1995, DOE secretly decided to terminate the existing FACA advisory committee—its only FACA advisory committee on inertial confinement fusion, and immediately began confidential discussions with the academy regarding a new ICF committee under NRC auspices. According to internal DOE memorandums

and the viewgraph presented at DOE meetings, the two principle weaknesses that DOE identified in the existing FACA committee were that it was, "restricted by legal requirements", meaning FACA, "(FACA)", and "that it was perceived to lack understanding of science-based stockpile stewardship", which was at the time DOE's new multibillion dollar program to maintain the skills of nuclear design laboratories under the comprehensive test band.

Now the centerpiece of this new program is a facility called the National Ignition Facility, which will cost about $1.7 billion to construct, and about $3.5 billion in total public expenditures for the program.

The technical and scientific readiness of NIF to achieve its design goal of fusion ignition was coming under increasing scrutiny by ICFAC at the time it was terminated.

Mr. HORN. I didn't quite get the group straight. You say, at the time it was terminated it was coming——

Mr. PAINE. The existing FACA committee was terminated at that time——

Mr. HORN. This is a FACA committee?

Mr. PAINE. Yes, the existing Federal Advisory Act Committee that DOE was running at the time.

Mr. HORN. Yes, spell it out. I don't like these bureaucratic nonsense. I see it in staff, and I just don't like it, because knowing the Livermore Laboratory, I thought maybe there was a UC faculty committee involved in this, and that's what I couldn't hear.

Mr. PAINE. I'm sorry.

Mr. HORN. So just spell it out.

Mr. PAINE. OK. At the time that the existing DOE Federal Advisory Committee on Inertial Confinement Fusion was terminated, had decided to set up a new target physics subcommittee to probe more deeply the very sensitive issue of whether the inertial confinement fusion machine at Livermore could achieve its design goals. DOE was extremely uncomfortable with that direction. DOE terminated the committee, and turned to the academy for a new review.

Now, a November 1995 letter from Secretary O'Leary to the members of the committee, explaining 2 months late that they had been terminated, explained that the program—that is the ICF program—was now entering a new phase of broader scope, as an integral part of the Department's science-based stockpile stewardship mission, and therefore the, "limited scope of the existing committee restricts its usefulness", that is, its usefulness to DOE.

Left unsaid was the fact that this new phase of broader scope was expressly designed to finesse the critical issue of confidence in achieving fusion ignition with this facility. Those were the old terms of reference of the committee that had been terminated. Now the new broader terms of reference, having to do with assessing stockpile stewardship were convenient because they allowed—DOE to assess the NIF—this new facility—against much less demanding criteria which did not require ignition.

And less there be any doubt about what the agency's motivation was in turning to the academy, we have in the course of litigation obtained a 1995 December memorandum that stated, "A major review of the ICF program is needed in this fiscal year to reaffirm

mission need and give further credence to arguments for success of the National Ignition Facility. In order for the National Academy of Sciences to produce an interim report before September 1996" which was the scheduled date for starting construction "a contract with the NRC must be in place by February 1996."

Now, all the individual committee members who were appointed to this committee were distinguished scientists, and the committee was well suited for technical evaluation, the scientific credentials of these scientists have never been an issue. The committee as a whole, however was seriously imbalanced, with respect to rendering a judgment on whether DOE's ICF program was scientifically and technologically ready to proceed.

Mr. HORN. Well, let me just ask you at this point, what do you mean by imbalanced? Could you give us a few examples?

Mr. PAINE. Right.

Mr. HORN. OK.

Mr. PAINE. Out of 16 members, 5 were paid consultants to the Livermore Laboratory where the facility is being constructed. While serving on the committee, three members were directly involved in successful bids for closely related DOE defense program contracts for computer simulation of nuclear weapons performance. Overall, 14 out of 16 members had a personal or institutional connection with the agency whose program was ostensibly undergoing, "independent review by the Academy."

Out of 16 members, 11—that is, two-thirds of the committee, and that's a very significant number for a Member of Congress—had either previously stated positions supporting NIF and/or were consultants or advisors to Livermore Laboratory, and even to the NIF program itself. Taken as a whole therefore, the NRC/ICF Committee was egregiously unbalanced, that is to say biased, in its inclusion of individuals with serious conflicts of interest, and in its lopsided distribution of scientific and technical viewpoints, professional associations, and institutional affiliations.

Now we felt, as a result of such palpable evidence of bias, that when it was pointed out to the academy they would do something to rectify it. In fact, they stonewalled us, and I think that response is a pretty good indicator of how the academy might continue to enforce its own rules in the absence of statutory standards.

Needless to say, there were other FACA violations involved in the operation of this committee. There were never any public notices of meetings of the NRC/ICF Committee, and more seriously, the committee operated under ground rules that the Chair retained a right to declare a closed session at any time at his sole discretion.

Now normally when the academy does that it means that only committee members and NRC staff can attend a closed session, and this is rightly motivated by desire to protect draft recommendations until completion of the academy review process, and to ensure that sponsors of studies cannot use their funding leverage to pressure members to make changes in draft reports, as Dr. Alberts has noted.

However, the chairman of this committee chose to undermine these objectives by inviting DOE officials to a closed session of the ICF Committee, in which, according to court papers, DOE received

verbal indications that the committee's analysis had found no technical reason to delay NIF.

Now this session was held before the committee's report had even been written, and before it had gone through the peer review process at the academy. So it appears that this so-called rigorous academy review process can also be merely pro forma whenever the situation dictates.

A member of our staff, a physicist, well qualified, and who had been invited to appear before the committee, sought access to committee documents to prepare his presentation, and was denied them by the committee staff, and only after appealing to senior officials at the academy, was he given the materials to prepare his presentation. And that was less than 24 hours before he met with the committee.

[The prepared statement of Mr. Paine follows:]

Mr. Chairman, members of the Subcommittee, the Natural Resources Defense Council (NRDC) appreciates this opportunity to present our views on the proposed exemption of taxpayer-financed National Research Council (NRC) committees from the public access and accountability provisions of the Federal Advisory Committee Act (FACA). NRDC is an informed and interested consumer of NRC reports, and our technical and legal staff have served on both NRC and FACA committees.

I am a senior researcher in the Nuclear Program of the NRDC, where we work on a wide range of technical, legal, and policy issues involving domestic and foreign nuclear programs, both civil and military. Our program is perhaps best known for its unclassified estimates of world nuclear stockpiles, which are widely used, in lieu of the government's own classified estimates, by government agencies, the Congress, the media, and indeed, by the National Academy itself.

We do not style ourselves – nor are we – "opponents" of the National Academy of Sciences and its self-governing system of advisory committees. However, I would be remiss and less than candid if I failed to note the irony – some might say outright hypocrisy – of witnessing the pinnacle of American science, which ultimately depends on openness and the free exchange of ideas for its very survival, scrambling to exempt itself from even the modest FACA guarantees of citizen access to committees that are paid for by the public, and that can strongly affect public policy.

The interface between science and government policy, where the NRC committees do most of their work, is inherently a public arena, and the Academy has no business recruiting biased committees and conducting the work of these committees behind closed doors. The necessary exceptions to this general rule – for instance in order to protect national security – are already provided for under FACA.

While we are not opposed to a carefully crafted exemption of NRC committees from the provisions that mandate direct federal agency oversight of advisory committee membership, meetings, and agendas, *the essential public access and*

accountability provisions under Section 10 must be preserved. The Academy has aggressively sought, in a most unbecoming fashion, to blur and obscure the distinction between federal agency "management" of its committees – which we suppose might impair the Academy's flexibility and independence in some instances – and *the essential public protections afforded by FACA against unwarranted secrecy, bias, and conflict-of-interest* in the procurement of scientific and technical advice by Federal agencies. This is an absolutely critical distinction, and this committee must not lose sight of it.

In other words, the NRC should continue to appoint, screen, and manage its own committees, *but the composition and deliberations of these committees should be subject to the same minimum statutory standards for openness, balance, and accountability* that have long applied to federal advisory committees established or utilized by federal agencies, and failure to comply with these standards should be subject to judicial review to ensure that citizens can seek redress in the courts – as we recently did – for the occasional egregious failures that occur in the Academy's internal system of controls.

I will now turn to one recent instance of such a failure – the NRC's 1996-97 Committee for the Review of the Department of Energy's Inertial Confinement Fusion Program (henceforth "the NRC-ICF Committee"). Next week we will release a detailed case study regarding the rise and fall of this committee, which we believe epitomizes in a compelling way the kind of occasional serious abuses that Congress created FACA to guard against. As you may know, the D.C. Federal District Court has permanently enjoined DOE from relying on, disseminating, or continuing to support this committee's work on the grounds that the Committee was formed and operated in violation of FACA. The Academy itself, however, was not enjoined from publishing the report, and hence its independence and first amendment rights are not at issue.

Let me briefly summarize some of the results of our forthcoming case study.

- In September 6, 1995 the DOE Office of Defense programs secretly decided to dissolve its only ongoing advisory committee under FACA – the Inertial

Confinement Fusion Advisory Committee (ICFAC) – and almost immediately began confidential discussions with Academy staff regarding a new ICF committee under NRC auspices . Members of the ICFAC and the public, however, were not informed of this decision until two months later, a week before ICFAC's last scheduled meeting.

- According to internal DOE memoranda and viewgraphs, the two principal "ICFAC Weaknesses" identified by the DOE Office of Defense Programs were that it was "restricted by legal requirements (FACA)" and "perceived to lack understanding of science-based stockpile stewardship," the DOE's multi-billion dollar program for maintaining the skills of the nuclear weapon design laboratories under a Comprehensive Test Ban Treaty.
- A centerpiece of this new program is the National Ignition Facility (NIF), a $1.7 billion laser fusion machine the size of the Rose Bowl now under construction at the Lawrence Livermore National Laboratory (LLNL). The technical and scientific readiness of the NIF project to achieve its design goal of fusion ignition had come under increasing scrutiny by the ICFAC, which at the time of its dissolution was intending to reconstitute a Target Physics Subcommittee to probe more deeply the sensitive issue of whether technical confidence in the achievement of ignition was sufficient to warrant proceeding to the construction phase of the project, then scheduled to begin in about one year.
- A November 1995 letter from Secretary O'Leary explained that the basis for abolishing ICFAC was that "[t]he program is now entering *a new phase of broader scope as an integral part of the Department's science-based stockpile stewardship of nuclear assets...the limited scope of the committee restricts its usefulness.*"
- Left unsaid was the fact that this "new phase of broader scope" was expressly designed to finesse the critical issue of confidence in fusion ignition, because many of the NIF's recently acquired "stockpile stewardship missions" do not require ignition.

- Also left unsaid was the DOE staff's conclusion that, along with its expanded scope, the principle virtue of a new Academy committee would be its freedom from FACA's openness and balance requirements.

- Lest there be any doubt regarding DOE's true motivations in dumping the FACA Committee, a December 1995 memorandum from the ICF Program manager states, "*A major review of the ICF program is needed in this fiscal year to reaffirm mission need and give further credence to arguments for success of the National Ignition Facility (NIF)*...[I]n order for the National Academy of Sciences to produce an interim report before September 1996, a contract with the NRC must be in place by February 1996."[1]

- Information obtained during the discovery phase of *NRDC, et al. v. Peña, et al.*, shows that while the *underlying contractual charge* to the committee remained unchanged – "determine the technological readiness of the NIF project to proceed with construction [and] the adequacy...of confidence of achieving ignition" – the public *description* of this charge – the so-called "Terms of Reference" under DOE's first "Task Assignment" to the Committee – was altered at the last moment *at the behest of Academy officials*, with the effect of papering over the otherwise direct link between DOE's request for an interim report and the planned go-ahead for NIF construction.

- The revised "Terms of Reference" under the contract's first task order dropped any reference to the impending decision to begin physical construction of NIF, and the contracts's requested assessment of the *adequacy* of NIF project's confidence in *achieving* fusion ignition suddenly became "make recommendations to *facilitate* the scientific *goal*, which is ignition.

- A logical inference from the evidence presented in our forthcoming report is that the Academy staff belatedly sought to conceal—or at least blur—the review's

[1] DOE Memorandum from DP-11 (M. Sluyter, 3-5491) to Assistant Secretary for Defense Programs, Dec. 15, 1995, p. 1.

linkage to NIF construction, because it attested to the fact that the ICF Committee had indeed been specifically established by DOE to lend the Academy's prestige to a major program decision.

- Nevertheless, at the Committee's first meeting, Dr. Robin Staffin, the DOE Defense Programs Deputy Assistant Secretary for Research and Development, "pointed out that the committee's input, at least in the form of an interim report, will be ***essential*** prior to proceeding through Critical Decision 3, ***approval of physical construction of the NIF.***"[2] And in its March 1997 Interim Report, the ICF Committee stated that it was rendering a judgment on whether the NIF project was "technologically and scientifically ready *to proceed as planned.*"[3]
- While all the individual committee members were distinguished scientists and the committee was well suited for technical evaluation – scientific credentials were never an issue – the committee as a whole was seriously unbalanced with respect to rendering a judgment on whether DOE's ICF program was scientifically and technologically ready to begin construction of NIF at (LLNL).
- Five out of the sixteen members were paid consultants to LLNL.
- While serving on the committee, three members were directly involved in (successful)bids for closely related DOE Defense Program computer simulation contracts.
- Overall, 14 out of sixteen members had a personal or institutional connection with the agency whose program was ostensibly undergoing "independent" review

[2] "Minutes [of the] Meeting of the National Research Council's Committee for the Review of the Inertial Confinement Fusion Program, NAS Beckman Center, Irvine, CA., August 1- 2, 1996." These DOE minutes of the panel's meeting go on to note that, according to Staffin, "current plans call for this [construction] decision to be reached in March 1997."

[3] NAS, "Review of the Department of Energy's Inertial Confinement Fusion Program—The National Ignition Facility," ICF Committee, 1997, p. 6., emphasis added.

- Eleven out of 16 members (i.e. two-thirds) of the committee had either previously stated positions supporting NIF and/or were consultants or advisers to Livermore Laboratory and even the NIF program itself.

- Taken as a whole, therefore, the NRC-ICF Committee was egregiously unbalanced, that is to say, biased, in its inclusion of individuals with serious conflicts of interest, and in its lopsided distribution of scientific and technical viewpoints, professional associations, and institutional affiliations.

- In light of the evidence of such palpable bias, and the expressions of outside concern which it aroused, we frankly were astonished by the stonewalling response from the Academy. It provides a good indicator of the standards likely to be applied to NRC federal advisory committees in the future if the Academy succeeds in removing itself from the purview of FACA.

- In a January 22, 1997, letter to NRDC, Dr. Bruce Alberts responded to the bias concerns as follows:

> "After careful review, I can only respond by reiterating what my colleagues here at the NRC have discussed with you before - that the NRC has carefully chosen this committee of highly-qualified experts, that the NRC believes the committee is appropriately balanced and free of conflict of interest for the charge addressed to the NRC, and that the committee's draft report will be rigorously reviewed by experts outside the committee and revised, if necessary....
>
> "It is true that half of the committee members have served on previous bodies reviewing the NIF, ICF, or the DOE laboratories....Such service, in fact, gives these members both a broader and more in-depth knowledge of the scientific and technical issues in the programs which are being reviewed. Concerning the overall balance of the committee, fully one-half have no such previous experience with the NIF or ICF program." [4]

- This response indicates a virtual breakdown in the Academy's controls for recognizing obvious individual conflicts of interest and palpable bias in the composition of its review committees. I our forthcoming study, we review below

the backgrounds of each of the committee members individually. The available data indicate that, contrary to Dr. Alberts claim, 12 of 16 members (75%) had "served on previous bodies reviewing the NIF, ICF, or the DOE laboratories," and 13 members (80%) of the committee had "previous experience with the NIF or the ICF program."

- In violation of FACA, there were never any public notices of meetings of the NRC-ICF Committee..
- The committee operated under the ground rule that the chair retained the right to declare a closed session at any time at his sole discretion. A closed session of an NRC committee means attendance by the committee and NRC staff only – supposedly to protect draft recommendations until completion of the Academy review process and to ensure that sponsors of studies cannot use their funding leverage to pressure members to make changes in draft reports. Chairman Koonin chose to undermine these objectives by inviting DOE officials to a closed meeting of the ICF Committee, in which, according to court papers, DOE "received verbal indications that the committee's analysis found no technical reason to delay NIF." While the stacked nature of the committee meant that this conclusion was never in doubt, Chairman Koonin's actions reveal that the Academy's nominally "rigorous" internal and external review process can also be merely *pro forma*, whenever the situation dictates.
- Despite being a scientist and having received an invitation to make a presentation to the committee on technical issues, my colleague Dr. Thomas Cochran was initially denied access by the NIF Committee staff to written testimony and viewgraph materials of previous presenters. Only after Cochran appealed directly to the Executive Officer of the NRC was he given limited access to these materials—less than 24 hours before he met with the committee. Our other co-

[4] Letter from NRC Chairman Bruce Alberts to Thomas B. Cochran, Director, Nuclear Program, NRDC, January 22, 1997, p. 1.

plaintiffs in the case encountered even greater difficulties in dealing with the Committee.

In summary, several committee members had direct financial conflicts of interest, in direct violation the Academy's own conflict of interest rules. The Academy, the Committee, and the Department of Energy refused to correct these problems when they were brought to their attention. As a consequence the NRC biased the scientific and technical review of a major public policy issue. The Academy's staff treated the public shabbily. The Academy staff and the ICF Committee acted to prevent interested members of the public from attending unclassified meetings and making presentations. For a short period the Academy's staff acted to prevent interested scientists and a Federal official at the Office of Management and Budget from obtaining unclassified minutes of a committee meeting. The Academy staff repeatedly refused to make available unclassified documents—those that were distributed to the committee—to an interested scientist who was not on the committee.

In sum, the Academy violated FACA, the Academy's own rules, minimal standards of conduct related to the provision of scientific data to inquiring scientists, and minimal standards of decency toward the public while taking public moneys to address a public policy issue. The Academy has demonstrated that it is incapable of enforcing even its own weak rules.

The nation deserved an independent, unbiased review of the scientific and technological readiness of NIF prior to spending up to $3.5 billion on the project.[5] The nation did not obtain such a review from the ICF Committee.

[5] This estimate includes $1.7 billion in construction and LLNL program related costs and $1.8 billion in operating funds over 15 years (See footnote 2 above).

As a consequence of *ADLF v. Shalala* the Academy must now comply with FACA. As a consequence of *NRDC, et al. v. Peña, et al.*, while the Court permitted the Academy to publish the first and only report of the NRC- ICF Committee, DOE cannot utilize it or any other product of the ICF Committee; and the ICF Committee, at least as presently constituted, has been abolished.

Given that the Supreme Court has let stand *ADLF v. Shalala*, the Academy is now turning to the Congress for a total exemption from the requirements of FACA. A better solution, at least in terms of the *public's interest*, would be insure that all Federally funded committees of the Academy comply with the FACA requirement that advisory committees be "fairly balanced in terms of points of view," and FACA's "openness" provisions, but give the Academy, rather than funding agencies, responsibility for insuring compliance with these provisions, while continuing to ensure that these FACA requirements are judicially reviewable.

Mr. HORN. Well, I appreciate that summary, and you've given some very interesting examples, and an additional real life perspective on the situation.

I'm now going to welcome the ranking Democrat on the full committee, a person that's been deeply involved in the development of public policy, much of it related to scientific research. The gentleman from California, Mr. Waxman, who would like to have a statement commenting on this situation.

Mr. WAXMAN. Thank you very much, Mr. Chairman. I appreciate the testimony all of you have given. Unfortunately, I wasn't here to receive it, but I have reviewed this issue. And I want to ask Bruce Alberts the following question.

I'm concerned about the conflicts of interest on NAS boards. When agencies establish advisory committees under FACA they frequently follow procedures that safeguard against hidden conflicts of interest.

For example, when FDA establishes advisory committees under FACA, FDA follows provisions to ensure against inappropriate conflict of interest. The general rule FDA follows is that a member of an advisory committee can't have a conflict of interest unless the conflict is disclosed and a waiver is obtained. Waivers are given in situations where the committee member may have a special expertise that cannot be obtained from anyone else.

Do you agree that it makes sense to have limitations on conflicts of interest on NAS panels?

Mr. ALBERTS. Yes, Congressman. We have very elaborate bias procedures that are carried out at the first meeting of the committee in the sense that there's a public discussion of the bias that's reported. We then look at the debate and see whether, in fact, the committee is biased, whether we have to remove somebody from the committee, or whether we have to add people to the committee. We frequently ask people to serve on committees, and basically we look at biases very carefully before we appoint people to the committees to try to avoid that, but occasionally things go wrong.

I'm going to leave with the committee our official policy——

Mr. HORN. Without objection, it's going to be put in the record at this point.

[The information referred to follows:]

November 1, 1992

THE NATIONAL RESEARCH COUNCIL POLICY ON DISCLOSURE OF PERSONAL INVOLVEMENTS AND OTHER MATTERS POTENTIALLY AFFECTING COMMITTEE SERVICE

Introduction

The National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council accord special importance to the policies and procedures established by the institution for assuring the integrity and hence the public confidence in the reports prepared by its committees. The policies address two types of issues. One is examining the question of potential sources of bias and conflict of interest in committees of the institution engaged in studies and other related activities. The other is the question of the participation of persons who are subject to formal investigations of allegations of scientific misconduct. Those policies and procedures are summarized in this document. Because of the importance of these policies, they have been approved by the Councils of the National Academies of Sciences and Engineering and the Institute of Medicine, as well as the National Research Council's Governing Board.

The work of the institution is largely done by volunteer committees appointed for their special expertise in the area of study. Each year roughly 10,000 scientists, engineers, and other professionals working on such committees contribute their knowledge and experience to the solution of national problems, the identification of new scientific and technical goals and opportunities, and other forms of national service. These men and women are drawn from every part of the nation and from every sector of society--academia, industry, government, nonprofit and public interest groups, and so on. The technical skills and perspectives of this distinguished and diverse group of individuals are essential to the ability of the institution to consistently produce accurate and objective assessments of national problems and needs.

Extensive efforts are made to assure the soundness of reports issued by the institution by selecting highly qualified committee members. Yet, if a report is to be not only sound but also effective as measured by its acceptance in quarters where it should be influential, the report must be, and must be perceived to be, (1) free of any significant conflict of interest, and (2) not compromised by bias, and (3) untainted by allegations of scientific misconduct. Conclusions by fully competent committees can be undermined by allegations of lack of objectivity, or conflict of interest, or misconduct on the part of its members.

"Bias" and "Conflict of Interest"

To address questions of potential bias and conflict of interest for the protection of both the individual involved and the institution, individuals participating in studies and other activities are asked to complete a "Potential Sources of Bias and Conflict of Interest" form to be submitted to and reviewed by the institution. In addition, committees are asked to discuss the general questions of bias and conflict of interest, and the relevant circumstances of their individual members, at the first committee meeting, and annually thereafter. Information regarding potential bias or conflict of interest is carefully considered by the institution in the overall composition of committees and in the appointment (or reconsideration of appointment) of individuals to committees.

For any individual who has completed a "Potential Sources of Bias and Conflict of Interest" form, *any changes in information previously reported or any new information relevant to the question of potential bias or conflict of interest should be promptly reported to the institution.* Such newly reported information will be promptly considered by the institution and such action will be taken as deemed necessary or appropriate by the institution, in consultation with the affected individual.

NATIONAL ACADEMY OF SCIENCES
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NATIONAL RESEARCH COUNCIL

Potential Sources of Bias and Conflict of Interest

INSTRUCTIONS TO THE INDIVIDUAL COMPLETING THIS FORM

1. Please read THE NATIONAL RESEARCH COUNCIL POLICY ON POTENTIAL SOURCES OF BIAS AND CONFLICT OF INTEREST IN STUDIES AND RELATED ACTIVITIES (below).

2. REPORT ON PAGES 2-4 ONLY THAT INFORMATION WHICH IS **RELEVANT** AND MERITS DISCLOSURE IN LIGHT OF:

   1. THE NATIONAL RESEARCH COUNCIL POLICY ON POTENTIAL SOURCES OF BIAS AND CONFLICT OF INTEREST IN STUDIES AND RELATED ACTIVITIES and
   2. THE TASKS TO BE UNDERTAKEN BY THE PARTICULAR COMMITTEE, PANEL OR OTHER GROUP ON WHICH YOU WILL SERVE.

   For each category for which there is no information that needs to be reported, write the word "NONE" in the space provided.

3. Contact the cognizant staff officer listed below if you have any questions regarding the completion of this form.

4. When this form has been completed, sign and date this form and return it to the cognizant staff officer listed below. *Retain a copy for your records.*

5. If you simultaneously serve on more than one NAS/NAE/IOM/NRC committee, panel, or other group, you may receive a form to be completed for each activity. You may list all relevant information for all activities on one form and attach a photocopy of that form to each of the other forms in lieu of fully completing each separate form.

During an individual's period of service in connection with the activity for which this form is being completed, any changes in information reported on this form or any new information relevant to the question of potential bias or conflict of interest should be promptly reported to the cognizant staff officer.

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NATIONAL ACADEMY OF SCIENCES
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NATIONAL RESEARCH COUNCIL

Potential Sources of Bias and Conflict of Interest

NAME: _____ TELEPHONE: _____

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EMPLOYER: _____ TITLE: _____

NAS/NAE/IOM/NRC Committee: _____

The responsibility for determining the information to be reported rests in the first instance with the individual completing this form.

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1. THE NATIONAL RESEARCH COUNCIL POLICY ON POTENTIAL SOURCES OF BIAS AND CONFLICT OF INTEREST IN STUDIES AND RELATED ACTIVITIES and
2. THE TASKS TO BE UNDERTAKEN BY THE PARTICULAR COMMITTEE, PANEL, OR OTHER GROUP ON WHICH YOU WILL SERVE.

For each category for which there is no information to be reported, write the word "NONE" in the space provided. Attach additional sheets if necessary.

I. ORGANIZATIONAL AFFILIATIONS. Report **relevant** business relationships (as an employee, owner, officer, director, consultant, etc.) and **relevant** remunerated or volunteer non-business relationships (e.g., professional organizations, trade associations, public interest or civic groups, etc.)

II. FINANCIAL INTERESTS. Report **relevant** information regarding financial interests and investments in companies, partnerships, joint ventures, trusts, real property, stocks and bonds, etc., by listing the company, partnership, etc. by name and a brief description and by listing the property by location. Please list the approximate value of any interest or investment reported.

III. RESEARCH SUPPORT. Report **relevant** information regarding sources of research support (other than your present employer).

IV. GOVERNMENT SERVICE. Report **relevant** service (full-time or part-time) with federal, state, or local government in the United States (including military service), but report *all* government service (including advisory boards, etc.) within the past five years.

V. PUBLIC STATEMENTS AND POSITIONS. List relevant articles, testimony, speeches, etc., by date, title, and publication (if any) in which they appeared. Provide a brief description of relevant positions of any organizations or groups with which you are closely identified or associated.

VI. ADDITIONAL INFORMATION. If there are other circumstances in your background or present connections that in your opinion might reasonably be construed as unduly affecting your judgment in matters within the assigned task of the group to which you have been appointed or which might be reasonably viewed as creating an actual or potential bias or conflict of interest or the appearance of a bias or conflict of interest, please describe them briefly.

_____ _____

SIGNATURE DATE

Reviewed by:

_____ _____ _____ _____

Executive Director Date Executive Office Date

This statement is privileged to those NRC offices whose proper business it is. It is the policy of the National Research Council that this statement may be released, on a privileged basis, to the head of any agency sponsoring the study or other activity in which a committee is engaged, if that official so requests in writing and if the Chairman of the National Research Council concurs. It will not be otherwise released by the NRC or the agency except with the approval of the individual completing the form unless required by law.

Mr. WAXMAN. Now you have this disclosure requirement to members that are on the committee. Is this publicly disclosed?

Mr. ALBERTS. The forms they produce are not totally disclosed. What we ask them to do, and partly in response to this realization that the public distrusts anything they can't see, is to hold the bias discussion in public as much as possible, and to ask the committee members as much about their intellectual biases, in particular, and their associations with other organizations, in particular, in public at the first meeting of the committee.

Mr. WAXMAN. I think there would be a real value in shedding some sunshine on the issue of conflict of interest. As a general measure I think it's wise to avoid having conflicts on NAS panels, but I can understand how conflicts might be unavoidable in some circumstances. When you've got the leading expert in the world on a particular issue, we would want them to be involved.

In this kind of a case the best way to ensure public trust in the NAS panel may be to disclose the conflict and explain why it was necessary. Would you support such an approach?

Mr. ALBERTS. Yes, I would certainly support that approach. In addition, we've been talking to Congressman Horn, the chairman, about hosting our committee membership and giving the public the right to comment before we—hopefully, before the first meeting, but if not, shortly thereafter. It is possible in some cases we won't know about the things that we could learn about in this way. I would be very open to such a process. I think it would in many cases save us from later embarrassment. And I think now that we have that electronic means of doing so—it's a new world, as you know—we could do things that we couldn't do conveniently before.

Mr. WAXMAN. Well, Mr. Chairman, I hope that we can work together to address these conflict issues, while at the same time assuring that NAS can conduct its work without unnecessary red tape or bureaucratic processes. I look forward to exploring it with you further.

Mr. HORN. Thank you. The point's well made. We thank you for coming.

Well, let's begin some of the questioning. I think both Dr. Alberts and Mr. Fosler need to give us a view of the scientific enterprise in terms of formulating recommendations. What you have here are largely the physical sciences, although some social sciences are in the academy. And the public administration group is essentially social scientists. Tremendous value orientation comes with all social scientists. Certain values, not necessarily the same as the social scientists, come with physical science. In a sense, it's easier to be a physical scientist and keep your biases out in many ways than it is to be a social scientist.

So what I'd like is a feel for how do scientists in the National Academy—and you're also representing medicine, the Academy of Engineering, so forth. How do you think and develop conclusions on particular situations? And then I'd like the same from Mr. Foster, just to give us a feeling for how your observations over your own professional careers show how these individuals work, and to what degree does being open inhibit any discussion that you feel is useful in the formulation of particular recommendations?

Mr. ALBERTS. Do you want me to go first? I'd be happy to, Mr. Chairman.

Let me just give you one example, because I think it's best understood in the specific context. We did a major report—it came out about a year ago—on the health hazards of electromagnetic fields in the home. You all saw that on the front pages of newspapers and on television.

That committee was chaired by a distinguished member of the academy, who knew nothing about this topic when he started. He's a physicist and neurobiologist, and this was a very educational process for him.

On this committee we tried to set up as we always do—and I'm not claiming we never make mistakes, but you have to remember we publish something like 200 reports a year. What we always try to do is get the broadest range of opinion and expertise that's tolerable within the constraints that we want every person to represent themselves.

What some of our critics object to, is that they want representatives of organizations on committees. We have made that mistake in the past, because we are asking an individual to learn during the process. These committee members may meet together for 30 days. We ask them to learn from each other, and that's why we need every possible expertise to use the principles of science, which really are very objective. Then we ask them to evaluate and come to a consensus view. This consensus view could not possibly be arrived at when those members arrive. They need to learn, and they need to be willing to listen. Somebody who is representing an organization is pressed by constituencies, and they cannot participate in that process.

So the very art form of setting up a committee is to get—for example, on the animal case. Animal esthesis, we had representatives from animal welfare organizations, but we asked them before they accepted membership, whether they could act as an individual, and not as a representative.

So we do want in this educational process every expertise represented. And so on the Electromagnetic Field Committee we had six or seven people who had made a living of examining whether or not there's a health hazard from electromagnetic fields. And so those people would start with a bias—said, yes, there must be some health hazard, otherwise I'm going to be out of a job, and nobody is going to pay me to go study this anymore.

Then we had a lot of distinguished scientists at the core of that committee that had no opinion whatsoever; didn't know enough about it to have an opinion. And over the course of those meetings they went over 500 individual studies that were published in literature over the previous 17 years, and they came to a consensus view that there was no evidence from any of that literature, that electromagnetic fields from power lines or home appliances is any health hazard. So that's how we contribute to the country's welfare. We have already spent billions of dollars as a Nation, moving people away from power lines and other things that don't actually harm their health.

One of the great benefits I think that this kind of process brings to the Nation, is to tell us what to be afraid of and what not to

be afraid of. Science is a way of understanding nature so we can predict the future. And what we try—on these committees is to use the best scientific and technical judgment to predict the results of future policies, and that way to make sure that the United States uses resources optimally.

Mr. HORN. Mr. Fosler, you want to add to that dialog?

Mr. FOSLER. Mr. Chairman, you're quite correct in the way that you lay out the issue, and as you well know, the kind of work that we do in the field of public administration and public management, while we attempt to make it as objective and hopefully as scientific as possible, falls short of that. It is not a science. It involves a great deal of judgment. There is a great deal of contentiousness in the field about which are the correct principles, approaches, and theories. And in fact, we take it as one of the charges to us from Congress to be a place where we can consider these different points of view, and attempt to determine which makes sense in specific circumstances. How can we take as much of the best knowledge, and the experience, and the thinking, generalize and synthesize from it, but then apply it in particular circumstances.

In some cases the tasks that we undertake are really quite clearly defined and quite objective. We have been working for example on a project to define seismic safety standards. And while there is always judgment involved in situations of that kind, it involves fairly hard analytic kinds of data. However, for a great deal of the work that we do we're attempting to look at a combination of relatively objective data and circumstances, but also a great deal of subjective information.

A classic kind of situation we face in looking at a Government agency, is to ask how much of the problem that we're asked by Congress or the agency itself to examine is a systemic problem and how much is a leadership or a personnel problem. It's enormously difficult for us to make the distinction between the two, because it's always possible that we can end up attempting to solve what is a leadership or a personnel problem by making structural and systemic changes, which are really not desirable for the agency.

This requires judgment. It requires being able to assure people of confidentiality when they are explaining problems that they have potentially with their supervisors or with the top leadership of the department.

Mr. HORN. Thank you. I'm going to yield 10 minutes to Mrs. Maloney. She has another commitment she needs to get to.

Mrs. MALONEY. I would like to ask Mr. Alberts—one of the debates before Congress right now is the use of sampling—statistical sampling for the last 10 percent in the census count, and practically every scientific organization, including the National Academy of Sciences, have come out in support of statistical sampling. And I support it. And I support the scientific experts that have come out with this conclusion in the census department. Yet people who disagree with this position have been very critical of the National Academy of Science. They have said that the committee is stacked, so that they come out with census panels that achieve a recommendation that supports sampling. And what is your comment on that?

