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## Checks and Balances on the Fifth Branch of Government: Colorado Environmental Coalition v. Wenker and the Justiciability of the Federal Advisory Committee Act

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Checks and Balances on the Fifth Branch of  
Government: *Colorado Environmental Coalition v.  
Wenker* and the Justiciability of the Federal  
Advisory Committee Act

I. INTRODUCTION

In March 2001, the Bureau of Land Management (“BLM”) published a call for nominations to fill fourteen vacancies on Resource Advisory Councils (“RACs”) in Colorado.<sup>1</sup> The RACs are made up of private citizens who help the BLM develop environmental and public land use policies throughout the state. Shortly after the announcement, the BLM received nearly fifty applications for the positions, complete with the required letters of reference from the applicants’ represented interests. Fifteen days *after* the announced deadline for nominations, Colorado Governor Bill Owens sent a letter to the Colorado Director of the BLM with a list of thirteen names the Governor wished to nominate for the RAC positions. However, the letter included no letters of reference or any other documentation supporting the nominations. When the BLM announced the appointments, all thirteen of Governor Owens’ nominees and only one of the other fifty nominees had been selected.

Two of the rejected applicants and two environmental groups challenged the BLM’s action in federal court for, among other things, failing to ensure “that the advice and recommendations of the advisory committee . . . not be inappropriately influenced . . . by any special interest.”<sup>2</sup> However, the U.S. Court of Appeals for the Tenth Circuit held that the issue was not subject to judicial review because the decision of whom to appoint to the RACs was “committed to agency discretion by law.”<sup>3</sup> This Note argues that the Tenth Circuit erred by disregarding Congress’s intent with respect to

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1. *See* Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1226 (10th Cir. 2004).

2. 5 U.S.C. app. 2 § 5(b)(3) (2000).

3. 5 U.S.C. § 701(a)(2).

agency selections of advisory committee members and that such agency decisions should be subject to judicial review.

These events and the court's subsequent holding highlight one of the primary concerns of administrative law in today's regulatory state—the danger of agency capture. According to some theories, agency capture occurs when regulated industries come to dominate the government entities charged with regulating them.<sup>4</sup> Thus, much of administrative law deals with the nature and scope of judicial review of agency actions, providing a check on federal regulatory agencies—the so-called “fourth branch” of government.<sup>5</sup> However, regulated industries may succeed in an alternative or “backdoor” approach to agency capture through use of the numerous but relatively unknown federal advisory committees, which some have called the “fifth branch” of government.<sup>6</sup> Advisory committees are essentially private groups that perform research and make recommendations to government agencies. Although these committees can provide important expertise, their members represent private interests and may offer biased opinions slanted in favor of the interests they represent.

In 1972 Congress, concerned with the proliferation and potential misuse of advisory committees, passed the Federal Advisory Committee Act (“FACA”).<sup>7</sup> Among FACA's provisions, Congress included two key requirements for creating advisory committees:

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4. See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050–52 (1997).

5. See, e.g., Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387.

6. See 117 CONG. REC. H2750 (daily ed. Feb. 17, 1971) (statement of Rep. Monagan), reprinted in FEDERAL ADVISORY COMMITTEE ACT (PUBLIC LAW 92-463), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 259–60 (1978) [hereinafter SOURCE BOOK]; Allan J. Stein, *FOIA and FACA: Freedom of Information in the 'Fifth Branch'?*, 27 ADMIN. L. REV. 31 (1975).

To avoid confusion, it should be pointed out that the term “fifth branch of government” has been applied to a variety of other public, quasi-governmental institutions. See, e.g., Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165 (1989) (applying the term to private regulators such as the Better Business Bureau, the National Association of Security Dealers, and the American Bar Association); William P. Fuller, *Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon*, 17 SETON HALL LEGIS. J. 419, 420 (1993) (applying the term to the lobbying industry).

7. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 (2000)).

first, that “membership of the advisory committee . . . be fairly balanced in terms of the points of view represented”<sup>8</sup> and second, that “the advice and recommendations of the advisory committee . . . not be inappropriately influenced by the appointing authority or by any special interest.”<sup>9</sup> In *Colorado Environmental Coalition v. Wenker*,<sup>10</sup> the Tenth Circuit addressed whether the BLM’s selection of the Governor’s nominees as RAC members was subject to judicial review under these two provisions or “committed to agency discretion”<sup>11</sup> and therefore not justiciable under the Federal Administrative Procedure Act (“APA”). Ultimately, the court decided that while the “fair balance” provision of FACA was justiciable, the “inappropriate influence” provision was not because Congress had provided “no meaningful standard against which to judge the agency’s exercise of discretion.”<sup>12</sup> However, a brief review of FACA’s legislative history and related cases demonstrates that Congress did provide such a standard and that the court diverged from its own precedent by not looking to the legislative history for that standard. In addition, the court may have missed an opportunity in this case to clarify an important distinction between these two FACA provisions, which would show why each provision should independently present a justiciable issue.

This Note gives an overview of how the justiciability of agency actions is treated in the APA and by the courts, a brief explanation of FACA, and how the issue of justiciability has been addressed in other FACA cases. Part III briefly reviews the facts and the court’s reasoning in *Colorado Environmental Coalition v. Wenker*. Part IV then analyzes the court’s conclusions and offers legal and policy-based support as to why the Tenth Circuit should have considered both of the relevant FACA provisions to be justiciable issues. Finally, Part V concludes with a brief summary and outlook.

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8. 5 U.S.C. app. 2 § 5(b)(2).

9. *Id.* § 5(b)(3).

10. 353 F.3d 1221, 1227 (10th Cir. 2004).

11. 5 U.S.C. § 701(a)(2).

12. *Wenker*, 353 F.3d at 1231 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

## II. BACKGROUND ON THE APA AND FACCA

While courts have generally acknowledged a strong presumption in favor of judicial review of agency actions,<sup>13</sup> Congress provided in the APA for nonreviewability in certain narrow circumstances.<sup>14</sup> Unfortunately, the APA does not make very clear when those circumstances apply. The courts therefore have had to grapple with the determination of when to apply the APA's nonreviewability provisions to challenges of agency actions. However, the courts have not always come to clear consensus on when to grant judicial review of agency decisions under the APA, particularly for claims of FACCA violations. For example, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit issued three separate opinions on the justiciability of FACCA provisions under the APA.<sup>15</sup> This Part will review the relevant provisions of the APA and FACCA and outline some of the various diverging judicial opinions that deal with these provisions.

