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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	[Draft] [Judicial Selection Process] [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Martha W. Barnett - From: Alberto R. Gonzales	2	03/21/2001	
002	Letter	[Draft] [Judicial Selection Process] [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Patrick J. Leahy et al - From: Alberto R. Gonzales	1	03/22/2001	
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COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
ABA (American Bar Association) [2]

FRC ID:
9631

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(1) National security classified information [(b)(1) of the FOIA]
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b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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This document was prepared on Thursday, September 11, 2025

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SUPERSEDED

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001	Letter	[Draft] [Judicial Selection Process] - To: Martha W. Barnett - From: Alberto R. Gonzales	2	03/21/2001	P5;
002	Letter	[Draft] [Judicial Selection Process] - To: Patrick J. Leahy et al - From: Alberto R. Gonzales	1	03/22/2001	P5;
003	Letter	[Draft] [Judicial Selection Process] - To: Martha W. Barnett - From: Alberto R. Gonzales	1	04/09/2001	P5;

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ABA file - FN 4

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*302 U.S. App. D.C. 208; 997 F.2d 898, *;*
*1993 U.S. App. LEXIS 14831, **; 21 Media L. Rep. 1705*

Association of American Physicians and Surgeons, Inc., et al., Appellees v. Hillary Rodham Clinton, et al., Appellants Association of American Physicians and Surgeons, Inc., et al., Appellants v. Hillary Rodham Clinton, et al., Appellees

No. 93-5086, No. 93-5092

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

302 U.S. App. D.C. 208; 997 F.2d 898; 1993 U.S. App. LEXIS 14831; 21 Media L. Rep. 1705

April 30, 1993, Argued
June 22, 1993, Decided

PRIOR HISTORY: [1]** Appeals from the United States District Court for the District of Columbia (93cv0399).

CORE TERMS: task force, advice, working group, spouse, advisory committee, full-time, duty, presidential, advisory committees, appointed, composed, federal government, adviser, consultant, confidentiality, appendix, utilized, advise, recommendation, recommend, appointment, discovery, ethics, advisory, staff, cabinet, government employees, statutory construction, anti-nepotism, exemption

COUNSEL: Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellants/cross-appellees Hillary Rodham Clinton, et al. With him on the briefs were J. Ramsey Johnson, United States Attorney, Stuart E. Schiffer, Acting Assistant Attorney General, Robert E. Kopp, Patricia A. Millett, and Malcolm L. Stewart, Attorneys, U.S. Department of Justice. Stuart M. Gerson, Attorney, U.S. Department of Justice, entered an appearance for appellants/cross-appellees.

Kent Masterson Brown argued the cause for appellees/cross-appellants Association of American Physicians and Surgeons, Inc., et al. With him on the briefs were Frank M. Northam and Alan P. Dye.

Steven R. Ross, General Counsel, and Charles Tiefer, Deputy General Counsel, Office of General Counsel, United States House of Representatives, filed the brief for amicus curiae Speaker and Bipartisan Leadership Group.

Ronald A. Zumbrun, Anthony T. Caso, and Robin L. Rivett filed the brief for amici curiae Pacific Legal Foundation and the National Taxpayers Union.

Jane E. Kirtley, **[**2]** J. Laurent Scharff, James E. Grossberg, Richard M. Schmidt, Jr., Allan R. Adler, Bruce W. Sanford, Henry S. Hoberman, and Whitney M. Adams filed the brief for amici curiae Reporters Committee for Freedom of the Press, et al.

Joseph Gregory Sidak filed the brief for amicus curiae J. Gregory Sidak.

Samuel B. Wallace, IV, filed the brief for amicus curiae Samuel B. Wallace, IV.

JUDGES: Before: Silberman, Buckley, and Williams, Circuit Judges. Opinion for the Court filed by Circuit Judge Silberman. Opinion concurring in the judgment filed by Circuit Judge

Buckley.

