

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
FREEDOM WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 09-2398 (RWR)
)	
BARACK OBAMA <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

MEMORANDUM OPINION AND ORDER

Plaintiff Freedom Watch brings this action against the President of the United States, an entity styled in the complaint as the Obama Health Reform De Facto Advisory Committee, and the unknown non-federal employee members of the committee, alleging that the committee was subject to and failed to comply with the requirements of the Federal Advisory Committee Act ("FACA"), codified at 5 U.S.C. app. 2. The defendants have moved to dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted.¹ Although the FACA does not provide a private right of action to enforce its provisions, and Freedom Watch cannot proceed under the Administrative Procedure Act ("APA"), Freedom Watch has alleged sufficiently that the committee at issue qualifies under

¹ The defendants' motion to dismiss Freedom Watch's Freedom of Information Act claim previously was granted as conceded.

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must construe the complaint in the light most favorable to the plaintiff, id., and "the court must assume the truth of all well-pleaded allegations." Warren v. Dist. of Columbia, 353 F.3d 36, 39 (D.C. Cir. 2004).

I. PRIVATE RIGHT OF ACTION

The mere "fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. Univ. of Chi., 441 U.S. 677, 688 (1979). Rather, "private rights of action to enforce federal law must be created by Congress." Alexander v. Sandoval, 532 U.S. 275, 286 (2001). For a cause of action to exist, a plaintiff must demonstrate that the statute under which it is attempting to proceed reflects Congressional intent to create a private remedy. See id. It is irrelevant that a private right of action may be desirable as a policy matter or compatible with the statute. See id. at 287. The "judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Id. at 286. Judicial creation of a private right of action conflicts with "the authority of Congress under Art. III to set the limits of federal jurisdiction.'" Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) (quoting Cannon, 441 U.S. at 747 (Powell, J., dissenting)).

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In the wake of Sandoval, several courts in this district have determined that the FACA does not create a private right of action because there is no evidence of Congressional intent to confer a private remedy for FACA violations. See Judicial Watch, Inc. v. U.S. Dep't of Commerce, 736 F. Supp. 2d 24, 30 (D.D.C. 2010) ("Because the FACA does not explicitly confer a private remedy, . . . and because this fact alone is 'determinative,' the court holds that the FACA does not provide the plaintiff with a private right of action." (internal citation omitted)); Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp., 219 F. Supp. 2d 20, 33 (D.D.C. 2002) (stating that "[n]othing in the language of FACA evidences any intent" to create a private remedy). Freedom Watch has pointed to no authority that could provide a basis for concluding that Congress did, in fact, intend to confer in the FACA a private right of action. Accordingly, Freedom Watch cannot proceed here under the FACA alone.³

Freedom Watch argues that it is alternatively "entitled to enforce FACA's substantive requirements through the judicial review provisions of the APA." (Pl.'s Opp'n to Defs.' Mot. to Dismiss Count One of Pl.'s Compl. at 3.) Plaintiffs alleging violations of the FACA may proceed under the jurisdictional grant

³ Whether the question addresses the power of the court to adjudicate a private action brought under the FACA, or the availability of any relief under the FACA for such a claim, the result is the same.

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in the APA, 5 U.S.C. § 704, which subjects "final agency action for which there is no other adequate remedy" to judicial review. See Judicial Watch, Inc. v. U.S. Dep't of Commerce, 736 F. Supp. 2d at 30-31 (surveying other cases and noting that "a number of courts have allowed plaintiffs to proceed with APA actions based on alleged FACA violations"); Nat'l Energy Policy Dev. Grp., 219 F. Supp. 2d at 36-40. The APA provides "a limited cause of action for parties adversely affected by agency action."⁴ Trudeau v. FTC, 456 F.3d 178, 185 (D.C. Cir. 2006).

An entity cannot be at once both an advisory committee and an agency, however. See Heartwood, Inc. v. U.S. Forrest Serv., 431 F. Supp. 2d 28, 36 (D.D.C. 2006) (noting that an "advisory committee cannot have a double identity as an agency" (internal quotation marks omitted) (quoting Wolfe v. Weinberger, 403 F. Supp. 238, 242 (D.D.C. 1975))); Gates v. Schlesinger, 366 F. Supp. 797, 798-99 (D.D.C. 1973) ("The [FACA] utilizes the definition of agency contained in the [APA] It is

⁴ However, that does not sanction proceeding here under the APA against the President. While the APA's definition of agency does not explicitly exclude the President, 5 U.S.C. § 701(b)(1), in the face of such "textual silence[,] "respect for the separation of powers and the unique constitutional position of the President" warrants exempting the President from the provisions of the APA. Franklin v. Massachusetts, 505 U.S. 788, 800 (1992); see also Natural Res. Def. Council, Inc. v. U.S. Dep't of State, 658 F. Supp. 2d 105, 109 (D.D.C. 2009) ("Because the President is not an 'agency' for purposes of the APA, presidential action is not subject to judicial review under that statute.").