*A. Justiciability of Agency Actions Under the APA*

By the end of World War II, Congress saw that the vast array of federal agencies it had created to regulate various industries needed closer regulation itself. Therefore, in 1946 Congress passed the Administrative Procedure Act to govern all federal agency procedures, based partly on the notion that superb procedures would lead to superior substantive results. Congress also hoped to make agencies more accountable for the use of authority it had delegated to them. In more recent decades, growing distrust of agency use (or abuse) of that authority has led to calls for courts to apply stricter scrutiny when reviewing agency actions.<sup>16</sup> Since the APA governs

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13. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (“[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.”).

14. *See* 5 U.S.C. § 701(a)(1), (2).

15. *See* *Pub. Citizen v. Nat’l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 219 (D.C. Cir. 1989).

16. *See, e.g.*, 5 KENNETH CULP DAVIS & JOHN P. WILSON, *ADMINISTRATIVE LAW TREATISE* § 28 (2d ed. 1984); CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION* (1988); SENATE COMM. ON THE JUDICIARY, *ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79th Cong., 1944-46* (1946); Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65

judicial review of agency decisions, most courts have interpreted the APA to allow for broad judicial review. This Section reviews the APA provisions that dictate when judicial review is not to be granted and how courts have applied those provisions.

*1. Foreclosure of judicial review in the APA*

The APA sets out two circumstances under which a court may not legally review an agency's action. The first circumstance, defined in section 701(a)(1) of the APA, occurs when congressional "statutes preclude judicial review."<sup>17</sup> The second appears in section 701(a)(2) and occurs when an "agency action is committed to agency discretion by law."<sup>18</sup> Legal scholars have debated much over this second provision for several reasons. First, it seems to create an inherent inconsistency with section 706 of the APA, which requires courts to "set aside agency action . . . found to be arbitrary, capricious, an *abuse of discretion*, or otherwise not in accordance with law."<sup>19</sup> The APA fails to explain how courts can review an agency action for abuse of discretion in accordance with section 706 if the agency's decision is committed to agency discretion and therefore non-reviewable under 701(a)(2).<sup>20</sup> Second, the statutory language itself is ambiguous. While the APA protects from review decisions "committed to agency discretion by law," it fails to define what "by law" encompasses. Absent some explicit pronouncement from Congress, courts must determine for themselves whether an agency's decision falls within the agency's protected discretion "by law." These two apparent conflicts have led one commentator to suggest that Congress passed section 701(a)(2) of the APA merely as a

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COLUM. L. REV. 55 (1965); Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966 n.9 (1969) (citing to eight previous works in an ongoing debate between Professors Berger and Davis, discussing judicial review of agency actions); James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399 (1986); Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).

17. 5 U.S.C. § 701(a)(1).

18. *Id.* § 701(a)(2).

19. *Id.* § 706(2)(A) (emphasis added).

20. *See, e.g.*, Berger, *Administrative Arbitrariness and Judicial Review*, *supra* note 16, at 60.

political compromise<sup>21</sup> and intended for it to have no force of law other than what the courts are willing to give it.<sup>22</sup>

2. *How the courts have approached non-reviewability under the APA*

In accordance with the general policy favoring judicial review of agency actions mentioned above, courts have construed the APA provisions that bar review very narrowly. The United States Supreme Court briefly addressed the ambiguities in these provisions in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>23</sup> In that case, the Secretary of Transportation was required by statute to consider “feasible and prudent” alternative routes before building a highway through a downtown public park.<sup>24</sup> The Court rejected the notion that the Secretary’s failure to do so constituted a decision “committed to agency discretion” not reviewable under section 701(a)(2) of the APA.<sup>25</sup> Instead, the Court called that provision “a very narrow exception,” interpreting it to apply only “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”<sup>26</sup> Under this new standard, the Court found that the statutory terms “feasible and prudent alternative” supplied adequate “law to apply” and that the Secretary’s decision was thus not “committed to agency discretion,” but instead subject to review.<sup>27</sup> This standard turns out to be narrow indeed since agencies can generally act only when Congress delegates power to them by statute,<sup>28</sup> and courts can nearly always point to such an enabling statute as “law to apply.”

The Court eased this narrow test somewhat in *Heckler v. Chaney*.<sup>29</sup> There, the Court declined to review the Food and Drug Administration’s (“FDA”) refusal to grant a petition from prison inmates to enforce standards for the drugs used in death penalty

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21. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 698 (1990).

22. *Id.* at 699.

23. 401 U.S. 402 (1971).

24. *Id.* at 405 (quoting 49 U.S.C. § 1653(f) (2000)).

25. *Id.* at 410.

26. *Id.* (quoting S. REP. NO. 79-752, at 26 (1945)).

27. *Id.* at 413.

28. See Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004).

29. 470 U.S. 821 (1985).

lethal injections.<sup>30</sup> Ultimately, the Court distinguished agency action from inaction and concluded that since the FDA chose not to do something, the presumption switched to no review—a presumption that the inmates failed to overcome.<sup>31</sup> In regards to the standard set in *Overton Park*, the Court explained that section 701(a)(2) of the APA cuts off review of a decision “committed to agency discretion” when the relevant “statute is drawn so that a court would have *no meaningful standard* against which to judge the agency’s exercise of discretion.”<sup>32</sup> Thus, even if a statutory grant of authority to an agency arguably provides “law to apply,” a court needs at least some further guidance from Congress on how to proceed if the court is to review an agency’s decision.

In *Webster v. Doe*,<sup>33</sup> the Supreme Court further expanded this test by looking beyond the plain statutory text for indications of guidance from Congress. In *Webster*, the Director of the Central Intelligence Agency had terminated a homosexual employee whom he considered to be a security risk.<sup>34</sup> The Court held that the Director acted within his discretion under section 701(a)(2) of the APA because the National Security Act allowed the Director to take such actions whenever he “shall deem such termination necessary or advisable.”<sup>35</sup> The Court looked not only to the statutory language, but also to the “overall structure” of the statute to conclude that the statute “fairly exude[d] deference” to the Director, whose decision was thus not subject to review.<sup>36</sup>

As it stands today, the Supreme Court’s section 701(a)(2) jurisprudence interpreting when agency action is “committed to agency discretion” requires a finding of nonjusticiability, not when there is simply “no law to apply,” but when there is no judicially meaningful standard by which to review the issue. While the Supreme Court has considered statutory language and “overall structure” in making this determination, the Tenth Circuit has gone

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30. *Id.* at 823.

31. *Id.* at 831.

32. *Id.* at 830 (emphasis added).

33. 486 U.S. 592 (1988).

34. *Id.* at 595.

35. *Id.* at 600 (quoting National Security Act § 102(c), 50 U.S.C. § 403(c) (2000)).