OPINIONBY: SILBERMAN

OPINION: [*900] Silberman, *Circuit Judge:* This expedited appeal presents the question whether the President's Task Force on National Health Care Reform ("Task Force") and its working group are advisory committees for purposes of the Federal Advisory Committee Act ("FACA"). If they are, we are asked to decide whether FACA unconstitutionally encroaches on the President's Article II executive powers. We hold that the Task Force is not an advisory group subject to FACA, but remand to the district court for further proceedings to determine the status of the working group.

I.

On January 25, 1993, President Clinton **[**3]** established the President's Task Force on National Health Care Reform. The President named his wife, Hillary Rodham Clinton, as the chairman of the Task Force, and appointed as its other members the Secretaries of the Treasury, Defense, Veterans Affairs, Health and Human Services, Labor, and Commerce Departments, the Director of the Office of Management and Budget, the chairman of the Council of Economic Advisers, **[*901]** and three White House advisers. President Clinton charged this body with the task of "listening to all parties" and then "preparing health care reform legislation to be submitted to Congress within 100 days of our taking office." 29 Weekly Comp. Pres. Doc. 96 (Feb. 1, 1993).

On the same day, the President also announced the formation of an interdepartmental working group. According to the government, the working group was responsible for gathering information and developing various options on health care reform. It was composed of three types of members: (i) approximately 300 permanent federal government employees drawn from the Executive Office of the President, the federal agencies, and Congress; (ii) about 40 "special government employees" hired by the agencies and the **[**4]** Executive Office of the President for a limited duration; and (iii) an unknown number of "consultants" who, it is asserted, "attend working group meetings on an intermittent basis." Ira Magaziner, the senior adviser to the President for Policy Development, headed the working group and was the only member of the Task Force who attended the group's meetings.

According to the government, the working group had no contact with the President. In addition to gathering information, the working group developed alternative health care policies for use by the Task Force. But only the Task Force, it was contemplated, would directly advise and present recommendations to the President. On March 29, 1993, the Task Force held one public hearing where interested parties could present comments on health care reform. *See* 58 FR 16,264 (1993). However, the Task Force met behind closed doors at least 20 times in April and May to "formulate" and "deliberate" on its advice to the President. As the government publicly has announced, in those meetings "the Task Force reviewed materials it received from the interdepartmental working group; formulated proposals and options **[**5]** for health care reform; and presented those proposals and options to the President." Statement of the White House Press Secretary (June 4, 1993). In accordance with its charter, the Task Force then terminated its operations on May 30. n1 All of the working group's meetings remained closed to the public.

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n1 The Task Force's "termination" does not render this case moot. As both parties, in anticipation of this event, agreed before oral argument, this case still presents a live controversy concerning the availability of Task Force and working group documents, which the appellees sought below pursuant to FACA.

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Appellees are the Association of American Physicians and Surgeons, which represents physicians; the American Council for Health Care Reform, which represents health care consumers; and the National Legal & Policy Center, which seeks to promote ethics in government. They sought access to the Task Force's meetings under the Federal Advisory Committee Act. Pub. L. No. 92-463, 86 Stat. 770 (1972) (reproduced at 5 U.S.C. App. 1 **[**6]** (1988)). Their efforts were rebuffed by the Counsel to the President, who informed them that the Task Force was not an advisory committee subject to FACA.

Appellees thereupon brought suit against the Task Force in district court. They claimed that the Task Force was a FACA committee because it was chaired by Mrs. Clinton, a private citizen, and that the Task Force had violated FACA by failing to file an advisory committee charter. They further asserted that FACA permitted them to attend all of the meetings of the Task Force and of any of its subgroups. Appellees sought a temporary restraining order and a preliminary injunction halting the operation of the Task Force until it complied with FACA and allowed the public to attend its meetings. The government responded that the Task Force was exempt from FACA because all of its members--including Mrs. Clinton--were government officers and employees. The government alternatively challenged any application of FACA to the Task Force as an unconstitutional infringement on the President's executive power.

