

SCIENCE ADVICE

Academy Seeks Government Help to Fight Openness Law

A minor squabble between animal-rights activists and federal officials over a study on the care and use of lab animals has turned into a major debate over how the country's most prestigious scientific advisory body should operate. Next month, the U.S. Supreme Court will be asked to decide whether the National Research Council (NRC)—the operating arm of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine—should abide by government openness rules. The outcome could have profound implications for the future of the academy complex.

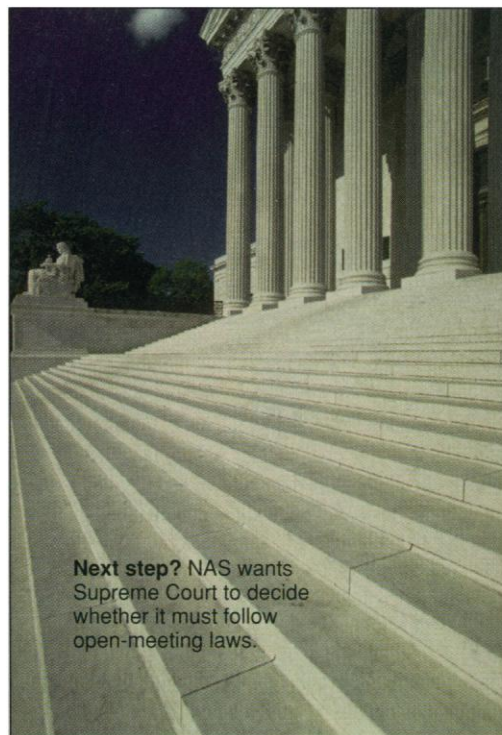
The case pits the Animal Legal Defense Fund against the Department of Health and Human Services and the academy. The animal-rights activists maintain that an NRC panel that updated an animal-care guide under contract to the department should have conducted its work under the Federal Advisory Committee Act (FACA) of 1972. The act stipulates that government advisory panels must meet in open session and make their documents public, and that their membership should be selected to represent a balance of views on any particular issue. Some government officials and the academy maintain that the law would give agencies undue influence over administrative aspects of NRC committees, something they insist legislators did not intend.

Last year, a lower court agreed with the government and the academy, but in January the U.S. Court of Appeals for the District of Columbia overturned that decision. Its ruling shook the council's leadership, which is now lobbying the Administration to join in its request for a review by the Supreme Court. Petitions must be submitted by 4 August.

The Justice Department is considering the academy's request. Its decision could have a critical impact on the prospects for the case, say parties on both sides. "If the government does file a petition, it seems likely the Supreme Court would take the case," says Lucinda Sikes, an attorney at Public Citizen, a nonprofit organization that supports increased government openness. If the government stays on the sidelines, say observers, it is a toss-up whether the court would consider the case.

At least eight agencies, including NASA, the National Science Foundation, and the

Departments of Energy and Health and Human Services, have written to the Justice Department urging it to continue the fight, says William Colglazier, the NRC's executive secretary. Officials in these agencies argue that they would lose an important source of independent advice if the council



were forced to follow FACA. Under the current system, agencies fund the NRC but do not have direct control over the membership, schedule, or logistics of a panel. Academy supporters argue that the council's neutrality would be compromised under FACA as agencies became more involved. NRC critics, however, maintain that it is hard to know the degree of independence that now exists when the NRC selects committee members and discusses panel recommendations in secret.

The Justice Department may be reluctant to push this case, say observers. One reason is that having the Supreme Court take the case could reopen broad legal issues involving FACA that the government might prefer to leave closed. That includes the 1989 decision—*Public Citizen v. Department of Justice*—in which the high court decided that the American Bar Association need not abide by FACA when advising the

president on judicial nominations. "If the Supreme Court takes this, it could open up a Pandora's box for Justice," says Eric Glitzenstein, a lawyer with Meyer & Glitzenstein in Washington, D.C., which is representing the Animal Legal Defense Fund. He also argued on behalf of Public Citizen in the 1989 case.

Of course, a decision by the Supreme Court to review the matter would only be the first step in overturning the appellate ruling. "The academy has a tough row to hoe" in making its case, insists Glitzenstein. He notes that the Public Citizen decision repeatedly cites the academy as an example of the kind of quasi-public organization that should abide by FACA, and he says House and Senate reports even mention the academy as falling under the proposed law. But Richard Meserve, a lawyer with the D.C. firm of Covington & Burling representing the academy, points out that the 1989 case did not deal directly with the academy and did not offer a clear definition of a quasi-public organization. Meserve also points to floor speeches and other records that suggest Congress did not want the academy to be ruled by FACA.

Meserve also argues that the current court's tendency to follow a literal interpretation of the law would favor the academy. FACA applies to groups "utilized" by the government—that is, groups over which the government exerts management and control. Meserve says that because the academy oversees individual committees, they are "insulated" from being utilized by the government in the way the law states. "The fact that federal money pays for the work is insufficient" to apply FACA to the NRC, he maintains. "[The panel] must be managed and controlled by the agency itself." But Glitzenstein counters that a strict reading of the law could work the other way: Congress failed to exempt the academy from the law as it did with other groups and, therefore, FACA should apply to its activities, too.

The Supreme Court is likely to decide shortly after it returns in October whether to take the case; if it does, a ruling is anticipated sometime before July 1998. If the academy loses or the court refuses to hear the case, the academy may try to seek legislation exempting it from FACA. Such a request would face an uphill battle, say NRC sources and congressional staffers, given the relative obscurity of the issue in the minds of most members. In the meantime, academy officials are biding their time as the wheels of justice slowly turn.

—Andrew Lawler