36. *Id.*; see also *Lincoln v. Vigil*, 508 U.S. 182 (1993) (holding that Indian Health Service’s decision to cancel a regional clinical services program in favor of a nation-wide program was “committed to agency discretion by law” and thus not reviewable by the courts).

even further and included consideration of “the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.”<sup>37</sup> Thus, at least in the Tenth Circuit,<sup>38</sup> courts may look much further than the simple text for suggestions that Congress intended to leave the decision at issue up to the agency’s discretion and consequently nonreviewable by a court.

### *B. A Brief Overview of FACA*

In 1972, Congress passed legislation<sup>39</sup> aimed at reigning in what it saw as a potentially dangerous expansion of government—advisory committees.<sup>40</sup> An advisory committee, as defined in FACA, is essentially any private body created by a statute or by a government actor that makes recommendations to a government decision maker, especially federal agencies.<sup>41</sup> Presumably, these private bodies are composed of prominent figures in their respective fields who, will be able to supply agencies with valuable research and expertise, allowing the agency to make more informed decisions. However, Congress had grown concerned with many aspects of advisory committees, including their dramatic proliferation, lack of accountability, and increasing drain on the federal budget.<sup>42</sup>

In particular, some members of Congress were worried that advisory committees might serve as a device for surreptitious agency capture. Special interests seeking to influence agency decision making could “load” advisory committees with their own representatives, who would make recommendations to promote their

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37. *Am. Bank v. Clarke*, 933 F.2d 899, 902 (10th Cir. 1991) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

38. The applicability of the Tenth Circuit’s expansion to courts in other circuits is in question here because the court applied this test in a section 701(a)(2) case (“committed to agency discretion”) even though the Supreme Court’s language it quoted comes from a case dealing with section 701(a)(1) of the APA (preclusion of judicial review).

39. The Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 (2000)).

40. See Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997); Richard O. Levine, *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217, 225 (1973); Stein, *supra* note 6, at 34.

41. See 5 U.S.C. app. 2 § 3.

42. See H.R. REP. NO. 92-1017 (1972); S. REP. NO. 92-1098 (1972). Many of these same concerns are ongoing. See UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL ADVISORY COMMITTEES: ADDITIONAL GUIDANCE COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE AND BALANCE (2004), <http://www.gao.gov/new.items/d04328.pdf>.

agendas—agendas that may be contrary to the public interest.<sup>43</sup> In response to these concerns, FACA includes two key provisions: First, under section 5(b)(2), any legislation or charter that establishes an advisory committee must “require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed.”<sup>44</sup> Second, under section 5(b)(3), “appropriate provisions [must] assure that the advice and recommendations to the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest.”<sup>45</sup> These dual provisions constitute Congress’s attempt to prevent advisory committees from becoming a “nesting place”<sup>46</sup> from which special interests could engage in “backdoor” agency capture.

### *C. Justiciability of FACA Provisions under the APA*

Predictably, courts have been asked to review agency actions under FACA. As agencies have created advisory committees, individuals and organizations have challenged the organization of those committees under FACA’s section 5(b)(2) “fair balance” provision and section 5(b)(3) “inappropriate influence” provision. Courts have consequently had to decide whether to review the agencies’ decisions or to decline to review them if “committed to agency discretion” under the APA.<sup>47</sup> The various diverging opinions on this question have created something of a legal quandary, including three separate opinions from a three-judge panel of the D.C. Circuit<sup>48</sup> and opposite conclusions by the Fifth and Tenth Circuits.<sup>49</sup>

A panel of the D.C. Circuit engaged in a thorough discussion of the justiciability under the APA of FACA’s “fair balance” and

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43. See CONG. REC. S14, 644–55 (1972).

44. 5 U.S.C. app. 2 § 5(b)(2).

45. 5 U.S.C. app. 2 § 5(b)(3). This Note refers to section 5(b)(2) as the “fair balance” provision, and to section 5(b)(3) as the “inappropriate influence” provision.

46. CONG. REC. S14, 644–55 (1972), reprinted in SOURCE BOOK, *supra* note 6, at 205.

47. 5 U.S.C. § 701(a)(2).

48. See *Public Citizen v. Nat’l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989).

49. *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1232 (10th Cir. 2004) (citing *Cargill, Inc. v. United States*, 173 F.3d 323, 339 n.30 (5th Cir. 1999)).

“inappropriate influence” provisions in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*.<sup>50</sup> In that case, plaintiffs challenged the composition of a Department of Agriculture advisory committee under sections 5(b)(2) and 5(b)(3) of FACA; they claimed that all the committee members had strong ties to the food industry and that none represented public health or consumer interests.<sup>51</sup> The district court dismissed the complaint, holding that the plaintiffs had failed to show that the advisory committee was improperly balanced in terms of viewpoints or inappropriately influenced by any special interest.<sup>52</sup> The plaintiffs then appealed to the D.C. Circuit, and in three separate opinions, Judges Friedman, Silberman, and Edwards each took a different approach as to both the justiciability of the claims and to the outcome on the merits.<sup>53</sup> A brief summary of their positions may serve as a helpful guide: Judge Friedman implied justiciability and affirmed the lower court’s dismissal on the merits.<sup>54</sup> Judge Silberman also affirmed the dismissal but argued that neither of the provisions should be justiciable and never reached the merits.<sup>55</sup> Finally, Judge Edwards argued that the claims should be justiciable and the district court’s dismissal reversed on the merits.<sup>56</sup>

Each of the D.C. Circuit Judges’ opinions in *Microbiological Criteria* gives insight into how courts should approach whether to review FACA challenges to advisory committees under the APA. Although Judge Friedman did not directly address the issue of justiciability, his analysis of the case under the “fair balance” and “inappropriate influence” provisions provides an important explanation of what each provision requires.<sup>57</sup> Quoting from FACA’s legislative history, Judge Friedman explained that to be “fairly balanced” an advisory committee’s membership should be “representative of those who have a direct interest” in the committee’s work.<sup>58</sup> He further explained that the “inappropriate

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50. 886 F.2d 419.

51. *Id.* at 420–21.

52. *Id.* at 421.

53. *Id.* at 420–38.

54. *Id.* at 420–26 (Friedman, J., concurring).

55. *Id.* at 426–31 (Silberman, J., concurring).

56. *Id.* at 431–38 (Edwards, J., concurring in part and dissenting in part).

57. *Id.* at 422–25 (Friedman, J., concurring).

58. *Id.* at 423 (quoting S. REP. NO. 92-1098, at 9 (1972)).

influence” provision was “designed to protect against ‘the danger of allowing special interest groups to exercise undue influence upon the Government’” by dominating the membership of an advisory committee<sup>59</sup>—essentially the agency capture theory. These explanations help clarify what FACA provisions mean and why they should be justiciable, as this Note discusses below in Part IV.

