

CREW | citizens for responsibility and ethics in washington

February 1, 2017

The Honorable Donald F. McGahn
White House Counsel
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. McGahn:

President Donald Trump's use of an advisory committee composed of both federal employees and non-governmental individuals to obtain advice on potential Supreme Court justice nominations appears to violate the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. § 3. Citizens for Responsibility and Ethics in Washington ("CREW") therefore requests that you take all necessary steps to comply with the FACA, including making publicly available the committee's "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the committee. 5 U.S.C. App. § 10(b).

The FACA's provisions, including most significantly its disclosure requirements, are triggered whenever a committee within the Executive Office of the President is advising the President and is not "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. § 3(2). In addition to the disclosure requirements outlined above, such committees also must "file a charter; provide notice of their meetings in the Federal Register; hold public meetings; and document each meeting with detailed minutes. *Id.* §§ 9(c); 10(a)(1), (2), (b) and (c); and 11. FACA also requires such advisory committees to be "fairly balanced in terms of the points of view represented," and prohibits them from being "inappropriately influenced by the appointing authority or by any special interest." *Id.* §§ 5(b)(2), (3), and (c).

The Supreme Court has recognized that, in enacting the FACA, Congress did not intend to "intrude on a political party's freedom to conduct its affairs as it chooses." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453 (1989) (citation omitted). But the language the enactors chose illustrates the FACA's clear application to "committees advising the President that were . . . 'established or utilized' by" the President. *Id.* at 459. Further "[a]pplication of FACA depends on who is a member of a committee and who is not." *In re: Richard B. Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).

Multiple press reports describe the advisory committee President Trump assembled to give him recommendations for Supreme Court nominees to fill the existing vacancy as including both Leonard Leo Jr. of the Federalist Society and Jim DeMint of the Heritage Foundation.¹ Mr.

¹ See, e.g., Peter Baker, *Supreme Court Nomination Will Come on Tuesday, Trump Says*, *New York Times*, Jan. 30, 2017 (available at https://www.nytimes.com/2017/01/30/us/politics/trump-supreme-court-nominee.html?_r=2); Bill Mears, *Trump Set to Make Supreme Court Choice This Week, Short List Down to Three*, *Fox News*, Jan. 24, 2017 (available at <http://www.foxnews.com/politics/2017/01/24/trump-set-to-make-supreme-court-choice-this-week->

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Leo in particular has been described as “one of Trump’s top advisers in the Supreme Court search,”² and reportedly “has continued to meet with the president throughout the process.”³ Other members of the president’s advisory team include “Mike Pence, Steve Bannon, Jeff Sessions, and White House counsel Don McGahn.”⁴ The president also consulted with a number of other outside individuals who apparently were not part of his “advisory team.” *Id.* If these reports are accurate, the president’s use of a committee composed of federal employees and non-governmental members to solicit advice on Supreme Court nominees implicates the FACA.⁵ Yet the committee has failed to comply with any of the FACA’s requirements, leaving the public in the dark about the nature of the advice the committee has rendered and even whether the committee is “fairly balanced” as the statute requires.

In nominating a Supreme Court justice, the president exercises one of his most consequential powers. Public interest in the process he uses and the nominee he chooses is at an apex. When the president opts to include outside individuals in that process as part of an advisory committee, as President Trump appears to have done here, the public is entitled to know how the committee conducted its business and the recommendations it provided the president. Because the White House has to date denied the public’s right to this information, we respectfully request that you ensure that the president’s advisory committee comply immediately and fully with its statutory requirements under the FACA.

Sincerely,



Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics in Washington

[several-judges-on-short-list.html](#)); Greg Stohr, [Trump Fulfills Conservative Wishes With High Court Shortlist](#), *Bloomberg.com*, Jan. 26, 2017 (available at <https://www.bloomberg.com/politics/articles/2017-01-26/trump-fulfills-conservative-wishes-with-supreme-court-shortlist>).

² Eliana Johnson and Shane Goldmacher, [Trump’s Down to 3 in Supreme Court Search](#), *Politico*, Jan. 24, 2017 (available at <http://www.politico.com/story/2017/01/trump-supreme-court-senators-234102>).

³ Maggie Stevens, [How Trump is Approaching his SCOTUS Selection](#), *Politico*, Jan. 27, 2017 (available at <http://www.politico.com/blogs/donald-trump-administration/2017/01/how-trump-is-approaching-his-scotus-selection-234272>).

⁴ Jonathan Swan, [Inside Trump’s Supreme Court Pick](#), *Axios*, Jan. 31, 2017 (available at https://www.axios.com/inside-trumps-scotus-pick-2226499240.html?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam).

⁵ At least one other press report has identified Sen. Jeff Sessions, Mr. Trump’s choice for attorney general, as also offering advice. Stevens, *Politico*, Jan. 27, 2017.