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significant that the [FACA] contains a separate and distinct definition of an 'advisory committee,' thus supporting the proposition that an advisory committee is not an 'agency.'" (footnote omitted)). Because Freedom Watch argues that the committee at issue is an advisory committee subject to the requirements of the FACA, the committee cannot also qualify as an agency for the purposes of APA review. Thus, the APA does not provide a jurisdictional grant for Freedom Watch's FACA claim against the committee or its members, and the defendants' motion to dismiss will be granted with respect to Freedom Watch's APA claim.

However, Freedom Watch also seeks in its complaint mandamus relief under 28 U.S.C. § 1361. This provision creates subject-matter jurisdiction over an action "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. "[T]he mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private cause of action." Nat'l Energy Policy Dev. Grp., 219 F. Supp. 2d at 41-42 (citing Chamber of Commerce v. Reich, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (if "a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action")). If a federal

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official -- including the President -- has a clear obligation to perform a duty, Nat'l Wildlife Fed'n v. United States, 626 F.2d 917, 923 (D.C. Cir. 1980), the plaintiff has a clear right to relief, and there is no other adequate remedy available to the plaintiff, a court may grant mandamus relief. Council of and for the Blind of Del. Cnty. Valley, Inc. v. Reagan, 709 F.2d 1521, 1533 (D.C. Cir. 1983). "[I]f there is no clear and compelling duty under the statute as interpreted, the district court must dismiss the action. To this extent, mandamus jurisdiction under § 1361 merges with the merits[.]" In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005), and will be assessed by whether the claim is sufficiently pled.

II. SUFFICIENCY OF CLAIM

The defendants address the merits of Freedom Watch's claim for mandamus review by arguing that Freedom Watch has not alleged sufficient facts from which to conclude that the committee at issue here qualifies as an advisory committee under the FACA. (Defs.' Mem. at 9.) As relevant to the claim at issue here, the FACA defines an advisory committee as "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 the President[.]" 5 U.S.C. app. 2 § 3(2). Although the FACA's definition of an advisory committee covers many groups, it does not extend to

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"every formal and informal consultation between the President . . . and a group rendering advice." Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 453 (1989). Because "a group is a FACA advisory committee when it is asked to render advice or recommendations, as a *group*, and not as a collection of individuals[,]" "an important factor in determining the presence of an advisory committee [is] the formality and structure of the group." Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 913-14 (D.C. Cir. 1993) ("AAPS"). Criteria relevant to determining if a group has sufficient formality and structure to qualify under the FACA as an advisory committee include whether the group has 1) an organized structure, 2) a fixed membership, and 3) a specific purpose. Id. at 914. However, groups vary widely with respect to these features, falling on a continuum:

At one end one can visualize a formal group of a limited number of private citizens who are brought together to give publicized advice as a group. That model would seem covered by the statute regardless of other fortuities such as whether the members are called "consultants." At the other end of the continuum is an unstructured arrangement in which the government seeks advice from what is only a collection of individuals who do not significantly interact with each other. That model . . . does not trigger FACA.

Id. at 915. Additionally, by definition, an advisory committee cannot be "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government[.]" 5 U.S.C. app. 2 § 3(2). "[A] committee is composed wholly of federal officials if the President has given no one other than a federal

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official a vote in or, if the committee acts by consensus, a veto over the committee's decisions." Cheney, 406 F.3d at 728.

The complaint alleges that the committee exists to "gather[] information and negotiat[e] agreements that will lead to the passage of President Obama's proposed Health Reform legislation" (Compl. ¶ 7), suggesting that the committee has a specific purpose. Freedom Watch claims that "non-federal employees, including lobbyists from the private pharmaceutical industry (i.e. Pharma), Planned Parenthood, the U.S. Chamber of Commerce, the American Association of Retired Persons (AARP), the American Medical Association (AMA), and other private lobbyists . . . regularly attended and fully participated" in committee meetings. (Compl. ¶ 8.) This description suggests that the committee has a fixed membership. While the complaint does not describe the committee's structure, the defendants cite no authority for the proposition that a complaint pleading a cause of action under the FACA must detail each of the three factors enumerated in AAPS in order to state a claim for relief.⁵ Rather, Rule 8 does not

⁵ Each of the cases that the defendants cite in support of their argument that Freedom Watch's allegations are insufficient to establish that the committee has the requisite formality and structure to qualify as an advisory committee under the FACA considered the issue on a motion for summary judgment, where the defendants provided evidence that the challenged committees did not satisfy the requirements. See Citizens for Responsibility & Ethics in Wash. v. Leavitt, 577 F. Supp. 2d 427, 432-33 (D.D.C. 2008) (considering declaration on motion for summary judgment to conclude that the committee in question did not qualify as an advisory committee); Am. Soc'y of Dermatology v. Shalala, 962 F.