Judge Silberman’s opinion in *Microbiological Criteria* strongly articulates the arguments against justiciability.<sup>60</sup> Based on the Supreme Court’s opinion in *Heckler*, Judge Silberman argued that the relevant FACA provisions provide “no meaningful standard against which to judge the agency’s exercise of discretion” and are therefore not justiciable under the APA.<sup>61</sup> He first addressed the “fair balance” provision, pointing out that those terms are nowhere defined in the statute and reasoning that courts cannot determine whether undefined requirements have been met.<sup>62</sup> He then turned to the “inappropriate influence” provision, arguing that it was meant to “prevent ‘inappropriate’ external influences on an already constituted advisory committee” and that it “presupposes that an advisory committee is already in existence and ‘fairly balanced’ in accordance with section 5(b)(2).”<sup>63</sup> Thus, according to Judge Silberman, “inappropriate influence” is unrelated to committee membership, which is only an issue in claims of “unfair balance.”<sup>64</sup> He then argued that even if “inappropriate influence” were related to membership, the term “special interest” was too “value-laden [and] undefinable” to provide a meaningful standard of review.<sup>65</sup> These arguments were echoed by the Tenth Circuit in this Note’s principal case and are further discussed in Part IV below.

Finally, Judge Edwards in his partial dissent vigorously argued that the “fair balance” claim presented a justiciable issue.<sup>66</sup> He contended that the strong presumption favoring judicial review is not overcome just because “the ‘fairly balanced’ requirement falls short of mathematical precision in application, or . . . may involve

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59. *Id.* at 425 (quoting H.R. REP. NO. 92-1017, at 6 (1972)).

60. *Id.* at 426–31 (Silberman, J., concurring).

61. *Id.* at 426 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

62. *Id.* at 426–30.

63. *Id.* at 430.

64. *Id.*

65. *Id.*

66. *Id.* at 432–34 (Edwards, J., concurring in part and dissenting in part).

some balancing of interests.”<sup>67</sup> However, despite his enthusiastic defense of section 5(b)(2)’s “fair balance” provision, Judge Edwards inexplicably failed to address section 5(b)(3)’s “inappropriate influence” provision. His silence may have implied an intention to include 5(b)(3) when he found section 5 as a whole to be justiciable. Judge Edwards did say that “the alleged violation of section 5”—which he identified at the beginning of his opinion as section 5(b)(2), (3)<sup>68</sup>—was “also judicially cognizable.”<sup>69</sup> This characterization does not explain, however, why Judges Friedman and Silberman both addressed each provision separately while Judge Edwards did not. Alternatively, Judge Edwards may have agreed with Judge Silberman’s view that 5(b)(3) deals only with external influences on committee recommendations and is unrelated to committee membership. Judge Edwards said that one of the concerns Congress had when it enacted FACA was that “governmental officials would be unduly *influenced* by industry leaders” on committees, but that this concern “prompted Congress to enact the ‘*fairly balanced*’ provision.”<sup>70</sup> If this characterization of Judge Edwards’s opinion is accurate, then he may have avoided discussing 5(b)(3) because he viewed 5(b)(2) as both justiciable and an independently sufficient basis for upholding the section 5 claims. Whichever reading is correct, Judge Edwards did not discuss the “inappropriate influence” provision, so his opinion is ultimately inconclusive as to its justiciability.

Some of the confusion arising from the D.C. Circuit’s three-way split in *Microbiological Criteria* has carried over into other circuit court opinions. For example, the Fifth Circuit may have drawn unwarranted conclusions from the D.C. Circuit’s divergent opinions when it decided *Cargill, Inc. v. United States*.<sup>71</sup> In *Cargill*, several mine owners challenged a decision by the National Institute for Occupational Safety and Health (“NIOSH”) to entrust one of its scientific advisory committees with peer reviewing a study on the health effects of diesel exhaust on underground miners.<sup>72</sup> The plaintiffs alleged violations of FACA, including the “fair balance”

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67. *Id.* at 434.

68. *Id.* at 432.

69. *Id.* at 437.

70. *Id.* (emphasis added).

71. 173 F.3d 323 (5th Cir. 1999).

72. *Id.* at 328.

and “inappropriate influence” provisions.<sup>73</sup> Holding in favor of NIOSH on FACA claims, the Fifth Circuit relied on the opinions of Judges Friedman and Edwards in *Microbiological Criteria* to find both of these two provisions to be justiciable under the APA.<sup>74</sup> With respect to the “fair balance” provision, that reliance appears to be justified. Judge Edwards strongly supported that view,<sup>75</sup> and Judge Friedman’s opinion was at least consistent with it.<sup>76</sup> With respect to 5(b)(3)’s “inappropriate influence” provision, however, that reliance appears to have been misplaced. The Fifth Circuit engaged in no analysis of 5(b)(3)’s justiciability but purported in a footnote to “follow the *Microbiological Criteria* majority,” citing to Judges Friedman and Edwards’ opinions.<sup>77</sup> As discussed above, Judge Friedman implied but did not directly address the justiciability of 5(b)(3), and Judge Edwards failed to discuss it at all. While Justice Edwards’s opinion may be read to imply justiciability of 5(b)(3) by its discussion of 5(b)(2), it may also reasonably be read to deny it. In either case, by relying on *Microbiological Criteria*, the Fifth Circuit also likely imported the same uncertainty.

In sum, there appears to be no consensus in this fractured area of law. Of the two circuit court opinions that have addressed whether the “inappropriate influence” provision is justiciable, one has no clear majority, and the other relies solely on the first. These cases are important, however, because they provide a basis for analyzing the issue in the principal case *Colorado Environmental Coalition v. Wenker*.

A brief review of this background on the APA and FACA provides the necessary context to a discussion of *Wenker*. First, courts have generally acknowledged a strong presumption favoring judicial review of government agency decisions. The APA mandates no review, however, of decisions “committed to agency discretion by law,”<sup>78</sup> which the Supreme Court has interpreted to mean that there

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73. *Id.* at 327, 337–38.

74. *Id.* at 335, 339.

75. *Microbiological Criteria*, 886 F.2d at 432–34 (Edwards, J., concurring in part and dissenting in part).

76. *Id.* at 423–25 (Friedman, J., concurring).

77. *Cargill*, 173 F.3d at 339 n.30 (citing *Microbiological Criteria*, 886 F.2d at 425 (Friedman, J., concurring); *id.* at 432–34 (Edwards, J., concurring in part and dissenting in part)).