Mr. ALBERTS. As far as we're concerned, this committee worked very hard and the report, as you've seen, is a huge volume which has all the evidence and reasoning for that conclusion. I have not heard the science in that report criticized by anyone. I think the debate we have now is a political one. FACA would not solve that problem that would make it worse. In particular, in this case, we are accused by some of our critics who don't like the conclusion that we are in the pocket of the Census Bureau. Now, under FACA, we would have been in the pocket of the Census Bureau. They would have been there, I mean, we would have obviously fought them off but, to the public, we would have lost the credibility that we do have now by having Census Bureau people, the people paying for the study, in the room while we're trying to decide what we're going to conclude. So——

Mrs. MALONEY. But it wouldn't be just the Census Bureau. It would have been my staff, as cochair of the——

Mr. ALBERTS [continuing]. Sure.

Mrs. MALONEY. Census——

Mr. ALBERTS [continuing]. That's right.

Mrs. MALONEY. Mr. Shays' staff of the Republican cochair of the Census caucus. It would have been possibly some of the Government activist groups that are in the room and citizens that are just concerned——

Mr. ALBERTS. Yes.

Mrs. MALONEY. And in my opinion, I think it's an example of how you could have defused a debate, where they think, oh, you're in the back room stacking an outcome that is not what we want, you know. You can counter and say, what scientist, is there anybody who hasn't supported statistical sampling? I don't know anyone who hasn't.

Mr. ALBERTS. Well, I agree with——

Mrs. MALONEY. I think that's an example of——

Mr. ALBERTS. I agree with——

Mrs. MALONEY [continuing]. Where opening up the meeting would have made it more support for the scientific conclusion that you're coming forward with.

Mr. ALBERTS. Let me emphasize in that case, and in all other cases, we have open meetings. We had as many open meetings as we could where we're gathering information. Many people in the public did come. The only thing we're arguing about here is whether when the committee is coming down to us to make its conclusions whether or not those meetings should be open. And the problem that I stated, initially, in having it open is that we would not be viewed as independent by those people who are now criticizing.

In this case, they're criticizing us for being in the pocket of the Census Department. They would have had a rationale for that. There's no basis to that criticism at all——

Mrs. MALONEY. See, I don't understand they'd have a rationale. You're in a room with a group of scientists that have been selected by the scientific community——

Mr. ALBERTS. Right.

Mrs. MALONEY [continuing]. Discussing a scientific problem. Sitting in the room watching maybe everybody at this panel and maybe somebody who works for the Census Bureau, someone who

works for the Speaker, someone who works for the minority leader, whatever. I mean, how, having them in the room, how does that in any way discredit what you're coming forward with? If anything, I think it might shed light on what you're doing and more understanding and more respect for the scientific process.

If I may ask it in another way, as a Member of Congress, we made a decision that our deliberations would be open to the public. I'm on the Banking Committee, too. When we're debating certain bills, not only is the room filled with the public, they have mikes that go into other rooms so that they can sit there and take notes over what every single member is saying and why they're saying it and explaining why they're voting for or not for an amendment. And we made a decision. We're taking taxpayer dollars, which 80 percent of the National Academy of Sciences funded by taxpayer dollars or Government dollars for their work, and we're basically working for the public. We have opinions but why can't other people know what our opinions are? Why should our opinions be kept secret?

To me, I think it would build support and strength for the National Academy of Sciences and I'm given the example of the census debate. And I think the fact that you debated it on the scientific merits would prove that you've making a scientific decision which every scientist supports. You understand what I'm saying?

Mr. ALBERTS. Yes.

Mrs. MALONEY. I don't understand your rationale that this would build more support for you if you could close the door and come up with a solution afterwards that people could not hear your debate.

Mr. ALBERTS. So, basically, have everything open that we can and when we close the meeting under FACA, you know, the census people would always be there. Again, the key that for most of the staff, they have no time to come so the people who would mostly be in the room would be the people who are the sponsoring agency. These discussions are very technical and boring. We're not going to have a big public out there. It's not exciting like Congress.

So, what would happen, in fact, as our critics have said, well, for most of these meetings when you're deciding, the only outside person in the room was the person from the Census Department. That's the effect of this.

So, the real question that we're discussing is how can we achieve some more public confidence in our process and that's what we very much want to do without subjecting ourselves to more criticism that we're in the pocket of whatever Government agency is supporting us.

Let me just talk about the Department of Energy for a moment. Nobody trusts the Department of Energy when they're dealing with radioactive waste because of past history. They can't use this if we're, in fact, a committee. They tell us that because nobody will pay any attention. If the Energy people are there while we're deciding on what to do with the Whip facility or whatever, the critics who don't want any radioactive waste anywhere will say, you know, the Energy Department managed this thing.

Dan Goldin tells me the exact same thing about NASA. There are two different kinds of advisory committees. There are many FACA committees which NASA has which are open and serve one

purpose. Dan Goldin feels that we serve a different purpose. We give him a credibility because it cannot be said that his staff torqued our decision. That——

Mrs. MALONEY. But, Dr.——

Mr. ALBERTS [continuing]. Happens over and over. You know, we have a problem here that we can't have it both ways. We can't have it completely open and have yet the independence of the academy seen from the outside that's so crucial to people paying attention.

Mrs. MALONEY. But I guess the problem that I'm having is why is having it open, in any way, remove your independence? All of our meetings are open. It doesn't mean that we don't have private conversations or negotiations on legislation that maybe two people are talking on on a very intricate matter. But, when it comes time to making decision, passing a bill, it's always open.

To ask it in a different way, if Government agencies request and fund roughly 80 percent of all National Academy of Sciences committees, how are they independent advisory committees uninfluenced by Government? And how can National Academy of Sciences panelists reach conclusions disliked by the sponsoring agency if the agency can then cease funding and refuse to pay for the publication?

I give an example that Professor Rustan Roy of the University of Pennsylvania chaired a National Research Council Committee that produced a report with results that the Department of Education did not like and DOE refused to pay for the publication and Professor Roy was forced to find independent funding to publish the report. How can National Academy of Sciences' panels avoid agency influence when funding curtailment is a threat? So, therefore, I feel I can argue you were arguing that you couldn't have independence with the public because the Bureau of Census was going to be there.

Since I don't know how you're funded on these things, but you could argue that people would have more trust, whether you're looking at DOE, or the Environment, or whatever, or Energy, even though the Energy Department may be sitting there and they're funding for the study. If it's open to the public and the public can hear the debate, hear the conclusion, and hear the rationale, in my opinion, it seems to me, that that would build more support for the independence of the National Academy of Sciences.

And your power is going to be growing dramatically in the years that come as we become more scientific in our approaches to things. We're going to be relying more and more on your recommendations and would have more trust in you, not only that you have all these great experts, but that you're willing to let people who aren't experts listen to what you have to say and be in the room along with everybody else that may have a stake in it.

Mr. ALBERTS. This is exactly why we have report review; so that all the evidence is there so that the rationale is exposed to the public. And all that stuff is on the Web and anybody in the world could read it and print it out for free. So, the report has got to be transparent with all the logic that goes in, the scientific evidence that goes behind the committee's conclusion.

I don't know anything about Professor Roy's committee. I will get back to this committee with information about what that's about. I can tell you what would happen today——

Mr. HORN. Without objection, that will be put in the record.

Mr. ALBERTS. OK, thank you. That didn't happen under my watch and I don't know anything—this is the first time I've ever heard of it. What we would do, in my experience, is if the agency withdrew funding and didn't like the report to disseminate it, we'd spend our own money to disseminate it. We've done that many times.

So, we fiercely guard against exactly what you're talking about. We will not let ourselves be controlled by agencies. We often give them advice they don't want and that's why Congress asked us to do studies. I mean, you ask us to look at cryptography because you didn't trust, I assume, what the administration was telling you and I could give you a whole list in the medical field of veterans in Agent Orange, HIV in the bloodsupply, which is a big, critical thing at the Department of Energy.

It is a miracle to me that they continue to fund us even though we tell them things that they don't want to hear. But, this is the beauty of this system and we are not going to—all our mechanisms are designed to avoid the influence of the agency that funded us.

Mrs. MALONEY. Well, I wanted to thank my distinguished colleague, Mr. Horn, who has worked on—we probably have the most partisan Congress in history, but we've worked in a truly bipartisan way on really important legislation. I think this is a very important question that we have before us.

I have a draft bill that I'd like to circulate to all of you with Mr. Waxman for your comments and to see what you think of it. I have a lot more questions. My time is up here and I'm needed at another committee for a vote and I'd like to put my questions in to have them submitted to you. I have quite a few for Mr. Fosler also and have all of you respond into our record.

I hope that there will be more hearings on it because I think this is a really critical point of view that has to go forward. We have to have trust in our committees and in our Government and the best way to build that trust, plus enabling them to go forward with their work, is important. I personally think that openness gives us strength, but I yield back the balance of my time. I would like to put materials in the record and my questions to have them circulated and I——

[The information referred to follows:]

Answers to the Questions for the NAS from the Majority

1. Just recently the Supreme Court decline to hear your appeal so all court actions are now finished. Is this correct?

Yes, the Supreme Court denied the petition for certiorari on November 3 in ALDF v. Shalala. This case will now be remanded to the District Court for an appropriate remedy by the presiding judge. A second lawsuit, NRDC v. Pena, challenging an Academy committee under the Federal Advisory Committee Act (FACA) of 1972 is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit. In this second lawsuit, the District Court judge issued an injunction preventing the Department of Energy from using the Academy's report.

Without Congressional action to amend FACA, the Supreme Court's denial of the petition for certiorari ensures that the Federal Advisory Committee Act of 1972 will be applied to many of the committees of the Academy. The Academy, however, will not operate study committees under the procedures codified in the 1972 act. The ultimate outcome may be that the nation will lose the capacity for receiving independent and objective scientific advice from the Academy.

2. I am interested in how one balances a NAS committee. I assume it is not by Democrat versus Republican. What kind of balance do you seek on your committees and how would the FACA Administrator who is currently GSA be able to judge whether or not you have achieved balance?

The President of the National Academy of Sciences, who also serves as chair of the National Research Council, appoints all study committees. Every study committee must collectively possess the scientific and technical expertise needed to execute its charge. Many of the individuals of relevant expertise have backgrounds and experiences that constitute, or can be construed by others as constituting, potential sources of bias in one direction or another. Therefore, it is additionally important that members of committees be selected by the NRC chair, so that they comprise a carefully "balanced" group of scientific experts.

The scientific credentials of nominees prior to their appointment are rigorously examined by internal Academy oversight units, and a primary and alternate slate is presented to the NRC chair for decision. After appointment, each committee member is required to complete a confidential written form on potential sources of bias and conflict of interest; and at the first committee meeting, each member is asked to present this information orally in executive session. The written and oral information is reviewed, and the NRC chair at his or her discretion may make changes in committee membership to ensure that no member has a disqualifying conflict of interest and that biases are reasonably balanced.

Final decisions on committee appointments rest with the President of the NAS acting in the capacity of the chair of the National Research Council. This process

ensures that the nation's premier scientific body has sole responsibility for judging the expertise that is required and the balance that is appropriate for the scientific study task to be undertaken. GSA does not have scientific competence, independence, or the confidence of the scientific community to make these judgments.

3. Mr. Glitzenstein points out that the FACA legislation seeks to preserve the independence of FACA committees. If NAS committees had a government employee as Chairman as required by FACA, how would this affect your independence?

The Academy's independence would be severely compromised if a government official has the responsibility to chair or attend all meetings, the authority to approve each meeting and its agenda, and the power to adjourn any meeting at his or her discretion.

4. NAS uses a separate set of reviewers who are not members of the committee, why is that?

Appointing a group of independent reviewers who have relevant scientific expertise, diverse scientific perspectives on key issues under consideration, and whose names are anonymous to the committee is critical to the integrity and the quality of the Academy's review process. The group of reviewers is generally as competent scientifically as the committee, and together the reviewers' expertise covers all of the topics raised in the report. The task of the reviewers is to provide candid and critical comments that will assist the Academy and the committee members in making the published report as sound as possible and to ensure that the report meets institutional standards for objectivity, evidence, and responsiveness to the study charge. The content of the review comments and draft manuscript remain confidential to protect the integrity of the deliberative process. The responsibility for the final content of each report rests solely with the Academy and the authoring committee.

5. The independent review process that NAS uses is not required by or even covered by FACA. However, if this review process was open, how would it affect the quality of NAS reports?

The purpose of the Academy's review process is to ensure that reports are of the highest scientific quality and that decisions about the content of the report are made solely on the scientific judgments of the nation's best experts. Anonymous review is intended to encourage individual reviewers to express their views freely and to permit the committee to respond to each comment on its merits without regard for the position or status of the reviewer. The reviewers' comments are revealed only to committee members and to Academy officials and staff overseeing the review process. The names of the reviewers are not revealed to committee members, other reviewers, or others not involved in administering the review process. The Academy utilizes the reviewers' comments to judge the adequacy of the draft report and to ensure that adequate changes are made, if necessary, so that the final report satisfies the Academy's standard of quality and supporting evidence. If both the reviewers' names and

comments were made public, there is significant risk that many reviewers would decline to participate or, if they did choose to participate, would tend to moderate their comments and be less candid in conveying their critical evaluations of the report. On both counts, the agencies that request studies and the public will not be well served. Moreover, the confidentiality of the review process protects the committee and the Academy from political pressures that might be brought to bear by those with a vested interest in the outcome, including the sponsoring agencies.

6. What does NAS do if agencies reject your reports in whole or in part; how do you enforce the recommendations made in your reports?

The Academy acts solely in the capacity of an independent and objective advisor to the government. The government seeks the Academy's advice because of its scientific competence, the quality of its reports, and its credibility with the public. The government is free to adopt or disregard the recommendations in the Academy's reports. The Academy has no enforcement capacity with respect to the recommendations in its reports.

7. There are two alternative legislative versions before us today. The long one specifies procedures for NAS, the short one specifies that these procedures shall be embodied by GSA in regulations for Federal Agencies when contracting with NAS. Does NAS prefer either one?

The Academy prefers a modified version of the legislation that specifies certain procedures that would increase public access during the Academy's study process while at the same time protecting the Academy's independence. Protecting the Academy's independence requires that the Academy have total control over the appointment of its committees and that the deliberative and review process of its study committees be closed.

Answers to the Questions for the NAS from the Minority

1. Dr. Alberts, how do National Academy of Sciences committees differ from that definition?

Upon the authority of the charter granted to it by the Congress in 1863, the National Academy of Sciences has a mandate that requires it to advise the federal government on scientific and technical matters. The Academy executes this mandate using committees of experts appointed under its auspices and operating in accordance with its policies and procedures to conduct studies and to help prepare reports that provide the scientific and technical basis for the advice.

2. Dr. Alberts, you state that the primary threat to the NAS posed by the recent court decisions is the Academy's independence from government. What percentage of the NAS's funding comes from government agencies? What percentage is from the private sector? And what percentage is from non-profits and public interest groups?

In its recent Report to Congress, the Academy reported that for its fiscal year ending June 30, 1996, contracts and grants from federal agencies represented about 87 per cent of revenues, contracts and grants from private and non-federal sources (primarily involving not-for-profit foundations and some state governments) represented about 10 per cent of revenues, and contributions from private and non-federal sources (including not-for-profit foundations, corporations, industry associations, and some local government entities) represented the remaining 3 per cent of revenues. The Academy receives no line-item appropriation from the government; all of the Academy's funding from the government comes from individual contracts, grants, or cooperative agreements for particular studies or other activities.

3. Dr. Alberts, if government agencies request and fund roughly 80 percent of all NAS committees, how are they independent advisory bodies, uninfluenced by government?

By virtue of its charter, the Academy - not its committees - serves as an independent advisory body to the government. The committees appointed by the NAS help to develop the scientific and technical basis for the advice. The Academy's time-proven study process ensures that its advice is not inappropriately influenced by the government. After the Academy and government agree on a statement of task and an appropriate budget for the study as reflected in a signed contract, grant, or cooperative agreement, the Academy then conducts the study completely independently from the government. The President of the Academy in the capacity as chair of the National Research Council (NRC) appoints the study committee, and the Academy manages and controls the committee. The draft report prepared by the study committee is vetted through the Academy's confidential review process, and the final report is revised to meet the Academy's standards of quality and evidence. The report is released to both the sponsor and the public after it has satisfied the Academy's review process. Thus, the government is not permitted to exert pressure on the committee or the Academy during the deliberative meetings of the committee or during the Academy's review

process. The Academy has produced numerous reports that have been very critical of government sponsors. When the report is released, the government is free to use or reject the Academy's findings, and the government is free to decide not to use the Academy for particular studies in the future. However, the Academy's study process insulates the Academy from the government and prevents the government from trying to inappropriately influence a study while that study is being conducted.

4. Dr. Alberts, how can NAS panels reach conclusions disliked by the sponsoring agency if the agency can then cease funding and refuse to pay for publication? I understand, for example, that Professor Rustum Roy of the University of Pennsylvania chaired a National Research Council committee that produced a report with results DOE did not like. DOE refused to pay for publication and Professor Roy was forced to find independent funding to publish the report. How can NAS panels avoid agency influence when funding curtailment is a threat?

A contract, grant, or cooperative agreement with a federal agency or other sponsor is executed before a study (or other activity) is initiated and includes specific line items in the agreement for all the anticipated costs from completing and disseminating the study, including where appropriate, the costs of printing and publishing the study report. Even where the funding agreement does not include costs for dissemination, Academy policy requires that its reports be made publicly available without restriction and that this be planned and budgeted at the outset and accomplished through several mechanisms, including postings on the internet and using supplemental sources of funds such as Academy funds, if necessary. The Academy is making all of its new reports and most of its past reports available on its World Wide Web site on the internet. A prospective funding curtailment by agencies for the purposes of withholding the publication and dissemination of reports poses no threat to the release of Academy reports to the public.

Regarding the 1978 report of the Panel on Waste Solidification, which was chaired by Professor Rustum Roy, our archives indicate that prepublication copies of the final report (after clearing the Academy's internal review process) were released to the sponsoring agency, the U.S. Nuclear Regulatory Commission, as well as to other federal agencies and interested private individuals in July, 1978. Officials at the Department of Energy questioned the factual data base of the report. The Academy conducted further internal review of the report, and based on this review the Academy decided in March, 1979, not to publish the panel's report as an official Academy report because of certain reservations raised by additional reviewers.. However, it appears that the panel's report was available in prepublication form to those who were interested, and the U.S. NRC published additional copies of the panel's report as background information for its licensing proceedings.

5. Dr. Alberts, is there a conflict of interest for NAS staff, given that their salaries depend on receiving grants from agencies requesting NAS panels?

No. Although continuity of funding is a general requirement for the continued employment of all Academy staff, the Academy's study process ensures that the findings and recommendations of its reports are determined not by the staff, but by the individuals who are appointed to the committee and the individuals who oversee the Academy's review process. The committee members and the review monitors of the Academy's reports all serve without compensation. The role of the staff is to support the work of the Academy's officials and committees. Many staff are typically involved in several funded projects, and the staff know that the Academy seeks to retain highly qualified staff when a project ends by assigning that staff person to a new project. Many of the Academy's most highly competent staff remain with the Academy for many years working on a wide variety of projects.

6. Dr. Alberts, is it true that some Academy staff are current (on leave) or former employees of the federal agencies funding the NAS study? What percentage of NAS staff fall into this category?

There are currently 8 government employees working at the Academy under Intergovernmental Personnel Agreements. This number is small in comparison to the Academy's current staff of approximately 1,100. The use of borrowed personnel via the Intergovernmental Personnel Act is intended to promote the exchange of ideas and knowledge. To the extent current and former government employees perform services at the NRC, the Academy takes active steps to comply fully with both the ethics rules established by the Office of Government Ethics and the Academy's own policies and procedures regarding ethics and conflicts of interest. All prospective employees, consultants, and committee members are required to disclose their connections and relationships with the Government that may give rise to a conflict of interest. For example, senior NRC staff are required to complete forms indicating potential sources of bias and possible conflicts of interest.

7. Dr. Alberts, is there a conflict of interest for NAS staff, given that their salaries depend on receiving grants from agencies requesting NAS panels?

This question is answered in response to question 5 above.

8. Dr. Alberts, If the advisory committees of the Academy that are utilized by federal agencies are effectively given exemption from the requirements of the Federal Advisory Committee Act, what responsibility does the Academy have for assuring that the meetings of such committees are open to public observation, that summaries or minutes of their meetings are prepared, and that their records are preserved for public inspection?

The Academy fully supports increasing public access to its study process provided that its deliberations in producing a final report are closed, thereby protecting the Academy's independence from inappropriate influence and pressure by the government and others with a vested interest. The Academy recently implemented a new policy making essentially all of the information-gathering meetings of its study committees open to public observers. In addition, the Academy makes all of its final

reports publicly available (except for classified or proprietary information). The Academy is also willing to produce brief summaries of closed meetings that identify the committee members present and the topics discussed, but not draft findings or conclusions. The Academy is also willing to make publicly available, as part of the records of its study committees, the material presented by outsiders to these committees.

9. Dr. Alberts, if the exemption from the Federal Advisory Committee Act requirements were balanced with general requirements for open meetings, prepared summaries of meetings, and the preservation of committee records for public inspection, might the Academy's regulations on these matters be codified by the proposed amendment?

Yes, as noted above in answer to question 8.

10. Dr. Alberts, if the Academy is given exemption from the Federal Advisory Committee Act requirements, what assurance do we have that the Academy will achieve the openness and accountability required by the courts? What assurance do we have that the openness will continue under future presidents?

The Academy will conform at all times to the statutory requirements that it is expected to meet. The Academy's performance in this regard will be matter of public record.

11. Dr. Alberts, in your information gathering sessions, how do you decide which members of the public will be allowed to testify? I have heard several complaints that on committees examining nuclear regulatory issues, industry and DOE representatives are asked to testify while those who may be critical of the proposed project are not.

Committees often seek information from a variety of individuals and organizations who have something substantial to offer to the committee's inquiry and analysis. Time and other constraints may make it impractical for the committee to receive all such information in person. Consequently, committees have to limit the number of presentations at its meetings and select those that may provide it the most value for the study task being undertaken. However, it is the Academy's policy that anyone who is interested in providing information to a committee may do so in writing, including by electronic communication.

12. Dr. Alberts, in Congress, our committee mark-ups are open to the public because it was decided that deliberations on issues of public policy should be on the public record. How does the deliberative process of NAS committees differ from congressional deliberations?

There is a fundamental difference. Congress is an elected body that formulates public policy, directs its implementation, and wields enforcement authority. The Academy is a private organization that reviews scientific and technical information, conduct analyses, and hold deliberations to develop and present the evidentiary basis on which the Academy can render independent and objective scientific advice to the government. Neither the Congress or the Executive Branch is required to adopt or

accept any of the Academy's recommendations. The value of the Academy's study process to the government is assurance that the Academy has made its judgments independently and objectively based on scientific evidence using the nation's best experts. Protecting the Academy's study process from political influence and pressure from sponsors and other vested interests is the reason that the Academy closes its deliberations in finalizing its reports.

13. Dr. Alberts, would you care to respond to the critics who have accused the Academy of stacking the census panels to achieve a recommendation that supports sampling?

The Academy was asked to review the sampling procedures being planned by the Census. The Academy put together a committee of preeminent experts in statistical sampling to conduct this review, and the committees report was vetted through the Academy's rigorous review process. The Academy stands fully behind these reports which represent its best judgment on the scientific issues of statistical sampling for the census. The Academy fully recognizes that the policy decision on whether or not to employ statistical sampling in the census is a decision that will be made by elected officials.

14. Dr. Alberts, how do you ensure balance on your committees?

The President of the National Academy of Sciences, who also serves as chair of the National Research Council, appoints all study committees. Every study committee must collectively possess the scientific and technical expertise needed to execute its charge. Many of the individuals of relevant expertise have backgrounds and experiences that constitute, or can be construed by others as constituting, potential sources of bias in one direction or another. Therefore, it is additionally important that members of committees be selected by the President of the NAS, who serves as NRC chair, so that they comprise an appropriate balance of scientific views and relevant experiences. Final decision on appropriate balance of a committee rests with the NRC chair, which ensures that the leader of the nation's premier scientific body has sole responsibility for final judgment on the expertise that is required and the balance of views that is appropriate for the scientific study task to be undertaken.

15. Dr. Alberts, is there a tendency or an incentive to bring people together who are likely to reach a consensus so that a final conclusion can be made in the committee's report?

The Academy selects individuals for its committees based on the scientific expertise needed for a study task. The Academy then asks each committee, which contain individuals from a wide range of scientific disciplines and expertise, to aim at developing consensus findings, conclusions and recommendations. This approach helps focus the committee on the key elements of the study task and areas of agreement and disagreement. Experience has demonstrated that in the great majority of cases, committees have been successful in reaching scientific consensus. Developing a consensus report therefore remains a central objective of an Academy study.

Circumstances may arise, however, when reaching consensus is not possible or would substantially skew what otherwise would be the considered view of the majority of the committee. If consensus is not reached, committee members in the minority are given the opportunity to write a dissent, which appears as an appendix to the final report.

16. Dr. Alberts, do you think it is appropriate for NAS panels to include members who have already taken a position on the issue with which they would be charged with examining?

It would be not be inappropriate if that individual provides an especially valuable expertise, does not have a disqualifying conflict of interest, and the committee as a whole is balanced as determined by the chair of the NRC. On many occasions, a committee member who has expressed a prior opinion based on limited knowledge has changed his or her point of view as a result of the educational process that is integral to each committee study. In fact, we expect this to occur in most cases. For this reason, it is important to us that all members of our committees be free to act as individuals, and we try to exclude those who would serve as representatives of specific groups, unable to compromise on the basis of new knowledge and understandings derived from a committee's information-gathering and deliberative processes.

18. Dr. Alberts, it is my understanding that in 1992 the National Academy of Sciences proposed a cooperative agreement with the Public Health Service of the Department of Health and Human Services that would provide core support, including "rapid on-line advice." Please provide the terms of that contract and any other similar contract between the NAS and any federal agency.

The proposal submitted in 1992 by the Academy to the U.S. Public Health Service, which serves as the basis of the cooperative agreement with the Public Health Service and the Department of Health and Human Services, states that:

> ***"The principal purpose of the cooperative agreement, from the standpoint of the government, was to have available to it a group of standing bodies in a number of health areas that could be called together to provide either rapid on-line advice or more deliberative seminars or studies on discrete issues. The device of a cooperative agreement was chosen as the instrument to achieve those ends since it permitted the establishment of core entities and could also be used as a base to which specific tasks could be added at the request of the government or on suggestion by IOM/CLS (the Institute of Medicine and the Commission on Life Sciences)."***

The term "on-line" advice was a poor choice of words subject to possible misinterpretation, for the proposal goes on to state:

> ***"In the course of these interactions, PHS [the Public Health Service] and HCFA [Department of Health and Human Services] should understand that only written reports reviewed according to NRC review procedures are official NRC/IOM statements."***

The use of the term "on-line" advice in the proposal was intended only to mean that the sponsoring agencies could meet with the Academy's standing committees at their regular meetings to hear the perspectives of individuals on the committee. However, as the second statement makes clear, the Academy only offers its advice through written reports that are reviewed in accordance with its review procedures. The Academy has not provided its advice "on line" under this cooperative agreement or in other agreements with the government.

QUESTIONS FOR ERIC GLITZENSTEIN, NRDC AND ALDF

(Questions are for all three unless specified)

1. One legislative proposal on the table is to simply exempt the National Academy of Public Administration and the National Academy of Sciences from the Federal Advisory Committee Act. What would be the effect of such an exemption?

2. Please discuss the issue of independence in NAS committees: How does FACA alter the independence of Academy committees, given that these committees are currently funded by federal agencies and sometimes private sector industries?

3. Some people have suggested that the courts erred in applying the Federal Advisory Committee Act to the National Academy of Sciences. They argue that the Supreme Court decision in Public Citizen should not be considered binding. Would you respond to those contentions?

4. Both Academies argue that they could not continue to operate if the Federal Advisory Committee Act is applied. Others suggest that is an exageration of the facts. Is there a middle ground between the full application of the Federal Advisory Committee Act to the Academies and achieving the goals set forth in the court opinon and your law suits?

5. Is there an incentive for agencies to convene NAS panels -- behind closed doors -- rather than FACA committees which are open to public scrutiny?

6. Ms. Stanley, were the Animal Legal Defense Fund or other groups concerned about the treatment of animals invited to testify at information gathering meetings of the NAS panel convened to examine the care and treatment of laboratory animals?

7. Nearly everyone who argues for exempting these organizations from the Federal Advisory Committee Act begins by arguing about the onerous bureaucratic requirements of the Federal Advisory Committee Act. Is that an real issue, or would every one involved agree to wave those requirements?

8. Are the National Academy of Science=s current procedures for preventing conflicts of interest on its committees adequate?

9. Mr. Paine, can you describe the conflicts of interest among the panel members of the National Academy of Sciences 1997 report on DOE's Inertial Confinement Fusion Program?

10. How adequate are FACA's provisions for preventing conflict of interest on its panels?

11. Ms. Stanley, you mentioned an agreement between the Department of Health and Human Services in which the NAS agreed to provide "on-line" advice. Could you describe the circumstance in greater detail?

[Questions for counsel, Mr. Glitzenstein*]*

1. Do you suggest that the President, OMB, and GSA have been negligent for 25 years in their failure to include NAS in their regulations and annual reports?
2. Taking your argument for HHS "utilization" of the Guide and applying it to another example. If Boeing defines the maintenance standards for their 757 and the FAA specifies this standard for all airlines using Boeing 757s. One, is the Boeing engineering team who defined their standard subject to FACA? And two, should the FAA adhere to the regulation issuance process for 757s or should Boeing?
3. Regarding responsibility for decisions. Assume that ALDF prepared a guide. Can HHS decide to use the ALDF guide instead of the NAS guide?
4. The Interagency Research Animal Committee made a decision to "utilize" the NAS Guide. Was this committee

decision open to the public, open to comment, open to witnesses with alternative views?

5. Quoting your statement, "The majority of Committee members were scientists who use animals in their research." One, does this mean that the committee was balanced in the sense that some do and some do not use animals in their research? Two, does this mean that we should exclude pilots from involvement in regulation of airline safety because they "must comply with the very federal standards they were being asked to develop?"
6. Because HHS "utilizes" the NAS Guide, NAS is subject to FACA. Hence, if HHS rejects the Guide, NAS is not "utilized." Hence, the decision on guidelines belongs to HHS. Why did you sue NAS instead of HHS?
7. If MIT wrote a good guide on animal research and it was adopted by HHS, would MIT be subject to FACA?

8. If HHS considered three guides, one each from NAS, ALDF and MIT, would the "winner" be subject to FACA but not the losers?

9. Is Price Waterhouse subject to FACA when they are utilized by GSA to audit their financial statements?

10. Is MITRE subject to FACA when they are utilized by the Air Force to design a telecommunications network?

11. Is MIT subject to FACA when they are utilized by the EPA to design pollution monitoring equipment?

12. There are two alternative legislative versions before us today. Do you prefer either the long or the short version?

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D.J. Schubert
(Wildlife Biologist)

January 12, 1998

Chairman Stephen Horn
House Subcommittee on
Government Information, Management,
and Technology
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Chairman Horn:

Thank you for the opportunity to testify at the November 5, 1997 hearing on the Federal Advisory Committee Act ("FACA") and the National Academy of Sciences ("NAS"). While Congress has since passed legislation pertaining to this issue, I am, for the record, responding to the questions posed along with your November 7 letter (another copy of which is enclosed).

In response to the first set of questions (entitled "Questions for counsel, Mr. Glitzenstein"):

1. I believe that GSA's regulations implementing FACA, which defined "utilized" advisory committees as those which an "agency official adopts, such as through institutional arrangements, as a preferred source" of advice, plainly did encompass many NAS committees. See 41 C.F.R. § 101-6.1003(1988). With regard to "annual reports," it has not generally been the practice of the Executive Branch to include any "utilized" committees (as opposed to those directly established by the government) in such reports, so it is unsurprising that they contained no mention of NAS committees.

2. Under the Supreme Court's definition of "utilized"

committees -- which only covered committees established by a "quasi-public" organization such as NAS "for" a federal agency -- the Boeing engineering team would not be covered by FACA, since it is not "quasi-public." As for whether the FAA or Boeing should "adhere to the regulation issuance process" -- which I take to mean the public notice and comment process required by the Administrative Procedure Act -- that would depend on whether FAA adopted the standard as a "substantive rule." If it did, by instructing all airlines that they must follow the standard, then there would be such a requirement.

3. At least under current HHS regulations -- which require recipients of HHS grants and others to follow the NAS guide -- the answer is clearly no. Obviously, HHS could attempt to amend its rules, although it would be constrained in doing so by those private parties who might maintain that they have modeled their practices after the NAS guide, as required by the agency's rules.

4. As far as I know, the Interagency Research Animal Committee does not open its meetings to the public, or otherwise make its proceedings and decisions subject to public comment. IRAC claims to be composed entirely of federal officials and hence not subject to FACA.

5. With regard to the first question, the vast majority of committee members used animals in their research and/or worked for institutions which depended on animals for research, and hence it plainly was not balanced in any meaningful sense. A few individuals who purported to represent animal interests exclusively were belatedly added in response to complaints, but this only minimally redressed the overall bias of the panel.

With regard to the second question, the answer is no, such pilots should not be excluded from involvement in airline safety issues. Nor did anything in my testimony state or suggest that even those who use animals in research should not have been represented on the Guide committee. There is a clear difference between seeking a genuine balance of viewpoints and interests, and arguing (as the question appears to suggest I did) for the total elimination of one such viewpoint and interest.

6. The question appears to be mistaken in its factual premise. We did sue HHS (rather than NAS), and NAS then asked to intervene in the litigation in order to protect its own interests. Simply put, it was NAS's decision, not ours, for the Academy to become involved in the litigation pertaining to the NAS Guide.

7. The answer is no for the same reasons suggested in response to the Boeing hypothetical (No. 2). The Supreme Court has adopted an extremely narrow definition of "utilized" committees which does not apply to purely private entities, at least unless (under D.C. Circuit law) they are "managed" and "controlled" by the government. Once again, the only reason why NAS fell within the Supreme Court's test was because the Supreme Court itself declared NAS to be a "quasi-public" organization which was created for the express purpose of furnishing the Executive Branch with advice and recommendations. That is not the case with MIT or any other purely private entity.

8-11. See answers to questions 2, 7.

12. This question is now moot in light of the FACA amendment which was adopted, which imposed some explicit regulations on the government's use of NAS committees. This was far preferable to the alternative approach under consideration, although I believe that it still allows for too much secrecy in NAS committee discussions.

In response to the second set of questions (entitled "Questions for Eric Glitzenstein, NRDC and ALDF):

1. The effect of that wholesale exemption would be to encourage the kind of abuses which were so vividly illustrated in the ALDF and NRDC cases. Secrecy and lack of public accountability encourage the manipulation of advisory committees so that those with conflicts of interests may, to the detriment of the public at large, unduly influence public policy on a wide variety of fronts.