In a memorandum opinion issued on March 10, 1993, the district court granted in part appellees' motion for a preliminary injunction. The **[**7]** court determined that appellees had a substantial likelihood of success on the merits. Mrs. Clinton, the court held, was not an officer or employee of the federal government merely by virtue of her status as "First Lady." Therefore, the Task Force **[*902]** could not qualify for an exemption from FACA as an advisory group composed solely of "full-time officers or employees" of the government. *See Association of Am. Physicians & Surgeons v. Hillary Rodham Clinton,* Civil Action No. 93-0399, Mem. Op. at 16-17 (D.D.C. March 10, 1993) ("Mem. Op."); *see also* 5 U.S.C. App. 1 § 3(2)(iii). The court, however, agreed with the government that FACA encroached on the President's constitutional authority to receive confidential advice for the purpose of recommending legislation. But the court thought that executive prerogatives were implicated only when the Task Force was advising the President, not when it engaged in information-gathering. The district court accordingly granted a preliminary injunction requiring the Task Force to meet all the requirements of FACA except when it met to formulate advice or recommendations for the President.

As to the working group, **[**8]** the district court concluded that appellees had failed to state a claim under Fed. R. Civ. P. 12(b)(6) that the subordinate body was covered by FACA. Relying on *National Anti-Hunger Coalition v. Executive Committee,* 557 F. Supp. 524 (D.D.C.), *aff'd,* 229 U.S. App. D.C. 143, 711 F.2d 1071 (D.C. Cir. 1983), the court held that the working group was not an advisory committee because it was engaged in fact-gathering and did not provide advice directly to the President. The court denied appellees motion for expedited discovery concerning the actions and status of the working group, but nevertheless determined that there were no issues of material fact and that it could have dismissed on summary judgment grounds as well. Mem. Op. at 15 n.11.

The government filed this appeal on March 22, 1993. Appellees subsequently filed a cross-appeal. We have jurisdiction to review a grant of a preliminary injunction under 28 U.S.C. § 1292(a), and we expedited the appeal due to the short time frame within which the Task Force and the working group operated.

II.

The government, as appellant and cross-appellee, and the plaintiffs **[**9]** below, as appellees and cross-appellants, together challenge much of the district court's ruling. The government takes issue primarily with the court's determination that Mrs. Clinton is not an "officer or employee" for purposes of section 3(2) of FACA. It is claimed that as the "First

Lady," Mrs. Clinton is the functional equivalent of a government officer or employee, that the Task Force, therefore, is composed solely of full-time government officials--indeed officers drawn from among the President's closest official advisers--and that thus the Task Force is exempt from FACA. In the alternative, the government reiterates its claim that FACA cannot be applied constitutionally to the Task Force. We are urged, in that regard, to discard the distinction drawn by the district court between the information-gathering function of the Task Force and its role in advising the President. As would be expected, the government is content with the district court's ruling concerning the status of the working group, and it argues that the district court's dismissal of appellees' claim is an unappealable interlocutory order.

Appellees, on the other hand, support the district court's determination **[**10]** that FACA covers the Task Force because Mrs. Clinton is not an officer or employee of the federal government. However, they challenge the court's ruling as to the status of the working group, which they contend is also covered by FACA. They further maintain that applying FACA to either body raises no serious constitutional issues, and, in any event, that the district court prematurely decided the constitutional issue. Appellees also contend that the court should have permitted discovery, which would have shown more clearly the FACA status of both groups, and that a straightforward application of FACA's procedural requirements would not curtail the President's constitutional powers.

We first consider the status of the Task Force and then turn to the working group issues.

III.

Congress passed FACA in 1972 to control the growth and operation of the "numerous committees, boards, commissions, councils, **[*903]** and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government." 5 U.S.C. App. 1, § 2(a). As Congress put it, FACA's purpose was: to eliminate unnecessary advisory committees; to limit the **[**11]** formation of new committees to the minimum number necessary; to keep the function of the committees advisory in nature; to hold the committees to uniform standards and procedures; and to keep Congress and the public informed of their activities. *See id.* § 2(b)(1)-(6). The statute orders agency heads to promulgate guidelines and regulations to govern the administration and operations of advisory committees. *See id.* § 8.