78. 5 U.S.C. § 701(a)(2) (2000).

must be “no meaningful standards by which to judge the agency’s exercise of discretion.”<sup>79</sup> Some courts have dealt with whether this applies to FACA, which governs federal advisory committees. Under FACA, advisory committees must be “fairly balanced” in terms of viewpoint and function and may not be “inappropriately influenced . . . by any special interest.”<sup>80</sup> Courts must therefore determine whether these FACA provisions provide a meaningful standard for courts to apply and are thus subject to judicial review under the APA.

### III. COLORADO ENVIRONMENTAL COALITION V. WENKER

#### A. *The Facts*

In March 2001, the Bureau of Land Management (“BLM” or “the agency”) published in the Federal Register a call for nominations for private citizens to serve on Resource Advisory Councils (“RACs”) in Colorado.<sup>81</sup> RACs are designed to provide for a balance of private interests to make land use policy recommendations to the BLM.<sup>82</sup> They are governed by the Federal Advisory Committee Act (“FACA”), under which they must, among other things, “be fairly balanced in terms of the points of view represented”<sup>83</sup> and “not be inappropriately influenced by the appointing authority or by any special interest.”<sup>84</sup>

The Secretary of the Interior, pursuant to the Federal Land Policy and Management Act<sup>85</sup> (“FPLMA”) and BLM regulations,<sup>86</sup> was to fill fourteen vacancies in the Colorado RACs.<sup>87</sup> The BLM received nearly fifty applications for the RAC positions by the

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

80. 5 U.S.C. app. 2 § 5(b)(2), (3).

81. Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1226 (10th Cir. 2004); see 43 U.S.C. § 1739 (2000) (statutory provision directing the Secretary of the Interior to establish Resource Advisory Committees).

82. See *Wenker*, 353 F.3d at 1224. For more information on the BLM’s Colorado Resource Advisory Councils, see Bureau of Land Management, Resource Advisory Councils, Colorado, [http://www.blm.gov/rac/co/co\\_index.htm](http://www.blm.gov/rac/co/co_index.htm).

83. 5 U.S.C. app. 2 § 5(b)(2) (2000).

84. *Id.* § 5(b)(3).

85. 43 U.S.C. § 1739 (2000).

86. 43 C.F.R. § 1784 (2005).

87. *Wenker*, 353 F.3d at 1226.

announced deadline, complete with letters of reference from represented interests, as required in the regulations.<sup>88</sup> Fifteen days after the deadline for receiving nominations, the Governor of Colorado sent a letter to the BLM in which he recommended thirteen individuals to serve on the RACs.<sup>89</sup> However, the Governor did not include letters of reference for any of his recommendations.<sup>90</sup> Nevertheless, when the BLM announced the Secretary's appointments, all thirteen of the Governor's recommendations and only one of the prior applicants were selected to serve on the RACs.<sup>91</sup>

### *B. The Procedural Setting*

In response to the BLM's apparent bias favoring the Governor's nominees, two rejected applicants and two environmental groups brought an action in Federal District Court, challenging the nominations and seeking to enjoin RAC meetings on three counts.<sup>92</sup> First, they argued the nominations were improper because the nominees lacked the requisite letters of reference from interest groups.<sup>93</sup> Second, they claimed that the Governor would have an "inappropriate influence" over the RACs, in violation of section 5(b)(3) of FACA because he chose thirteen of the fourteen appointees.<sup>94</sup> Finally, they alleged that by appointing a disproportionate number of the Governor's nominees, the Secretary had violated the requirement that the RACs "be fairly balanced in terms of the points of view represented," under section 5(b)(2).<sup>95</sup>

The district court dismissed the case on two grounds. It held first that the plaintiffs lacked standing for failure to show injury-in-fact, and second that the relevant provisions of FACA were not justiciable

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88. *Id.*

89. *Id.* The regulations provide that the Secretary is to "consult" with the Governor on appointments to the RACs. 43 C.F.R. § 1784.6-1(e) (2005).

90. *Wenker*, 353 F.3d at 1226.

91. *Id.*

92. *Id.*; see also Colorado Environmental Coalition et al., *Briefing Packet on Unlawful 2001 Resource Advisory Council Process*, at [http://www.ourcolorado.org/alerts/041802\\_racpacket.htm](http://www.ourcolorado.org/alerts/041802_racpacket.htm) (last visited Oct. 11, 2005) (setting out the plaintiffs' principal arguments for challenging the advisory committee appointments).

93. *Wenker*, 353 F.3d at 1226.

94. *Id.*

95. *Id.*

for being “too vague to provide a meaningful standard of review” under APA standards.<sup>96</sup>

### *C. The Tenth Circuit’s Holding*

The Tenth Circuit remanded the case, holding that while the two rejected applicants for RAC positions had standing, the environmental groups did not.<sup>97</sup> The court also held that the failure of the agency’s regulations requiring letters of reference was principally for the benefit of the agency and failure to enforce it did not substantially harm the plaintiffs; thus, the requirement was not judicially enforceable.<sup>98</sup> Most importantly, the court held that while the FACA provision that membership of advisory committees be “fairly balanced” was justiciable, the provision that there be “appropriate provisions to assure that the advice and recommendations of the advisory committee . . . not be inappropriately influenced . . . by any special interest” was not justiciable because it was “committed to agency discretion by law”<sup>99</sup> by virtue of lacking a “meaningful standard against which to judge the agency’s exercise of discretion.”<sup>100</sup> Specifically, the court reasoned that the plaintiffs were really alleging that because the Governor had nominated so many of the RAC members, he would have undue influence over the decisions and recommendations of the RAC.<sup>101</sup> The court then determined that Congress had provided no guidance for determining whether such “hypothetical future influence” would be inappropriate, and that the issue was therefore nonjusticiable.<sup>102</sup>

## IV. ANALYSIS

This opinion by the Tenth Circuit represents the latest federal circuit court analysis on the issue of reviewability of agency actions under FACA. Unfortunately, by holding that the “inappropriate influence” claim was not justiciable, the court likely missed an

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96. *Id.*

97. *Id.* at 1237.

98. *Id.* at 1229–30.

99. 5 U.S.C. § 701(a)(2) (2000).

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

101. *Wenker*, 353 F.3d at 1231.

102. *Id.* at 1231–32.

opportunity to set a compelling precedent that would ensure the independence of advisory committees and protect them from agency capture. This Part explains how the court came to its conclusion by failing to consider FACA's legislative history and by mischaracterizing the plaintiffs' "inappropriate influence" claim as an "unfair balance claim." In addition, this Part discusses why the singular circumstances of this case, in which the plaintiffs impute the role of "special interest" to the Governor, should not affect the analysis. Finally, this Part conjectures that future courts will not likely uphold similar claims of FACA violations, even if they find them justiciable.