2. FACA's purpose is to increase, not lessen, the ability of advisory committees to furnish independent advice and recommendations. As noted by Rep. Maloney at the hearing, public scrutiny enhances the ability of committee members to keep agency officials at arm's length, whereas closed-door meetings at which only agency officials are present can only make the committees more susceptible to agency influence and pressure. Thus, the kind of public accountability required by FACA could only strengthen the independence of NAS committees.

3. The legislative history of FACA is replete with statements that Congress did intend to subject NAS committees to FACA's coverage. More important, apart from what the Supreme Court said in Public Citizen, the plain meaning of the word "utilized" clearly encompasses agency use of NAS committees. If Congress wants courts to abide by the plain language of the laws

that Congress writes -- as critics of so-called "judicial activism" contend -- then Congress has to live with the policy consequences, or else change the law.

4. There is a "middle ground" which involves subjecting the Academies to basic public accountability requirements while not requiring them to comply with all of the procedures mandated by FACA. The amendment passed by Congress strives for such a middle ground, and certainly establishes some useful requirements that should be helpful in avoiding the most serious abuses. However, as noted above, I do not believe that this amendment goes far enough in opening NAS committee discussions to public scrutiny -- as would otherwise have been required by FACA -- and that Congress should revisit that specific question in future hearings. The most pressing issue, left unanswered by the recent amendment, is: why should the public be able to observe the deliberations of most government advisory bodies, including on extraordinarily sensitive subjects, yet largely lose the opportunity for such scrutiny when agencies obtain advice from NAS committees, including on mundane but important technical issues?

5. There certainly is such an incentive, even under the amendment as passed by Congress. While the amendment imposes some very useful requirements on agency use of NAS committees -- including conflict of interest requirements which go well beyond anything in FACA -- it plainly allows for far less contemporaneous public access. Whenever agencies wish to avoid such access -- which, ironically, is more likely to be the case the more public interest there is the particular committee -- they will have an enormous incentive to "hire" NAS rather than establish committees directly. That is an unfortunate consequence of the new amendment which Congress should review in future hearings.

7. As far as I could discern, nearly everyone agreed that there was no overriding public interest in applying all of FACA's bureaucratic requirements to NAS committees. Having said that, it is also important to recognize that these requirements are not nearly as "onerous" as they were made out to be, as reflected by the fact that hundreds of government-established committees manage to comply with them each year while still furnishing valuable advice to agencies. Put bluntly, if these procedures are so awful, why are they appropriate for government-formed committees and why haven't they been changed by now?

Moreover, much of the bureaucracy is not mandated by law but, rather, is self-inflicted. The prime example is the time

that it takes to get a committee "chartered." For political (not legal) reasons, OMB has made it enormously difficult and time-consuming to get a charter approved for a new committee -- which frequently has the effect of simply encouraging the agency to figure out a way of circumventing FACA, sometimes lawfully and sometimes not. Thus, when the Academies (and others) complained about FACA's "bureaucracy," what they were really complaining about, to a large degree, was the Executive Branch's own policy inconsistency in dealing with the statute -- on the one hand, encouraging the formation of advisory committees and other citizen groups charged with developing "compromise" solutions to thorny public policy questions but, on the other hand, creating massive disincentives to doing so in compliance with federal law.

8. It seems obvious that the Academy's procedures (prior to the new amendment) for avoiding conflicts of interests were not adequate. Otherwise, it is difficult to explain how committees with such flagrant conflicts as evidenced on the ICF committee and the Guide Committee could have existed.

10. FACA has no adequate, detailed provisions for preventing conflicts of interests. While the statute's balanced representation provision generally forbids agencies from allowing committees to be stacked with members with one kind of viewpoint or interest, the courts have, for the most part, been unable to apply that provision in any meaningful, consistent fashion. Ironically, the amendment passed by Congress now imposes far clearer conflict of interest requirements on NAS committees than is true for government-formed committees subject to FACA.

In a report I co-authored while working with Public Citizen, we suggested, as an amendment to FACA, a simplified, targeted conflict of interest reporting system for advisory committee members. I continue to believe that such an approach should be seriously considered by Congress.

Thank you again for considering my views and for your interest in the operation of FACA, a vital element in our nation's
commitment to "open government."

Sincerely,

Eric R. Glitzenstein

cc: Rep. Henry Waxman

ANIMAL LEGAL DEFENSE FUND

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BY FACSIMILE AND FIRST CLASS MAIL

October 31, 1997

The Honorable Henry A. Waxman
Ranking Member
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Re: Amendment of the Federal Advisory Committee Act

Dear Congressman Waxman:

I have been provided a copy of the October 28, 1997 letter from the Office of Management and Budget (OMB) to you which purports to explain why the Federal Advisory Committee Act (FACA) needs to be amended.

I am writing to apprise you of some critical facts which the OMB has omitted from its letter. First, Eric Glitzenstein and I were counsel in Animal Legal Defense Fund, Inc. v. Shalala, 114 F.3d 1209 (D.C. Cir. 1997), the case which OMB argues must be voided by an overhaul of FACA. OMB's letter suggests that the decision was an aberrant ruling by the D.C. Circuit which needs to be corrected legislatively. This grossly distorts the facts. The D.C. Circuit based its ruling in ALDF v. Shalala entirely on Public Citizen v. Department of Justice, 491 U.S. 440 (1989), the Supreme Court's only ruling on the FACA. In that ruling, the Supreme Court stated in at least five separate passages that FACA was meant to apply to committees of the National Academy of Sciences and it even described such committees as the "paradigmatic" FACA committees. The D.C. Circuit faithfully followed this precedent in the ALDF case.

Furthermore, NAS has petitioned the Supreme Court to grant certiorari in

the ALDF case and the Court has not yet decided whether to grant NAS' petition. Significantly, the Department of Justice has taken the position that the Supreme Court should not grant certiorari in this case because the Court of Appeals ruling is consistent with Public Citizen. The Justice Department has also told the Court that, "review by this Court would be premature because the implications of the court of appeals' decision for agency operations have not yet fully crystallized," Brief for Federal Respondents in Opposition at 14.

Finally, while OMB chooses to refer to the "problem" created by the recent Court decision, the core issue is really the openness of the process of how our federal government gets advice from NAS on a whole range of issues affecting the public. The public deserves access to this process especially since taxpayer money is used to pay for it --- one of the central reasons why the Supreme Court held that NAS committees should be subject to FACA's requirements.

We urge you to proceed cautiously in any attempts to limit access to these processes and to overturn the Supreme Court's interpretation of the FACA.

Very truly yours,

Valerie J. Stanley

Identical Letter Sent to:

The Honorable Dan Burton
The Honorable Bill Frist
The Honorable John Glenn
The Honorable Steven Horn
The Honorable Tom Lantos
The Honorable Carolyn Maloney
The Honorable F. James Sensenbrenner, Jr.
The Honorable Fred Thompson

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Washington, D.C. 20005-3821 WORLD WIDE WEB http://relm.lmi.org/napa

RESPONSES TO FACA HEARING QUESTIONS

MAJORITY QUESTIONS:

1. During the data gathering phase of your panels, you often guarantee anonymity to individuals. Why is that and how would FACA regulations affect this aspect of your work?

Since our studies deal with management and organizational issues, we draw heavily upon perceptions and judgments in addition to "hard data". Thus, much of our data gathering relates to interviewing numerous employees and other stakeholders related to an agency's, or group of agencies', mission, functions, organization, and management. In order to provide the requesting agency - or the Congress - with sound conclusions and recommendations concerning a troubling situation, we need to be able to penetrate below management's "party line" and get candid views and information from those who take a different position. Many of our panels function in areas where there may be tensions between organizational levels, between political and career personnel, or where sensitive turf wars are being waged.

To be effective, our panels have to be trusted to protect a variety of individuals immersed in these complex and dynamic environments who have sharply conflicting views. Our panels must have access to the confidential views and experience of people at various levels without those people fearing that their participation will trigger retaliation or other problems with their supervisors. Neither do we want the public airing of these individual views to exacerbate internal agency conflict which may already exist.

Therefore, we assure individuals that their comments will be kept confidential. In many cases, our contracts with federal agencies require interviewees' confidentiality. Although our reports sometimes list in an appendix the individuals who were interviewed, we do not attribute particular comments or views to them.

We believe it is essential that we be able to continue to keep comments confidential. Thus, we would have serious concerns about any proposed FACA language (in legislation or regulation) that REQUIRED either that interviewees give comments to a panel in an open forum or that correspondence from such people, or written records of conversations with interviewees, always be made part of the public record.

NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

RESPONSES TO FACA HEARING QUESTIONS

2. Does NAPA exclude accountants from accounting projects; exclude people who worked for the Justice Department when working on Justice issues; how do you achieve balance and on what dimensionality?

We would not exclude panel members for either of these types of reasons. In fact, we might specifically include individuals with those types of backgrounds on a panel, precisely in order to achieve a panel which represents a range of relevant viewpoints, skills, and experience. Rather than have any predetermined list of criteria by which we determine if a panel is "balanced", we try to embody all the major types of views and perspectives that are relevant to each specific project. Thus, in some cases, state and local as well as private industry perspectives might be germane, while in other cases different types of specific functional experience (eg, human resources management or budgeting) might be especially important. Regardless of their background, panel members are selected based on what they can contribute individually to the issues involved and how they contribute to the panel's balance, but not as representatives of particular organizations or interest groups.

3. When selecting a panel, how does NAPA avoid conflict of interest?

The major types of conflicts which we feel are disqualifying for an individual panel member are current or recent financial relationships with the federal agency or program being studied, or situations in which an individual is now playing a prominent role in a federal organization which is to be studied. Individuals are not approached to be panelists if NAPA is aware of any such relationship.

In addition, when prospective members are approached, they are initially asked informally if they have any conflicts and then are asked to complete a conflict of interest form (see attached). These forms are to be completed before or during the first panel meeting. The forms ask members to disclose anything that they feel might pose a conflict. In cases where a potential conflict is disclosed, the Academy president determines if that conflict of interest is disqualifying. We are currently reviewing these procedures to determine what changes are warranted to ensure full compliance with the newly passed FACA amendments.

4. What does NAPA do if agencies reject your reports in whole or in part; how do you enforce the recommendations made in your reports?

We do not do anything. We have no enforcement or other authority to compel agencies to follow our recommendations. Occasionally, congressional committees or other stakeholders urge an agency to follow Academy recommendations that the agency might otherwise have ignored.

NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

RESPONSES TO FACA HEARING QUESTIONS

5. Mr. Glitzenstein and others keep referring to the original intent of Congress in 1972 when FACA was passed. It is my understanding that the intent was to cut back the wasteful expenditure of money on unnecessary meetings that was the real driving force. Dwight Ink, I believe you were a prime mover in this legislation at the time. What is your understanding of Congress' intent regarding FACA?

The following statement was provided by Mr. Ink.

As with many bills, I can recall different reasons that members of Congress had for passing FACA. Although I was concerned about parts of the final legislation, I agreed with Congress that there were very serious problems with a number of advisory committees which had to be addressed in some way.

As one example, President Johnson's White House Task Force on Education, which I chaired, earlier found that a number of the standing committees which were advisory to the Office of Education were following practices I regarded as corrupt. Too often they were simply mechanisms for dividing up the money pie among the educational institutions which the committee members represented. In addition, career staff were prohibited from making recommendations concerning the awarding of grants, leaving the committee members a free hand at the pork barrel. Conflict of interest and secrecy issues were other elements of this misuse of committees. Cost to the taxpayers and balance of these committees were also concerns to members of Congress.

I should also stress that these committees then under criticism were entirely different in composition and purpose than the panels established by the two national academies. In meetings I had with the Government Operations Committee Chairman Chet Holifield, and the ranking minority member Frank Horton, the only discussion relating to NAS or NAPA was to the effect that these academies and their panels should not be covered by the Act. They had no intention of hobbling the capacity of either academy to carry out its mission.

6. The longer of the two legislative alternatives before us today specifies the procedures for NAS. Does NAPA agree with these procedures or does NAPA prefer a different list of procedures?

The procedures specified for NAS in the legislative alternative under discussion today would pose serious problems for NAPA. Although we are comfortable with the general intent of the procedures, we feel that all of the procedures listed are far too detailed and prescriptive for the types of projects NAPA carries out.

NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

RESPONSES TO FACA HEARING QUESTIONS

If this level of legislative detail is ultimately required for NAS, then we would definitely want a shorter and/or simpler list of procedures. We feel that some of the procedures (such as greatly increased use of open meetings and the requirement to make all sorts of background documentation available to the public) would jeopardize the quality of our process, while others (such as the requirement for public duplicating of materials at our facility) would pose significant administrative and financial burdens for an organization of our size.

7. Assuming two lists of procedures, one for NAS and one for NAPA, would NAPA prefer the short legislative version wherein GSA embeds these procedures in regulations or the long version wherein Congress embeds these procedures in law?

Both of these two approaches presents substantial problems. The short version might present the fewest initial problems, but with the passage of time, could ensnare us in as many, if not more, difficulties as the latter. This is because we see virtually no way to avoid incremental GSA treatment of NAPA as simply another advisory committee subject to more and more FACA regulations. Our major concern in both cases is the unintended consequences of requirements which will impede, to varying degrees, our capacity to undertake studies which provide meaningful assistance to the agencies and to the congressional committees who request our services.

Thus, our Academy would prefer LEGISLATIVE language which would allow us FLEXIBILITY in the design and implementation of procedures which would meet the intent of Congress for openness and public accountability.

MINORITY QUESTIONS

1. Mr. Fosler, the report accompanying the Federal Advisory Committee Act defines an advisory committee to be any committee which is established by statute, by the President, or by one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies. How is that different from committees established by the National Academy of Public Administration?

Federal agencies on their own initiative, or at the direction of Congress, frequently approach our Academy for assistance in matters of management and organization, and we typically use the committee mechanism to provide that assistance. However, there are several differences from the FACA report language cited above. The most significant difference is that the agencies request assistance from, and contract with, the Academy as an organization, not with any of its committees. Thus, the committees are not established by the agencies. Each committee, or panel of experts, is created by the Academy President and Chairman of the Board of Trustees on a project by project basis as seems most appropriate to address the issues at hand. Relatedly, with the exception of an

ongoing panel on public sector human resources management practices, there are no ongoing or standing project committees and therefore there is no committee (with that exception) which provides advice to an agency on an ongoing basis.

1.1 Mr. Fosler, you argue that the history and work of the National Academy of Public Administration is quite different from the National Academy of Sciences. Have your panels been subject to the same criticisms of conflict of interest and lack of openness?

Our history and our work are different from that of NAS, although we have similar congressional charters. A significant difference in our history is that we operated in essentially the same manner as we do now for the seventeen (17) years before we received our charter. We have always been a private, non-profit institution and were not established by the Congress. A significant difference in our work is the type of issues involved, which require more attention to the perceptions and opinions of the various players involved.

Our panels have never been criticized for conflict of interest and lack of openness. In our 30 years of existence, including the period of the recent suits concerning NAS, I am not aware that anyone has raised such a criticism.

20. Mr. Fosler, you have indicated that it is important for your committees to be able to protect the confidentiality of some of the people you interview. Is there a way to provide some openness to your committees and still provide that protection?

I think so. The answer lies in providing us some flexibility concerning what meetings or parts of meetings to open to the public. Not all of our meetings involve listening to comments from people who want or need to remain confidential, or deliberations on findings and recommendations. We are happy to make such meetings open to the public, and we intend to do so.

21. Mr. Fosler, what proportion of the Academy's work is done under contract to federal agencies?

Approximately 90 percent.

22. Mr. Fosler, one of the burdens of complying with FACA you have described is having an agency official attend all committee meetings and control the meeting agendas. Please describe the current involvement of agency liaisons in (NAPA) panels, specifically: Which meetings do they attend? To which documents, reviews, or draft reports do they have access? What kind of "veto power" can they exert over the direction or conclusions of (NAPA) panels?

NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

RESPONSES TO FACA HEARING QUESTIONS

The level of agency involvement varies somewhat from project to project, according to the specifics of each project. Generally, officials from the agency (which may or may not be the agency liaison) attend some portion of at least one meeting, in order to brief the committee on the issues that they see facing their agency or program. Sometimes, when more than one agency is involved, we invite them to hear briefings from the other agencies. Sometimes agency staff attend some portion of all the committee meetings, but that is not generally true. However, they rarely attend later deliberative sessions and they never have the power to control the meeting agendas or to adjourn meetings.

Typically, agencies are provided with a next-to-final draft of the report, with a specific request to review it for factual accuracy. Of course, they would have access to any of the background materials which they provided to us, or other reports on the subject (such as a GAO report) which are public documents.

Agencies have no "veto power" over the direction or conclusions of the panels. An essential part of our mission is the degree of independence which enables us to tell agencies - and the Congress - things they don't want to hear, in order to try and make the governance system work better. We have had numerous "clients" over the years who could testify that we both diagnosed problems and proposed solutions with which they did not agree. In a limited number of cases, agencies which disagree sharply with what we have to say write us letters to that effect. We believe that compromising our independence through application of FACA would undermine our ability to fulfill the reason Congress enacted our charter.

Questions for Mr. Paine:

1. Based upon your incomplete draft statement: One, NRDC agrees that FACA need not apply to NAS, and two, that increased public access is needed. Is this correct?

NRDC believes that a *partial* exemption from FACA for federally funded National Research Council(NRC) and NAS committees is acceptable. As I noted in my testimony, we do not oppose a carefully crafted exemption from those provisions of FACA that mandate direct Federal agency oversight of advisory committee membership, meetings, and agendas. But we believe that the essential public access and accountability provisions of FACA under Section 5 and 10 should be preserved, and the Academy's compliance with these provisions should remain subject to judicial review.

2. A point of fact please. An NAS report recommended construction of the National Ignition Facility (NIF). A Federal District court has enjoined DOE from using the report. DOE is actually constructing NIF. Doe this mean if the NAS report was negative instead that DOE could still have constructed NIF?

In the narrow legal sense, yes. An NRC committee's recommendations would not be legally binding unless this were explicitly provided for by statute. However, a negative technical review of a major project such as NIF, by a highly qualified and nominally "independent" NAS/NRC committee, would obviously create a serious political obstacle to simply proceeding headlong with the project, and would certainly be likely to attract critical Congressional and media attention.

3. One of the legislative alternatives before us today would require GSA to issue regulations for Federal Agencies when utilizing NAS or NAPA. Would this basic approach be amenable with NRDC?

We would regard GSA Regulations, absent judicially reviewable statutory requirements for balance and public access, as insufficient, while regulations on top of such legally enforceable standards may not be needed. Our preferred approach would allow the NRC to appoint, screen, and manage its own committees, while subjecting these committees to FACA's judicially reviewable standards for openness, balance, and public accountability. We would recommend waiting for a year or two to assess the Academy's performance before drawing up new regulations.

Questions for Eric Glitzenstein, NRDC, and ALDF:

1. One legislative proposal on the table is simply to exempt the National Academy of Public Administration and the National Academy of Sciences from the Federal Advisory Committee Act. What would be the effect of such an exemption?

NRDC believes that a blanket exemption would be most unwise. The National Academy of Sciences has demonstrated on occasion that it is incapable of enforcing even its own modest internal protections against committee bias and committee-member conflicts of interest. Likewise, both the Academy's attitude toward, and procedures for, facilitating public access are clearly deficient. A recent case study by NRDC's Nuclear Program, "The Rise and Fall of the Third ICF Committee," which we have provided to the Committee, serves to document the extent of the problems that would be likely to recur in the absence of binding statutory standards. We are not acquainted with the workings of the NAPA, and thus are not competent to judge the effect of an exemption on the balance, credibility, and public accountability of its committees.

2. Please discuss the issue of independence in NAS committees: How does FACA alter the independence of Academy committees, given that these committees are currently funded by federal agencies and sometimes private sector industries?

Given the Academy's high level of dependence on federal funding, and the significant dependence of the scientific establishment as a whole on federal funding, the Academy's "independence" must be regarded as relative rather than absolute - for example, in a given instance, an NAS committee's independence may be greater than a similar advisory committee chartered and managed directly by a federal agency, but clearly less than, say, a privately owned journal that receives no federal funds. We were frankly disturbed when the Academy sought to obtain a blanket exemption from FACA by seeking to confuse the Congress regarding the distinction between direct federal "management" of its committees - which we suppose could impair the Academy's scheduling flexibility and independence in some instances - and the essential public protections that FACA affords against unwarranted secrecy, bias and conflict of interest in the procurement of scientific and technical advice by federal agencies. One can have the latter without the former.

3. Some people have suggested that the courts erred in applying the Federal Advisory Committee Act to the National Academy of Sciences. They argue that the Supreme Court decision in Public Citizen should not be considered binding. Would you respond to those contentions?

I would defer to our attorney in the recent litigation, Mr. Glitzenstein, for a response to this question.

4. Both Academies argue that they could not continue to operate if the Federal Advisory Committee Act is applied. Other suggest that is an exaggeration of the facts. Is there a middle ground between full application of FACA to the Academies and achieving the goals set forth in the court opinion and your law suits?

Yes, there is an appropriate middle ground – exempt the Academies from the provisions of FACA that entail direct Federal agency management and oversight of advisory committees, but continue to make the Academies subject to FACA's requirements for committee balance, public access, and accountability.

5. Is there an incentive for agencies to convene NAS panels – behind closed doors – rather than FACA committees which are open to public scrutiny?

Yes, such incentives may well be present in certain instances. For example, in September 1995 senior DOE Defense Program officials decided to terminate its Inertial Confinement Fusion Advisory Committee (ICFAC) on the grounds that it was "perceived to lack understanding of science-based stockpile stewardship" (DOE's multi-billion dollar program for the weapons laboratories under a Comprehensive Test Ban Treaty) and was "restricted by legal requirements (FACA)." Even before the existing committee had been informed of its termination, DOE officials had begun confidential discussions with Academy staff regarding a new ICF Committee under National Research Council auspices, one with a more artfully crafted mandate that would ensure that the National Ignition Facility would not fail to pass muster even if scientific confidence in its ability to achieve fusion ignition remained low or indeterminate. (For further elaboration, see NRDC's report, "*The Rise and Fall of the Third ICF Review...*".)

6. [Not applicable]

7. Nearly everyone who argues for exempt these organizations from the Federal Advisory Committee Act begins by arguing about the onerous bureaucratic requirements of FACA. Is that a real issue, or would everyone involved agree to waive those requirements?

While these "bureaucratic requirements" are not nearly as burdensome as the Academy is wont to argue, they could conceivably impede the timely functioning of NAS/NRC committees in certain instances, and thus we have no objection to waiving these requirements if FACA's public access, accountability, and balance requirements are maintained.

8. Are the National Academy of Sciences current procedures for preventing conflicts of interest on its committees adequate?

No, they are not. While the committee selection process is far from transparent to outsiders, it appears that scientists are first appointed to membership on a given committee and only then asked to fill out a "Potential Sources of Bias and Conflict of Interest" form. This form is therefore not analogous to an "application" for service on such a committee – the potential member has already been invited and has agreed to serve. Hence the Academy staff starts the process of reviewing this information in the somewhat awkward position of having to "disinvite" scientists with conflict problems, something that the staff is naturally disinclined to do. A better procedure would be to first "nominate" potential advisory committee members for service on a given committee, thoroughly vet them both inside and outside the Academy for service on that committee in light of its charge, and only then formally "appoint" them. While vetting inside the Academy would involve a more careful review of confidential information regarding potential sources of bias and conflict of interest, vetting outside the Academy – not now done – could involve, for example, disclosure of nominees and their curriculum vitaes on the Internet for public comment for at least one month prior to making conferring a formal appointment.

A second problem is that the Academy's disclosure form instructs the appointee to report "only that information which is relevant and merits disclosure in light of [the Academy's policy statement]...and the tasks to be undertaken by the particular committee, panel, or other group on which you will serve." That is, rather than requiring broad disclosure regarding financial interests, research support, government service, prior public statements and positions, etc., the scientist is instructed to disclose *only what he or she judges to be "relevant"* to the committee's tasks after reading a copy of the National Research Council's Nov. 1, 1992 statement, "Policy on Disclosure of Personal Involvements and Other Matters Potentially Affecting Committee Service."

The Academy's officers and staff have few means and little inclination for second-guessing an individual scientist's judgments about what is or is not relevant to a given committee's tasks. Actual enforcement of the NAS policies against bias and conflict of interest is left largely to the committees themselves, which are "asked to discuss the general questions of bias and conflict of interest, and the relevant circumstances of their individual members, at the first

committee meeting, and annually thereafter." There is a "fox-in-charge-of-the-chicken-coop" quality to this whole procedure which makes one question its effectiveness in preventing the formation and operation of biased or self-interested committees.

The completed conflict of interest forms are nominally "reviewed" by the "appropriate unit" of the National Academy/National Research Council structure to determine "whether a conflict of interest exists and whether the desired balance in committee composition has been achieved," but if "questions persist," the final decision regarding the composition of a committee or a particular individual's service on the committee "rests with the chairman of the National Research Council." Given that the NAS/NAE/IOM/NRC structure operates hundreds of committees, vesting decision authority in a single senior official with a host of other responsibilities virtually guarantees that bias and conflict of interest review process will result in few "persistent questions" requiring resolution by this one individual. Moreover, the Academy's guidelines do not contain even the most general definition or standard for what would plausibly constitute a "biased" committee membership, or conversely, what constitutes a "balanced committee." In sum, the Academy lacks both the necessary criteria and the efficient procedures needed to identify and prevent overall committee bias as well as individually disqualifying conflicts-of-interest.

9. Mr. Paine, can you describe the conflicts of interest among the panel members of the National Academy of Sciences 1997 report on DOE's Inertial Confinement Fusion Program?

Five out of sixteen members were paid consultants to the Lawrence Livermore National Laboratory that was imminently to begin construction of the National Ignition Facility (NIF) then under ICF Committee's review during the first phase of its operations. In the course of serving on the committee, three members gained access to classified information on DOE nuclear explosion simulation requirements while they were also directly involved in (successful) bids for closely related DOE Defense Program computer simulation contracts offered to the unclassified university research community. Eleven out of 16 members (i.e. two-thirds) of the committee had either previously stated positions supporting NIF and/or were consultants or advisers to the Livermore Laboratory and even the NIF program itself. Overall, 14 out of 16 members had a personal or institutional connection with the agency whose program was ostensibly undergoing "independent" review.

The ICF Committee members' conflicts of interest are summarized in the attached table (and discussed in extensive detail in NRDC's report, "*The Rise and Fall of the Third ICF Review...*")

National Academy of Sciences
Third ICF Review Committee

Conflict of Interest

	Committee Member																
	Koonin (Chair)	Arnett	Byer	Conn	Davidson	DeMara	Dimotakis	DongArra	Falcone	Grunder	Kendall	Kerman	Otszag	Rosenbluth	Trilling	VanDevender	
Paid Consultants to LLNL	X		X				X		X			X					
Directly involved in (successful) bids for closely related DOE Defense Program nuclear weapon simulation contracts while serving on the NAS committee	X						X	X									
Advisors to the NIF Program at LLNL										X		X					
Previously endorsed NIF project as members of:																	
• DOE's ICF Advisory Committee 1992-1995	X					X						X		X			
• JASON/MITRE Corporation SBSS and NIF reviews	X													X			
Previously recommended, as members of Second NAS ICF Review Committee in 1990, that funding priority be given to Livermore's technical approach of developing a 1-2 megajoule glass laser to "demonstrate" fusion ignition and modest gain in the near term, while recommending termination, deferral, or scaling back of other approaches	X			X	X	X								X			
Former head of DOE's Office of Fusion Energy					X												
On leave from Sandia National Laboratory where he was in charge of DOE funded ICF work																	X
Received free time on Nova, a glass laser ICF facility at Livermore National Laboratory		X															
Employed by the management and operating contractor (University of California) of the weapons laboratory hosting the NIF project				X					X					X	X		
Co-authors of papers with LLNL ICF scientists		X					X		X			X					
Lobbied the Chairman of the Subcommittee on Energy and Water Development of the House Appropriations Committee to support DOE SSMP and NIF											X						
Lobbied Representative Ron Dellum's office expressly to support the LLNL position on NIF	X																
Said to be a joint owner of a commercial firm with a DOE/ICF program researcher at the University of Rochester's Laboratory for Laser Energetics, where NIF related experiments are conducted													X				
Professor emeritus at UC's Lawrence Berkeley Laboratory which has a heavy-ion ICF program that collaborates closely with LLNL															X		
Appeared in a promotional video about NIF which was prepared by LLNL and shown at the NIF groundbreaking ceremony	X										X						
Employed by other DOE physics or nuclear energy research contractors			X		X			X		X	X	X	X				

10. How adequate are FACA's provisions for preventing conflict of interest on its panels?

I would defer to NRDC's counsel in this matter, Mr. Glitzenstein, for a detailed response, but it is my understanding that FACA does not contain any conflict-of-interest standards or disclosure requirements. FACA does contain, however, a general provision that committees created by an agency be fairly balanced with respect to the points of view represented by committee members.

11. [Not applicable]

Mr. HORN. Yes, we'll——

Mrs. MALONEY [continuing]. Thank everyone.

Mr. HORN. Without objection, the questions of the ranking member will be put in the record. At this point, staff will work with the majority staff to have them sent to all of the panelists here and your answers, if we could get them, within a week or so would be very helpful. And I thank the ranking member for her usual constructive questions and comments.

Now, let me get back to this whole bit of what makes physical scientists, primarily, in your case, engineers—How do they conduct themselves when they're working on strictly scientific matters and making recommendations? Is there any difference when they're working on a project related to the Federal Government?

And let's face it. If, sometimes, national associations and some of them have a bias to the left or a bias to the right, I think most of us regard the National Academy, both of us, above the battle on that, or, at least, you seek to be above the battle, without everybody grinding their axes, as you said I thought very well with the representation of people that get paid to represent an interest and if they're polluting the process, that really doesn't get us too far. But the question is, How do you balance these committees? To what degree does somebody play God, frankly, to do it? Because there has been a lot of criticism over the years of certain scientists that have the "in" with the Federal agency and other scientists that don't.

Having spent 18 years of my life as a university president, I'm well aware of when you look at one set of projects and how they were judged and other sets by various Federal agencies which are filled with bias, in terms of the research directors in some of the areas. So, I'd like to hear a little more on that to get a feel for what you see is a problem, it sounds like, in opening it up.

Now, you're coming part of the way, but what is it that would most irritate a dedicated scientist who's trying to grapple with a problem, then come up with a conclusion. Now, part of this isn't going to be a scientific conclusion and that's part of the problem. Part of it is going to be a policy conclusion with intended and unintended consequences, laden with value-bias of either the world around us or the individual, although they look you in the eye and say, I'm not biased. The fact is everybody is biased. Lawyers are biased, political scientists are biased, and that's my profession. So, explain to me where that line is drawn and how we deal with it in terms of getting "objective," very hard to get at anytime, information out of your respective academies.

Mr. ALBERTS. Do you want me to answer? Let's just take that electromagnetic fields committee again, because that's a good example. The chairman is recognized, as an academy member, as one of the world's great scientists and he's there or she's there, whoever the chairman is, in a very important position to keep everybody honest. Scientists value most, in my experience, and I'm a scientist, of course, value most of all their reputation for honesty. I mean, if you do something dishonest as a scientist, that's the end of your career. So, the scientific process and the scientific values of honesty are what really works to create this consensus.

You might be amazed to find that there are so few committees that get deadlocked and end up with a minority report. Actually, I'm amazed as well because we set up these committees at the start with people who have all kinds of different opinions. That is really the magic of the process.

I chaired the committee in 1987 that set up the roadmap in an answer to a question about whether we should map in sequence the human genome. When they called me to chair this committee, I said, why do you want me? I haven't even thought about this. And they said, this is the National Research Council saying that they wanted me because I had no opinion and I would be a fair chairman. And we started out with people on both sides, Nobel Prize winners on both sides. One, Jim Watson, who's on one side, and Olya Gilbert on another. One said that it should be done right away and the other one said that it should never be done. So, the fact is we were able to bring in, over the course of the meetings, all these people who were actually doing the work, young people actually doing the work, working in human genetics. And we learned together, we learned. It was like a, you know, a big course in what was going on in biology for even the world's experts there. We didn't know a lot and in the end, after four or five meetings, we came to the common view and we mapped out a specific thing that we could all agree on. That set up the human genome project.

And I want to emphasize that we are not a Government committee. We published this thing. The NIH didn't set up its own committee to evaluate whether we gave good advice or not. That was, of course, a fact of open process. They evaluated what they should do. That's the normal course of events. We publish something, it goes in the public record, the Government agency then has a hearing, the whole process is open, to decide what they should do with this information.

So, the end process is that the Nation gets served by two different kinds of processes. One much more political than the other. What we're trying to do here is maintain the objective advice that we give and, frankly, it's often ignored. We advised in 1987 that the Delaney clause made no sense. It took until last year, when I testified using a 10-year-old report, to get that law out of the books.

So, as you know better than I, science is only one of many contributors. Our job, and this is why we must be independent of the Government, independent of politics, is to give the best advice we possibly can on science and whether or not that's taken by Federal agencies and others is up to them based on the evidence. So, we don't make policy, we only put out the science.

Mr. HORN. Well, in essence, what you're saying is it is not all bad. In fact, it is good that we have people with certain biases, provided the committee is balanced——

Mr. ALBERTS. Right.

Mr. HORN [continuing]. And those biases can clash with each other, just as you noted in the case of the two Nobel Prize winners.

Mr. ALBERTS. Right.

Mr. HORN. So, eventually, they reached a consensus and was either one of them already masters in the field or were they both?

Mr. ALBERTS. Well, they were both masters——

Mr. HORN. In the same field?

Mr. ALBERTS [continuing]. In parts of the field but actually, there's no one person who knows enough to produce the kind of reports that we want. The committee must learn from a whole variety of different people. We did the National Science Education Standards. We brought in schoolteachers, State people working in education, education researchers, scientists. It was a great learning experience. In fact, you could argue that the communities which then, after the committee breaks up, creates the interactions that reverberate for further years, as they are on education, you know, it's the being together as constituencies that never talk to each other that's one of our most important processes.

Mr. HORN. Yes; you're absolutely right. That's a very valuable function. Mr. Fosler, you want to add to that? And then we'll throw it open to the rest of the panel.

Mr. FOSLER. One of the founders of the National Academy of Public Administration was James Webb, who, at the time, was the Administrator of NASA during the period of the Apollo program. And one reason he wanted to create the academy was to seek what he called a trusted source of advice on how to make Government work better. He was looking for people who had top-level experience that he could turn to, people he knew had first-hand experience in Government, not just with management and organizational issues, but governmental management and organizational issues, and people that he knew would place a priority on the public interest. This is the watchword of our academy; it is to be a trusted source of advice.

One is trusted in our field if one has first-hand experience, if one has achieved scholarly distinction in the field, if one is independent, objective, nonpartisan. And those are the values that we hold to be our top priority. In pursuing those values, we're very careful as to who is elected to that National Academy of Public Administration, the principal pool of people from whom we draw our experts. When we put together a panel, we're enormously careful to be sure that we have people with the kinds of expertise and the kinds of perspective that are required to address a particular issue. And we require that our standards of excellence in the methodology that we have by which we approach these problems be clearly applied.