FACA places a number of restrictions on the advisory committees themselves. Before it can meet or take any action, a committee first must file a detailed charter, *see id.* § 9(c). The committee must give advance notice in the Federal Register of any meetings, *see id.* § 10(a)(2); and it must hold all meetings in public, *see id.* § 10(a)(1). Under section 10, the committee must keep detailed minutes of each meeting, *see id.* § 10(c), and make the records available--along with any reports, records, or other documents used by the committee--to the public, provided they do not fall within the exemptions of the Freedom of Information Act (FOIA), *see id.* § 10(b). Under section 5, an advisory committee established by the President or by legislation **[**12]** must be "fairly balanced in terms of the points of view represented," *id.* § 5(b)(2). n2 The Act also requires that precautions be taken to ensure that the advice and recommendations of the committee "will not be inappropriately influenced by the appointing authority or by any special interest." *Id.* § 5(b)(3).

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n2 FACA's "balanced viewpoint" requirement may not be justiciable, however, because it does not provide a standard that is susceptible of *judicial* application. *See Public Citizen v. National Advisory Comm.*, 885 F.2d 419, 426 (D.C. Cir. 1989) (Silberman, J., concurring).

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The Act's definition of an "advisory" committee is apparently rather sweeping. Section 3

states:

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereinafter in this paragraph referred to as "committee"), which is ... (B) established or utilized by the President ... in **[**13]** the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.

Id. § 3(2). The government does not contend that the Task Force was not "established" or "utilized" by the President in the interest of obtaining advice or recommendations. FACA's definition contains one important proviso, however. Section 3(2)(iii) exempts "any committee which is composed wholly of full-time officers or employees of the Federal Government." And, according to the government, the Task Force was not only wholly composed of government officers, it was actually (like the Task Force we encountered in *Meyer v. Bush,* 299 U.S. App. D.C. 86, 981 F.2d 1288 (D.C. Cir. 1993)) a partial, yet somewhat augmented, cabinet grouping. Thus, subjecting the Task Force to FACA would fall outside Congress' purpose of regulating the growth and use of committees composed of outsiders called in to advise government officials. Appellees would have no quarrel with the government's characterization of the Task Force, except for the description of its chairman, Mrs. Clinton. Appellees contend that she is not an officer or employee of the federal government **[**14]** despite her traditional and ceremonial status as "First Lady." This is not just a technicality according to appellees; she is statutorily barred from appointment as an officer because of the Anti-Nepotism Act. *See* 5 U.S.C. § 3110(b).

The district court, finding no definition of officer or employee of the federal government in FACA itself, quite reasonably turned to Title 5 of the U.S. Code to find a definition. *See* 5 U.S.C. §§ 2104 & 2105. An officer or employee according to those sections must be: (i) appointed to the civil service; (ii) engaged in the performance of a federal function; and (iii) subject to supervision by a higher elected or appointed official. As the district court held, and as appellees correctly point out, Mrs. Clinton has not been appointed to the civil service. Reading these definitions **[*904]** *in pari materia* with FACA would seem to suggest that the Task Force is not exempt.

Nevertheless, it is true, as the government insists, that Congress did not adopt explicitly all of Title 5's definitions in FACA. FACA is not part of Title 5, which was enacted six years before FACA's passage, **[**15]** *see* Pub. L. No. 89-554, 80 Stat. 378 (1966), but, instead is only temporarily housed there as an appendix. Typically, when Congress wishes to add a statute to Title 5, it amends the Title. *See, e.g.,* Government in the Sunshine Act, § 3(a), Pub. L. No. 92-409, 90 Stat. 1241 (1976); Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974). It did not do so when it passed FACA, but at that time it specifically did adopt certain Title 5 definitions. For example, adjacent to the definition of an advisory committee is FACA's definition of an agency, which incorporates the definition in Title 5: " "agency' has the same meaning as in section 551(1) of title 5, United States Code." 5 U.S.C. App. 1, § 3(3). But Congress actually deleted from the Senate version of FACA definitions of "officer" and "employee" that paralleled those of sections 2104 and 2105. *See* H.R. Rep. No. 1403, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3508, 3509. And the Code contains another definition of a federal officer which tends to support the government's position. Title 1 provides that a federal officer "includes any person authorized **[**16]** by law to perform the duties of the office." 1 U.S.C. § 1. That definition could cover a situation in which Congress authorizes someone who is not formally an officer (such as the President's spouse) to perform federal duties. Even if, as our concurring colleague argues, Mrs. Clinton does not occupy an "office" specifically created by Congress, she could still be regarded as an "employee."