*A. Why Judicial Review Best Effectuates Congressional Intent*

The Tenth Circuit in *Wenker* held that the "inappropriate influence" provision of FACA was not justiciable because there was no guidance from Congress on what the provision meant.<sup>103</sup> In other words, the court claimed to have no way of knowing whether upholding the plaintiffs' "inappropriate influence" claim was the type of grievance Congress sought to redress by enacting that provision. Instead the court held that the claim would best be addressed under the "fair balance" provision. A review of the legislative history of FACA demonstrates that Congress intended the "inappropriate influence" provision to address the plaintiffs' particular type of claim. In addition, the facts in *Wenker* illustrate why the plaintiffs' claim could properly be addressed only by that provision. This Section explains how both of these aspects weigh in favor of justiciability.

*1. The legislative history of the "inappropriate influence" provision*

By holding the "inappropriate influence" provision in section 5(b)(3) of FACA to be nonjusticiable, the Tenth Circuit departed from its own precedent by disregarding the legislative history of the Act. Specifically, the court held that the agency's decision was "committed to agency discretion"—and thus not justiciable under the APA<sup>104</sup>—based on the court's finding that Congress provided "no meaningful standard against which to judge the agency's

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103. *Id.*

104. 5 U.S.C. § 701(a)(2) (2000).

exercise of discretion.”<sup>105</sup> While the text of the statute itself may not reveal the “meaningful standard” the court sought, an earlier Tenth Circuit case identified legislative history as a viable source for such congressional guidance.<sup>106</sup> FACA’s legislative history indicates that Congress intended the Act to prevent the precise type of violation alleged. Nevertheless, the court omitted references to both its earlier case and the legislative history from its “inappropriate influence” discussion.

The Tenth Circuit’s approach to interpreting section 5(b)(3) of FACA demonstrates why the court found no “meaningful standard.” The plaintiffs in *Wenker* argued that the BLM had violated the “inappropriate influence” provision by selecting a disproportionate number of the Governor’s nominees to serve on the RACs.<sup>107</sup> The Governor, the plaintiffs claimed, was a special interest who would be able to exert an inappropriately large amount of influence over the RACs “by virtue of having nominated or endorsed such a large percentage of the membership.”<sup>108</sup> The court, however, did not view section 5(b)(3) to be related to selection of membership. Instead, the court read the provision to deal with direct attempts to control committee work from outside the committee’s membership. An example of this would be “bribes or threats from a recommending interest group to its nominee,” which, of course, was never alleged.<sup>109</sup> The court concluded that whether the “kind of hypothetical future influence” that was alleged should be considered “inappropriate” within the meaning of the statute was an issue on which the court had “absolutely no guidance, guidelines, or standards from Congress.”<sup>110</sup> Had the court looked beyond the simple text of the statute and considered the legislative history, however, it likely would have found that guidance.

The Tenth Circuit earlier found it appropriate to search legislative history for the “meaningful standards” from Congress that are necessary for finding a challenge to an agency decision

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105. *Wenker*, 353 F.3d at 1231 (quoting *Heckler*, 470 U.S. at 830).

106. *See* *Am. Bank v. Clarke*, 933 F.2d 899, 902 (10th Cir. 1991) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

107. *Wenker*, 353 F.2d at 1230.

108. *Id.* at 1231.

109. *Id.*

110. *Id.* at 1232.

justiciable.<sup>111</sup> In *American Bank v. Clark*, the Tenth Circuit held that a decision by the U.S. Comptroller of the Currency to enter a closure order was “committed to agency discretion” and not justiciable under section 701(a)(2) of the APA.<sup>112</sup> The court quoted a Supreme Court case stating that “[w]hether and to what extent a particular statute precludes review is determined not only from its express language, but also from . . . its legislative history.”<sup>113</sup> The court then applied this approach by examining the “language of the statute,” the “structure of the Act,” and the “goals” that “Congress sought to achieve” by passing the statute.<sup>114</sup> Despite this illustrative precedent, the Tenth Circuit failed to examine the legislative history of FACA in *Wenker*.

The Tenth Circuit claimed in *Wenker* that Congress provided “absolutely no guidance” as to what kind of influence should be considered “inappropriate” under section 5(b)(3) of FACA.<sup>115</sup> However, the legislative history of FACA indicates that the influence an entity might wield by having nominated a disproportionate number of committee members—essentially the allegation in *Wenker*—is exactly the type of influence Congress aimed to prevent. In a report to the House of Representatives on FACA, the House Committee on Government Operations stated that “[p]articularly important among the guidelines are the requirement contained in § [5](b)(2) . . . and the requirement contained in § [5](b)(3) . . . .”<sup>116</sup> The report explained their importance by warning that “[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 exercise undue influence upon the Government through the *dominance* of advisory committees.”<sup>117</sup> The report illustrated this danger by citing a case in which a particular advisory committee included members from only one industry; the report assured Congress that FACA would prohibit “the *heavy representation* of

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111. *American Bank*, 933 F.2d at 902.

112. *Id.* at 900–02.

113. *Id.* at 902 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

114. *Id.* at 903.

115. *Wenker*, 353 F.3d at 1232.

116. H. R. REP. NO. 92-1017 (1972), *reprinted in* SOURCE BOOK, *supra* note 6, at 276.

117. *Id.* (emphasis added).

parties whose private interests could influence their recommendations.”<sup>118</sup>

This concern over disproportionate representation also appeared in the Senate’s discussion. A study submitted to the congressional record warned that advisory committees “can be a convenient nesting place for special interests seeking to change and preserve a federal policy for their own ends” and that “[s]uch committees *stacked* with giants in their respective fields can overwhelm federal decision makers.”<sup>119</sup> Thus, members of both the House and Senate expressed apprehension that interest groups could manipulate public policy by installing a disproportionate number of their own representatives on advisory committees. In spite of this record, the *Wenker* court did not mention the legislative history and maintained that Congress had provided no guidance.<sup>120</sup>

Just because the court did not address the legislative history in its opinion, however, does not necessarily mean the court ignored it completely. The court may not have referred to the legislative history if it believed the above quoted passages did not apply to 5(b)(3)’s “inappropriate influence” provision but only to 5(b)(2)’s “unfair balance” provision. The court did suggest that the plaintiff’s 5(b)(3) claims should have been addressed under “unfair balance,”<sup>121</sup> and this view would be consistent with the opinions of Judges Silberman and Edwards in *Microbiological Criteria*.<sup>122</sup> Other factors, of course, weigh against taking such an approach. The legislative history itself never separates the two provisions in this manner, and Judge Friedman applied language from the legislative history specifically to section 5(b)(3).<sup>123</sup> If, as the court suggested, section 5(b)(2) adequately satisfies both Congress’s and the plaintiffs’ concerns, and the legislative history does not apply to 5(b)(3), that would leave 5(b)(3) without any “judicially meaningful standards” and hence unjustifiable. The next Section explains why some of Congress’s

118. *Id.* (emphasis added).