Now, you asked, Mr. Chairman, what is the kind of a problem here that might make it difficult or might even deter the kinds of experts and people of experience that we draw on from participating in our panels. I stressed earlier the issue of confidentiality in convincing people that we need to draw on, to get information from, that they can speak their minds freely and give us the kind of information that we need to make good decisions.

I think one of the principal deterrents to getting good people to serve on our panels of the caliber that we can get at the present time would be if they felt that they were inhibited from getting that kind of information. They know that they need it in order to be able to have the facts, to reach sound conclusions, and to make recommendations that they can feel confident in. If they felt that they could not get that kind of information, I think it would be very discouraging for them to want to serve on one of our panels.

Mr. HORN. Let's take a couple of your studies. One Paul Volker headed had to do with the public service, how you attract people, so forth. Would that have been a problem, to be completely open in terms of deliberation? Is it because we're talking about particular agency administrators and how they handle it? And if you had a reporter sitting there, it would be in the front page of the Washington Post or, at least, the Federal column?

Mr. FOSLER. That particular commission was not an academy panel. It was not an academy project, if it's the same one I think we're referring to——

Mr. HORN. Yes. Right.

Mr. FOSLER [continuing]. The National Commission on the Public Service.

Mr. HORN. Right.

Mr. FOSLER. And, in fact, that was an entirely, so far as I can recall, an entirely private panel, privately funded organization, and they were not subject to any requirements that I'm aware of, aside from those that did obtain in private law.

Mr. HORN. Well, give me some examples of some of your studies where you feel openness to the full degree of deliberations being observed by whoever walks through the door that that would inhibit that study.

Mr. FOSLER. Well, I think Peter Szanton cited one that was very important, and, in fact, it's one that the Congress came to us and contracted with us directly to do and that was our review of the General Accounting Office. It's always difficult, of course, to both find an organization and to establish a study to review the principal Government reviewers. It was enormously important, in that case, for us to have candor and confidentiality from people inside the General Accounting Office to be able to tell us exactly what they saw as the issues that we needed to address.

We recently completed a study of the Veterans Benefits Administration and, there again, I think that, in that particular case, I think the leadership was genuinely interested in having us give the most candid advice. It could well be that the candor of both what we learned and what we said was perhaps even more than they had anticipated.

We've had studies of the Environmental Protection Agency, the Federal Emergency Management Agency, and the Department of Housing and Urban Development in which almost in all cases, in both administrations, Democrat and Republican, we came up with findings and conclusions based on a very careful analysis and interviews, which we guaranteed would be held confidential for those public employees that wanted to tell us their views. We reached conclusions that, I think, at least at the time, the agencies were not all that happy with, but, over the long run, have demonstrated their validity and the value of being sure that we did get that kind of candid information.

Mr. HORN. Dr. Ink.

Mr. INK. A few years ago, the academy conducted a study of revitalization of the Federal Government which involved a number of different Federal agencies. This report was later voted at one of the academy meetings the most significant document the academy had ever released. It was a document which the NPR staff told us was

their most useful single document in developing Vice President Gore's recommendations. We had to assure each agency with whom discussions with their people, those agency people would be confidential and would not be made public. That is the way we got the kind of candid information we needed concerning the red tape, the undue costs of operation, and how the bureaucratic process had become so fossilized that agencies were unable to respond to the public needs. We couldn't have done it if the people who were coming in with their information would have been held in public session.

Mr. HORN. OK. We've listened now to the heads of the two academies. I would like to hear from the other witnesses. Is there anything you disagree with in their testimony? Mr. Glitzenstein.

Mr. GLITZENSTEIN. Thank you, Mr. Chairman. Not surprisingly, I do disagree with some of what was said. I just want to also be clear at the outset that some of these descriptions of particular examples I think we have to be clear because these sound like investigations, which it's not clear to me, involved committee structures. We're talking about a statute and a lot of investigations, obviously.

Mr. HORN. Well, let's clear that up——

Mr. GLITZENSTEIN. Yes.

Mr. HORN [continuing]. Right now. To what degree does the Academy in terms of science and public administration—this isn't sending one or two people out into the field. This sounds to me like a team effort where you go and call in people and so forth. Can you clarify that?

Mr. SZANTON. Just to be clear, Mr. Chairman, in the case that I adverted to, namely the GAO study performed by the National Academy of Public Administration, there you had a committee, a project panel of the academy, doing the study and receiving testimony under the conditions of assured confidentiality.

Mr. GLITZENSTEIN. Again, I think a distinction has to be drawn. Some of these examples, at least, may involve investigations which don't involve putting committees together. I think it's very crucial to focus on that distinction because the attack on the openness of a committee process is at core, whether you think it's good or bad.

To go back to your opening remarks, Mr. Chairman, a fundamental question about the entire concept underlying FACA. The concept underlying FACA, when passed in 1972, was: We want to have these committee discussions in public. And, again, putting aside for a moment whether that was a good or bad judgment by Congress at the time, I don't think we've necessarily heard any, at least from my standpoint, cogent distinction between committees put together for these purposes by the set kinds of entities and committees put together on, for example, on things like entitlement reform, as we now have, obviously, a government-formed committee on that extremely controversial subject; and on human radiation experiments, on which a FACA committee was also formed.

I think what you really have to grapple within: do you fundamentally believe that that kind of access to deliberations of committees is a good or bad idea? And that really implicates the underlying concept of FACA.

The other point I want to make in that regard is that the existing statute has exemptions for at least some of what was discussed here. This notion about particular supervisors being discussed, for

example; at least some of the examples given by the gentleman on the panel involve, it seems to me, asking employees about particular supervisors and their ability to perform certain kinds of functions. That would plainly be covered by the existing exemption in the statute for personal privacy matters. So, Congress has already made an effort to craft exemptions for exactly these kinds of problems.

What we'll really have to get in focus is do we want public access to the general advisory committee discussion of policy questions, I think, Mr. Chairman, you very articulately explained, in my view, why ultimately these all come down to policy questions. Do we want those policy questions to take place in public?

It also seemed to me that Dr. Alberts ultimately suggests the following syllogism: that if you want these kinds of recommendations to be trusted by the public, you have to make sure they take place in secret. I don't understand that syllogism. I think that the concept of FACA is precisely the opposite, that if you do have public access, the public will trust them better and, just to close on that point, Dr. Alberts made the point that many of these recommendations are produced and then they're not implemented. And NAS recently put out a study which talked about a lot of the NAS committee recommendations being produced at great public expense that sit on shelves and are never implemented by anyone, including the agencies that paid for them.

I think you have to ask yourselves, in light of that empirical record which ultimately, after all, if agencies are not implementing NAS recommendations, then what's the point of the public funding them? Perhaps the reason why they're not being implemented is because we are not generating the kind of public credibility and support that would occur if the public had an opportunity to see many of these committees in which people sit down, work through their analyses and really craft what, I think, are in many cases, obviously, fine recommendations. And, so I think you really have to start from the standpoint of FACA again—perhaps public access would help the ultimate implementation of the good recommendations and prevent abuses of the system where that's warranted.

Mr. HORN. Ms. Stanley, you have some comments?

Ms. STANLEY. Thank you. I think that openness is important because you have to have a way to expose those situations where there's too much of a close relationship between the National Academy of Sciences committees or the staff and the Federal agencies. In discovery that we took in our case, we learned from the National Academy of Sciences staff that they basically view themselves as knowing the Government agencies' needs before the Government agency even knows it has those needs. Where you have such a unity of interest, I think it's important to the public to have communications between the agency and NAS committees open to the public.

I would like to comment on the suggestion that Dr. Alberts made that, for example, in this animal committee, that persons from animal organizations are just simply unsuitable to serve on National Academy of Sciences committees. We proposed a list of experts, people who have experience and who published on and studied these issues of animal use and experimentation for 10, 20, 30 years

and who know very well what the issues are and are very knowledgeable in those areas.

We suggested them to be as members on the committee. I don't think there's any person that we suggested who couldn't say, if asked, could they put aside the fact that they work for an organization and give the committee the full benefit of their expertise. I just think that it's ludicrous to suggest that animal organizations couldn't do that.

I'd also like to suggest that, you know, what about the flip side of this, what about the bias that comes from being employed in the very field that you're asked to make recommendations on. I think there's a bias there, too. Yet, National Academy of Sciences committees are routinely composed of people with that kind of bias. There's a problem. What viewpoints do we want to have on the committee? Do we want our own viewpoints that we know very well that are not going to cause problems? Are we willing to go outside our trusted circle of people to get viewpoints where there may be some contention? Maybe in other areas, there's been more of a willingness of the National Academy of Sciences to do that. In the area that I work in it has not, for the most part.

Mr. HORN. Well, Dr. Alberts, what do you think of that in terms of the balance on committees?

Mr. ALBERTS. Well, let's get back to this particular committee that is being discussed. Of 15 members, 8 were veterinarians. You could argue their interest is to have more requirements for care because that's what they do.

Jo Ann Steggerda, I don't know how to pronounce it, was specifically there as a representative of animal groups. She's from the Humane Society, the American Society for the Prevention of Cruelty to Animals. She agreed with this committees consensus report.

We have a letter from Gus Thornton, president of the Massachusetts Society for the Prevention of Cruelty to Animals, who said that, "it has taken time and expertise to gain the trust of the research community." Trust has now been established and, increasingly, the director for the Center for Laboratory Animal Welfare, Peter Thieren, finds he's invited to participate in arenas formerly closed to animal protectionists. It used to be Thieren was asked to submit revisions to the guide and care, use of laboratory animals, that's the one in dispute, here published by the National Academy of Sciences. He is also serving as the animal protection spokesperson on the academy committee that will make recommendations on the fate of more than 1,500 chimpanzees in U.S. laboratories." That report has since been published.

So, I think there's a disagreement within the animal welfare community as to how well we're doing on these reports and I don't think you can satisfy everybody. And that's the general problem we have. If you're going to try to do this work in controversial areas, otherwise you don't get asked, you're going to have critics. But we do the best we can.

Mr. HORN. On that point, in exhibit 3 of the Animal Legal Defense Fund, they recommended that any of the seven additional members at least, I guess, to that National Academy of Sciences committee, and none of those seven actually conducted research on laboratory animals. Is that intentional or what?

Ms. STANLEY. No, it's not. I think there were one or two on there who have had that experience in their background. I'd like to say that, in response to Dr. Alberts, Jo Ann Steggerda and Peter Thieren, who I know personally and have a lot of respect for, were put on those committees after those issues of opening up the committee and adding additional people were brought to the National Academy of Sciences attention. But, while I commend those actions, I have a concern because they're 1 person out of 12 or 13. However, it was commendable that the Academy did try to make an effort to try to put some other viewpoints on those two committees.

Mr. HORN. Mr. Paine.

Mr. PAINE. Mr. Chairman, FACA exists not to ratify the best cases but to deter the worst cases and I don't doubt that there are many excellent processes that have been pursued in the course of preparing Academy reports. I mean Dr. Alberts has, in effect, cited some of the best cases. But we have testified to and can provide to the committee a 50-page study of a worse case that occurred very recently in the academy. Dr. Albert talks about independence and that being a major goal of the Academy procedures and I just have to say, in the case of this particular committee, that suggestion is sheer nonsense.

This committee was not independent of DOE. The academy staff was drafting letters for the Assistant Secretary of Defense Program's signature. There was a DOE note-taker who was the official recorder for the academy's meetings, these so-called independent meetings. The only account of those meetings that is available to the public was kept by DOE.

Mr. HORN. So, that one, in your judgment, I think I'd agree with you, quacks like an advisory committee, given the linkages there.

Mr. PAINE. It's bellowing like an advisory committee, Mr. Chairman.

Mr. HORN. But, would you agree that if you've got an area that you want to pursue to find the best thinking, best practices in case of the Academy of Public Administration, whatever, that if they're delegating that problem area to either academy or engineering, the other academies, wouldn't you say that's a better way to get the information than have simply individual government-chosen scientists which is what they'll do? And the question is, where does the American people, as a whole, not just the interest groups sitting at the table, not just the academy sitting at the table, get the best deal in terms of bringing the "truth," if there is any, to the fore? Because otherwise, you're just going to have Energy pick their buddies and that——

Mr. PAINE. And that occurred in this case. What I'm saying is we are supporters of the academy's independence. We support the idea that the academy should not be directly supervised by the Federal Government and I think the academy has been somewhat misleading in continually lumping the public access provisions and the openness provisions of FACA together with the administrative and oversight role that the Federal Government plays for Federal advisory committees. Those are two very distinct functions of the committee act; one can have one without the other.

Mr. HORN. Um-hum.

Mr. PAINE. And we are suggesting that one can have public access and statutorily mandated standards for balance, for example, that the Academy itself will be responsible for ensuring and if it doesn't ensure them, there's a statutory standard that citizens can then use for judicial review. We are not suggesting that the Academy be subordinated, you know, to all the administrative requirements of FACA and become like any other FACA committee. And I think that should be clear now. I think that's pretty much a consensus among all the groups here that have expressed a concern about public access.

But, it is quite clear that the academy's own internal controls do not work in all cases. Dr. Alberts refers to the need to disclose biases and conflicts of interests but, if you look at that form, the scientist is invited himself to make the judgment about which conflicts are relevant. The form says, disclose all conflicts that you believe are relevant to the committee's charge, not to the sponsoring agency or, you know, to other stands or positions you've taken on the issue, relevant to the committee's charge. And that——

Mr. HORN. Well——

Mr. PAINE [continuing]. I think, in this case, it misled the academy. They didn't get the full information that they claimed to be requesting on the participants in this committee.

Mr. HORN. How would you word the sentence, then, which includes the sponsor to your conflicts in relation to the sponsor, et cetera? What are your biases?

Mr. PAINE. I think——

Mr. HORN. How do you get it any finer than that?

Mr. PAINE. Well, I think one thing is to ask for, you know, instead of relevant to the committee's charge, you know, ask for full disclosure of the professional associations and memberships and contracts and consulting arrangements that that person has and then let the academy staff decide what is relevant. And, in fact, I think that kind of information should be made public. But, you have a sort of limited quasi-disclosure to the academy itself which is then kept secret from the public. So, they are sort of two layers removed from what we would consider full disclosure needed to conduct a real balanced analysis.

Now, the academy clearly has a dilemma, especially in the field that we reviewed, where, the only experts in the field have ties to DOE and all know each other and have been on previous panels. For example, the chairman of the review was not someone who didn't know anything about the subject. He's one of the world authorities on it and he chaired the previous academy review in 1990 that had favored a going in the direction of the National Emission Facility. So he was the exact opposite of what Chairman Alberts previously referred to as the ideal chairman for a committee.

Mr. HORN. Of course, one could argue that maybe if they did have their deliberations in private, with nobody from Energy in the room, they might have a more honest opinion put forth than if the Energy crowd was in the room and they know they're going to have to see them 2 months from now to get a project out of them.

Mr. PAINE. But the Energy crowd is in the room in the sense that 15 out of 16 members had some institutional or personal tie to the Department of Energy, I mean, that's——

Mr. HORN. Well, you also have those—it's like a friend of mine who was rector of the University of Sarajevo described a mission going to Poland when the Soviets were at the height of their power and they were speaking into the chandelier about each other, and that was all being taken down. And yes, there are people that can get on there that will run back and tattle for their own personal economic gain. Now, how do you solve that, Dr. Alberts? Mr. Fosler? Either one of you.

Mr. ALBERTS. Let me just point out that this particular study was a very special, unusual study. No, it was a classified study. Most of that information was classified, so, he's talking about closed meetings which would have to be closed. I don't know anything about this Department of Energy person. He shouldn't have been in the room if they were deliberating, and I'll get back to the committee with information about that.

Mr. HORN. Without objection, be put in the record at this point.

Mr. ALBERTS. Yes. There may have been somebody there taking notes because of the classified information that was being transferred and that's a different thing. And there, we're caught with certain government requirements that we must obey, of course.

I will also emphasize to ask you to look at this report. It's incredibly technical. I've read this report, you know, I couldn't have been chair of that committee. I mean, it's hopeless. It's all about the science of this particular kind of operation and, obviously, the people who know about it have had some association, by and large, with some agency that supports research in this area.

And when we had a big committee on Ward Valley, for example, which is investigating a radioactive waste site, and we were attacked by certain groups because there were so many people from universities on this panel that argued that anybody from a university was biased because most universities had medical schools and medical schools have to dump their medical waster somewhere, but that's not the way the world works because I know I'm from a big university.

I don't care, you know, what happens to the university's waste, I'm trying to act as a scientist. So, one person's view of bias is different from another person's view of bias. If we're going to eliminate for anybody to associate with a university for some radioactive waste because the university generates some radioactive waste, you're not going to be able to give the best advice to our government.

In this particular case he's talking about, we were looking into this extensively. This is a highly technical committee. It was not telling the Department whether or not they should build this thing. It was telling them about the science. We needed people who really understood that and many of the people, obviously, had visited the lab, had studied this issue before independently. You know, there's just so many people in the world who have the expertise and——

Mr. PAINE. Mr. Chairman——

Mr. HORN. We're going to——

Mr. ALBERTS [continuing]. That's the problem with that. So——

Mr. HORN. I would——

Mr. ALBERTS [continuing]. You know, we did produce the report. I had urged you to look at the report and the proof is in the pudding.

Mr. HORN. We're going to go into recess for 5 minutes and then I'll be glad to hear Mr. Paine's answer on that. So, we're recessed for 5 minutes.

[Recess.]

Mr. Horn. OK, Mr. Paine.

Mr. PAINE. Mr. Chairman, we have prepared a detailed 50-page study on the rise and fall of this particular academy committee that, as you may know, was ultimately terminated by a Federal judge, and we would like to provide that for the record.

Mr. HORN. Sure. I don't know if we can get everything in, but we would certainly, with your permission, get the relevant parts, and without objection that will be put in the record.

[The information referred to follows:]

The Rise and Fall of the Third ICF Review

A Case Study of Bias and Conflicts of Interest in a National Academy of Sciences Review of the National Ignition Facility

by

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(Note: Starred items (**) are included in the following excerpts from the NRDC Report.)

EXECUTIVE SUMMARY

Under the sponsorship of Office of Defense Programs of the Department of Energy (DOE), from May 1996 through March 1997 the National Research Council (NRC) of the National Academy of Sciences (NAS or "Academy") organized and supervised the activities of a Committee for the Review of the Department of Energy's Inertial Confinement Fusion Program (henceforth "the NRC-ICF Committee"). The rise and fall of this committee epitomizes in a compelling way the kind of occasional serious abuses that Congress sought to guard against when it created the Federal Advisory Committee Act (FACA) in 1972. Until recently, federally financed advisory committees managed independently by the Academy, under contract to a sponsoring agency, had never complied with FACA, despite the fact that such committees clearly fit FACA's description of committees "utilized" by an agency to provide advice which the agency relies upon to make decisions.

In response to a legal challenge brought by NRDC and two co-plaintiffs in March 1997, the D.C. Federal District Court has permanently enjoined DOE from relying on, disseminating, or continuing to support the NRC-ICF Committee's work, on the grounds that the Committee was formed and operated in violation of FACA. The Academy itself, however, was not enjoined from publishing the report, and hence its independence and first amendment rights were not at issue.

In summary, the major results of this case study are as follows:

- In September 6, 1995 the DOE Office of Defense programs secretly decided to dissolve its only ongoing advisory committee under FACA—the Inertial Confinement Fusion Advisory Committee (ICFAC)—and soon thereafter began confidential discussions with Academy staff regarding a new ICF committee under NRC auspices. Members of the ICFAC and the public, however, were not informed of this decision until two months later, a week before ICFAC's last scheduled meeting.
- According to internal DOE memoranda and viewgraphs, the two principal "ICFAC Weaknesses" identified by the DOE Office of Defense Programs were that it was "restricted by legal requirements (FACA)" and "perceived to lack understanding of science-based stockpile stewardship," the DOE's multi-billion dollar program for maintaining the skills of the nuclear weapon design laboratories under a Comprehensive Test Ban Treaty.
- A centerpiece of this new program is the National Ignition Facility (NIF), a $1.7 billion laser fusion machine the size of the Rose Bowl now under construction at the Lawrence Livermore National Laboratory (LLNL). The technical and scientific readiness of the NIF project to achieve its design goal of fusion ignition had come under increasing scrutiny by the ICFAC, which at the time of its dissolution was intending to reconstitute a Target Physics Subcommittee to probe more deeply the sensitive issue of whether technical confidence in the achievement of ignition was sufficient to warrant proceeding to the construction phase of the project, then scheduled to begin in about one year.
- A November 1995 letter from Secretary O'Leary explained that the basis for abolishing ICFAC was that "[t]he program is now entering *a new phase of broader scope as an integral*

part of the Department's science-based stockpile stewardship of nuclear assets . . . the limited scope of the committee restricts its usefulness."

- Left unsaid was the fact that this "new phase of broader scope" was expressly designed to finesse the critical issue of confidence in fusion ignition, because many of the NIF's more recently acquired "stockpile stewardship missions" do not require ignition. Also left unsaid was the DOE staff's conclusion that, along with its expanded scope, the principle virtue of a new Academy committee would be its freedom from FACA's openness and balance requirements.

- Lest there be any doubt regarding DOE's true motivations in dumping the FACA Committee, a December 1995 memorandum from the ICF Program manager states, "*A major review of the ICF program is needed in this fiscal year to reaffirm mission need and give further credence to arguments for success of the National Ignition Facility (NIF)* . . . [I]n order for the National Academy of Sciences to produce an interim report before September 1996, a contract with the NRC must be in place by February 1996."

- Information obtained during the discovery phase of *NRDC, et al. v. Peña, et al.*, shows that while the *underlying contractual charge* to the committee remained unchanged—"determine the technological readiness of the NIF project to proceed with construction [and] the adequacy...of confidence of achieving ignition"—the public *description* of this charge—the so-called "Terms of Reference" under DOE's first "Task Assignment" to the Committee—was altered at the last moment *at the behest of Academy officials*, with the effect of papering over the otherwise direct link between DOE's request for an "interim report" and its planned go-ahead for NIF physical construction.

- The revised "Terms of Reference" dropped any reference to the impending decision to begin physical construction of NIF, and the requested assessment of the *adequacy* of NIF project's confidence in *achieving* fusion ignition suddenly became "make recommendations to *facilitate* the scientific *goal*, which is ignition."

- A logical inference from the evidence presented in this report is that the Academy staff belatedly sought to conceal—or at least blur—the review's linkage to NIF construction, because it attested to the fact that *the NRC-ICF Committee had indeed been specifically established by DOE to lend the Academy's prestige to a major program decision.*

- Nevertheless, at the Committee's first meeting the DOE Defense Programs Deputy Assistant Secretary for Research and Development, "pointed out that the committee's input, at least in the form of an interim report, will be ***essential*** prior to proceeding through Critical Decision 3, ***approval of physical construction of the NIF.***" And in its March 1997 Interim Report, the NRC-ICF Committee stated that it was rendering a judgment on whether the NIF project was "technologically and scientifically ready *to proceed as planned.*"

- While all the individual committee members were distinguished scientists and the committee was well suited for technical evaluation—scientific credentials were never an issue—the NRC-ICF Committee as a whole was seriously unbalanced with respect to rendering a judgment on whether DOE's ICF program was scientifically and technologically ready to begin construction of NIF at LLNL.

- Five out of the sixteen members were paid consultants to LLNL.
- While serving on the committee, three members were directly involved in (successful) bids for closely related DOE Defense Program computer simulation contracts.
- Overall, 14 out of sixteen members had a personal or institutional connection with the agency whose program was ostensibly undergoing "independent" review
- Eleven out of 16 members (i.e., two-thirds) of the committee had either previously stated positions supporting NIF and/or were consultants or advisers to Livermore Laboratory and even the NIF program itself.
- Taken as a whole, therefore, the NRC-ICF Committee was egregiously unbalanced, that is to say, biased, in its inclusion of individuals with serious conflicts of interest, and in its lopsided distribution of scientific and technical viewpoints, professional associations, and institutional affiliations.
- In light of the evidence of such palpable bias, and the expressions of outside concern which it aroused, the stonewalling response from the Academy was instructive, and provides a good indicator of the standards likely to be applied to NRC federal advisory committees in the future if the Academy succeeds in its current drive on Capitol Hill to remove itself from the purview of FACA.
- In a January 22, 1997, letter to NRDC, Dr. Bruce Alberts responded to the bias and conflict concerns as follows:

> "After careful review, I can only respond by reiterating what my colleagues here at the NRC have discussed with you before—that the NRC has carefully chosen this committee of highly-qualified experts, that the NRC believes the committee is appropriately balanced and free of conflict of interest for the charge addressed to the NRC, and that the committee's draft report will be rigorously reviewed by experts outside the committee and revised, if necessary . . .
>
> "It is true that half of the committee members have served on previous bodies reviewing the NIF, ICF, or the DOE laboratories....Such service, in fact, gives these members both a broader and more in-depth knowledge of the scientific and technical issues in the programs which are being reviewed. Concerning the overall balance of the committee, fully one-half have no such previous experience with the NIF or ICF program."[1]

- This response indicates a virtual breakdown in the Academy's controls for recognizing obvious individual conflicts of interest and palpable bias in the composition of its review committees. This report reviews the backgrounds of each of the committee members individually. The available data indicate that, contrary to Dr. Alberts claim, 12 of 16 members (75%) had "served on previous bodies reviewing the NIF, ICF, or the DOE

[1] Letter from NRC Chairman Bruce Alberts to Thomas B. Cochran, Director, Nuclear Program, NRDC, January 22, 1997, p. 1.

laboratories," and 13 members (80%) of the committee had "previous experience with the NIF or the ICF program."

In violation of FACA, there were never any public notices of meetings of the NRC-ICF Committee.

The committee operated under the ground rule that the chair retained the right to declare a closed session at any time at his sole discretion. A closed session of an NRC committee means attendance by the committee and NRC staff only—supposedly to protect draft recommendations until completion of the Academy review process and to ensure that sponsors of studies cannot use their funding leverage to pressure members to make changes in draft reports. Chairman Koonin chose to undermine these objectives by inviting DOE officials to a closed meeting of the NRC-ICF Committee , in which, according to court papers, DOE "received verbal indications that the committee's analysis found no technical reason to delay NIF." While the stacked nature of the committee meant that this conclusion was never in doubt, Chairman Koonin's actions reveal that the Academy's nominally "rigorous" internal and external review process can also be merely *pro forma*, whenever the needs of the situation dictate.

Despite being a scientist and having received an invitation to make a presentation to the committee on technical issues, one of us (Cochran) was initially denied access by the NIF Committee staff to written testimony and viewgraph materials of previous presenters. Only after Cochran appealed directly to the Executive Officer of the NRC was he given limited access to these materials—less than 24 hours before he met with the committee. Our other co-plaintiffs in the case encountered even greater difficulties in dealing with the Committee.

In summary, several committee members had direct financial conflicts of interest, in ect violation the Academy's own conflict of interest rules. The Academy, the Committee, and e Department of Energy refused to correct these problems when they were brought to their ention. As a consequence the NRC biased the scientific and technical review of a major public licy issue. The Academy staff and the NRC-ICF Committee acted to prevent interested embers of the public from attending unclassified meetings and making presentations. For a ort period the Academy's staff acted to prevent interested scientists and a Federal official at the ffice of Management and Budget from obtaining unclassified minutes of a committee meeting. ıe Academy staff repeatedly refused to make available unclassified documents—those that ere distributed to the committee—to an interested scientist who was not on the committee.

In sum, the Academy violated FACA, the Academy's own rules, minimal standards of nduct related to the provision of scientific data to inquiring scientists, and minimal standards decency toward the public while taking public moneys to address a public policy issue. The cademy has demonstrated that it is incapable of enforcing even its own weak rules.

The nation deserved an independent, unbiased review of the scientific and technological adiness of NIF prior to spending up to $3.5 billion on the project.[2] The nation did not obtain ich a review from the NRC-ICF Committee .

This estimate includes $1.7 billion in construction and LLNL program related costs and $1.8 billion in operating nds over 15 years.

As a consequence of *Animal Legal Defense Fund v. Shalala* the Academy must now comply with FACA. As a consequence of *NRDC, et al. v. Peña, et al.*, while the Court permitted the Academy to publish the first and only report of the NRC-ICF Committee, DOE cannot utilize it or any other product of the NRC-ICF Committee; and the NRC-ICF Committee, at least as presently constituted, has been abolished.

Given that the Supreme Court has let stand *ADLF v. Shalala*, the Academy is now turning to the Congress for a total exemption from the requirements of FACA. A better solution, at least in terms of the *public's interest*, would be insure that all Federally funded committees of the Academy comply with FACA's "openness" provisions, and with the FACA requirement that advisory committees be "fairly balanced in terms of points of view," but give the Academy, rather than funding agencies, responsibility for insuring compliance with these provisions, while also continuing to ensure that the Academy's FACA compliance is subject to judicial review.

Acknowledgements

While they are in no way responsible for the preparation of this report, the authors gratefully acknowledge the sage advice and insights of our outside counsel, Eric R. Glitzenstein, in recent litigation involving DOE Defense Programs, the NAS, and FACA, as well as the assistance of our co-plaintiffs, Western States Legal Foundation of Oakland and Tri-Valley CAREs of Livermore, CA. Many of the documents cited in this study were obtained as a product of the discovery process pursued during the recent litigation. Dr. Matthew McKinzie of the Nuclear Program staff also helped to provide information for the study, as did a few National Academy members, reviewers, and participants in the 1996-97 ICF Review. The draft report was prepared for publication by Tanya Washington.

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The authors wish to emphasize that the purpose of this study is not to impugn the integrity or expertise of any individual scientist or group of scientists, but rather to identify and illustrate the kinds of abuses that the self-regulating NAS/NRC Committee *system* is prey to when basic statutory requirements for balance and openness are either blithely ignored or weakly enforced.

Introduction

On February 14, 1997 the Natural Resources Defense Council, Inc. (NRDC), joined by two California groups, Western States Legal Foundation and Tri-Valley Citizens Against a Radioactive Environment (Tri-Valley CAREs), sued the Department of Energy (DOE) and the National Academy of Sciences (the "Academy" or NAS) for establishing and utilizing an NAS Committee for the Review of the DOE Inertial Confinement Fusion Advisory Committee ("NRC-ICF Committee") in violation of the Federal Advisory Committee Act (FACA).[3] DOE had asked the Academy to assess the technological readiness of the National Ignition Facility (NIF) project to proceed with construction. NIF is a $1.7 billion inertial confinement fusion machine the size of the Rose Bowl that DOE began constructing in June 1997 at the Lawrence Livermore National Laboratory (LLNL) in California.[4] Plaintiffs argued that the NRC-ICF Committee was not "fairly balanced in terms of the points of view represented" on the panel with respect to the committee's charge to investigate the scientific and technological readiness of NIF, and that the committee violated FACA's "openness provisions, including failure to provide public notice of meetings, failure to permit interested persons to attend, appear before, or file statements at meeting not closed for reasons of national security.[5]

Finding that the NRC-ICF Committee had likely operated in violation of FACA at least with respect to FACA's "openness" provisions, on March 5, 1997, District Court Judge Paul L. Friedman granted in part plaintiffs' motion for a preliminary injunction. The Court enjoined DOE from (1) "providing or obligating any funding, monies or other forms of support to the NRC-ICF Committee or to NAS for the purpose of supporting the ICF Committee as of today;" and (2) "utilizing, relying on or in any way incorporating into its decisionmaking process the ICF Committee report or any other work product of the ICF Committee." Concerned by First Amendment implications, the Court declined to enjoin the Academy from publishing the results of its panel's deliberations, and the Academy proceeded to publish the report of the NRC-ICF Committee on March 20.[6]

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[3] *Natural Resources Defense Council, et al. v. Federico F. Peña, et al.*, D.C. Circuit, CV-97-308 (PLF). When initially filed, the suit was identified as *Natural Resources Defense Council, et al. v. Charles Curtis, et al.*

[4] According to the NAS ICF Committee report, NIF is estimated to cost $1.148 billion to construct, there is an additional contingency of $0.127 billion, there are $0.397 billion in NIF related costs in the LLNL budget, and the annual NIF operating cost is estimated to be $120 million, i.e., $60 million per year each for direct operating budget and the target physics program ($1.8 billion total operating expenses over 15 years).

[5] For further information concerning or related to this case, see *Science*, January 10, 1997, p. 147; March 14, 1997, p. 1560; May 9, 1997, pp. 900-904; May 23, 1997, p. 1183; May 30, 1997, pp. 1317 and 1328; June 27, 1997, p. 1959; July 4, 1997, p. 23; July 11, 1997, p. 163; July 25, 1997, p. 473; August 15, pp. 886-887; October 10, 1997, p. 211; *Nature*, February 27, 1997, p. 755; March 27, 1997, p. 309; April 10, 1997, p. 525; and *Physics Today*, June 1997, pp. 66-67; August 1997, pp. 46-48; *The Washington Post*, August 6, 1997, p. A19.

[6] National Academy of Sciences, "Review of the Department of Energy's Inertial Confinement Fusion Program—The National Ignition Facility," Committee for the Review of the Department of Energy's Inertial Confinement Fusion Program, Commission on Physical Sciences, Mathematics, And Applications, National Research Council, Washington D.C. 1997 [release date, March 10, 1997]. The NAS report can be found at http://www.nas.edu/cpsma/icf.htm.

Shortly after the Court rendered the preliminary injunction in *NRDC, et al. v. Peña, et al.*, several members of the Academy criticized NRDC for having brought the suit, and a chorus of Academy members have since argued that it would be ruinous to the Academy if were forced to comply with FACA.

Despite being deprived of the very report which DOE had hitherto stated would be crucial to its decision on whether to proceed with the project, DOE announced on March 11, 1997 that it had approved Critical Decision 3, construction of the NIF. Groundbreaking ceremonies took place on May 29, 1997.

On August 6, 1997, in response to a motion by DOE to expedite entry of a permanent injunction, Judge Friedman converted the preliminary injunction into a permanent injunction. On September 22, DOE gave notice that it was appealing the case to the U.S. Court of Appeals for the District of Columbia.