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require a plaintiff to plead in the complaint all facts that are needed to prove its claims, and Freedom Watch has plausibly alleged the existence of an advisory committee that may be subject to the requirements of the FACA. See Rouse v. Berry, 680 F. Supp. 2d 233, 236 (D.D.C. 2010) (“[A] complaint needs to plead ‘only enough facts to [nudge] a claim to relief . . . across the line from conceivable to plausible[.]’” (alterations in original) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

The defendants also argue, citing Cheney, 406 F.3d at 728, that Freedom Watch has not pled facts that establish that any non-government employees were members of the committee. (Defs.’ Mem. at 11.) However, the complaint alleges that individuals not employed by the federal government fully participated in and were members of the committee (Compl. ¶ 8), and Cheney noted that an identical allegation could be viewed “as alleging that non-federal employees had the right to vote on, or to veto,” decisions during committee meetings. 406 F.3d at 729. While Cheney ultimately concluded that the committee at issue did not qualify as an advisory committee, it did so on the basis of a statement the plaintiff attached to the complaint that listed as

Supp. 141, 148 (D.D.C. 1996) (same); Nader v. Baroody, 396 F. Supp. 1231, 1234 (D.D.C. 1975) (same). The defendants have not provided any evidence with their motion -- in the form of declarations or otherwise -- from which to conclude that the entity at issue here lacks the requisite structure or formality to qualify as an advisory committee.

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members of the committee only federal employees. Id. at 729-30. There is no comparable basis for concluding that the members of the entity at issue here all were federal employees -- Freedom Watch alleges that multiple non-federal employees are members of the committee, and the government has provided no evidence that only federal employees served on the committee. Thus, the defendants' motion to dismiss will be denied with respect to Freedom Watch's claim for mandamus review against the President.

III. SEPARATION OF POWERS

Finally, the defendants argue that applying the FACA to a task force set up by the President to solicit advice would raise separation of powers concerns by infringing on the President's ability to receive confidential counsel. (Defs.' Mem. at 12.) Although "the lines between the powers of the three branches [of government] are not always neatly defined[,]" the Constitution safeguards against the "'encroachment or aggrandizement of one branch at the expense of the other.'" Clinton v. Jones, 520 U.S. 681, 699-701 (1997) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)). In determining whether the FACA "disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which [a statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977). If the defendants could demonstrate that applying the

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FACA would disrupt Executive Branch functions, the inquiry would then turn to whether "that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Id.

"While no clause of Article II expressly grants the President the power to acquire information or receive advice in confidence, the necessity of receiving confidential advice appears to flow from Article II." Nat'l Energy Policy Dev. Grp., 219 F. Supp. 2d at 50. Additionally, the Supreme Court and D.C. Circuit have both suggested that applying the FACA to allow a plaintiff to obtain communications between the President and his advisors may be unconstitutional. See Public Citizen, 491 U.S. at 466 (noting the "formidable constitutional difficult[y]" posed by the possibility that the FACA "violated the doctrine of separation of powers"; AAPS, 997 F.2d at 909 (suggesting that the FACA may interfere with the President's Article II "ability to consult with his advisers confidentially[,] and "to organize his advisers and seek advice from them as he wishes").

However, a court should avoid reaching constitutional issues that are not strictly necessary to decide a case. See Burton v. United States, 196 U.S. 283, 295 (1905); see also Clinton, 520 U.S. at 690 (noting that "the importance of avoiding the premature adjudication of constitutional questions . . . is applicable to the entire Federal Judiciary"). Here, Freedom

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Watch's entitlement to any of the committee's communications turns on whether, beyond this pleading stage, Freedom Watch can present evidence sufficient to demonstrate that the committee qualifies under the FACA as an advisory committee. If the government presents evidence demonstrating that the committee at issue does not qualify under the FACA as an advisory committee, the case can be resolved on that statutory ground without reaching the constitutional question. See Nat'l Energy Policy Dev. Grp., 219 F. Supp. 2d at 54-55.

CONCLUSION

The FACA creates no private right of action and the APA provides none under which the plaintiff may bring a FACA claim on the facts alleged here. However, Freedom Watch has alleged sufficiently in its complaint that the committee here was an advisory committee under the FACA, Freedom Watch may be entitled to mandamus review against the President, and dismissing the complaint on separation of powers grounds would be premature. Accordingly, it is hereby

ORDERED that the defendants' motion [7] to dismiss be, and hereby is, GRANTED with respect to the plaintiff's FACA and APA claims, and DENIED with respect to the plaintiff's claim for mandamus review against the President. It is further

ORDERED that the parties file by September 26, 2011 supplemental memoranda addressing the issue of whether Freedom

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Watch's claims for access to meetings and to change the composition of the committee are moot.

SIGNED this 12th day of August, 2011.

_____/s/_____
RICHARD W. ROBERTS
United States District Judge