119. CONG. REC. S14, 644–55 (1972), *reprinted in* SOURCE BOOK, *supra* note 6, at 205 (emphasis added).

120. *Wenker*, 353 F.3d at 1232.

121. *Id.*

122. *See* Public Citizen v. Nat’l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 430 (D.C. Cir. 1989) (Silberman, J., concurring); *id.* at 432–34 (Edwards, J., concurring in part and dissenting in part); *supra* text accompanying note 70.

123. *See* *Microbiological Criteria*, 886 F.2d at 425 (Friedman, J., concurring) (quoting H.R. REP. NO. 92-1017, at 6; 118 CONG. REC. 30,276 (1972)).

concerns over disproportionate representation can adequately be addressed only by giving independent significance to the “inappropriate influence” provision in cases such as *Wenker*.

2. *Properly distinguishing the “fair balance” provision*

The court dismissed the plaintiffs’ “inappropriate influence” claim because, in the court’s view, it was not justiciable and was really a claim of “unfair balance.”<sup>124</sup> However, the particular facts in *Wenker* reveal a critical distinction between the claimed violation and what the “unfair balance” provision addresses. This Section explains the court’s conception of the statute, the nature of the claim, and why the claim would properly be addressed under the “inappropriate influence” provision.

According to the court, FACA’s “inappropriate influence” provision protects advisory committees from active, external influences and is unrelated to committee membership.<sup>125</sup> Under this conception, the provision may prevent special interests from pressuring committee members to vote in a particular way on pending issues, but it would have nothing to do with membership selection. As Judge Silberman stated, “[T]he provision presupposes that an advisory committee is already in existence and ‘fairly balanced’ in accordance with section 5(b)(2).”<sup>126</sup> According to the claim, on the other hand, the provision should also protect against indirect, structural influences.<sup>127</sup> Under this alternative conception, even if the Governor never directly involved himself with the committees again, he nevertheless already would have left an indelible mark on the RACs by having installed a disproportionate number of members—all of whom presumably share many of the Governor’s views on land use and environmental issues.

The court stated that this second type of grievance should be addressed under section 5(b)(2), which requires a fair balance “in terms of the points of view represented.”<sup>128</sup> The text of 5(b)(2) facially supports the court’s conclusion; if all the nominees share the Governor’s views, that would result in an imbalance of viewpoints.

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124. *Wenker*, 353 F.3d at 1232.

125. *See id.* at 1231.

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

127. *See Wenker*, 353 F.3d at 1231.

128. *Id.* at 1232.

However, because of the difficulty in discerning a “virtually infinite”<sup>129</sup> array of “points of view,” courts have interpreted the provision to require instead a balance of represented interests as proxy.<sup>130</sup> Under this interpretation, even if the majority of committee members shared similar personal views, the committee would still comply with the “fair balance” provision as long as they represented a balanced variety of interest groups.

In most cases, where the nominating entity is the same as the represented interest, the “fair balance” provision as interpreted would prevent a single entity from selecting a disproportionate number of committee members. If, however, the chosen members represent interests different from the entity that nominated them, the “fair balance” provision may be inadequate. In *Wenker*, the court never suggested that nominees represented the Governor; they represented their respective employers and affiliated organizations.<sup>131</sup> Assuming that the Governor chose individuals from a variety of organizations, the RACs would satisfy section 5(b)(2) for being “fairly balanced” in terms of the interests represented. The problem would remain, however, that the Governor hand picked a disproportionate number of RAC members—members who are likely to share his own views on land management and environmental issues. While the committees would be “fairly balanced” in terms of represented interests, the Governor would have had an enormous impact on their work by selecting so many of their members. Thus, neither the plaintiffs’ claims in *Wenker* nor Congress’s concerns in the legislative history were adequately addressed by the “fair balance” provision. To remedy this problem, the “inappropriate influence” provision should be given independent significance with respect to selecting committee members.

### *B. Government Entities as Special Interests*

When the plaintiffs in *Wenker* charged the BLM with allowing a “special interest” to influence the selection of RAC members, they

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129. *Microbiological Criteria*, 886 F.2d at 426 (Silberman, J., concurring).

130. *Id.* at 423 (Friedman, J., concurring) (citing Nat’l Anti-Hunger Coal. v. Executive Comm., 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983)).

131. *See Wenker*, 353 F.3d at 1225–26 (describing the three groups of interests RAC members were to represent, including industry, environmental protection, and the general public).

did not point to a large corporation or private industry as the culprit—entities usually associated with the term “special interest”—but to the Governor of Colorado. Section 5(b)(3) of FACA requires “that the advice and recommendations to the advisory committee . . . not be inappropriately influenced by the appointing authority or by *any special interest*.” The plaintiffs’ claim raises the question of whether a government actor should be considered a “special interest” under FACA or in general. The court in *Wenker* did not address this issue likely because it did not find the claim to be justiciable; but if the claim is justiciable, the question becomes critical. If Congress had intended for the “inappropriate influence” provision to apply only to “private” entities, then the Governor’s actions would be no violation because he would not be considered a “special interest.” While members of Congress may not have had state Governors in mind when they enacted FACA, no meaningful distinction likely exists, and the provision against “special interests” should apply equally to “public” and “private” entities.

As a practical matter, public officials should not be presumed always to be acting in the best interests of the public. According to one of the central tenets of public choice theory, a branch of economics and political science, government officials operate as rational, self-interested economic actors just as private entities do.<sup>132</sup> Under this theory, both are presumed to make rational, economic decisions to promote their respective interests. Just as private business owners seek to maximize profits, government agencies seek to maximize their regulatory authority or their budget.<sup>133</sup> Politicians

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132. For a general discussion of public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT’L REV. L. & ECON. 284 (1992) (recognizing both the potential and limits to understanding both law and law making through public choice theory); Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328 (1994). For a more in depth discussion, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (Univ. of Mich. Press 1965) (1962), available at <http://www.econlib.org/library/Buchanan/buchCv3Contents.html>.