Judge Friedman's conclusion that NAS committees utilized by one or more Federal agencies are advisory committees for purposes of FACA was based on a January 10, 1997 decision by a three judge panel of the U.S. Court of Appeals for the D.C. Circuit. *Animal Legal Defense Fund (ALDF), et al. v. Donna E. Shalala, et al.*, 104F.3d 424, 429 (D.C. Cir. 1997) Following an appeal by the Academy, the Court of Appeals refused to rehear the *ADLF v. Shalala* case *en banc*, and now the Academy is appealing *ADLF v. Shalala* to the Supreme Court, whose dicta was the basis for the original three judge opinion. The U.S. Government did not join the Academy in seeking *certiorari*. On October 3, 1997, eighty-four prominent scientists, physicians, and engineers filed a friend-of-the-court brief with the Supreme Court.[7] On November 3, 1997, the Supreme Court without comment denied the Academy's petition for *cert.*, letting stand the lower court ruling.[8]

The Academy has drafted a proposed amendment to the FACA that would exempt "any committee created by an entity other than an agency or officer of the Federal Government and not subject to actual management and control by such agencies or officers." Congressional hearings were held on the proposed legislation on November 5, 1997.[9]

In weighing the costs and benefits of the protections afforded by FACA, it may be important for members of Congress, the press, and the interested public to understand how the Academy operates when left entirely on its own to conduct an ostensibly disinterested review of a nuclear weapon science project that may ultimately involve the expenditure of some $3.5

[7] Jocelyn Kaiser, "Scientist Urge Court to Take Academy Case," *Science*, October 10, 1997, p. 211.

[8] Nicholas Wade, "Academy of Sciences, Fighting to Keep Its Panels Closed, Is Rebuffed by Supreme Court," *The New York Times*, November 4, 1997, p. A18.

[9] Government Management, Information and Technology Subcommittee of the House Committee on Government Reform and Oversight; Representative Steven Horn (R-Calif.), Chairman.

billion of the public's money. In what follows we begin by reviewing the history of how and why the NRC-ICF Committee was created. We demonstrate, beyond a reasonable doubt, that the Academy appointed an egregiously unbalanced committee, several members of which had, in addition, serious financial conflicts-of-interest. We show how both the Committee and the Academy leadership refused to correct these problems when they were brought to their attention. We also show how the Academy staff and the NRC-ICF Committee behaved in the face of public efforts to correct the deficiencies in the committee membership, to attend meetings and testify before the committee, and to obtain documents related to committee briefings. Finally, we address the issue of whether the Academy should be required to comply with the "balance of views" and "openness" provisions of FACA.

Establishment of the Third NRC-ICF Committee

Between 1978 and 1996—prior to the establishment of the NRC-ICF Committee—no less than a dozen nominally independent reviews were conducted evaluating either DOE's ICF program as a whole or specific candidate "driver" technologies for achieving fusion in the laboratory.[10] (See Attachment 1) Two of these reviews were conducted by committees of the NAS: a 1986 committee chaired by Professor William Happer (of Princeton University), and a 1990 committee chaired by Professor Steven Koonin (of the California Institute of Technology). The most recent of these earlier reviews was conducted by the Inertial Confinement Fusion Advisory Committee (ICFAC) chaired by Professor Venkatesh Narayanamurti (Dean of the College of Engineering, University of California at Santa Barbara). As an advisory committee established by DOE, ICFAC was legally required to comply with FACA—a matter that was never in dispute. ICFAC held seven meetings, the first the first of which was on December 16-18, 1992, and the last on November 14-15, 1995.

While a large majority of ICFAC members had voted in May 1994 to support proceeding with engineering design of the NIF, this decision was based on non-peer-reviewed LASNEX code predictions, hastily generated in the weeks prior to the meeting, of achieving ignition with novel gas-filled hohlraum targets—predictions that were not borne out by actual experiments conducted *after* the meeting. Key agreed "physics milestones" for the NIF project stemming from the 1990 Academy study—demonstrating control over the conversion of laser to x-ray energy and its spatial and temporal distribution on the tiny capsule of deuterium-tritium fuel ["hohlraum laser physics" or HLP], and understanding of the conditions required for stable capsule implosion and subsequent propagation of a fusion "hot spot" to "ignition," (when fusion output of the capsule equals or exceeds the laser energy deposited in the hohlraum)—remained unmet, but the NIF project nevertheless proceeded apace toward a "key decision" on siting and construction, then slated for the early fall of 1996. However, according to Chairman Narayanamurti, "We all agreed that rapid progress in ICF research and development must

[10] DOE Defense Programs staff, "The Search for an ICF Advisory Group," viewgraphs presented September 5, 1995.

continue in order to resolve some important remaining technical uncertainties *prior to Key Decision 2* [now called Critical Decision 3 - NIF Construction.][11]

A year later, at the June 6-8 1995 ICFAC meeting at Sandia National Laboratory, major and potentially crippling problems persisted in the NIF's target physics, particularly in demonstrating, via NOVA laser experiments and computational extrapolations, the ignition potential of the NIF "baseline" indirect drive gas-filled target. Dr. Stephen Bodner of the Naval Research Laboratory urged the committee "to alert the DOE to the current problems in the NIF target."[12] The upshot of the meeting was a proposal by the Chairman, endorsed by several of the members present, to reconstitute an ICFAC Target Physics Subcommittee that could probe more deeply into the critical issues that had been raised at the meeting. The next full committee meeting was set for mid-November, 1995.

At an August 8-9, 1995 ICF Program Managers meeting, the Director of DOE's Office of Inertial Confinement Fusion requested that the fusion research laboratories provide written comments on the utility of the ICFAC committee.[13] In a September 3 written response to DOE Headquarters, three senior scientists in the ICF program at LLNL suggested that ICFAC members lacked sufficient expertise in "high energy density physics" and "driver technology development."

> This criticism is particularly clear **for glass laser development** [i.e. NIF]. We would urge you to take the opportunity to replace six members this fall to increase the technical expertise of the committee. Bob McCrory has voiced his opinion **that the rules of a federal advisory committee are too restrictive**, but **a judicial choice of candidates** could make this possible (emphasis added).

The Livermore ICF program leaders concluded their critique by noting, "the charges to the committee should be broadened" to reflect the increasing involvement of the ICF program in "Science-Based Stockpile Stewardship" (SBSS).

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[11] Letter from Prof. V. Narayanamurti to Dr. Victor H. Reis, DOE/DP-1, August 8, 1994, p. 1.

[12] According to DOE's notes of the meeting, Bodner told the ICFAC that these problems included "beam bending of about ten degrees, about 10% SRS [Stimulated Raman Scattering of the laser energy], approximately 10% SBS [Stimulated Brillouin Scattering], fast electrons of unknown quantity, filamentation [of the laser beam] and accompanying sideways plasma flow, predictions of turbulence in the NIF fluid flow patterns, low x-ray conversion, low radiation temperature, late implosion times, weak hard x-ray wall emission, and strange M-shell x-ray emissions from the hohlraum interior. The overall problems that have been uncovered are not simply ones of energy loss, they are problems of a lack of control of the symmetry. It was suggested at this meeting that the anomalies could be fixed by simply re-aiming the laser beams. That is not true. They have not even been able to reaim the laser beams in the Nova experiments and obtain a symmetric implosion. The x-ray pinhole pictures look more like a shriveled fruit than a symmetric implosion. Something else is happening that is keeping part of the laser light from hitting the hohlraum walls." "Minutes - Meeting of the ICFAC, Sandia National Laboratories, June 6-8, 1995, p. 44."

[13] Joseph D. Kilkenny, John D. Lindl, and Howard Powell, LLNL, letter to Marshall M. Sluyter, Office of Inertial Confinement Fusion, DOE, September 3, 1993.

> In the past, there has been **a very intense focus of the committee on the likelihood of ignition**. We feel many of these questions have been answered and although **much work remains to be done, the involvement of the ICF program and its existing facilities in SBSS should increase in the areas where there is overlap**. . . hydrodynamics, high radiation temperature hohlraums, and EOS [equations of state]. . . . **The charges to the committee should reflect this.**[14] (emphasis added) (Attachment 2)

Of course, from a programmatic standpoint, a major virtue of each of the listed SBSS technical areas is that *they do not presuppose or require ignition,* thereby diffusing the sensitive—and possibly "show-stopping"—political issue of whether the NIF project was scientifically and technically ready to achieve its fundamental mission.

On September 6, 1995, Assistant Secretary of Energy for Defense Programs (ASDP) Victor H. Reis was briefed by his staff in preparation for the next ICFAC meeting scheduled for November 14-16.[15] One of the viewgraphs presented at this meeting, entitled "Highlights of 8/21/95 Draft ICFAC Report", noted that ICFAC would recommend "further risk reduction work on the NIF ignition target," identify "remaining technical challenges," including "modeling ignition hohlraum physics and a "quantitative understanding of mix and asymmetry in implosions," and recommend "a new target physics contract" as a sequel to the "Nova Technical Contract."[16] Another viewgraph noted that ICFAC "Recommends LLNL and LANL give *very high priority to goals of the new Target Physics Contract* (emphasis added)."

ICFAC's final report and recommendations from the June meeting, sent to Reis on October 2, noted ICFAC's interest in receiving "the 1995 Target Physics Contract (TPC) under development by Livermore and Los Alamos as soon as a sufficiently mature draft is available, and in reviewing it at our next meeting." The report also noted "the importance of advancing the objectives of the TPC *towards achieving continued risk reduction prior to Key Decision 2* [i.e. prior to NIF construction], and recommended that: Los Alamos and Livermore "give high priority to achieving the goals of the TPC;" the "goals of the TPC be carefully balanced with the need for enunciating. . . [the] role of NIF in Stockpile Stewardship;" and that "these be reviewed by the ICFAC in 1996."[17] Clearly, the chairman and members of ICFAC had no idea that the

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[14] *Id.*

[15] Marshall M. Sluyter, Director, Office of Research and Inertial Fusion Defense Programs, "Inertial Confinement Fusion Advisory Committee (ICFAC) Activities," September 13, 1995.

[16] DOE Defense Programs staff, "The Search for an ICF Advisory Group," viewgraphs presented September 5, 1995; cited pages are included in this report as Attachment 1.

[17] Letter from V. Narayanamurti to V. Reis, October 2, 1995, pp. 6-7.

decision to terminate the committee had already been taken, and that ICFAC would not be meeting in 1996.

DOE had already heard enough, and apparently saw no point in waiting for ICFAC's Final Report. At the September 6 briefing to Dr. Reis, the two principal "ICFAC Weaknesses" listed by the ICF Program Office were that ICFAC was "Restricted by legal requirements (FACA)" and "Perceived to lack understanding of science-based stockpile stewardship." A third weakness was that the committee had been "vague in identifying [the] value of KrF [i.e., krypton-fluoride laser technology] to stockpile stewardship.[18] (See Attachment 1) After reviewing the pros and cons of seven alternative advisory group concepts, the staff made three recommendations to Reis: 1) permit ICFAC to hold its mid-November meeting; 2) abolish ICFAC after this meeting; and 3) "commence procurement actions to establish a National Academy of Sciences review of ICF."[19] (See Attachment 1) At the conclusion of the September 6 briefing, Reis indicated his agreement and directed his staff "to proceed with the necessary actions to implement those recommendations."[20]

Abolishing ICFAC

On November 8, 1995, a week before their scheduled meeting at General Atomics in San Diego, members of ICFAC received a letter from Energy Secretary Hazel O'Leary stating that this would be the last meeting and that ICFAC's charter would not be renewed.[21] Members of ICFAC said the letter caught then by surprise. (Attachment 3) The basis given for eliminating ICFAC was that "[t]he program is now entering *a new phase of broader scope as an integral part of the Department's science-based stockpile stewardship of nuclear assets...the limited scope of the committee restricts its usefulness.*"[22] There was no hint that another reason DOE's Defense Programs staff wanted to abolish ICFAC was the legal restrictions imposed on its work by FACA. (Compare Attachments 1 and 3)

According to the minutes of the final ICFAC meeting, held November 14-15, 1995, Dr. Marshall Sluyter, Director of the DOE Defense Programs Office of Research and Inertial Fusion, told the committee that when it was formed in 1992:

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[18] DOE Defense Programs staff, "The Search for an ICF Advisory Group," September 5, 1995.

[19] *Id.*

[20] Marshall M. Sluyter, Director, Office of Research and Inertial Fusion Defense Programs, "Inertial Confinement Fusion Advisory Committee (ICFAC) Activities," September 13, 1995.

[21] Hazel R. O'Leary, Secretary of Energy, letter to Dr. J. Richard Airey, Corporate VP of SAIC and a member of ICFAC.

[22] *Id.*

> "there had been neither a Science Based Stockpile Stewardship (SBSS) Program nor a moratorium on the testing of nuclear weapons. Under the circumstances existing at the time, the ICFAC was an appropriate body to offer guidance to DOE regarding the IFC program. After extensive review, DOE has reached the conclusion that, in view of the greatly expanded role of ICF within the SBSS program, this is no longer the case. The ICFAC's charter is too restrictive to allow it to continue to provide the valuable guidance which DOE has been grateful to receive from it in the past." [23]

In reality, the ICFAC's charter merely stated that its purpose was to "provide advice and guidance to the Assistant Secretary for Defense Programs on both the technical and managerial aspects of the inertial confinement fusion program"—hardly a "restrictive" formulation—while ICFAC's first meeting was held December 16-18, 1992, more than two months *after* President Bush had signed the "Hatfield-Exon-Mitchell" nuclear test moratorium amendment into law, on October 2, 1992.

According to the minutes of the November 1995 ICFAC meeting, DOE was planning to make a formal "Record of Decision" on where to build NIF in September 1996, following completion of an environmental impact statement supporting construction of NIF at the "preferred" Livermore site. In light of the tight timetable for achieving *this* objective, DOE's real motivation for dissolving ICFAC was succinctly summarized by Dr. Sluyter in a December 15, 1995 memorandum to ASDP Reis (Attachment 4):

> "*A major review of the ICF program is needed in this fiscal year to reaffirm mission need and give further credence to arguments for success of the National Ignition Facility (NIF).* Earlier discussions with NRC [National Research Council] officials revealed that in order for the National Academy of Sciences to produce an interim report before September 1996, a contract with the NRC must be in place by February 1996."[24]

A deputy to Reis had already sent to the Academy a draft of a proposed letter from Reis to Dr. Bruce M. Alberts, who serves as both President of the NAS and Chairman of the NRC Governing Board.[25] (Attachment 5) This draft letter requested that the NAS convene a standing

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[23] Minutes of the November 14-15 ICFAC Meeting, quoted in *Fusion Power Associates Executive Newsletter*, Vol. 18, No.1, January 1996, p. 1.

[24] DOE Memorandum from DP-11 (M. Sluyter, 3-5491) to Assistant Secretary for Defense Programs, Dec. 15, 1995, p. 1.

[25] Dave Bixler, DOE's Acting Deputy Assistant Secretary for Research and Development, Office of Research and Inertial Fusion/DP-11, FAX Cover Sheet and attachment to Ronald D. Taylor, director of the Naval Studies Board of the Commission on Physical Sciences, Mathematics, and Applications ("CPSMA") of the National Research Council ("NRC"), November 1, 1995.

panel to periodically review the ICF program as well as relevant aspects of the science-based stockpile stewardship concept. The Academy edited the draft and returned it to DOE.[26] (Attachment 6)

On 18 December 1995, Reis sent to Alberts the final version of the letter that DOE and NRC had jointly crafted.[27] (Attachment 7) In his letter Reis requested that Alberts "examine the requirements to convene a National Academy of Sciences standing committee to periodically review the ICF program, as well as issues of the SBSS concept."[28]

On January 17, 1996, Alberts sent his formal response to Reis.[29] (Attachment 8) In his letter Alberts says, "It is particularly gratifying for me to read your assessment that the earlier advice has 'been of significant value to our [DOE's] planning over the intervening years.' "[30] This little testimonial had in fact been crafted and inserted by the Academy's own staff into the DOE draft letter. (Compare Attachments 5, 6 and 7)

Statement of Work of the NRC-ICF Committee

Was the primary purpose of the NAS committee's interim report was to advise DOE regarding the NIF project's scientific and technological readiness for construction? And were these views solicited to provide support for DOE's construction decision? Under the prevailing judicial interpretation that federally-funded NRC committees are subject to FACA, these questions are germane to assessing whether the NRC-ICF Committee complied with FACA's provision that an advisory committee "established by" an agency be "fairly balanced in terms of points of view represented." The DOE staff maintains that the NRC-ICF Committee 's initial review was tied to the construction decision and NRDC shares this conclusion. For example, in court papers Dr. David Crandall, Director of DOE's ICF Program, stated, "In its report, the ICF Committee provides an assessment of the technical and scientific readiness of NIF **to proceed to the construction phase**, . . .[31] Likewise, at the Committee's first meeting, Dr. Robin Staffin, the DOE Defense Programs Deputy Assistant Secretary for Research and Development, "pointed out

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[26] Ron Taylor, Naval Studies Board, NRC, FAX cover sheet and attachment to Dave Bixler, DOE, November 7, 1995.

[27] Victor H. Reis, Assistant Secretary for Defense Programs, DOE, letter to Dr. Bruce M. Alberts, Chairman, National Research Council, December 18, 1995.

[28] *Id.*

[29] Bruce Alberts, President, NAS, letter to Victor H. Reis, Assistant secretary for Defense Programs, DOE, January 17, 1996.

[30] *Id.* Compare with reference 13 above.

[31] Davis Crandall, "Crandall Second Declaration," *NRDC, et al. v. Peña, et al.*, D.C. Circuit, CV-97-308 (PLF), April 3, 1997, at 5.

that the committee's input, at least in the form of an interim report, will be **essential** prior to proceeding through Critical Decision 3, **approval of physical construction of the NIF**."[32] (See Attachment 9).

The Academy staff has sought to argue otherwise. In court papers Dr. Dorothy Zolandz, the NRC-ICF Committee 's staff director at the NRC, cited the committee's "Terms of Reference," which do not include the words "to proceed to the construction phase, " and she went on to say, "The Committee simply was not charged with evaluating, nor was it composed to evaluate, policy decisions such as SBSS (Science-based Stockpile Stewardship), or to make recommendations about the physical construction of the NIF (the National Ignition Facility), known as Critical Decision 3, in DOE's ICF time table."[33]

Further information, obtained during the discovery phase of *NRDC, et al. v. Peña, et al.*, shows that while the *underlying charge* to the committee remained unchanged, the public *description* of this charge was altered at the last moment *at the behest of Academy officials*, with the intent of papering over the otherwise obvious link between the NRC-ICF Committee 's interim report and the DOE's planned go-ahead for NIF construction. A logical inference from the evidence presented below is that the Academy belatedly sought to conceal—or at least blur—the review's linkage to NIF construction, because it attested to the fact that the NRC-ICF Committee had indeed been specifically established by DOE to perform an advisory function in a major program decision—a degree of responsibility that someone—either the Academy staff, the committee chairman, or other interested parties—did not want to see explicitly and publicly acknowledged.

The description of the second item in the contract's "Statement of Work," concerning assessment of the adequacy of the ICF Program's technical basis for achieving ignition, was likewise modified very late in the contracting process, possibly at the behest of parties with an interest in the review's outcome. The effect was to submerge the sensitive issue of whether the level of confidence in achieving fusion ignition with the baseline cryogenic indirect-drive target was indeed sufficient to support a $1.7 billion decision to proceed with construction of the NIF in its current design configuration. The evidence supporting these inferences is as follows:

On November 21, 1995, DOE sent to the Academy a draft "Statement of Work" for the Academy's review.[34] (Attachment 10) According to this draft statement of work, "The Review Group [the NRC-ICF Committee] will conduct an initial review to determine:

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[32] "Minutes [of the] Meeting of the National Research Council's Committee for the Review of the Inertial Confinement Fusion Program, NAS Beckman Center, Irvine, CA., August 1- 2, 1996." These DOE minutes of the panel's meeting go on to note that, according to Staffin, "current plans call for this [construction] decision to be reached in March 1997."

[33] Dorothy Zolandz, Declaration of Dorothy Zolandz, *NRDC, et al. v. Peña, et al.*, March 3, 1997, at 21.

[34] Dave Bixler, HQ DOE/DP/11, FAX Cover Sheet and attachment "Statement of Work (Nov 1995)," to Ron Taylor, OFC NAS, November 21, 1995.

(1) the technological readiness of the NIF project to proceed with construction, (2) adequacy of the ICF program in addressing the confidence of achieving ignition and providing the technical basis associated with NIF performance, and (3) projected capabilities of the NIF to support SBSS."[35] (emphasis added) After only slight modifications to other sections[36] the statement of work was redated "Dec 1995" and included as an enclosure to the December 18, 1995 letter from Reis to Alberts.[37] (Attachment 7)

On February 21, 1996, the Academy submitted a formal proposal to DOE which includes essentially the same language under "Proposed Activities," i.e., " **An initial review** will be conducted over a 12-month period from the issuance of an award **that determines (1) the technological readiness of the NIF project to proceed with construction, (2) adequacy of the ICF program in addressing the confidence of achieving ignition and providing the technical basis associated with NIF performance**, and (3) projected capabilities of the NIF to support SBSS."[38] (emphasis added)

On May 6, 1996, the Academy delivered to DOE the signed contract for the "Review of DOE's Inertial Confinement Fusion Program."[39] The "Services" identified in the signed contract referred to the aforementioned "Statement of Work (Dec 1995)," which was attached to the contract. Under normal contracting procedures between Federal agencies and the Academy for multiyear contracts, the formal contract contains a statement of work that is written in broad terms. Over the course of the contract period the agency then prepares specific "task assignments," each providing in greater detail the tasks to be performed during a specified period. However, in this case the cover letter to the completed contract included several revisions under the heading "Comments, Exceptions, Understandings Re: Letter Contract Number DE-AC01-96DP00116." One of these was entitled "Revision of Task Assignment 1"

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[35] *Id.*

[36] It was clarified that the NAS committee would be a standing committee and the dates of its interim and final reports were slipped a few months.

[37] Victor H. Reis, Assistant Secretary for Defense Programs, DOE, letter to Dr. Bruce M. Alberts, Chairman, National Research Council, December 18, 1995.

[38] William Colglazier, Executive Officer of the NRC to Marshall M. Sluyter, Director, Office of Research and Inertial Fusion, DOE, February 21, 1996, enclosing Proposal No. 96-CPSMA-118, February 1996, p. 3; see also Charles E. Arbanas, Senior Contract Manager, letter to Richard G. Lewis, Contracting Officer, DOE, March 21, 1996, enclosing the same proposal. Essentially the same language, i.e., "**An initial review...that determines (1) the technological readiness of the NIF project to proceed with construction, (2) adequacy of the ICF program in addressing the confidence of achieving ignition and providing the technical basis associated with NIF performance**, and (3) projected capabilities of the NIF to support SBSS." (emphasis added) was included in the package of "For Action, New Projects" materials included with the agenda of the February 6 and 13-14 meetings of the Executive Committee of the Governing Board of the NRC.

[39] Charles E. Arbanas, Senior Contract Manager, NRC, letter with enclosures to George S. Young, Office of Placement and Administration, DOE, April 30, 1997; a handwritten note indicates the letter was sent to G. Young via courier on May 6, 1996.

Task Assignment 1 should be revised as follows:

> Description of work to be performed: Select and Appoint Review Group members. Conduct an initial review to **(1) determine the scientific and technological readiness of the NIF project, (2) assess the entire ICF program (including program scope, balance, and priorities; facility operations; experimentation, theory, etc.) and make recommendations to facilitate the achievement of the scientific goal, which is ignition,** and (3) evaluate the capabilities of the ICF program (in conjunction with NIF) to support SBSS (*emphasis added*).[40] (Attachment 11)

The titling of this paragraph as a "revision" is curious, as there is no prior documentary evidence of a "Task Assignment 1" or any other task assignments having been prepared by DOE. The contract between DOE and the Academy was for a three year period. Task Assignment 1, submitted in a cover letter by the Academy, covered the preparation of an interim report to DOE by the NRC-ICF Committee . The existing contract requirement to provide "an initial review to determine (1) the technological readiness of the NIF project to proceed with construction" could only have been met if the determination were made as part of Task Assignment 1.

However, the language of the revised Task Assignment 1 represented a considerable watering down of the contract language. The words "to proceed with construction" which appear in the DOE/NAS contract were omitted from the "revised" Task Assignment 1. Similarly, the contract's charge to determine the "adequacy of the ICF program in addressing the confidence of achieving ignition" became "make recommendations to facilitate the achievement of the scientific goal, which is ignition." In a viewgraph presentation to the committee at its first meeting two months later, Dr. Robin Staffin from DOE's Office of Defense Programs elucidated the meaning of the latter phrase by explaining that the Committee was being tasked to assess "program quality and readiness to *seek* ignition." The third bullet of this viewgraph states, "Need report (at least interim) prior to March 1997 for Critical Decision 3 - physical construction of NIF."

Thus what began as "an initial review that determines . . . the technological readiness of the NIF project to proceed with construction; the *adequacy of* . . . *confidence of achieving* ignition and . . . the technical basis associated with NIF performance," became "a review to determine the scientific and technological readiness of the NIF project...and make recommendations to *facilitate* the achievement of . . . .ignition," and then finally, "determine program quality and readiness to *seek* ignition," thereby widening the goal posts to ensure that NIF would not fail to score.

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[40] *Id.*

This new description of work to be performed under the revised Task Assignment 1 became the "Terms of Reference"[41] for the Committee for the Review of the DOE Inertial Confinement Fusion Program, which were made available to the Committee and others. (Attachment 12) But as evidenced by Dr. Staffin's remarks to the Committee at its first meeting two months later, to which no one in attendance took exception, the programmatic purpose to be served by the committee's initial review remained unchanged.[42] At the time the NRC-ICF Committee 's interim report was due March 6, 1997 and DOE plans called for physical construction work to begin in "early-March" 1997. Indeed, in the NRC-ICF Committee's March 1997 report, the Committee used slightly different language from that in the DOE/NAS contract, but it had the same meaning. The NRC-ICF Committee stated that it was rendering a judgment on whether the NIF project was "technologically and scientifically ready *to proceed as planned.*"[43]

It is still a mystery to us who—DOE or the Academy—first crafted the wording of the revised Task Assignment 1 and "Terms of Reference" in a manner that did not faithfully reflect the more precise language of the contract, nor do we know conclusively why these changes were made. The changes occurred three months after Steven Koonin was appointed Chairman of the NRC-ICF Committee , but it is not know by us what part, if any, Koonin played in preparing the Task Assignment 1. But what is clear is that *under the contract* the NRC-ICF Committee agreed to determine whether the Government's ICF program was technologically ready to proceed with the construction of NIF, and, the Academy's disavowal notwithstanding, the NRC-ICF Committee made such a determination.

Selection of the NRC-ICF Committee Members

On January 16, 1996, Marshall M. Sluyter, Director of the Office of Research and Inertial Fusion at DOE, sent a memorandum to six laboratories that conduct ICF research for DOE, requesting suggestions for NRC-ICF Committee members.[44] These labs were the Livermore, Los Alamos and Sandia National Laboratories, the University of Rochester's Laboratory for Laser Energetics, the Naval Research Laboratory and General Atomics, the latter a commercial firm that makes ICF hohlraum targets and conducts research on the manufacture of targets. In

[41] National Research Council, Committee for the Review of the DOE Inertial Confinement Fusion Program, "Terms of Reference," undated.

[42] DOE, "Minutes: Meeting of the National Research Council's Committee for the Review of the Inertial Confinement Fusion Program, NAS Beckman Center, Irvine, CA, August 1-2, 1996, p. 2; and Dr. Robin Staffin, DOE, "What to expect - DOE & NAS, NAS/NRC Review of Inertial Fusion," viewgraphs, August 1, 1996.

[43] NAS, "Review of the Department of Energy's Inertial Confinement Fusion Program—The National Ignition Facility," ICF Committee, 1997, p. 6, emphasis added.

[44] Marshall M. Sluyter, Director, Office of Research and Inertial Fusion, Defense Programs, DOE, to S. Bodner, NRL, M. Cray, LANL, J. Kilkenny, LLNL, R. McCory, UR/LLE, J. Quintenz, SNL, and K. Schultz, GA, January 18, 1996

his memorandum, Sluyter said, "Purely as a matter of courtesy, the NAS has, in the past solicited DOE's suggestions for committee members. Anticipating this, I am seeking the suggestions of the laboratory ICF program directors."[45] Each of the laboratories responded, and in a Memorandum for the Record prepared one month after NRDC had filed its FACA suit against DOE and the Academy, Dr. David Crandall at DOE wrote, "The information contained in the responses was sent to the NRC, though the NRC neither solicited it nor acknowledged receipt of it."[46]

Professor Steven E. Koonin, Vice President and Provost of the California Institute of Technology, was appointed Chairman of the NRC-ICF Committee . His letter of appointment was sent by NAS President Alberts on February 7, 1996. Koonin is a member of the NAS, and he had chaired the NRC's influential 1990 ICF review that recommended focusing the bulk of the program's resources on glass laser-driven fusion.[47] Koonin had been recommended for membership on the NRC-ICF Committee by LLNL and the University of Rochester's Laboratory for Laser Energetics, the two main beneficiaries of the recommendations contained in the 1990 report.

Dr. Dorothy Zolandz, Director of the Board of the National Institute of Standards and Technology (NIST) Programs at the NRC, acted as the Staff Officer and Study Director for the NRC-ICF Committee . Dr. Zolandz claims to have had primary responsibility for assembling a slate of nominees for committee membership.[48] According to Zolandz, "The slate of nominees was constructed in close consultation with Steve E. Koonin, who had been appointed chair by the Chairman of the NRC."[49] "The nominees for the Committee were approved by the Chairman of

[45] *Id.*

[46] David H. Crandall, Director, Office of Inertial Fusion and NIF Project Office, Defense Programs, DOE, Memorandum for Record, April 18, 1997.

[47] The "Overview of the Recommendations" to the 1990 Report stated, ". . . considering the extrapolations required in target physics and driver performance, as well as the likely $1 billion cost, the committee believes that an LMF [i.e. a Laser Microfusion Facility with yields to one gigajoule] is too large a step to take directly from the present program. However, . . . it should be possible to closely approach and probably achieve, ignition and modest gain in the laboratory by the intermediate step of a few-megajoule class laser driver, which might be constructed for less than $400 M. . . The glass laser is the only candidate laser driver that could be used for an ignition demonstration in the next decade. Indeed, this demonstration is the natural next step in the Nova program and is referred to by LLNL as the 'NOVA Upgrade.' . . . The real point is that a glass laser will likely allow an ignition demonstration for a reasonable cost, and there appears to be no compelling reason to wait for other drivers to catch up." *Second Review of the Department of Energy's Inertial Confinement Fusion Program, Final Report*, September 1990, p. 8. LLNL's NOVA "Upgrade" project soon became the National Ignition Facility, and its price tag jumped from $400 million to $1.7 billion (FY97 dollars), far exceeding the "ignition demonstration for a reasonable cost" rationale advanced in the 1990 report.

[48] Dorothy Zolandz, "Declaration of Dorothy Zolandz, Ph.D. in Support of Defendant National Academy of Sciences's Opposition to Plaintiffs' Motion for a Preliminary Injunction," *NRDC, et al. v. Peña, et al.*, March 3, 1997, at 2 and 11.

[49] *Id.*, at 13.

the NRC on April 26, 1996 and letters of appointment were sent by the Academy to each proposed member in May."[50] Because of scheduling conflicts one prospective committee member, Arden L. Bement, Professor of Engineering at Purdue University, resigned from the committee prior to its first meeting on August 1-2, 1996. At this first meeting, the committee determined that it needed additional expertise; and to that end, two new members were added to the committee: Henry W. Kendall of the Massachusetts Institute of Technology and J. Pace VanDevender of Prosperity Institute, Albuquerque, NM.

The following 16 persons were ultimately selected and agreed to serve on the committee:[51]

Steven E. Koonin, California Institute of Technology, *Chair*

W. David Arnett, University of Arizona

Robert L. Byer, Stanford University

Robert W. Conn, University of California at San Diego

Ronald C. Davidson, Princeton University

Anthony J. DeMaria, DeMaria ElectroOptics Systems, Inc.

Paul E. Dimotakis, California Institute of Technology

Jack J. Dongarra, University of Tennessee

Roger W. Falcone, University of California at Berkeley

Hermann A. Grunder, Thomas Jefferson National Accelerator Facility

Henry W. Kendall, Massachusetts Institutes of Technology

Arthur K. Kerman, Massachusetts Institute of Technology

Steven A. Orszag, Princeton University

Marshall N. Rosenbluth, University of California at San Diego

George H. Trilling, Lawrence Berkeley National Laboratory and the University of California at Berkeley

J. Pace VanDevender, Prosperity Institute, Albuquerque, NM

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[50] *Id.*

[51] NAS, "Review of the Department of Energy's Inertial Confinement Fusion Program—The National Ignition Facility," 1997, p. iii.

Lack of Balance in the Membership of the NRC-ICF Committee

All of the committee members are distinguished scientists and the committee was well suited for technical evaluation. Their scientific credentials were never an issue; rather, it was whether the committee as a whole was balanced with respect to rendering a judgment on whether DOE's ICF program was scientifically and technologically ready to begin construction of NIF at LLNL. Speaking on behalf of the Academy, Dr. Zolandz declared:

> Of course, anyone with the requisite knowledge and expertise in many of these narrow fields, such as plasma or laser physics, will have some connection to or collaborations with a national lab, such as Lawrence Livermore National Laboratory ("Livermore") and will have connections to or collaborations with many other people and organizations in the field.[52]

Privately, however, some NRC officials say they are unhappy with the selection process for the study. "It was a sloppy job," says one NRC source.[53] Each of the 16 members of the NRC-ICF Committee fall into one or more of the following categories:

(a) paid consultants to LLNL (**Koonin, Kerman, Byer, Dimotakis, and Falcone**);
(b) directly involved in (successful) bids for closely related DOE Defense Program nuclear weapon simulation contracts while serving on the NAS committee (**Dimotakis, Dongarra, Koonin**);
(c) advisors to the NIF program at LLNL (**Kerman and Grunder**);
(d) previously endorsed NIF project as members of: DOE's ICF Advisory Committee 1992-95 (**Koonin, Kerman, Rosenbluth, and DeMaria**) or JASON/MITRE Corp. SBSS and NIF reviews (**Koonin and Rosenbluth**);
(e) previously recommended, as members of Second NAS ICF Review Committee in 1990, that funding priority be given to Livermore's technical approach of developing a 1-2 megajoule glass laser to "demonstrate" fusion ignition and modest gain in the near term, while recommending termination, deferral, or scaling back of other approaches (**Koonin, Conn, Davidson, DeMaria, Rosenbluth**);
(f) former head of DOE's Office of Fusion Energy (**Davidson**);
(g) on leave from Sandia National Laboratory where he was in charge of DOE funded ICF work (**VanDevender**);
(h) received free time on Nova, a glass laser ICF facility at LLNL (**Arnett**);
(i) employed by the management and operating contractor (University of California) of the weapons laboratory hosting the NIF project (**Conn, Falcone, Rosenbluth, Trilling**);

[52] Dorothy Zolandz, NRC Staff Declaration to the U.S. District Court, March 3, 1997.

[53] Andrew Lawler, *Science*, May 9, 1997, p. 901.