The government would have us conclude that the traditional, if informal, status and "duties" of the President's wife as "First Lady" gives her *de facto* officer or employee status. The government invokes what it describes as "a longstanding tradition of public service" by First Ladies--including, we are told, Sarah Polk, Edith Wilson, Eleanor Roosevelt, Rosalynn Carter, and Nancy Reagan--who have acted (albeit in the background) as advisers and personal representatives of their husbands. We are not confident that this traditional perception of the President's wife, as a virtual extension of her husband, is widely held today. As this very case suggests, it may not even be a fair portrayal of Mrs. Clinton, who certainly is performing more openly than is typical **[**17]** of a First Lady. Indeed, in the future we may see a male presidential spouse, which could make the term "First Lady" anachronistic.

More persuasive, however, is the government's argument that *Congress* itself *has* recognized that the President's spouse acts as the functional equivalent of an assistant to the President. The legislative authorization to the President to pay his White House aides includes the following provision:

> Assistance and services authorized pursuant to this section to the President are authorized to be provided to *the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities.* If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President's family whom the President designates.

3 U.S.C. § 105(e) (emphasis added). Of course, even without section 105(e), the President presumably could draw upon his spouse for assistance. The statute's importance, rather, lies in its assistance in helping us interpret the ambiguous terms of FACA *in pari materia.* **[**18]**

It may well be, as appellees argue, that many in Congress had in mind "ceremonial duties," but we do not think the presidency can be so easily divided between its substantive political and ceremonial functions. In any event, section 105(e) neither limits the particular kind of "assistance" rendered to the President, nor circumscribes the types of presidential duties and responsibilities that are to be aided. We see no reason why a President could not use his or her spouse to carry out a task that the President might delegate to one of his White House aides. It is reasonable, therefore, to construe section **[*905]** 105(e) as treating the presidential spouse as a de facto officer or employee. Otherwise, if the President's spouse routinely attended, and participated in, cabinet meetings, he or she would convert an all-government group, established or used by the President, into a FACA advisory committee.

Pursuant to this section, moreover, the President's spouse is supported by a substantial staff who are undeniably full-time government officers or employees. Therefore, the President could have--as the government points out--easily designated Mrs. Clinton's chief of staff as a member of the **[**19]** Task Force, perhaps even as the chairman, who would then be expected to report to Mrs. Clinton. It would seem quite anomalous to conclude that FACA would apply if the President's spouse were a member of the committee, but not if her chief of staff were the actual member.

The President's implicit authority to enlist his spouse in aid of the discharge of his federal duties also undermines appellees' claim that treating the President's spouse as an officer or employee would violate the anti-nepotism provisions of 5 U.S.C. § 3110. That section prohibits any "public official" from appointing or employing a relative, such as a spouse, "in the agency in which he is serving or over which he exercises jurisdiction or control." *Id.* § 3110(b). Although section3110(a)(1)(B) defines agency as "an executive agency," we doubt

that Congress intended to include the White House or the Executive Office of the President. *Cf. Franklin v. Massachusetts,* 120 L. Ed. 2d 636, 112 S. Ct. 2767, 2775 (1992) (holding that President is not "agency" for purposes of Administrative Procedure Act); *Meyer,* 981 F.2d at 1298 (President's **[**20]** advisers are not "agency" under FOIA); *Armstrong v. Bush,* 288 U.S. App. D.C. 38, 924 F.2d 282, 289 (D.C. Cir. 1991) (President not APA "agency"). So, for example, a President would be barred from appointing his brother as Attorney General, but perhaps not as a White House special assistant. Be that as it may, it is not reasonable to interpret that provision to bring it into conflict with Congress' recognition of (and apparent authorization for) the President's delegation of duties to his spouse. The anti-nepotism statute, moreover, may well bar appointment only to paid positions in government. *See* 5 U.S.C. § 3110(c). Thus, even if it would prevent the President from putting his spouse on the federal payroll, it does not preclude his spouse from aiding the President in the performance of his duties.