133. For application of public choice theory to administrative law in particular, see THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (André Blais & Stéphane Dion eds., 1991); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 23-25 (1997); WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 640-41 (6th ed., 2003) (1973); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998); Jeffrey J. Rachlinski & Cynthia R.

seek to please their constituencies and to be reelected. Public choice theory holds that while altruistic efforts to serve the “public good” may occur, the driving motivation of public entities comes from these more practical concerns. Therefore, under this theory, the Governor would be most likely to nominate to the RACs individuals whom he believes will best serve his political interests.

If, as public choice theory suggests, the Governor primarily seeks the interests of his constituents, he may qualify as a “special interest” to the extent that those interests are not universal. The Governor’s constituency may have different values and priorities than the general public; he may promote the interests of his political base over those of the state in general or those of the state over those affected in other states. For example, if a Governor owes her successful election to people who favor promoting local industries over environmental protection, her RAC nominees may reflect that view to the detriment of environmental resources and those who rely on them.<sup>134</sup> As Judge Silberman noted in *Microbiological Criteria*, the term “special interest” serves primarily “as a political pejorative (typically referring to an interest of which the speaker disapproves).”<sup>135</sup> Thus, the Governor’s interests are just as likely as a private entity’s to be “special” and fall within the scope of the “inappropriate influence” provision.

The Fifth Circuit has also expressed the view that government entities should be considered “special interests” for purposes of preventing “inappropriate influences.”<sup>136</sup> In *Cargill*, the Fifth Circuit was “troubled” that two members of an advisory committee were allowed to participate in a study on diesel exhaust while interviewing for jobs with government agencies “whose regulatory authority

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Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986).

134. Several commentators have noted with particular apprehension the implications of public choice principles applied to environmental and land use policy. See Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405 (1994); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998); Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 ENVTL. L. 1015 (2004); Sheila Lynch, Note and Comment, *The Federal Advisory Committee Act: An Obstacle to Ecosystem Management by Federal Agencies?*, 71 WASH. L. REV. 431 (1996) (arguing for more restrictive application of FACA to groups that advise on land policy issues).

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

136. See *Cargill, Inc. v. United States*, 173 F.3d 323, 339 (5th Cir. 1999).

[would] be directly affected by the results of the diesel study.”<sup>137</sup> While the court did not view only two of the fifteen members as rising to the level of “inappropriate influence,” it nevertheless recognized the danger of allowing public entities with a stake in advisory committee work to have an influence.<sup>138</sup> Therefore, both political theory and the reasoning of this Fifth Circuit case indicate that a government actor such as the Governor should be considered just as much a “special interest” as any private entity.

### *C. Prognosis for Future Cases*

The Tenth Circuit’s reasoning in *Wenker* suggests that courts in future FACA cases are actually likely to review but rarely uphold “inappropriate influence” claims whether or not they find such claims to be justiciable. The court’s approach in *Wenker* illustrates how concluding that an agency’s action is not reviewable often requires an analysis as detailed as, and often indistinguishable from, an actual review of the agency’s action. Even if a court does find a claim to be reviewable, however, it is unlikely to overturn the agency’s decision because of the relatively high standard of review.

Even on a cursory reading, the court in *Wenker* appeared to be reviewing the “inappropriate influence” claim even though it ultimately concluded that claims under that provision are not reviewable.<sup>139</sup> The court went into a detailed analysis of the facts, considered possible interpretations of the statute, and hypothesized as to what types of actions would violate the provision<sup>140</sup>—all components of a full-fledged judicial review. At least one commentator has observed this phenomenon in cases where courts have held that an agency “action is unreviewable if and only if judicial review of the decision would be infeasible.”<sup>141</sup> Such cases include *Overton Park* and *Heckler*, where the Supreme Court held that there must be “no law to apply”<sup>142</sup> or “no meaningful standards from Congress.”<sup>143</sup> In such cases, “a court cannot find an agency

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137. *Id.*

138. *Id.*

139. *See* *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1231 (10th Cir. 2004).

140. *Id.*

141. Levin, *supra* note 21, at 734.

142. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

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

action unreviewable without thinking about the substance of the challenger's contentions—that is, reviewing the action.”<sup>144</sup> Thus, as a practical matter, courts that find “inappropriate influence” claims to be nonjusticiable will still have to actually review the claims.

Even if future courts disagree with *Wenker* and find the “inappropriate influence” provision to be justiciable, they are unlikely often to uphold a claim on the merits due to deference for agency decisions. For a court to overturn an agency's decision, the APA requires a finding that the agency's action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>145</sup> While a court may still find that an agency has abused its discretion under FACA by creating patently unbalanced advisory committees or by allowing a single interest to endorse a disproportionate number of committee members, such cases will likely be rare. The court in *Wenker* ultimately remanded the case to determine whether the nomination by the Governor of thirteen of the fourteen appointees violated the “fair balance” provision,<sup>146</sup> but courts in less extreme cases likely will defer to agency selections under the APA's standard.

#### V. CONCLUSION

When Congress passed FACA, one of its clear intentions was to protect advisory committees from becoming a tool of agency capture. Congress recognized at the time that “an invitation to advise can by subtle steps confer the power to regulate and legislate.”<sup>147</sup> Therefore, Congress incorporated provisions into FACA that it hoped would assure fairly balanced advisory committees that would be immune from inappropriate influences by special interests. For an ally in the struggle against agency capture and as an enforcer of these provisions, Congress has had to rely on the courts. And the courts' primary weapon in the arsenal against agency capture has long been a strong presumption in favor of judicial review of agency actions.

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144. Levin, *supra* note 21, at 735.

145. 5 U.S.C. § 706(2)(A) (2000).

146. *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1237 (10th Cir. 2004).

147. 92 CONG. REC. S14644-55 (1972), *reprinted in* SOURCE BOOK, *supra* note 6, at 205 (quoting Congressman Monagan).

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*The Justiciability of FACA*

By finding a claim based on section 5(b)(3) of FACA to be unreviewable, the Tenth Circuit took a step toward undermining this presumption. The court based this step on the APA provision prohibiting judicial review on issues that are committed to agency discretion, even though that provision is poorly elucidated in both the legislative history and prior court decisions. In addition, the court's decision disregarded Congress's clear intent to make an inappropriate-influence violation out of an agency action that allows a single interest to select a disproportionate number of advisory committee members. Finally, the court appeared to say one thing and do the opposite when it engaged in a review of the issue to determine that the issue was unreviewable. While a future court may find the Tenth Circuit's precedent persuasive when faced with the difficult decision of whether to grant judicial review of an agency action under section 5(b)(3) of FACA, hopefully it will consider how its decision will further or detract from Congress's struggle against the dangers of agency capture.

*Joshua W. Abbott\**

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