(j) co-authors of papers with LLNL ICF scientists (**Arnett, Dimotakis, Kerman, and Falcone**);
(k) lobbied the Chairman of the Subcommittee on Energy and Water Development of the House Appropriations Committee to support DOE SSMP and NIF (**Kendall**);
(l) lobbied Rep. Ron Dellums office expressly to support the LLNL position on NIF (**Koonin**);
(m) said to be a joint owner of a commercial firm with a DOE/ICF program researcher at the University of Rochester's Laboratory for Laser Energetics, where NIF related experiments are conducted (**Orszag**);
(n) professor emeritus at UC's Lawrence Berkeley Laboratory which has a heavy-ion ICF program that collaborates closely with LLNL (**Trilling**);
(o) appeared in a promotional video about NIF which was prepared by LLNL and shown at the NIF groundbreaking ceremony (**Koonin and Kendall**);
(p) employed by other DOE physics or nuclear energy research contractors (**Byer, Davidson, Dongarra, Grunder, Kendall, Kerman, Orszag**).

Considered on an individual basis, some of these conflicts-of interest are clearly disqualifying, while others are not. For example, while being on the payroll of Livermore's ICF program for long periods (e.g., Kerman), both immediately prior and immediately after the NAS review, is a serious and in most cases disqualifying conflict, simply being an employee of the same UC management that also manages Livermore is not. However, it is the totality of such member conflicts and associations that must be taken into account when constituting a *committee* that can be fairly characterized as balanced. For example, having four members of the panel be UC employees may by itself not be very significant, but considered in conjunction with the five members who were paid consultants to Livermore, and the eight members employed by or on leave from other DOE physics and fusion research contractors, means that 14 out of sixteen members had a personal or institutional connection with the agency whose program was ostensibly undergoing "independent review." As for the remaining two members without an obvious institutional tie, one had received free time on Livermore's Nova laser for his research (Arnett), and the other (DeMaria) had served on two previous panels endorsing Livermore's technical approach to ICF.

Looked at another way, at least 11 out of 16 members (i.e. two-thirds) of the committee had either previously stated positions supporting the NIF project and/or were consultants or advisers to Livermore Laboratory and even the NIF Program itself.

Taken as a whole, therefore, the NRC-ICF Committee was egregiously unbalanced, that is to say, *biased*, in its inclusion of individuals with serious conflicts of interest, and in its lopsided distribution of scientific and technical viewpoints, professional associations, and institutional affiliations. In light of the evidence of such palpable bias, and the expressions of outside concern which it aroused, the response of the Academy is nothing short of astonishing, and provides a good indicator of the standards likely to be applied to NRC federal advisory committees in the future if the Academy succeeds in removing itself from the purview of FACA. In a January 22, 1997, letter to NRDC, Dr. Bruce Alberts responded to the bias concerns as follows:

> "After careful review, I can only respond by reiterating what my colleagues here at the NRC have discussed with your before – that the NRC has carefully chosen this committee of highly-qualified experts, that the NRC believes the committee is appropriately balanced and free of conflict of interest for the charge addressed to the NRC, and that the committee's draft report will be rigorously reviewed by experts outside the committee and revised, if necessary....
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> "It is true that half of the committee members have served on previous bodies reviewing the NIF, ICF, or the DOE laboratories. . . Such service, in fact, gives these members both a broader and more in-depth knowledge of the scientific and technical issues in the programs which are being reviewed. Concerning the overall balance of the committee, fully one-half have no such previous experience with the NIF or ICF program." [54]

This response indicates a virtual breakdown in the Academy's controls for recognizing obvious individual conflicts of interest and palpable bias in the composition of its review committees. We review below the backgrounds of each of the committee members individually, beginning with the biographical sketch provided by the NRC-ICF Committee itself, which was included as Appendix C of the NRC-ICF Committee report. This is followed by additional relevant information which did not appear in the Academy report. The available data indicate that, contrary to Alberts claim, 12 of 16 members (75%) had "served on previous bodies reviewing the NIF, ICF, or the DOE laboratories," and 13 members (80%) of the committee had "previous experience with the NIF or the ICF program."

1. **Dr. Steven E. Koonin,** *Chair*
Vice President, Provost, and Professor of Physics, California Institute of Technology, Pasadena, California.

> Steven E. Koonin (Chair) is vice president and provost and a professor of physics at the California Institute of Technology. His areas of expertise include theoretical nuclear physics and computational physics; current research interests include nuclear structure and reaction models and quantum computing. **He has served as a consultant for various national laboratories, including Lawrence Berkeley, Lawrence Livermore, Los Alamos, and Oak Ridge. He chaired the National Research Council's (NRC's) 1990 review of the Inertial Confinement Fusion (ICF) program, served on the Department of Energy's (DOE's) Inertial Confinement Fusion Advisory Committee (ICFAC), and participated in a review of Science Based Stockpile Stewardship as part of the JASON**

[54] Letter from NRC Chairman Bruce Alberts to Thomas B. Cochran, Director, Nuclear Program, NRDC, January 22, 1997, p. 1.

> **group.** He is a fellow of the American Physical Society, the American Academy of Arts and Sciences, and the American Association for the Advancement of Science.[55] (emphasis added)

The NAS's 1990 review of DOE's ICF program, chaired by Koonin, significantly altered DOE's ICF program. The NAS Committee judged the Laboratory Microfusion Facility (LMF), DOE's conceptual plan for a 100 megajoule high gain fusion facility to be too ambitious, and thus recommended that DOE abandon the LMF in favor of a more modest goal, the "expeditious demonstration of ignition and gain in the laboratory" as the highest priority ICF program. In the JASON's Science Based Stockpile Stewardship study of November 1994, which Koonin also co-authored, the following glowing statements related to NIF are made:

> The NIF is without question the most scientifically valuable of the programs proposed for SBSS, particularly in regard to ICF research and "proof-of-principle" for ignition, but also more generally for fundamental science.[56]

> As the most scientifically exciting program proposed by the national laboratories for Science Based Stockpile Stewardship (SBSS), we feel that NIF has an essential role to play in maintaining "the core intellectual competency" mandated by the 1994 National Defense Authorization Act (PL103-160).[57]

> We believe there is strong evidence that NIF can achieve ignition (probably about as much evidence as existing facilities like NOVA can provide), nonetheless, the NIF will be exploring uncharted regions of high compression, and energy densities unique for a laboratory experiment. Unpleasant surprises cannot be ruled out. In the worse case scenario, NIF will come close to ignition with adequate diagnostics to determine accurately what would be the best design and critical minimum size pellet for both direct and indirect drive. Tests of such advanced ideas as the fast ignitor could also be made. Many defense and other science applications would be largely accessible even on a sub-ignited NIF. Naturally we expect continued progress in further evaluating ignition prospects from experiments on NOVA and on OMEGA upgrade, a direct-drive laser facility at the University of Rochester, and particularly from the ever more sophisticated computations in the coming years.[58]

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[55] NAS, "Review of the Department of Energy's Inertial Confinement Fusion Program—The National Ignition Facility," 1997, Appendix C.

[56] S. Drell, et al., "Science Based Stockpile Stewardship," JASON, The Mitre Corp., McLean, VA, JSR-94-345, November 1994, p. 5.

[57] *Id.*, p. 37.

[58] *Id.*, pp. 41-42.

Before being appointed Chairman of the NAS NIF Committee, Steven Koonin was actively lobbying the Congress on behalf of NIF for LLNL. In 1994 NIF development was proceeding through several "Key Decisions" (KD) (subsequently called "Critical Decisions" (CD)). KD-0 (CD-1), made in January 1993, permitted the preparation of a conceptual design of the NIF facility. In May 1994, a proposal that NIF proceed to KD-1 (CD-2) was sitting on the desk of then Secretary of Energy Hazel O'Leary. In the face of nonproliferation and environmental concerns raised by NRDC and others, Secretary O'Leary delayed signing KD-1 for NIF. Both Supporters and opponents of NIF voiced their concerns to Congressman Ron Dellums, then Chairman of the House Armed Services Committee, which oversees the budget for DOE Defense Programs budget, including the NIF budget. In June 1994, Lee Halterman, on Congressman Dellums' staff, initiated a series of roundtable discussions with NIF supporters and opponents in Dellums' Oakland office, to assist the Chairman in reaching a position on whether to support the KD-1 proposal. Steven Koonin accompanied LLNL Associate Director for Lasers Mike Campbell to the first of these meetings in June 1994.[59] There Koonin touted the readiness of the NIF project and claimed the scientific community was united in favor of NIF.[60]

On October 7, 1996, DOE issued a request for university research proposals, dubbed the Academic Strategic Alliances Program (ASAP), to support the Accelerated Scientific Computing Initiative (ASCI) an integral component of the SBSS program, with critical applications for ICF research, that is funded by DOE's Defense Programs. The ASCII/ASAP program is intended to generate, in conjunction with NIF and other experimental facilities, a quantum leap in the fidelity of nuclear explosion simulations. At its November 4, 1996 meeting at Los Alamos, the NRC-ICF Committee received a classified briefing on ASCI. The Committee then submitted an extensive list of questions to weapon/ICF laboratories (LLNL,LANL, SNL, NRL and LLE) pertaining to ICF, weapon design codes, and the ASCI program. The questions included, for example, "How will code development and/or experimental contributions from universities and other institutions be integrated into the ASCI program?"

The responses were due back to the NRC-ICF Committee in time for the December 5-6, 1996 meeting. The questions and answers were not made public until revealed through litigation

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[59] Marylia Kelley, "Declaration of Marylia Kelly," *NRDC, et al. v. Peña, et al.*, February 24, 1997, at 18 and private communication.

[60] Congressman Dellums, in a letter to Secretary O'Leary, ultimately proposed that DOE introduce a new KD-1 Prime decision step, and not to proceed to KD-1 until NIF had been subject to a thorough review of the nonproliferation implications of NIF. On October 10, 1994 Secretary of Energy O'Leary signed KD-1. At her address at LLNL on the same day, Secretary O'Leary said, ". . . while I am clear personally that there is no nonproliferation deterrent in moving ahead with the project, . . . But I have heard those criticisms from people whose point of view I respect, and we have taken the time to understand that. The leadership coming from Chairman Dellums, of the House Armed Services Committee, to ask that we further expand the dialog with some members of the nonproliferation community—not all—and some environmentalists, so that we can clearly answer that question, is a piece I want to continue while we're moving logically through the process that will take us to Key Decision Number 2 [CD-1]."

discovery in 1997. Also, on December 5-6, 1996, DOE held an unclassified "Preproposal Conference" in Dallas, Texas to inform prospective grant applicants of DOE's research needs regarding ASCI/ASAP. Some 143 participants representing 47 universities and 10 other institutions attended the conference. "Preproposal submissions" for grants under the ASAP were due January 16, 1997. Forty preproposals were received and reviewed by DOE. Twenty-one final proposals were received by the March 18, 1997 deadline (two days before the NAS ICF report was released to the public). Five universities were awarded grants on July 31, 1997, including one to California Institute of Technology, where Koonin wears the multiple hats of Vice President, Provost and Professor of Physics.

Under the Caltech grant, a "Facility for Simulating the Dynamic Response of Materials" is to be established at Caltech. This and similar facilities at other universities are referred to as 'centers of excellence" under the ASCI/ASAP. The Caltech grant is potentially worth $47 million ($3 million in FY 1998, $5 million per year over the following four years, and DOE's intention to renew the grant for an additional five years at the same funding level). Paul Dimotakis and Jack Dongarra, both of whom served with Koonin on the NRC-ICF Committee , are identified as co-investigators under the DOE grant to Caltech. Management of the Caltech program will be achieved through efforts of the principal investigator and the oversight of three committees: an Executive Committee, a Project Steering Committee, and an External Advisory Committee. The Project Steering Committee, among other roles, will be responsible for annual reprogramming of funding based on its evaluation of project activities. The Project Steering Committee, including the chair, will be appointed by Caltech's Provost, Steven Koonin.[61]

Thus, Koonin, Dimotakis and Dongarra (all involved directly in the Caltech proposal) were provided classified and unclassified briefings and written materials on ASCI/ASAP that were not made available to other institutions competing for ASCI/ASAP grants. Caltech bid on the simulation grant while Koonin, Dimotakis and Dongarra were involved in an NAS review the technical and programmatic relationship of the NIF to the rest of the SBSS program, especially advanced three-dimensional computer simulations.

Koonin was interviewed for, and appeared in, a promotional video prepared by LLNL that was shown at the NIF groundbreaking ceremony on May 29, 1997. Dr. Kendall, also appeared in the same video. The taping of this video presumably occurred after the NRC-ICF Committee report was released, but it may have occurred earlier.

Will Compliance with FACA Damage the Academy?

Academy officials and many of its members have claimed that compliance with FACA would be ruinous to the Academy for a variety of reasons.[101] In congressional testimony, the Academy's president, Bruce Alberts, argued that the application of FACA causes two types of damaging impacts: it would "seriously erode the independence of the Academy" by placing a number of government controls on the Academy's studies;" and it would "tie up the Academy operations."[102]

By far the most important issue to the Academy and its members is the preservation of the Academy's independence. As claimed by NRC Executive Officer William Colglazier, "[t]he key thing for us is our independence."[103] The Academy argues that its independence would be

[101] The Academy feels so strongly about these matters that while the *ALDF v. Shalala* case was being appealed to the Supreme Court, the Academy advised DOE that its preferred option for carrying out work for DOE was to "continue with our current process and procedures." E. William Colglazier, NRC, letter to Eric J. Fygi, DOE, 26 June 1997. In other words, the Academy's first preference was to continue to violate the law. Recognizing that "the DOE General Counsel's office does not consider this a viable option," the Academy offered DOE two other options for avoiding compliance with FACA. *Id.* "The second option is to structure an activity to use a "principal investigator" approach, i.e., to avoid completely the use of a committee." *Id.* The third option, involves establishing a single NRC Advisory Board which would comply with FACA, and have all other committees act as subcommittees reporting to the NRC Advisory Board. Although the Academy has prepared, or is preparing, a legal brief to defend this option, it appears to us to be illegal.

[102] Bruce Alberts, President of the NAS and Chairman of the NRC, "Oversight of the Federal Advisory Committee Act," Testimony before the Subcommittee on Government Management, Information and Technology, Committee on Government Reform and Oversight, U.S. House of representatives, November 5, 1997, p. 3.

[103] *Nature*, March 27, 1997, p. 309.

seriously eroded if a Federal officer or employee exercised any control over membership on Academy committees or conduct of the committee meetings [104] It should be noted, however, that there is nothing in FACA that requires that the Academy relinquish to a Federal officer control over the selection of committee members or the conduct of Academy meetings, and therefore the Academy in not constrained from specifying its own operating procedures in its contracts with Federal agencies.

Out of concern that FACA would "tie up Academy operations," a *Washington Post* op-ed by Norman Augustine, former CEO at Lockheed-Martin Corporation, cited the experience of an Academy panel which was involved in overseeing a redesign of the space shuttle's solid rocket boosters following the Challenger accident.[105] Augustine claims this review, in which the committee met 89 times over 30 months, would not have been possible under FACA. There is no doubt that on rare occasions FACA's requirement of public notice of meetings could get in the way. On the other hand, the more frequently heard criticisms of the Academy is its slowness to act. In fact, "lacks timeliness" was one of the criticisms by the DOE staff of commissioning the Academy to review the ICF program (See Attachment 1). The DOE decided to replace ICFAC with an Academy committee on September 6, 1995, and discussions were held with the Academy as early as November 1, 1995. But the contract between DOE and the Academy for the NRC-ICF Committee work was not signed until May 6, 1996, and the first meeting was not convened until August 1-2, 1996. The Committee then met five times over four months to hear briefings on the program. Clearly, given the way the Academy usually operates, the FACA requirements for public notice of meetings would not be detrimental to the Academy or the public it purports to serve.

To avoid unnecessary burdens being imposed upon the Academy and to insure that the Academy controls its committee appointments, NRDC supports legislation that would provide a carefully crafted exemption of Academy committees from those FACA provisions that mandate direct federal agency oversight of advisory committee membership, meetings, and agendas. However, *the essential public access and accountability provisions under Section 10 of FACA must be preserved.* Unfortunately, the Academy has aggressively sought, in a most unbecoming fashion, to blur and obscure the distinction between federal agency "management" of its committees—which we concur might impair the Academy's flexibility and independence in some instances—and *the essential public protections afforded by FACA against unwarranted*

[104] For example, in an editorial in *The Washington Post*, Norman R. Augustine cites an Academy assessment of the national blood supply during early stages of the AIDS epidemic as an example of an assessment that "might not have produced important recommendations for dealing with future threats to blood safety had it [the Institute of Medicine] been subject to the control of any of the Federal agencies whose actions were reviewed and, in some cases, criticized." Norman R. Augustine, Editorial, *The Washington Post*, August 6, 1997, p. A19. Similar sentiments have been echoed by editorials and letters to the editor in scientific journals. See for example, Professor M.R.C. Greenwood, *Science*, Editorial, July 11, 1997, p. 163; and Colin Macilwain, Editorial, *Nature*, April 10, 1997, p. 525.

[105] Norman R. Augustine, Editorial, *The Washington Post*, August 6, 1997, p. A19.

secrecy, bias, and conflict-of-interest in the procurement of scientific and technical advice by Federal agencies.

Under the Academy's historical operating practices—before being compelled to comply with FACA—the committee chairman was given complete discretion to determine which meetings were open to the public and which were closed and who got invited to attend which meetings—hardly a formula for impartiality and fairness. In the case of the NRC-ICF Committee this discretion was abused by the Chairman Koonin and Zolandz of the Academy staff. As noted earlier, for example, Zolandz refused to permit Western States Legal Foundation to address the committee, and Koonin invited senior DOE officials in for private discussions with the committee. In response to the recent court rulings the NRC has adopted a new "openness" policy whereby committees are to open those portions of meetings dedicated to "gathering information" while conducting closed "executive sessions" when meetings are dedicated to "committee deliberations." According to the Academy,

> . . . the council's work "can benefit from increased public access and increased opportunities for public input" at those meetings in which panel members are gathering information. That openness must be balanced by assurances that "committees and panels are shielded from undue pressures."
>
> "The institution retains the right to close meetings as appropriate," the policy states, "to conduct work free from external influences."[106]

The Academy argues that opening committee deliberations would stifle the free and frank exchanges that now take place in closed sessions. According to the Academy, "keeping the committee deliberations and our review process closed and confidential is fundamental for ensuring the independence of our studies and the scientific quality of our reports, enabling our recommendations and findings to be based on science rather than politics. A frank, confidential discussion of the merits of a committee draft during review is our most effective quality assurance mechanism."[107]

Just as it did during the Watergate scandal, such a "limited modified-hangout" policy falls far short of the disclosure requirements under current law. It is a sad commentary, but a fact, that the scientific elite in our democratic society apparently feels incapable of functioning effectively in full view of those who pay its bills. The Academy publicly claims its committees need to be shielded from federal agency, i.e., sponsor, influence. Were this a serious problem the Academy could adopt rules that required public disclosure of any and all such attempts by a sponsoring agency or indeed any agency of the government Unfortunately, an unstated but apparently greater concern is that many scientists are afraid of retribution by, or prefer not to be openly critical of, the work of other scientists. This condition arises more frequently when there are long standing personal and/or professional relationships between the committee members and

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[106] *Id.*

[107] Bruce Alberts, "Oversight of the Federal Advisory Committee Act," November 5, 1997, p. 8.

scientists within the programs they are reviewing—as was certainly the case with members of the NRC-ICF Committee . When committee members are truly independent of the programs they are reviewing, one would not expect the committees members to feel the need to shield their criticisms from their colleagues and the public. Moreover, it hardly enhances one's view of the integrity of the NRC's peer review processes to learn that the Academy feels the scientific judgement of its panel members could be swayed by the mere unsolicited presence of a funding agency representative or fellow scientist in the room. Apparently being forced on occasion to muster the courage of one's own convictions is not a requirement for service on NRC committees.

The FACA requirement that meetings be open to the public is designed to ensure the objectivity of advisory committees' advice, in part by preventing committees of "good old boys" from quietly colluding with agency management or laboratory colleagues and "cooking" the results. In our judgment it is far more important to have open deliberations to expose and curb committee abuses, than it is to close meetings to shield committee members from putative retribution from colleagues or funding agencies. Conducting critical deliberative meetings and peer reviews in secret by no means guarantees that these improper influences will not be brought to bear on the process. It merely guarantees that these influences will remain hidden. In the final analysis, the best deterrent to the abuses the Academy claims to fear is a norm of openness, in which the free exchange of ideas is truly free, and not limited to an anointed few.

The Academy's process for reviewing draft reports of its committees is modeled after the process used to peer review articles submitted to professional journals. The draft reports and the reviewers' names and comments are not made public. In our view it is presumptuous of the Academy to believe that its committees would not benefit by opening-up this review process more broadly to include all potentially interested and informed parties, as is done, for example, with Environmental Impact Statements.

Conclusions

As we have demonstrated above, collectively the membership of NRC-ICF Committee was egregiously biased in terms of determining (1) "the technological readiness of the NIF project to proceed with construction," and (2) the "adequacy of the ICF program in addressing the confidence of achieving ignition and providing the technical basis associated with NIF," as called for under the contract between the Academy and DOE. Several committee members had direct financial conflicts of interest, in direct violation the Academy's own conflict of interest rules. The Academy, the Committee, and DOE refused to correct these problems when they were brought to their attention. As a consequence the Academy biased the scientific and technical review of a major public policy issue. The Academy's staff treated the public shabbily; the staff and the NRC-ICF Committee acted to prevent interested members of the public from attending unclassified meetings and making presentations. For a short period the Academy's staff acted to prevent interested scientists and a Federal official at the Office of Management and Budget from obtaining unclassified minutes of a committee meeting. The Academy staff repeatedly refused to make available unclassified documents—those that were distributed to the

committee—to an interested scientist who was not on the committee. In sum, the Academy violated FACA, the Academy's own rules, minimal standards of conduct related to the provision of scientific data to inquiring scientists, and minimal standards of decency toward the public while taking public monies to address a public policy issue. The Academy has demonstrated that it is incapable of enforcing even its own weak rules.

The nation deserved an independent, unbiased review of the scientific and technological readiness of NIF prior to spending up to $3.5 billion on the project.[108] The nation did not obtain such a review from the NRC-ICF Committee .

As a consequence of *ADLF v. Shalala* the Academy must now comply with FACA. As a consequence of *NRDC, et al. v. Peña, et al.*, while the Court permitted the Academy to publish the first and only report of the NRC-ICF Committee, DOE cannot utilize it or any other product of the NRC-ICF Committee ; and the NRC-ICF Committee , at least as presently constituted, has been abolished.

Given that the Supreme Court has let stand *ADLF v. Shalala*, the Academy is now turning to the Congress to seek a blanket exemption from the requirements of FACA. NRDC supports a more carefully crafted FACA exemption for the Academy. In our view, the Academy should be permitted to continue to appoint, screen, and manage its own committees, *but the composition and deliberations of these committees should be subject to the same minimum statutory standards for openness, balance, and accountability* that have long applied to federal advisory committees established or utilized by federal agencies. Moreover, failure to comply with these standards should be subject to judicial review to ensure that citizens can seek redress in the courts for the occasional egregious failures that occur in the Academy's internal system of controls—as occurred in the case of the NRC-ICF Committee.

[108] This estimate includes $1.7 billion in construction and LLNL program related costs and $1.8 billion in operating funds over 15 years (See footnote 2 above).

Mr. PAINE. I wanted to speak to this question of whether the academy committees, when they present their results, are actually presenting technical results. In the case of this ICF Committee, we couldn't actually perceive the direct link between the evidence presented in the report and the conclusions of the panel.

As you say, as you correctly note, many times the National Academy panels are called upon to present bottom-line policy conclusions—and this panel was no different—it just said—the actual conclusion of the report was that this project should proceed as planned. Now that is a policy conclusion if I've ever heard one, but if you go through the report with a knowledgeable eye, if you understand what's being presented, you will actually find that the technical data presented does not support, or at least arguably does not support, the conclusion.

The second point I would make about this panel is that when you have this problem of a narrow technical community with a very highly concentrated esoteric expertise, it seems to me the way you achieve balance, then, is to make sure that you have a diversity of technical views.

We're not talking about putting representatives of different organizations on there to act as spokespeople for their organizations. We're saying, for example, in the case of this committee, most of the members of the committee had already announced their support for this project and, in fact, for the specific technology that was being used. Why not, then, have appointed members to the panel that advocated other fusion technologies and that had expressed serious reservations about the feasibility of this facility.

My God, the entire weapons program at Los Alamos has serious reservations about this project, and yet there wasn't a single scientist from Los Alamos Laboratory on the committee.

Mr. HORN. Well, that's a very helpful description of the situation, and Dr. Alberts has agreed it's before his watch, but he's going to find out and prepare a statement at the appropriate point on this dialog.

Let me just go down with a few questions that I have that concern me. Now you mentioned that the National Academy of Science has an agreement with NIH. Do they?

Mr. ALBERTS. No; that's a misunderstanding. We have a cooperative agreement for contract signing. We do not provide advice online, as was implied. This is simply——

Mr. HORN. I think Mrs. Stanley mentioned it.

Mr. ALBERTS. Yes. That's simply so we could write our contracts in a more expeditious manner, so when they ask us to do something in 6 months, it doesn't take 6 months to write the contract to get the money so we could start the study. It has nothing to do with advice giving. Advice giving can only be given by a process that involves review, et cetera, and we don't have individuals getting online advice as part of the academy. They may do that as individuals outside of the academy.

Mr. HORN. Given the advisory committee legislation on the books now, if you were made fully responsive to that by us doing nothing, would that completely slow you down in terms of contracts? You'd have to go back to ground zero every time with the agency?

Mr. ALBERTS. That's right. Well, we have 400 studies underway, so they would immediately have to be rechartered. I mean, we'd have to charter these committees. It could be done with the manpower available on the Government side; it would take 6 to 8 months, we're told. The other aspects I've already mentioned.

But in addition, there are many things that we now do that I believe are very important to the Nation, such as give advice to the Nation about radioactive waste disposal from both the Department of Defense and the Department of Energy, which could not be done under that fact simply because the agency doesn't want to be there while they're deciding, because then the process loses all credibility. That is, they already have their own committees; they're not credible with the public because the public doesn't trust the Department, so they want us to be independent. The same thing could be said for NASA.

So, there are things that we couldn't do because our independence would no longer be the valued resource that the agency was wanting and demanding from us. We couldn't provide the independence that we now have.

Mr. GLITZENSTEIN. Mr. Chairman, could I just comment on that for one moment because——

Mr. HORN. Please.

Mr. GLITZENSTEIN [continuing]. I think you may not have a real accurate picture of how that requirement of FACA is actually complied with in the real world. Usually when these agency employees are sent to advisory committee meetings, they don't sit there and run the meetings.

If you were hearing from advisory committee officers, which almost all agencies have, these are people whose job it is merely to make sure that the committee is in there talking about the subject matter of the charge that they've been given. These are people with technical expertise in compliance with the Advisory Committee Act. These are not people who, generally speaking, have subject matter expertise in the nature of the recommendations being considered.

And the extraordinarily simple way of resolving the problem that Dr. Alberts just discussed would be an agreement between the agency and the academy that when they have these committee meetings they will simply send employees who have expertise in advisory committee procedures; that is, how much public notice do we have to give, which is generally what these FACA officers do under current law, rather than people who will be substantively involved in discussions.

And I honestly think that if you were hearing from current agency officials who supervise FACA compliance that's what they do. The purpose is not to allow the agencies to run the meetings; that would completely contradict the purpose of FACA, which is to ensure that the Government does get independent, neutral, objective advice.

The sole administrative purpose of that provision, if you look back at the original legislative history, was simply to make sure that people complied with the very technical requirements of the Advisory Committee Act. These agency people are not involved in the subject matter of meetings. So there are easy ways to resolve it under current law, and as we have indicated, I don't think that

anybody believes that there is a massive pubic interest, in any event, in applying that particular feature of the act to academy operations. So I think it can be dealt with in a variety of ways.

Mr. HORN. Well, one can argue that when the Government agency appoints the people directly to the advisory board, that usually they're going to have the slant to preserve the bureaucracy that is already there or the policies that the bureaucracy has dreamed up that maybe Congress never heard of.

Now the difference between the two academies is they don't have that direct reach in; it doesn't mean they might not have an indirect reach or a whole variety of indirect reaches and make their projects look more objective with the imprimatur of the National Academy of Sciences, filled with Nobel Prize winners and all the rest of it, similar with the Academy for Public Administration.

Mr. GLITZENSTEIN. Mr. Chairman, there is no requirement under current law that agencies have to appoint advisory committee members. It simply is not in existing law. There is nothing under——

Mr. HORN. No, but with agency advisory committee members, they do appoint advisory committee members.

Mr. GLITZENSTEIN. That's right, but Mr. Chairman, there is nothing that would prevent an agency from doing what it does with the academy now. There is nothing at all that would stop an agency from going to the academy and saying "This is what the Supreme Court said in 1989. We want you to establish an advisory committee for us." That, is exactly what the Supreme Court said, would be subject to the openness requirements of the law.

Mr. HORN. Now, you talk about the Supreme Court saying this. Is this the dicta of Mr. Justice Brennan?

Mr. GLITZENSTEIN. Well, the whole point of the recent D.C. circuit decision was that that was the holding in the case. The holding in the case was that where Federal agencies have committees established "for" them—that's the word that the court uses time and again—for them—by a quasi-public organization like the academy, then that arrangement becomes subject to the openness and accountability requirements of FACA.

But if you just look at the plain terms of the law, there is nothing to stop an agency under this law from going to the academy and saying, "We want you to do what you do now. We want you to pick the members so there's no question about our independence and credibility." As long as there's compliance with the openness provisions of the statute, there's nothing at all under the statute that disallows that kind of construct from going forward.

Mr. HORN. OK; Dr. Alberts, Mr. Fosler—have you got a problem with what he just said?

Mr. FOSLER. Mr. Chairman, we feel as if we do favor in practice these basic principles of openness, and have, to the extent that it is possible and appropriate for the kind of work that we do. I'm struck in the discussion in thinking about—whether questions have been raised about the objectivity of panels that we've put together, or particular individuals, and, frankly, I can't think of any.

We certainly have had serious disagreements with the agencies that we have given advice to, but that is to be expected, and that's in the nature of our independence. But I really can't think of ques-

tions that have been raised about objectivity, which is another reason why we hope that, because there does not seem to be a problem with the way our academy is functioning, that whatever legislation is written will take that into account and recognize the distinctions between the different kinds of work that our academies do.

Mr. HORN. Dr. Ink has a point.

Mr. INK. I have a different impression of the FACA role of the Federal agency employee, although it varies all over the lot. The act, for example, authorizes an agency to have a Federal employee chair each meeting. I agree that they generally don't, but there is that latent power and authority. That individual, whether he or she chairs it or not, also has the authority to adjourn the meeting. The agenda has to be approved—I repeat, has to be approved—by the agency.

These at times are, as he indicated, very routine; other times that's not the case. I know of a number of instances in which that agency individual said nothing during the meeting, but then, in reporting back to that agency, raised issues which later at a higher level, the agency, in turn, then raised with the advisory committee. So, while in many instances it is very routine, it is not necessarily so, and the statutory authority there is much, much stronger than suggested a few minutes ago.

Mr. HORN. Dr. Alberts.

Mr. ALBERTS. He said exactly what I was going to say. The main point is not even what actually happens. For many cases, the main point is what the public's perception is. It's crucial to our value to the Nation that the public's perception be that we are not in the pocket of the Census Department, that we are not in the pocket of the Department of Energy. I guarantee with FACA, no matter what the person does, we would be criticized much more than we are now, with much more arguments on their side that we are, "in the pocket of this agency that paid for the results."

Mr. HORN. Are there any other questions any of the other panelists have of the heads of the academies involved here? Any other points you want to make in the testimony? We're trying to get a dialog here, so I'm curious where we are.

Well, let me ask you a few closing questions. Mr. Glitzenstein, do you suggest that the President, the Office of Management and Budget, and the General Services Administration have really been negligent for about a quarter of a century in their failure to include the National Academy in their regulations and annual reports? How do you feel about that?

Mr. GLITZENSTEIN. I think that the GSA, in particular, which has been given the administrative authority in the statute, in the past has never really directly addressed coverage of academy committees. What they did do—and I think this is very instructive for this subcommittee—is they drafted a regulation back in the mid-1980's—which, in fact, was discussed in the Public Citizen case—which defined utilized committees in a particular way that would have encompassed at least some NAS committees, and perhaps not others.

GSA defines "utilized committees", Mr. Chairman, basically encompassing committees in which there was a formal recognition by the agency and the entity establishing the committee that that

committee's advice and recommendations would be deemed a formal kind of advice or recommendation for the purposes of crafting Government policy. Clearly, as I think you've heard here today, that definition, in my view at least, would apply to a number of these NAS processes, although perhaps not others.

So I think what the GSA did, and that is the agency with interpretive authority under the statute, was to create a definition of a utilized committee, which, quite frankly, the Supreme Court didn't pay a lot of attention to. And I think this might also be something that you should keep in mind when you craft whatever you want to do on what GSA's role would be. The Supreme Court, in Public Citizen, specifically said,

> We're not going to listen to what GSA's interpretation of FACA is. We're going to just take our own crack at it, based upon our reading of the statute and the legislative history.

So whatever you do, I think you have to bear in mind that the courts may not pay that much attention to what GSA has to say unless you make it extremely clear that you want them to. And I think it also would be a hazardous road to go down to simply throw it into GSA's ballpark and let them sort of hack away at it without some pretty specific guidance from this subcommittee as to what you do or don't want them to address.

Mr. HORN. You, Ms. Stanley, Mr. Paine, have all been advocates. Now here we had cited the Hollifield-Horton language. That was a colloquy on the floor; it wasn't written into law. You saw the court just ignore it—and did they even give it a passing reference? And the result is, if it was written in law, do you think they would not have ignored it, to exempt the National Academy of Sciences or the National Academy of Public Administration? If that had been in law, would we have these two decisions, or so, that we've got?

Mr. GLITZENSTEIN. Mr. Chairman, if Congress had said, as they did for other committees that they intended to exempt, that we exempt National Academy of Sciences committees, then obviously we wouldn't be here. The reason we're here is because two Members of Congress engaged in a colloquy on the floor—and I'm not going to tell this subcommittee how it should give weight to that; you can make your own judgment about the weight those kinds of post-committee rapport colloquies should be given and under what circumstances they're delivered on the floor; you know that better than I do.

What I can say is that whatever was said in that colloquy—and I think the court correctly described it as a "non sequitur," if you look at the actual question and the answer that was given—it's not in the law. It was not written into the statute, and obviously a judgment was made at some point that, although Congress knew how to write exemptions into the statute—had no problem with other kinds of committees—there was not a sufficient consensus among all Members of Congress to do that. And I think that's why we're here today.