In sum, the government musters a strong argument in support of its interpretation of "full-time officer or employee" under FACA as including the President's spouse--whether or not a "First Lady." But it is by no means overwhelming. Indeed, the government is uncomfortable at having to choose whether Mrs. Clinton should be thought of as an officer **[**21]** or employee. The government's discomfort is quite understandable. Mrs. Clinton has not in any sense been appointed or elected to office, and, assuming she is an officer under Title 1, due to the duties delegated to her under 3 U.S.C. § 105(e), how, one might ask, could she be removed? All officers and employees of the United States, except the Vice President, can be removed, at least for cause, through the ultimate authority of the President. We suppose the President could withdraw any or all authority delegated to his spouse, but then he would be left without the official assistance of any family member. The very provision authorizing the delegation to the spouse provides for a delegation to another member of the President's family only "if the President *does not have a spouse.*" 3 U.S.C. § 105(e) (emphasis added). That language seems to present the President with rather extreme alternatives.

What is more, section 105(e) would seem to apply whether or not the President's spouse held another job that an officer or employee of the government could not possibly hold. Suppose, for instance, that the President's **[**22]** spouse was counsel to a major law firm and spent a good portion of his or her time practicing law. Presumably, the spouse would still be authorized to provide assistance to the President under section 105(e) and would, thereby, also be an officer or employee of the government. The government suggests that this hypothetical does not create a problem under FACA, because a spouse in that situation, whether or not an **[*906]** officer or employee, would not be full-time and so would not qualify for the exemption. But that answer may be too facile. How would we determine how much or what kind of outside activity was inconsistent with full-time status?

Suffice it to say that the question whether Mrs. Clinton's membership on the Task Force triggers FACA is not an easy one. n3 The government argues, therefore, that we should construe the statute not to apply here, because otherwise we would face a serious constitutional issue. The Supreme Court has noted many times that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." **[**23]** *Public Citizen v. Department of Justice,* 491 U.S. 440, 466, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575 (1988)). Only a few years ago the Court employed that very maxim of statutory construction to avoid applying FACA to the ABA committee that advised the Attorney General on the qualifications of prospective federal judicial nominees. *See id.* The government there argued that applying FACA would impair the effectiveness of the committee's deliberations (by exposing them to public examination), and thus would interfere with the advice that the committee provided to the Attorney General and ultimately, it was assumed, to the President. Such interference would encroach on the President's appointment power--his sole responsibility to nominate federal judges. n4 In order to escape that constitutional question, the Court held that the

ABA committee was not "utilized" by the President because it was established and run by a private organization, even though the Act covers advisory committees established *or* utilized by the executive branch. *See* **[**24]** *id.* at 455-65. The Court adopted, we think it is fair to say, an extremely strained construction of the word "utilized" in order to avoid the constitutional question. The gravity of the constitutional issue was revealed by the three concurring justices who were unable to accept the Court's statutory construction and believed that FACA was unconstitutional as applied to the ABA committee. *Id.* at 467-89 (Kennedy, J., concurring).

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n3 It is not clear how FACA applies if only one member of an advisory committee is not a full-time government officer or employee. How does the government carry out its obligation to ensure that the committee is "fairly" balanced in terms of the points of view represented?

n4 Ironically, the ABA committee's role in advising administrations as to the qualifications of putative judges has over the years become more of an impediment (reflecting certain ABA institutional and, perhaps, political interests) than an aid to Presidents. R. Marcus & S. Torry, *ABA Judicial Evaluation Again Under Fire,* Wash. Post, May 7, 1989, A6; M. Thornton, *The ABA's Judgments on Judges,* Wash. Post, Sept. 25, 1987, A23.