Mr. HORN. So when judges are up for confirmation before the Senate of the United States, you're saying that our colleagues in the other body, as we call it, should be more precise when they ask the question, "Will you follow legislative intent?" And they need to say, "Will you follow legislative intent if we've spelled it out in the

law?" versus implying that colloquies on the floor, which many people make every time a bill is passed, are regarded by us as legislative guidance in intent, and that we don't have to put everything in the law. But now, I gather, we will have the germanic approach to law around here and really get into detail.

Mr. GLITZENSTEIN. Well, it's an awfully good question, and obviously one that goes far beyond our efforts here.

Mr. HORN. I shall advise Mr. Biden and Mr. Hatch as to what to do.

Mr. GLITZENSTEIN. Well, people like Justice Scalia, as you may know, have said we, in the Court, should not pay attention to any legislative history because people in Congress—somebody once described it in a court case as "looking out over a sea of people and picking out your friends." You can pretty much find support for any proposition in any legislative history of any bill.

What I will say on FACA is if you look back at the original reports, and this is what the Supreme Court looked at: the conference report said NAS committees would be covered; the Senate report said NAS committees would be covered; the House report said NAS committees would be covered; prior congressional reports said NAS committees would be covered. That's what the Supreme Court looked at.

On the other hand, you've got what I submit, if you read it carefully, is at best a vague colloquy. Stacked up against that and the plain language, I think the Supreme Court had it right. And I will leave for another day the theoretical question on how to best interpret congressional intent and the questions that should be asked of prospective judges.

Mr. HORN. Let me ask you one last question—then we're going to adjourn it—and it's to you Mr. Glitzenstein. You're taking your argument for HHS utilization of the guide and applying it to another example—bear with me on this.

If Boeing—and I will admit Boeing is in my district now—if Boeing defines the maintenance standards for their 757 and the Federal Aviation Administration specifies this standard for all airlines using Boeing 757's—one, is the Boeing engineering team who defined their standards subject to the Federal Advisory Act? And, two, should the FAA adhere to the regulation issuance process for 757's, or should Boeing?

Mr. GLITZENSTEIN. Well, the answer to the first one is, I don't believe it would be under current law because I don't think that would constitute a committee. The case is made quite clear, as I was trying to point out a moment ago, that there are all kinds of ways the Government can get advice and recommendations. It's only when it goes to a committee and tries to get the veneer of credibility that a committee structure entails that the government becomes subject to the act.

And, in fact, if you look at, for example, a decision involving the Hillary Clinton Task Force, that's exactly what the court said—it's only when you go to a committee. So I don't think that going to Boeing and asking for advice entails the formation of a committee of experts, but these other examples you've heard about, especially the NRDC case and the Animal Legal Defense Fund case, most certainly do involve that kind of effort.

The second point I would like to make is that, at least in that instance as I understand your question, Mr. Chairman, there would probably be a separate notice and comment process if that decision had any bearing on the public. But in a lot of these situations, before these recommendations become embodied in Government policy, there is no separate notice and comment process.

In the Animal Legal Defense Fund example, these guides became part of Federal regulatory policy automatically; I want to stress that—automatically. There was no separate opportunity for the public to comment, which makes it all the more critical that the public should see how these kinds of crucial recommendations are devised in the first instance.

Mr. HORN. Well, we thank you all. It's been a very interesting discussion. I've learned a lot. My colleagues who will read this will learn a lot.

And in the meantime I want to thank J. Russell George, our staff director and chief counsel, who is right in back of me here; Bob Alloway, to my left, the professional staff member responsible for this area; John Hynes, professional staff member also; Andrea Miller and Matthew Ebert, clerks to the committee; we thank them—especially keeping those microphones moving—and David McMillan, who is professional staff member for the minority; and Ellen Rayner, chief clerk for the minority and Sheridan Park on the minority side, and our court reporter, Daouda Gusatte—it's pronounced Gu-set, is it?

And we thank you all; it's been a very interesting exploration, and we'll have a lot of work to do. We'll welcome your continuing advice, and with that this hearing is adjourned.

[Whereupon, at 5:12 p.m., the subcommittee was adjourned subject to the call of the Chair.]

[The prepared statements of Hon. Henry A. Waxman and Hon. Danny K. Davis, and additional information submitted for the hearing record follows:]

Statement of Rep. Henry A. Waxman
November 5, 1997

Good afternoon. I am glad this hearing is being held.

I am a strong supporter of the National Academy of Sciences. The Academy has produced many studies that have had a major impact on national policy, including many studies that I have relied heavily on in crafting federal legislation. For example, the Academy's report on the risks of pesticides to children was the foundation of the pesticides law that Congress passed last year. The report that the Academy prepared on protecting children from tobacco provided the blueprint for the FDA tobacco regulations.

My interest is in strengthening the National Academy of Sciences and the public's confidence in the work of the Academy. I do not want to impose bureaucratic requirements on the Academy that hamper its ability to do its job. On the other hand, there may be some ways in which the procedures of the Academy can be improved. I hope we can explore these issues at this hearing.

For example, it is my understanding that committees convened under the Federal Advisory Committee Act often adopt safeguards against conflict of interest and to insure balance on the committee. There may be value in applying similar procedures to National Academy of Sciences panels that are convened for the purpose of advising federal agencies or Congress.

I look forward to this hearing and to working with the members of this Subcommittee on this important issue.

STATEMENT OF DANNY K. DAVIS (IL)

"The Government Reform and Oversight Subcommittee on Government Management Information, and Technology"

Thank you Mr. Chairman for convening this hearing regarding "Amending the Federal Advisory Committee Act to Exempt the National Academy of Sciences and the National

Academy of Public Administration." I also want to thank our distinguished witnesses for taking time to share with us their expertise as it relates to this issue.

This hearing focuses on the issue of

whether the Federal Advisory Committee Act should apply to the National Academy of Sciences and the National Academy of Public Administration. The Federal Advisory Committee Act (FACA) was

established in 1972 to provide openness and balance to groups convened by federal agencies to provide advice on proposed rules and regulations. The Advisory committees have one common thread --- a partnership of private

citizen participation into the decision making process of the federal government. The principal purpose of FACA is to enhance the public accountability of advisory committees and to reduce

wasteful expenditures on them.

However, the General Services Administration (GSA) has expressed concerns about their ability to implement the court order applying FACA to the

National Academy of Sciences. GSA has noted that the workload in applying FACA would be burdensome and overwhelming to their staff unless legislation exempts the National Academy of Sciences and the National

Academy of public Administration. In addition, the academies have raised several issues with respect to a lack of independence under FACA.

It is my hope that this hearing will address

some of the issues related to the lack of independence that the academies believe they will have under FACA. In addition, I look forward to hearing some of the ideas the academies may have to ensure that they are able to

do their work without being too burdened. Therefore, I look forward to hearing from our distinguished witnesses.

Again, thank you Mr. Chairman for this opportunity.

ANIMAL LEGAL DEFENSE FUND

401 EAST JEFFERSON STREET, SUITE 206, ROCKVILLE, MD 20850-2617
Phone: (301) 294-1617 Fax: (301) 294-8519 E-mail: aldf@wt.infi.net

By Facsimile and First Class Mail

November 7, 1997

The Honorable Stephen Horn
Chairman,
Subcommittee
Government Management, Information and Technology
Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Congressman Horn:

On Wednesday, November 5, 1997, at the hearing you chaired on the Federal Advisory Committee Act (FACA), I stated that the Public Health Service (PHS) provides funding to the National Academy of Sciences (NAS) through cooperative agreements for what I termed "rapid on line" advice. In response to this statement, you asked Dr. Bruce Alberts, President of the NAS, whether this was correct. He denied that any such arrangement existed.

I am writing to confirm that the statement I made to the committee was, in fact, correct. I would like the record to include this letter as well as the basis for my statement that such arrangements exist between NAS and at least PHS. I enclose a portion of a proposal from NAS to PHS for Core Support of Selected Boards of the National Academy of Sciences. The proposal describes the financial arrangement for providing "ongoing impartial advice," and states that such cooperative agreements have been in effect since 1981.

The proposal specifically states that,

> the principal purpose of the cooperative agreement, from the standpoint of the government, was to have available to it a group of standing bodies in a number of health areas that could be called together to provide either rapid on-line advice or more deliberative seminars or studies on discreet issues. The device of a cooperative agreement was chosen as the instrument to achieve those ends since it permitted the establishment of core entities and could also be used as a base to which specific tasks could be added at the request of the government or on suggestion by IOM/CLS.

The proposal described the importance of these cooperative agreements to NAS. It stated that the first purpose was to "create an effective means through which NAS could carry out its principal responsibility under its congressional charter of providing advice in *a thorough and timely fashion to the government.*"(emphasis added)

I would appreciate it if you would place this letter and enclosures in the record of the hearing. Thank you.

Very truly yours,

Valerie J. Stanley

Valerie J. Stanley

Enclosures

cc: The Honorable Rad R. Blagajevich
The Honorable Danny Davis
The Honorable Thomas M. Davis III
The Honorable Paul E. Kanjorski
The Honorable Carolyn Maloney
The Honorable Major R. Owens
The Honorable Joe Scarborough
The Honorable Mark Sanford, Jr.
The Honorable F. James Sensenbrenner, Jr.
The Honorable John E. Sununu
The Honorable Henry A. Waxman
Dr. Bruce Alberts

ANIMAL LEGAL DEFENSE FUND

401 EAST JEFFERSON STREET, SUITE 206, ROCKVILLE, MD 20850-2617
Phone: (301) 294-1617 Fax: (301) 294-8519 E-mail: aldf@wt.infi.net

December 4, 1997

Matthew Ebert
Subcommittee on Government Management,
Information and Technology
B-373 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Mr. Ebert:

Enclosed please find the edits of the transcript of my testimony.

I am also enclosing a self-explanatory letter with enclosures which I sent to Congressman Horn. Since Dr. Alberts denied the existence of the arrangement between NAS and NIH that I described in my testimony, and NAS' own documents confirm my statement, I would like the enclosed letter and its attachments to be included and published.

Thank you.

Very truly yours,

Valerie J. Stanley

Valerie J. Stanley

Enclosures

ANIMAL LEGAL DEFENSE FUND

401 EAST JEFFERSON STREET, SUITE 206, ROCKVILLE, MD 20850-2617
Phone: (301) 294-1617 Fax: (301) 294-8519 E-mail: aldf@wt.infi.net

By Facsimile and First Class Mail

November 7, 1997

The Honorable Stephen Horn
Chairman,
Subcommittee
Government Management, Information and Technology
Rayburn House Office Building
Washington, D.C 20515-6143

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I am writing to confirm that the statement I made to the committee was, in fact, correct. I would like the record to include this letter as well as the basis for my statement that such arrangements exist between NAS and at least PHS. I enclose a portion of a proposal from NAS to PHS for Core Support of Selected Boards of the National Academy of Sciences. The proposal describes the financial arrangement for providing "ongoing impartial advice," and states that such cooperative agreements have been in effect since 1981.

The proposal specifically states that,

> the principal purpose of the cooperative agreement, from the standpoint of the government, was to have available to it a group of standing bodies in a number of health areas that could be called together to provide either rapid on-line advice or more deliberative seminars or studies on discreet issues. The device of a cooperative agreement was chosen as the instrument to achieve those ends since it permitted the establishment of core entities and could also be used as a base to which specific tasks could be added at the request of the government or on suggestion by IOM/CLS.

The proposal described the importance of these cooperative agreements to NAS. It stated that the first purpose was to "create an effective means through which NAS could carry out its principal responsibility under its congressional charter of providing advice in *a thorough and timely fashion to the government.*"(emphasis added)

I would appreciate it if you would place this letter and enclosures in the record of the hearing. Thank you.

Very truly yours,

Valerie J. Stanley

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Enclosures

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The Honorable Mark Sanford, Jr.
The Honorable F. James Sensenbrenner, Jr.
The Honorable John E. Sununu
The Honorable Henry A. Waxman
Dr. Bruce Alberts

NATIONAL ACADEMY OF SCIENCES

EXECUTIVE OFFICE
2101 CONSTITUTION AVENUE
WASHINGTON, D.C. 20418

SEP 3 0 1992

Re: Proposal No. 93-IOM-041a

Burl J. McDaniel
Director, Materiel Management Division
Administrative Service Center
Office of Management
U.S. Public Health Service
Parklawn Building, Room 5-77
5600 Fishers Lane
Rockville, MD 20857

Dear Mr. McDaniel:

Enclosed is a proposal entitled "Core Support of Selected Boards of the National Academy of Sciences" in the amount of $546,800 ($436,800 from PHS and $110,000 from HCFA) for a 1-year period (October 1, 1992-September 30, 1993) under Cooperative Agreement No. ASU-000001-12. This proposal will support, as was done last year, the same eight boards and the oversight Committee on Clinical Evaluation of the Institute of Medicine and the Commission on Life Sciences. The total amount over a 5-year period (October 1, 1992-September 30, 1997) is $2,888,600 (see below):

	PHS	HCFA	TOTAL
92-93	$ 436,800	$110,000	$ 546,800
93-94	448,000	113,000	561,000
94-95	460,000	116,500	576,500
95-96	472,800	120,500	593,300
96-97	486,500	124,500	611,000
TOTALS	$2,304,100	$584,500	$2,888,600

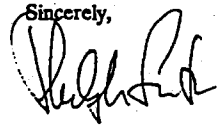
We will separately negotiate with HCFA to support four IOM boards and our Committee on Clinical Evaluation.

I understand that this proposal has been discussed with Dr. William Cloud, Director, Division of Program Development and Review, Office of Health Planning and Evaluation, Office of the Assistant Secretary for Health, and Ms. Melanie Timberlake, of his staff, to whom we are sending a copy of the proposal under separate cover.

Linda Engelbrecht, Contract Manager, Office of Contracts and Grants, will be responsible for negotiation of these Cooperative Agreements. The responsible program officers are Drs. Enriqueta C. Bond, IOM Executive Officer, and Alvin G. Lazen, Acting Executive Director, Commission on Life Sciences.

We shall appreciate your consideration of this matter.

Sincerely,



Philip M. Smith
Executive Officer

Enclosure

cc: Dr. William Cloud
Ms. Melanie Timberlake

National Academy of Sciences
Institute of Medicine
Commission on Life Sciences

Proposal No. 93-IOM-041a

Public Health Service
for
Continuation of Core Support of Selected Boards

October 1, 1992-September 30, 1993

Cooperative Agreement No. ASU-000001-12

This proposal is submitted by the National Academy of Sciences, which assumes full technical and financial responsibility under its Act of Incorporation for the work to be carried out under any resultant agreement.

Grant Administration:

Gary E. Dwoskin, Director
Office of Contracts and Grants
National Academy of Sciences
Telephone: 202-334-2254

Program Administration:

Enriqueta C. Bond, Ph.D.
Executive Officer
Institute of Medicine
National Academy of Sciences
Telephone: 202-334-2177

Alvin G. Lazen, Ph.D.
Acting Executive Director
Commission on Life Sciences
National Academy of Sciences
Telephone: 202-334-2500

September 1992

ATTACHMENT A

NATIONAL ACADEMY OF SCIENCES
Institute of Medicine

Proposal for Continuation of
Core Support of Selected Boards of the
National Academy of Sciences

Background

On February 15, 1981, the National Academy of Sciences (NAS) and the Public Health Service (PHS) of the Department of Health and Human Services (HCFA) signed a cooperative agreement providing core support for selected activities at NAS for an initial period of one year (Cooperative Agreement No. ASU000001-01). Since that time core support has been provided on an annual basis. For the period October 1, 1991-September 30, 1992, the total core support received for the Institute of Medicine (IOM) and Commission on Life Sciences (CLS) was $530,000 ($420,000 from PHS and $110,000 from HCFA). This year, we are seeking support for another 1-year period (October 1, 1992-September 30, 1993) in the amount of $546,800 ($436,800 from PHS and $110,000 from HCFA) under Cooperative Agreement No. ASU000001-12. The total amount over a 5-year period (October 1, 1992-September 30, 1997) is $2,888,600 (see below). Attached are the IOM's 1991 Annual Report/1992 Program Plan, reports on CLS' Board on Radiation Effects Research and the Board on Environmental Studies and Toxicology, and background information on the NAS, IOM, and CLS.

Purpose of the Core Support Provided by the Proposed Cooperative Agreement

NAS proposes to allocate core support to the eight established boards that were supported during previous years, as well as the IOM's Committee on Clinical Evaluation.

Institute of Medicine
Board on Health Promotion and Disease Prevention (now includes AIDS Activities)
Board on Biobehavioral Sciences and Mental Disorders
Board on Health Care Services
Board on International Health
Committee on Clinical Evaluation
Board on Health Sciences Policy
Food and Nutrition Board

Commission on Life Sciences
Board on Radiation Effects Research
Board on Environmental Studies and Toxicology

In 1981, PHS participated with IOM and CLS in an experiment in providing ongoing, impartial advice from the private sector to a federal government agency. In 1984, HCFA joined PHS as a sponsoring agency initially to help support one board. In 1987, HCFA increased its support to $70,000 in partial support of three IOM boards (Health Care Services, Health Promotion and Disease Prevention, Mental Health and Behavioral Medicine, and the AIDS Activities program, which was formerly under the Board on International Health. In 1988, we requested an increase in support from HCFA ($125,000 for 15 months) to be used in partial support of the four previously supported activities as well as the Board on Health Sciences Policy. During the ninth, tenth, and eleventh years, core support for these same programs continued a fruitful interaction for these activities. Core support as received during these years: October 1, 1989-September 30, 1990 = $500,000 ($400,000/PHS and $100,000/HCFA); October 1, 1990-September 30, 1991 = $525,000 ($420,000/PHS and $105,000/HCFA); and, October 1, 1991-September 30, 1992 = $530,000 ($420,000/PHS and $110,000/HCFA). With this proposal, we request support for a 1-year period (October 1, 1992-September 30, 1993) in the amount of $546,800 ($436,800 from PHS and $110,000 from HCFA). The total amount over a 5-year period (October 1, 1992-September 30, 1987) is $2,888,600 (see below):

	PHS	HCFA	TOTAL
92-93	$ 436,800	$110,000	$ 546,800
93-94	448,000	113,000	561,000
94-95	460,000	116,500	576,500
95-96	472,800	120,500	593,300
96-97	486,500	124,500	611,000
TOTALS	$2,304,100	$584,500	$2,888,600

The principal purpose of the cooperative agreement, from the standpoint of the government, was to have available to it a group of standing bodies in a number of health areas that could be called together to provide either rapid on-line advice or more deliberative seminars or studies on discrete issues. The device of a cooperative agreement was chosen as the instrument to achieve those ends since it permitted the establishment of core entities and could also be used as a base to which specific tasks could be added at the request of the government or on suggestion by IOM/CLS.

The principal purposes of this relationship, from the standpoint of the components of IOM and CLS, were three. The first was to create an effective means through which NAS could carry out its principal responsibility under its congressional charter of providing advice in a thorough and timely fashion to the government.

In carrying out this first objective, the boards were enabled to achieve the second purpose of the cooperative agreement, which was to develop and shape an annual program of studies in their subject areas designed to address the problems and issues identified.

The final purpose of the experiment was to create a mechanism that would provide partial support of a small staff (currently 12 percent of the cost of one professional and one support person for each board) which would be available to organize periodic general advice from the board and special studies stimulated either by the government or IOM/CLS, to confer with agency staff, and to conduct briefings for PHS agencies, HCFA, and others, on relevant work of NRC and IOM. We believe the annual reports we have submitted since the experiment began in 1981 have confirmed that the experiment was worth starting and that it is worth continuing.

Proposed Plan of Operation

Boards will continue to carry out the functions described on the following pages through meetings of the boards, through meetings of smaller groups covered under the auspices of the board to focus on a specific topic, and through consultation by writing and telephone. The boards will be assisted by IOM/CLS staff in carrying out these functions. In addition to developing specific proposals for study, which will be made available to PHS and HCFA, a progress report will be submitted at the end of the year describing progress under the cooperative agreement and highlighting aspects of important developments in the substantive fields covered by each board that are of particular relevance to the missions of PHS and HCFA.

In carrying out its functions, the boards provide for a regular interchange between PHS, HCFA and the boards. The following specific means of intervention will be included:

1. meeting with PHS and HCFA staffs to discuss plans for the activity of the boards during the coming year;

2. contacts with PHS and HCFA staffs prior to board meetings to discuss the agenda for board meetings;

3. presentations, when appropriate, by PHS and HCFA staffs at staff meetings to pursue specific ideas and suggestions generated by the boards;

4. in addition to the progress report at the end of the year, the development by the boards of brief reports on specific topics of joint interest to NAS, PHS, HCFA in the form of preliminary ideas for possible studies, which could serve as the basis for further discussion and development involving NAS, PHS, and HCFA; and

5. briefings, whenever appropriate, for PHS and HCFA on planned, ongoing and completed studies being conducted by the IOM or the CLS and other components of NRC which are of interest to PHS and HCFA.

The benefits of these interactions are intended to include:

1. access by PHS and HCFA to comments from board members regarding matters of interest to PHS, including independent advice on how complex issues might be defined and addressed in further studies;

2. an opportunity for PHS and HCFA to learn about NAS activities relevant to PHS throughout the NAS complex; and

3. an opportunity for NRC and IOM boards and staff to gain perspective on PHS and HCFA concerns in determining priorities and recommendations for future NRC studies.

In the course of these interactions, PHS and HCFA should understand that only written reports reviewed according to NRC review procedures are official NRC/IOM statements. Issues identified for more extensive study would require the establishment of a separate study committee and the provision of additional support from the federal government and/or private sources and review by the Executive Committee of the Governing Board of the NRC.

Reports resulting from this effort shall be prepared in sufficient quantity to ensure distribution to the sponsor, to committee members, and to other relevant parties in accordance with NAS policy. Reports may be made available to the public without restrictions.

Proposed Timetable and Estimated Costs

Support from PHS and HCFA is being requested for a 1-year period (October 1, 1992-September 30, 1993) in the amount of $546,800 ($436,000 from PHS and $110,000 from HCFA). The total amount over a 5-year period is $2,888,600 which would cover selected core activities of eight boards and the Committee on Clinical Evaluation of the IOM and CLS. HCFA will be requested to partially support four IOM boards and the Committee on Clinical Evaluation. The IOM's 1991 Annual Report/1992 Program Plan and reports of CLS' Boards on Radiation Effects Research and the Board on Environmental Studies and Toxicology during the proposed program period are attached. We expect that these plans will be modified on the basis of the interaction with the deliberations of the boards. While the general purposes and functions of each board are similar, we expect that the particular methods adopted by each board to carry out these functions, such as the number and timing of meetings during the year, will vary. The requested core support provides travel expenses for at least two meetings of each board, or subgroups to address particular topics, part time support for a senior professional, and related administrative costs.

Unit: National Research Council (NRC)
Date: 05/14/97
Date Edited: 08/12/97
Office: Governing Board
Contact Person: Bill Colglazier Additional Contact: Susan Turner-Lowe
Document Title: Guidelines on Public Access to Information
Unit Review Status:
Reviewed By: Kenneth R. Fulton Reviewed On: 07/30/97

GUIDELINES ON PUBLIC ACCESS TO INFORMATION

Adopted by the Governing Board of the National Research Council, September 20, 1975, as amended May 14, 1997.

The Governing Board of the National Research Council establishes the following guidelines to implement the policy adopted by the Council of the National Academy of Sciences on April 20, 1975 (concurred in by the Council of the National Academy of Engineering on April 24, 1975, and the Executive Committee of the Council of the Institute of Medicine on April 11, 1975), and amended on June 13, 1997. That adopted policy is entitled "Public Access to Information Concerning Studies Conducted Under the Auspices of the National Academy of Sciences," and is referred to herein as the "Policy Statement."

[Use Find & Replace (Control F) to go to a section.]

1. SCOPE AND POLICY

These guidelines apply to the conduct of all studies and other activities intended to produce reports for public release that are undertaken by the National Research Council and the Institute of Medicine. The reports of studies undertaken within the Academy are increasingly utilized by officials of the Federal Government and by the Congress in the formulation of Federal programs and policies. Accordingly, as a general practice, studies undertaken by the Academy through units of the

National Research Council and the Institute of Medicine should be conducted under conditions of openness, so that the public may be aware of the procedures and information utilized in such studies. The institution's work can benefit from increased public access and increased opportunities for public input to the information-gathering aspects of the institution's studies and workshops. At the same time, both the National Research Council and the Institute of Medicine must assure that their committees and panels are shielded from undue pressures while continuing to have maximum access to relevant information from all public and private sources.

These guidelines are not intended to replace or modify current National Research Council procedures for responding to general informational inquiries or normal recordkeeping practices employed in the conduct of National Research Council studies, except for modifications necessary to assure that privileged information continues to be protected.

2. COVERAGE OF GUIDELINES

Except as otherwise provided herein, these guidelines apply to all study committees and other activities intended to produce reports for public release of the National Research Council and the Institute of Medicine. The term "study committee" as used herein, means a committee, panel, task group, or other body established under an authorization by the Governing Board to investigate, examine, experiment, and report upon any subject.

The guidelines are not applicable to the meetings and deliberations of Boards, Commissions, or of the Governing Board of the National Research Council, unless those bodies have constituted themselves, or a portion of their membership, as a panel or committee to undertake a specific study.

3. RESPONSIBILITIES FOR PUBLIC ACCESS

The Chair of the National Research Council shall be responsible for implementation and interpretation of these guidelines, and under his or her policy guidance, the following officers and staff of the National Research Council are assigned the following stated responsibilities with respect to their implementation:

a. The Director of the Office of News and Public Information shall be responsible for the administration of these guidelines, and shall be available to consult with Major Program Units on matters pertinent to this task.

   Incoming requests to which these guidelines apply are to be referred to the Office of News and Public Information (regarding meetings) or the Office of the Archivist (regarding records), which will assign them for appropriate action to

responsible officials within the National Research Council. That office also will be responsible for administration of a regular schedule that will serve as the official public register of the National Research Council for announcing open meetings and disseminating other information relating to the implementation of these guidelines.

b. The Chairs of the Major Program Units and, under their guidance, the respective Executive Directors shall be responsible for implementation of the guidelines within their assigned program areas. They will be responsible for identifying study projects and other activities to which these guidelines and policies are to be applied and reporting to the Governing Board on plans for implementation either at the time program or project approval is requested or in subsequent information reports to the Board. In addition, the Governing Board may identify additional projects to which these procedures are to apply.

c. The Responsible Staff Officer of study committees, under the supervision of the Executive Directors of Major Program Units, shall be responsible for maintaining records and documentation required in the implementation of these guidelines and the Policy Statement. At the completion of each study and in cooperation with the Office of the Archivist of the Academy, the Responsible Staff Officer shall prepare, pursuant to these guidelines, necessary public access files which will then be transmitted as promptly as possible by the Executive Director of the relevant Major Program Unit to the Archivist after the public release of the study report. Guidelines on preparing public access files will be available from the Office of the Archivist. Questions concerning the selection of documents to be placed in the file shall be brought by the constituent units of the National Research Council to the attention of the Office of the Archivist and Office of News and Public Information for resolution.

d. The Office of the Archivist of the Academy shall be responsible for (1) maintaining the public access files subsequent to the completion of a study; (2) providing for the transfer, orderly arrangement and care of public access files; and (3) handling referrals from the Office of News and Public Information on requests for information under Item VI of the Policy Statement.

e. The Chief Financial Officer of the Academy is the custodian of signed contracts and related official correspondence and will be responsible for making such information available upon the request of the Office of News and Public Information or the Office of the Archivist.

4. PROCEDURES GOVERNING PUBLIC ACCESS

Requests for public access to National Research Council study project files should be made to the Archivist, National Academy of Sciences, 2101 Constitution

Avenue, N.W., Washington, D. C. 20418. General information inquiries on study projects will continue to be handled routinely without regard to these guidelines. Public requests under these guidelines shall be handled under the same time constraints as general information inquiries and every reasonable effort will be made to handle such requests as expeditiously as possible.

The Archives and Records Management guidelines of the Academy shall generally apply with respect to the maintenance of the public access files. The Office of the Archivist will maintain designated public access files, provide space where such files may be examined, and, upon request, make provision for duplication of records. Privileged study information will be maintained in the files of the Major Program Units, or transferred separately, as appropriate, to the Office of the Archivist.

If requests for information subject to the Policy Statement are received while a study is under way, the Office of News and Public Information will confer with the Executive Director of the appropriate Major Program Unit concerning current information that can be made available [see Item IV of the Policy Statement]. Separate privileged and public files of study committees need not be maintained while the study is under way.

In response to requests to identify committee members, it is intended that the type of information supplied will be that normally carried in such publications as American Men and Women of Science and Who's Who in America. Bias statements on committee members will remain privileged and current policy with respect to their care, safekeeping, and accessibility will continue to apply.

5. SERVICE AND OTHER FEES

The Chair of the National Research Council is authorized to establish a schedule of fees to be charged for handling requests, including clerical services, copies of documents, and related expenses. The schedule of fees and procedural instructions are to be posted in the Office of the Archivist and published in the official public register administered by the Office of News and Public Information.

6. OPEN AND CLOSED COMMITTEE MEETINGS (ITEM I, POLICY STATEMENT)

A. Open meetings

To enhance public understanding of the institution and of public policy issues, as well as to increase the impact of NRC and IOM reports, the program activities of the NRC and the IOM should be conducted in open meetings to the greatest extent possible. Open meetings are appropriate for workshops, symposia, and forums; they are also appropriate for committee meetings when the purpose is to gather

information and discuss its relevance with others who are not committee members. Generally, this will include discussions with sponsors' representatives and other potentially affected parties. In addition, in order to acquaint the public with the background of committee members, the chair at the first meeting of a committee in open session should ask each member to state briefly those aspects of his or her background, experience, expertise, and previously-stated positions that appear relevant to the work that will be undertaken by the committee. Committees should create opportunities that facilitate the gathering of as wide a range of views as possible, such as having a session permitting public comment at an open meeting or soliciting comments in writing or via the internet from interested members of the public.

Within the capacity of the meeting room, attendance at open meetings by observers should not be limited. Any person, including members of the news media, may attend as observers (not participants), whether explicitly invited or not, provided that he or she is not disruptive. The chair is responsible for the conduct of the event and may close the meeting, if necessary, to remove disruptive persons. In addition, members of the public may submit relevant material in writing to the committee staff prior to or at these open meetings, which the committee may choose to consider as long as this written material is freely available to anyone interested.

Program units will publicize all open meetings in advance on the official public register by listing the meeting topic, date, time, location, and a contact telephone number and email address. The register will be posted on the NAS World Wide Web site by the Office of News and Public Information.

For those open meetings at which the media are the primary anticipated attendees, such as press conferences, the Office of News and Public Information will have primary responsibility for all arrangements and invitations.

All open meetings should be regarded as "on the record." Therefore, whether representatives of the media are in attendance or not, chairs should advise everyone present of the nature and purposes of each meeting. Statements of this type are necessary at each meeting to help to assure that participants and observers do not misinterpret the purpose of the meeting or prematurely interpret the discussion as the positions of individual participants, the committee, or the NRC.

This open meetings policy covers public attendance at certain meetings and other activities of the NRC and the IOM. It refers to all activities of boards, committees, and panels that are undertaken in response to an external study request or that will result in a written product for external distribution. Such activities include (but are not limited to) study groups, workshops, and symposia. This policy does not cover strictly internal activities such as meetings of the Governing Board and

commissions, oversight activities of boards, or ad hoc studies of NRC processes.

The record of each open meeting will be subsequently made a part of the public access file. A "full record," as used in the Policy Statement, is defined as including all written documentation presented to a committee, and summaries of related discussions. It is not necessary to make verbatim transcripts or recordings of meetings. A list will be maintained of all individuals appearing before or otherwise providing statements to committees. The order of business for open meetings will be at the discretion of the committee chairs, who shall normally preside.

B. Closed Meetings

In general, information gathering meetings of NRC and IOM study committees are to be as open as possible. However, in the interest of the study process, the institution retains the right to close meetings as appropriate.

The purpose of closed meetings (or other activities that are closed) is to enable NRC study groups to conduct work free from external influences. Meetings generally are closed either to protect the integrity and independence of the study (executive sessions) or when the content involves classified or privately held proprietary information (restricted sessions).

The following activities must be carried out in closed executive session: (a) discussion of potential conflict of interest that involves personal information such as financial holdings; (b) discussion of personnel matters; and (c) deliberations on the contents of reports (including consideration of reviews). Neither the project sponsors nor other outsiders may be present, so that findings, conclusions, and recommendations may be developed free from external influence. Attendance at executive sessions is limited to committee members and appropriate staff.

Restricted sessions are held to comply with laws governing classified information and to adhere to agreements regarding privately held propriety data. Attendance at restricted sessions is limited to persons with a need to know, but may include (in addition to committee members and staff) sponsors' representatives, consultants, liaison representatives from outside organizations, and other persons invited to participate as sources of information, analysis, or opinion, provided that they are qualified to be present under the laws, regulations, or agreements governing classified and/or proprietary information.

In addition, the committee chair, with consent of the NRC executive officer, may close a meeting when doing so is determined to be critical to the successful completion of the activity. Such circumstances are expected to arise rarely.

7. PUBLIC SESSION ON STUDIES OF TOPICAL INTEREST (ITEM III, POLICY STATEMENT)

Newly published NRC reports will be publicly announced through listing in the official public register, and such listing may be supplemented by press releases or press conferences on reports that are noteworthy from a news standpoint. For those studies undertaken by the National Research Council in which there is widespread public interest and which contain issues potentially of continuing substantial public controversy, Major Program Units, in consultation with the Office of News and Public Information, may plan public sessions subsequent to the public release of reports to serve as a forum for purposes of permitting public discussions or for explaining a report's findings and recommendations to interested parties. Preferably, plans for such a public session should be made known when the project is presented for approval to the Governing Board; however, determination of the need for such a session may be made at any time during a study. Provision for financing a public session may be made with the sponsoring agency, or it may be financed independently from other sources. In either case, the sponsoring agency or agencies should be notified of the plans for such a session and should be given an opportunity to participate.

8. RESTRICTION ON PUBLIC RELEASE OF NRC REPORTS (ITEM V, POLICY STATEMENT)

The National Research Council will not normally accept external constraints on the public release of its reports, except those that are classified for reasons of national security. Temporary restrictions on the public release of reports are normally applicable in the following circumstances:

a. Where provision is made by statute, Executive Order, or contract for a specified delay in public release;

b. As a courtesy, to provide sponsors with advance copies of a report so that they may be prepared to respond to questions following its public release.

Delays in the public release of National Research Council reports for more than two weeks after delivery to the sponsor must be approved by the Chair of the National Research Council.

The title and an unclassified abstract of each classified report shall be made public at the time of the transmission of the report to the sponsoring agency.

9. INFORMATION MADE AVAILABLE TO THE PUBLIC (ITEM VI, POLICY STATEMENT)

Upon completion of a report, public access information of the study committee will

be transmitted by the Major Program Unit to the Office of the Archivist with appropriate notification to the Executive Office and the Office of News and Public Information. The categories of information to be included in the public record are those specified in Item VI of the Policy Statement, with these further modifications:

a. For purposes of this document, minutes are the records of meeting activities approved or acted upon by the study committee. The format and content of the minutes or other records of committee deliberations shall continue to be determined by the requirements of the committee itself for the normal conduct of its work and the fulfillment of the Academy's contractual obligations.

b. The phrase, "sources external to the study committee," as used in Item VI(b) of the Policy Statement, is deemed not to include internal correspondence such as correspondence among officers of the National Research Council or its Major Program Units, or of the Institute of Medicine, or of either Academy.

c. Manuscript reviews solicited by the committee or occurring under established procedures of the National Academy of Sciences shall be considered as internal to the work of the committee.

10. CATEGORIES OF PRIVILEGED INFORMATION (ITEM VII, POLICY STATEMENT)

As a general policy, the National Research Council will continue to protect the interests of those who have made available information under a promise that it will not be disclosed, and with respect to such privileged information the National Research Council will make only those informational disclosures required by law or as may be agreed to by the persons or institutions supplying the information.

The Policy Statement provides that classified information, trade secrets, or information of a personal nature, will be kept privileged. The Policy Statement also authorizes the Governing Board to define other classes of information to be held privileged. Accordingly, the following additional classes of information may be placed in the privileged category:

a. Information subject to statutory restriction on access and disclosure;

b. Draft manuscripts, original data, or other information for which the Academy recognizes a right of first publication by the author;

c. Information that by contractual stipulation or prior agreement is received on a privileged basis.

11. EXCLUSIONS FROM GUIDELINES

Those study committees that deal principally with data to which access is restricted by contract under the Privacy Act of 1974 are not subject to the requirements of these guidelines.

Index terms: Access, Governing Board, Guidelines, Information, Institutional Information, National Research Council (NRC), Public Access, Public Information, Report Release and Dissemination, Resolutions

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

November 4, 1997

The Honorable Dan Burton
Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Burton:

I am writing on behalf of Public Citizen to urge you to oppose legislation that would give advisory committees of the National Academy of Sciences a blanket exemption from the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II. A blanket exemption takes away critical legal safeguards for ensuring that federal policy-making is accessible and accountable to the public.

A primary purpose of FACA is to open to public scrutiny the manner in which government agencies obtain advice from private individuals. Legislation that exempts Academy committees from FACA's openness and conflict of interest requirements ignores the public's fundamental need for access and accountability whenever the executive branch adopts a committee as a continuous, preferred, and routine source of advice on a specific subject -- as has been the case with countless Academy committees.

The National Academy of Sciences was chartered by Congress in 1863 and has a duty to, "whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art." 36 U.S.C. § 253. To fulfill this Congressional mandate, the Academy establishes committees to provide scientific and technical advice to federal agencies. These Academy committees are used by agencies in just the same way as advisory committees established by the agencies themselves are used, and should be subject to the same openness and conflict-of-interest requirements as are government-established committees.

Take just one example. In 1992, Public Citizen filed a petition with the FDA to withdraw its approval of the drug Halcion. As part of its efforts to respond to the Public Citizen petition, FDA called upon the National Academy of Sciences Institute of Medicine, which then established the Committee on Halcion to perform an assessment of the adequacy of and confidence in the publicly-available data for Halcion. Public Citizen was

on the agenda and spoke at the first meeting of the committee in July 1997, attended the second meeting in September, and is monitoring the committee's work. Public access to the meetings and records of the Committee on Halcion ensures that our organization and others interested in the issue can verify that the advice the Committee eventually gives FDA is unbiased and scientifically based.

Academy committees are undoubtedly a useful and beneficial means of furnishing expert advice to the Federal Government. See 5 U.S.C. App. II § 2(a). At the same time, if they are permitted to function in a biased and secretive way, then the process can become hazardous to the health of a democracy. FACA's openness and conflict of interest requirements guarantee that NAS committees develop neutral, expert recommendations, rather than predetermined advice by a stacked membership.

Accordingly, we urge Congress to oppose any legislation that would give the committees of the National Academy of Sciences a blanket exemption from FACA.

Sincerely,

Lucinda Sikes
Staff Attorney
Public Citizen Litigation Group

BARBARA BOXER
CALIFORNIA

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

COMMITTEE ON THE BUDGET

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May 17, 1994

Dr. Bruce Alberts
President, National Academy of Sciences
Chairman, National Research Council
2102 Constitution Avenue NW
Washington, D.C. 20418

Dear Dr. Alberts:

I am writing to emphasize the importance of selecting a scrupulously impartial panel to review the scientific evidence related to the proposed Ward Valley radioactive waste facility.

I have for some time urged that an independent evaluation be undertaken of the serious questions raised in reports by U.S. Geological Survey (USGS) scientists Howard Wilshire, Keith Howard, and David Miller regarding the safety of the proposed Ward Valley site. I was therefore very pleased when Interior Secretary Babbitt informed me last March that he was asking the National Academy of Sciences (NAS) to undertake such a review. A credible, truly impartial evaluation is essential.

I have recently, however, been informed of concerns about the process and criteria being employed to select members of the NAS panel that is to conduct the review. I am sure you will agree that any perceived bias in the selection of the review panel would be most unfortunate.

It is critical that an impartial study be performed, one whose results will be believable to the public. This point is key, given the history of the reports to be evaluated by the panel. The reports in question by Wilshire and his colleagues at USGS were originally suppressed by the Interior Department and the California Department of Health Services (DHS), the co-authors of the Ward Valley Environmental Impact Report/Statement, and would not have seen the light of day had it not been for my intercession. The public was rightly very concerned, and any hint of bias in the selection of the NAS panel that is now to evaluate those reports would lead to great public concern.

The importance of an honest, thorough analysis of the reports by Dr. Wilshire and his colleagues, has been underscored in recent weeks by the decision of a Los Angeles judge to remand the Ward Valley matter back to DHS for reconsideration in light

Dr. Bruce Alberts
May 17, 1994

Page Two

of the issues raised in the second, detailed Wilshire report. The judge found the analysis performed to date by DHS regarding the Wilshire report to be inadequate.

I strongly urge your personal involvement to assure that an impartial, balanced panel is selected, one that will have the necessary credibility among important segments of the interested scientific community and the public.

Sincerely,

Barbara Boxer
United States Senator

BARBARA BOXER
CALIFORNIA
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
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July 1, 1994

Dr. Bruce Alberts
President, National Academy of Sciences
Chairman, National Research Council
2102 Constitution Avenue, NW
Washington, D.C. 20418

Dear Dr. Alberts:

Thank you for your response to my May 17 letter regarding the National Academy of Sciences (NAS) review of safety issues associated with the proposed Ward Valley radioactive waste dump.

I wrote to express concerns regarding reports I had received about the process and criteria being used to select members of the NAS review panel. It was my view that any perceived bias in the selection of the review panel would be most unfortunate, and would jeopardize the impartiality and credibility of the study.

I have recently been provided with the names of the participants selected for the Ward Valley panel. While I have no reason to doubt the professional ability of any individual named, I am deeply troubled by the pattern of the appointments. The selections tend, unfortunately, to confirm the concerns I and many others had about an apparent heavy bias in favor of those with contracts and other ties with the nuclear industry and associated institutions involved in the promotion of nuclear activities in this country.

Several of the panel members have published writings on the very issues the panel is to resolve, having taking positions contrary to those of the U.S. Geological Survey (USGS) scientists whose work they are to review. It will be very difficult for such panel members to engage in the required review without preconceived notions, since agreement with the USGS scientists would be a disavowal of their own published work.

I recognize the importance of drawing on the views of experts in the appropriate scientific fields, even if they have consistently supported nuclear projects, or have been employees or consultants of the Department of Energy or the Nuclear Regulatory Commission, or have taken positions in favor of siting specific nuclear waste facilities. What concerns me is the apparent failure to balance the panel with experts having opposing views and associations.

While any one individual may be able to act independently of his or her economic ties, a panel tilting very heavily toward only one side (in this case, the pro-nuclear side), creates the clear impression of bias, partiality, and a pre-ordained outcome. This is the last thing we need in this case, where the issue is whether the proposed nuclear dump could radioactively contaminate the Colorado River for generations to come.

Beyond the composition of the panel, I am concerned about how it is to operate. I have reviewed a copy of the agenda for its July 7-9 meetings in Needles, California. It is to begin with a 2-hour executive -- i.e., closed to the public -- session in which panel members will voluntarily disclose potential biases and conflicts of interest. I do not understand how NAS can in good faith maintain its credibility and confidence in its operations if biases and conflicts of interest are revealed only in secret. Disclosure must involve openness.

I understand further that each member of the panel is to complete conflict of interest and bias disclosure forms, but that these too will remain secret. I do not understand why the Academy would wait for the conflict and bias forms until after the selection of the member, when it is too late to do anything about their bias or conflict (either by removing them from the panel or balancing them with new members with different views or associations). Secret, post-selection disclosure of bias and conflict of interest is absurd and raises serious questions about how the Congress can rely on the product of such reviews as disinterested, impartial scientific assessments.

Additionally, I am troubled by the apparent bias and partiality in the agenda that has been established for the July 7-9 meetings of the NAS panel on Ward Valley. Not only has the NAS staff generally packed the panel with supporters and excluded critics or skeptics of nuclear waste matters, the agenda provides great opportunity for full participation in the meeting and formal presentations by lawyers for, executives of, and consultants to the two primary entities promoting the proposed Ward Valley dump, while precluding any participation by any representative of or scientist with any of the entities opposing Ward Valley. This one-sided agenda is startling in its bias.

One of the most controversial aspects of the Ward Valley dispute is over the nature of the wastes that will go there. The agenda gives one hour to a presentation by one side of that dispute, and prohibits any presentation by the other side.

I have received a communication from a radioactive waste expert who had been asked by Dr. Wilshire to come to the NAS meeting and make a presentation. I understand that his name was then submitted to the panel chairman, who then vetoed it, saying the waste expert has written books on the issue with which he, the chairman, politically disagreed. Additional experts were submitted and similarly rejected by the chairman.

You must understand that unless this pattern of bias is reversed, the panel's conclusions will not be believable to the public. I therefore urge you to intervene immediately to clean up this mess, and to address the broader questions of bias in panel selection at NAS and why bias/conflict of interest disclosure occurs in secret and after selection, instead of openly and prior to appointment, which would insure fairness and credibility.

As you know, the Congress relies heavily on the integrity of the National Academy of Sciences to conduct impartial studies on central policy issues. Manipulation of even one board of the National Research Council by industry through stacking of panels to subvert the assumption of impartiality will cause great damage to the Academy's most precious asset -- credibility. Studies such as this one on Ward Valley, so critical to my state and the region and generations to come if a mistake is made, will have little or no credibility if what we have seen to date with this panel continues.

Sincerely,

Barbara Boxer
U.S. Senator

BARBARA BOXER
CALIFORNIA
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
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March 30, 1995

Dr. Bruce Alberts
President, National Academy of Sciences
Chairman, National Research Council
2102 Constitution Avenue NW
Washington, D.C. 20418

Dear Dr. Alberts:

For nearly a year I have been corresponding with you regarding my concerns about the procedures employed by the Research Council's Board on Radioactive Waste Management in its review of issues related to the low-level radioactive waste facility proposed for Ward Valley, California (see for example, my letters of May 17 and July 1, 1994, attached).

These concerns include, among others, the imbalance in the composition of the panel selected to do the review, potential conflicts of interest, closed-door meetings, failure to release bias disclosure forms, and the refusal to hear formal presentations by experts associated with project opponents -- while at the same time providing days for presentations by project proponents (see attached letters for detailed descriptions of the problems encountered by opponents). I remain concerned that the result has been a failure to hear both sides on a range of important issues.

I now discover that virtually identical concerns have been raised by responsible officials in Nevada and New York State regarding studies being performed by the same Board of Radioactive Waste Management, and directed by the same staff. I am enclosing letters from Senator Bryan and leaders of the New York State Assembly raising those concerns. Furthermore, these problems associated with the Board are apparently longstanding, as evidence by Philip Boffey's 1975 study of the Academy and the Radioactive Waste Board in particular (attached).

The credibility of studies issued by the Board on Radioactive Waste Management will be severely strained if these problems are permitted to persist. I join officials from New York and Nevada in urging you to immediately review this situation and take appropriate action.

Sincerely,

Barbara Boxer
U.S. Senator

RICHARD BRYAN
NEVADA

COMMITTEES
ARMED SERVICES
BANKING, HOUSING, AND URBAN AFFAIRS
COMMERCE, SCIENCE, AND TRANSPORTATION
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INTELLIGENCE

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March 23, 1995

Dr. Bruce Alberts
President
National Academy of Sciences - National Resources Council
2102 Constitution Avenue, NW
Washington, DC 20418

Dear Dr. Alberts:

The Board of Radioactive Waste Management (BRWM) of the National Academy of Sciences - National Research Council is relied upon by federal agencies such as the Department of Energy (DOE) and the Environmental Protection Agency (EPA) to perform independent reviews of a number of proposed nuclear waste projects, including the proposed Yucca Mountain High Level Waste facility in Nevada. Given the extreme toxicity and longevity of these wastes and the potential for catastrophic environmental and public health damage, it is essential that these reviews be performed with the highest degree of rigor and objectivity.

Serious questions, however, have been raised regarding the balance, objectivity, openness, and fairness of study panels established under the Board's auspices. These concerns have been expressed not only by officials in Nevada regarding the Yucca Mountain studies, but also by officials in New York State and California regarding BRWM studies related to nuclear waste projects in their states. The concerns in each state are strikingly similar, suggesting a serious, generic problem within the BRWM.

The State of Nevada's concerns include: failure to provide an equal opportunity for all sides in the scientific dispute being examined to present their views and evidence; failure to provide to the Nevada Waste Office and other project critics access to the documents being reviewed by study panels; failure to disclose potential conflicts-of-interest and biases; misrepresentation of technical information; lack of scientific objectivity; failure to operate in the open; and concerns about

the supposedly independent blind-review process.

The similarity of criticisms of the BRWM from numerous separate sources create the serious impression that the BRWM process and procedures are not adequate to provide the objective scientific reviews that the Academy is often called on to provide. Accordingly, I urge you to immediately take appropriate steps to restore the reliability and objectivity of the BRWM, including, but not limited to, establishing an independent commission to evaluate the BRWM's performance of its duties.

I appreciate your attention to this request.

Sincerely,

Richard H. Bryan
United States Senator

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

MARTIN A. LUSTER
Assemblyman, 125th District

CHAIRMAN
Legislative Commission on Public Management Systems
Subcommittee on Libraries
Subcommittee on Rural Health
COMMITTEES
Aging
Agriculture
Energy
Health
Higher Education
MEMBER
Joint Legislative Commission on Rural Resources

March 31, 1995

Dr. Bruce Alberts
President
National Academy of Sciences
2101 Constitution Avenue, NW
Washington, DC 20418

Dear Dr. Alberts:

The National Academy of Sciences (NAS) Board on Radioactive Waste Management (BRWM) has established a Committee which is conducting a review of New York State's siting process for so-called "low-level" radioactive waste. Although this catch-all category is dubbed "low-level", it has substantial public health risk and is a matter of great concern here in New York State.

This NAS BRWM review is being carried out in a manner which has raised serious question. The process is troubling not only in lack of fairness and objectivity, but it is quite possibly in violation of New York State law.

As elected officials representing citizens of New York State affected by radioactive waste and the siting process, we are deeply concerned with the composition, conduct, procedures and attitudes of the NAS New York State Review Committee, the Board on Radioactive Waste Management, and their staff, and the apparently routine policy and operating procedures of this Board for conducting one-sided, secretive reviews. Details of these concerns follow.

Problems being experienced by New Yorkers in this BRWM review of the New York siting process resemble those being encountered by Nevadans and Californians in studies being carried out by Committees of that same Board (BRWM).

The problems are pervasive and part of a disturbing pattern which precludes true balance and objectivity by excluding critical perspectives and experts from meaningful participation or input. This bias is evident at every level and stage of the review from the selection of Committee members, through the operation of the Committees, during the "blind" peer review procedures and, in some instances, in the results and how they are used.

ALBANY OFFICE: Room 639, Legislative Office Building, Albany, New York 12248, (518) 455-3444
DISTRICT OFFICE: 106 East Court Street, Ithaca, New York 14850, (607) 277-8500

The problems seem to have long historical roots, beginning in the late 1960's when the entire NAS Committee on Geologic Aspects of Radioactive Waste Disposal was dismissed by NAS under US Atomic Energy Commission (AEC) pressure and threat of funding cutoff. The AEC, the major funder/contractor for the Committee's work, demanded successfully that NAS suppress a 1966 report by the Committee and threatened to cut off funds because the Committee was being too critical of the AEC waste program. After negotiating, NAS agreed to AEC's demands to terminate all the then-members of the Committee and form a new committee that would be more responsive to and less critical of the AEC, the agency whose work they were to have been independently evaluating. That new committee has become the current Board on Radioactive Waste Management (BRWM). According to Philip M. Boffey in The Brain Bank of America, "...the AEC... gained a more controlled advisory relationship under the new setup..." and "an implied veto power over the makeup of the [new] committee." The "new committee...was loaded with scientists who had close ties to the AEC or its major contractors." That situation persists today.

Observation of recent and ongoing studies under the NAS Board of Radioactive Waste Management in New York, California and Nevada provides further evidence that the Board has been taken over by the nuclear industry and promotional agencies whose activities it is expected to evaluate. The current chairman was, for years, with the Electric Power Research Institute, a utility consortium with a large nuclear power division serving the nuclear utilities, the generators of the vast majority of radioactivity in both high and so-called "low-level" radioactive waste. Having the chair of the NAS Board on Radioactive Waste Management from the nuclear power industry is like placing the head of the Tobacco Institute in charge of an NAS Board on the risks of smoking. Numerous other BRWM members have close ties to the nuclear industry and its promotional agencies. For example, another is a former executive of Chem Nuclear, a company that has contracts with several states for the new "low-level" radioactive waste sites.

The same bias is evident in the study committees this Board sets up. Specifically for New York, the composition of the BRWM Committee reviewing the NYS siting process is blatantly skewed toward promoters of new centralized radioactive waste dumps. Objectivity is impossible when the Committee consists of individuals who are actively involved in the very same siting processes in other states as contractors, promotional agency officials, compact commissioners and directors, or are affiliated with major waste generators.

Among our concerns are lack of independence and balance in the Committee composition, appearance of bias and conflict of interest, closed and secret meetings of the Committee, failure to comply with requests for basic information regarding relavant data and issues under consideration, procedural bias in the conduct of the meetings, veiling of the status of the process, lack of responsiveness, coziness with the agencies whose work is being

evaluated, and permitting input from only one side on the controversies being examined.

We understand these concerns are echoed in the complaints from Californians regarding the Ward Valley review and state agency officials in Nevada regarding completed, ongoing and proposed reviews at Yucca Mountain.

Because of the long historical roots and seriousness of these problems, we urge you to suspend release of all ongoing reviews under the BRWM until NAS has taken decisive action to remedy these concerns.

Such action should include:

- Establish a special NAS task force -- composed of truly independent, objective individuals in whom the public would have greater confidence -- to investigate the concerns raised regarding the BRWM and the reviews it is doing and has done.

- Commit all NAS BRWM studies and reviews to compliance with the Federal Advisory Committee Act, Sunshine Act, Open Records, Open Meetings, public disclosure, conflict of interest and all related laws which apply to the agencies with whom the Board contracts.

- Disclose the bias and conflict of interest disclosure forms of all committee and Board members and reviewers and open all meetings to the public.

- Revamp the NAS BRWM membership to include at least a majority of truly independent individuals and a genuine balance of perspectives.

- Replace the BRWM staff with professionals not tied to the agencies and industries the Board is to evaluate.

- Eliminate the current policy of excluding critics at every level of review: membership on the Board, membership on Committees, opportunities to make verbal and written presentations to the committees and board, etc.

- Commit to providing full opportunity for presentation to Board and Committee members by all sides of the subjects under review, especially the critical perspectives being investigated.

As the NAS's original committee on Radioactive Waste Disposal, before it was disbanded under AEC pressure, stated in its first major report, "the hazard related to radioactive waste is so great that no element of doubt should be allowed to exist regarding safety." Both the public safety and the Academy's reputation are at risk if the NAS continues to permit its current Board on Radioactive Waste Management to act as an agent of the nuclear industry and centralized radioactive waste site promoters.

We join officials in California and Nevada in urging the Academy to seriously review the operation of the Board on Radioactive Waste Management and its Committees.

Sincerely,

Martin A. Lyster
Member of Assembly
125th District

Sam Hoyt
Member of Assembly
144th District

Paul Tokasz
Member of Assembly
143rd District

LOS ANGELES TIMES

TUESDAY, APRIL 4, 1995

Nuclear Waste Dump Foes Call Science Academy Biased

■ **Environment:** Two senators and seven members of national body say its panels assessing Ward Valley and Yucca Mountain sites are pro-nuclear power.

By FRANK CLIFFORD
TIMES ENVIRONMENTAL WRITER

Officials in California and Nevada opposed to construction of the Ward Valley and Yucca Mountain radioactive waste dumps have questioned the impartiality of the National Academy of Sciences, the country's oldest and most august scientific body, which has been assessing the safety of the proposed dump sites.

In letters last week to the academy's president, U.S. Sens. Barbara Boxer (D-Calif.) and Richard H. Bryan (D-Nev.) as well as seven members of the national academy contended that the makeup of panels on nuclear waste sites is weighted heavily in favor of nuclear power interests that have been lobbying for the Ward Valley and Yucca Mountain dump sites.

The senators complained that the academy panels have not given equal opportunity to critics of the proposed waste sites.

"At least 10 members of the panel are or have been employees of or contractors for the Department of Energy in support of DOE's nuclear activities," said a report accompanying Boxer's letter.

"Not a single scientist associated with environmental organizations was included," said the report, which was written by the Committee to Bridge the Gap, a Los Angeles group that has led the opposition to the Ward Valley dump.

With an academy panel wrapping up its review of the Ward Valley project in the eastern Mojave Desert, opponents are fearful that a favorable assessment by the prestigious body will persuade the Clinton Administration to drop its concerns about Ward Valley and make the federally owned site available for use as a nuclear waste dump.

The proposed waste site near Needles on the Arizona border would accept radioactive waste from nuclear power plants and other industries and bury it in trenches in the desert. Critics argue that there is too great a danger that long-lived waste would leach into the ground water and ultimately into the Colorado River, which is about 20 miles away and a source of drinking water for millions of people.

Last summer, a 17-member National Academy of Sciences panel visited the site, held hearings and began work on an assessment of the geological suitability that is expected to be released within the next several weeks.

Criticism of the academy's process also has been expressed in another recent letter from three New York legislators concerned about a proposed radioactive waste dump in their state.

Noting the similarity of the complaints from California, Nevada and New York, the seven academy members who wrote a letter cited "a generic problem" with the way proposed waste sites are being assessed.

"It is apparent that the procedures and findings . . . have been weighted against criticisms of current governmental and industrial nuclear policies," their letter said.

The letter added that 90% of the budget of the academy's Board on Radioactive Waste Management, which oversees the assessment panels, comes from the U.S. Department of Energy. "This heavy dependence upon such funding may be contributing to a conflict to evaluate prudently proposals of DOE. . . ," the scientists wrote.

Most of the academy members who signed their names to the letter did so at the behest of Robert Livingston, a professor emeritus of neurosciences at UC San Diego and a past president of Physicians for Social Responsibility, one of the groups opposed to the Ward Valley project.

In reply, academy officials have defended the panels, saying in a letter to Boxer that reviews of the

Please see DUMPS A 9n

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panel members, at the time of their nominations, determined "that none of the members has a conflict of interest that would affect his or her involvement in the study." The letter added that experts on both sides of the Ward Valley controversy had been given ample opportunity to air their views.

The debate over Ward Valley, Yucca Mountain and other proposed burial sites for nuclear waste poses a dilemma for scientists and policy-makers. On one hand is the challenge of finding permanently safe resting places for some of the world's most toxic trash. On the other hand is the demand to do something now with the growing inventory of radioactive waste piling up in storerooms, laboratory closets and other temporary storage spaces.

In Nevada, where the state government has long been opposed to a Department of Energy plan to store high-level nuclear waste in Yucca Mountain, officials said they were concerned, based on past experience, that the academy would give short shrift to theories that might detract from Yucca Mountain's suitability. One of those theories, which has yet to be investigated by the academy, holds that atomic wastes buried deep underground, as they would be in Yucca Mountain, might erupt in a nuclear explosion.

San Francisco Chronicle
THE VOICE OF THE WEST

EDITORIALS

Questions of Credibility In Nuclear Dump Siting

REGARDING the permanent disposal of nuclear waste, one over-riding rule should apply: Do it right or don't do it at all, because there are no second chances. To assure as much as possible that science rather than politics is defining what is right, a second rule should apply: The decision-making process should be open to the highest degree of public scrutiny.

Questions have been raised about the impartiality of the panel reviewing the dump

Serious questions have been raised on both these counts with regard to the proposed nuclear waste facility at Ward Valley in the eastern Mojave Desert. Nuclear power plants and other, smaller generators of nuclear waste want to dispose of low-level (but still toxic and long-lived) radioactive products in unlined desert trenches at the proposed dump.

The question of whether the dump is the "right" solution to a serious waste problem was first raised several years ago by geologists' claims that the waste products could migrate to underground aquifers that reach the Colorado River, about 20 miles away, which is the source of much of Southern California's drinking water.

Last year, Secretary of the Interior Bruce Babbitt found the allegations serious enough — and the Wilson administration's safety review to be suspect enough — that he withheld transfer of the Ward Valley federal lands to state control pending a thorough, impartial study by the prestigious National Academy of Sciences. The academy's final report is due any day.

Now, further serious questions have been raised, from New York to Nevada to California, regarding rule number 2: the openness and impartiality of the academy panel that is issuing the report.

In recent weeks, legislators from New York, Nevada and California, all concerned about proposed dumps in their own states, have publicly complained about the alleged, pro-nuclear industry bias of academy review panels, the secrecy shrouding their conflict-of-interest disclosures and the allegedly short shrift given to testimony from scientists who oppose the projects. Those complaints have been echoed by seven members of the academy, who note that 90 percent of the academy's budget for nuclear waste assessments comes from the U.S. Department of Energy, which is ultimately responsible for providing nuclear waste options.

Rightly or wrongly, the credibility of the academy report is now itself in question, which only confounds the greater question of the safety of the Ward Valley site. It may be that the academy's entire review process — on which so many vitally important scientific questions depend — needs its own review. In any case, we strongly urge Secretary Babbitt to bear these questions in mind before concluding his own, definitive review of the forthcoming report.

LOS ANGELES TIMES MONDAY, APRIL 10, 1995

EDITORIALS of THE TIMES

Be Careful: Go Slow on Ward Valley

Mistakes made in the burial of radioactive waste are virtually uncorrectable, for radioactivity that escapes into the ambient soil is all but impossible to recapture. This is why the proposal that low-level (but still highly hazardous) radioactive waste should be buried at Ward Valley, just 20 miles from the Colorado River, deserves the most exacting and, equally important, the most public scrutiny possible.

More than a year ago, Interior Secretary Bruce Babbitt, tacitly judging inadequate the safety review conducted by Gov. Pete Wilson's Department of Health Services, declined to transfer the affected federal land to state control. Babbitt promised a public, evidentiary hearing and, in the interim, commissioned the National Academy of Sciences to conduct an independent study addressing the fear that radioactivity could migrate from the dump to ground water and through ground water to the river.

Last summer the academy's Board of Radioactive Waste Management convened a panel and held hearings in California. There were unsettling reports at the time that the panelists' conflict-of-interest disclosures (many have ties to the nuclear power industry) had taken place behind closed doors and that dump proponents—some of them financially interested parties—were given days to argue their case, while opponents were given just hours. Sen. Barbara Boxer (D-Calif.) filed an objection with academy President Bruce Alberts, but to no avail.

Now, on the eve of the delivery of the academy's Ward Valley report, Robert Loux, executive director of Nevada's Nuclear Waste Project Office, U.S. Sen. Richard Bryan (D-Nev.) and three New York state legislators have reported in detail—and with anger and alarm—on virtually identical academy behavior in their states. They accuse the academy of concealing its panelists' conflicts of interest in the review of proposed nuclear waste facilities in their states and of failing to allow opponents any semblance of a fair hearing.

Lamentably enough, it begins to appear that rather than resolving others' questions, the academy itself is in danger of becoming a question. The proposed Ward Valley facility and others like it around the country, if science can prove them safe, should not be stopped for political reasons. By the same token, science should not be compromised to fit what politicians have already decided.

We do not intend to prejudge the outcome of any inquiry into the safety of the proposed Ward Valley dump. We remain concerned, however, now as throughout this controversy, that there be no prejudgment by the relevant authorities. Babbitt and Energy Secretary Hazel O'Leary must take the well-documented and disturbingly consistent reports of Sens. Bryan and Boxer and the New York legislators seriously in evaluating the academy's record in the area of radioactive waste management

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

November 4, 1997

The Honorable Henry A. Waxman
Ranking Member
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Waxman:

I am writing on behalf of Public Citizen to urge you to oppose legislation that would give advisory committees of the National Academy of Sciences a blanket exemption from the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II. A blanket exemption takes away critical legal safeguards for ensuring that federal policy-making is accessible and accountable to the public.

A primary purpose of FACA is to open to public scrutiny the manner in which government agencies obtain advice from private individuals. Legislation that exempts Academy committees from FACA's openness and conflict of interest requirements ignores the public's fundamental need for access and accountability whenever the executive branch adopts a committee as a continuous, preferred, and routine source of advice on a specific subject -- as has been the case with countless Academy committees.

The National Academy of Sciences was chartered by Congress in 1863 and has a duty to, "whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art." 36 U.S.C. § 253. To fulfill this Congressional mandate, the Academy establishes committees to provide scientific and technical advice to federal agencies. These Academy committees are used by agencies in just the same way as advisory committees established by the agencies themselves are used, and should be subject to the same openness and conflict-of-interest requirements as are government-established committees.

Take just one example. In 1992, Public Citizen filed a petition with the FDA to withdraw its approval of the drug Halcion. As part of its efforts to respond to the Public Citizen petition, FDA called upon the National Academy of Sciences Institute of Medicine, which then established the Committee on Halcion to perform an assessment of the adequacy of and confidence in the publicly-available data for Halcion. Public Citizen was

on the agenda and spoke at the first meeting of the committee in July 1997, attended the second meeting in September, and is monitoring the committee's work. Public access to the meetings and records of the Committee on Halcion ensures that our organization and others interested in the issue can verify that the advice the Committee eventually gives FDA is unbiased and scientifically based.

Academy committees are undoubtedly a useful and beneficial means of furnishing expert advice to the Federal Government. See 5 U.S.C. App. II § 2(a). At the same time, if they are permitted to function in a biased and secretive way, then the process can become hazardous to the health of a democracy. FACA's openness and conflict of interest requirements guarantee that NAS committees develop neutral, expert recommendations, rather than predetermined advice by a stacked membership.

Accordingly, we urge Congress to oppose any legislation that would give the committees of the National Academy of Sciences a blanket exemption from FACA.

Sincerely,

Lucinda Sikes
Staff Attorney
Public Citizen Litigation Group

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November 4, 1997

The Honorable Carolyn B. Maloney
U.S. House of Representatives
Washington, D.C. 20515

Dear Congresswoman Maloney:

I am writing on behalf of OMB Watch to urge you to oppose legislation that would give advisory committees of the National Academy of Sciences (NAS) a blanket exemption from the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II. Such an exemption would remove essential legal safeguards for ensuring that federal policy-making is accessible and accountable to the public.

A primary purpose of FACA is to open to public scrutiny the manner in which government agencies obtain advice from private individuals. The executive branch has adopted innumerable NAS committees as continuous, preferred, and routine sources of advice on specific subjects. Legislation that exempts Academy committees from FACA's openness and conflict of interest requirements ignores the public's fundamental need for access and accountability whenever the executive branch conducts the public's business through such committees.

The National Academy of Sciences was chartered by Congress in 1863 and has a duty to, "whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art." To fulfill this Congressional mandate, the Academy establishes committees to provide scientific and technical advice to federal agencies. These Academy committees are used by agencies in just the same way as advisory committees established by the agencies themselves are used, and should be subject to the same openness and conflict-of-interest requirements as are government-established committees.

Academy committees are undoubtedly a useful and beneficial means of furnishing expert advice to the Federal Government. Were they to be permitted to function in a biased and/or secretive way, the process of "expert information" could well become injurious to the health of our democracy. FACA's openness and conflict of interest requirements guarantee that NAS committees develop neutral, expert recommendations and this should remain the case.

Accordingly, we urge Congress to oppose any legislation that would give the committees of the National Academy of Sciences a blanket exemption from FACA.

Sincerely,

Patrice McDermott

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Information Policy Analyst

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October 27, 1997

The Honorable Henry Waxman
2204 Rayburn Building
Washington, DC 20515

Dear Congressman Waxman:

I was made aware, through press reports, that the National Academy of Sciences (NAS) is obliged by a court decision to comply with the Federal Advisory Committee Act. Attorney Eric Glitzenstein informs me the NAS is presently engaging in an effort to get Congress to amend the statute in order to overturn the court's decision.

The court's determination that the NAS must provide open public access to its deliberations and documents is a most important accomplishment and must be preserved. I have enclosed documentation of NAS decisions based on their own scientifically fraudulent reports. Included is proof NAS committee members were selected with full knowledge they were biased in favor of the outcome the NAS sponsor desired.

Also enclosed is an editorial from *Scientific American*, February 1994, advising the NAS has allowed government officials to influence reports and cites instances where studies of the Earth Observing System, as well as those done for the Coast Guard, the Department of the Navy, and studies on agricultural policy "are also said to have been influenced through cozy relations with external parties."

I having participated in NAS studies. Scientific information is presented at open or closed meetings. In either instance, select members of the NAS committee then meet in closed session. Why were meetings dealing with how to save a drowning or choking victim held in secret? After several months, a decision is rendered that bears no relation to the facts, but is consistent with the interests of the sponsoring agency. Scientific references are misquoted and misinterpreted.

Congressman Waxman, I do not have to tell you one fraudulent report, let alone many, costs taxpayers billions of dollars for erroneous projects resulting from flawed, altered studies. I have firm evidence it has also cost lives. Such reports raise a question concerning the credibility of any other report turned out by the NAS.

Letters are enclosed, to and from Congressmen, who have seen our material and ask Congress, the Department of Health and Human Services, and the NAS to investigate the fraudulent scientific NAS reports.

Please let me know if I can help by providing additional information, discussing this matter with you or your staff, testifying before your committee, or providing the names of prominent scientists who can provide similar testimony.

Sincerely,

Henry J. Heimlich, M.D., ScD.
President

cc: Congressman Rob Portman
Congressman Steve Horn

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