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It is, of course, necessary before considering the maxim of statutory construction to determine whether the government's constitutional argument in this case is a powerful one. In other words, are we truly faced, as the Court thought it was in *Public Citizen,* with a grave question of constitutional law? The government relies primarily on the claim that an explicit presidential power is implicated. Article II of the Constitution provides that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3, cl.1. According to the government, this clause gives the President the sole discretion to decide what measures to propose to Congress, and it leaves no room for congressional interference. To exercise this power, the government claims, the President also must have the constitutional right to receive confidential advice on proposed legislation.

Under the government's theory, FACA would interfere with the President's unbounded discretion to propose legislation. President Clinton formed the Task Force specifically to recommend **[**26]** legislation dealing with health care reform. FACA's requirement of public meetings would inhibit both **[*907]** candid discussion within the Task Force and its presentation of advice to the President. Challenging the district court's ruling, the government argues that this encroachment occurs regardless of whether the Task Force is engaged in information-gathering or internal deliberation. In either situation, the glare of publicity would inhibit the free flow of frank advice and would handicap the President's ability to develop legislation.

Appellees point out that the concurring opinion in *Public Citizen* commanded the votes of only three justices and rely, instead, on the Court's opinion in *Morrison v. Olson,* 487 U.S. 654, 101 L. Ed. 2d 569, 108 S. Ct. 2597 (1988). n5 *Morrison* upheld the Ethics in Government Act's creation of an independent counsel because it did not prevent the President "from accomplishing [his] constitutionally assigned functions," *id.* at 695 (quoting *Nixon v. Administrator of General Services,* 433 U.S. 425, 443, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977)), even though the counsel was largely immune from the executive branch's operational control **[**27]** (she was appointed by a panel of judges and was removable only for good cause). Applying FACA to the Task Force, according to appellees, has a rather minor impact on the institution of the presidency compared to the much greater encroachment on the President's core executive function sanctioned in *Morrison.*

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n5 Justice Kennedy, who was recused in *Morrison,* was joined by Chief Justice Rehnquist and Justice O'Connor in *Public Citizen.* Justice Scalia, who dissented in *Morrison,* was, in turn, recused in *Public Citizen.*

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Nevertheless, the government maintains that *Morrison* is not directly on point. Picking up on Justice Kennedy's concurrence in *Public Citizen,* the government contends that the *Morrison* Court's imprecise balancing test, which is apparently less favorable to the President, does not apply when a textual grant of presidential authority is implicated. In distinguishing *Morrison,* Justice Kennedy said:

> Thus, for example, the relevant aspect of our decision in *Morrison* involved **[**28]** the President's power to remove Executive Officers, a power we had recognized is not conferred by any explicit provision of the text of the Constitution (as is the appointment power) but rather is inferred to be a necessary part of the grant of the "Executive Power."

Public Citizen, 491 U.S. at 484 (Kennedy, J., concurring). n6 But because *Public Citizen* involved the President's textually granted power to appoint federal judges, the concurrence would have struck FACA down:

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n6 *But see Bowsher v. Synar,* 478 U.S. 714, 721-27, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) (removal power more important than appointment power in controlling subordinate officials).

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> Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself.

Id. at 486. The government argues that here, as in *Public Citizen,* but unlike in *Morrison,* we have an explicit textual delegation to the President **[**29]** to propose legislation.

We perceive several weaknesses in the government's position. First, the government ignores the *Morrison* Court's consideration of the President's Article II, section 3 responsibility to "take Care that the Laws be faithfully executed." *See Morrison,* 487 U.S. 654 at 692-93, 101 L. Ed. 2d 569, 108 S. Ct. 2597 . The Court specifically recognized that the statute before it encroached upon or burdened that responsibility, but concluded that the burden was not great enough to be unconstitutional.

> This is not a case in which the power to remove an executive official has been *completely* stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws.... We do not think this limitation as it presently stands *sufficiently* deprives the President of control over the independent counsel to interfere *impermissibly* with his constitutional obligations

> to ensure the faithful execution of the laws.

Id. (emphasis added) (footnote omitted). *Morrison v. Olson,* thus, cannot be easily disposed of in accordance with the government's **[*908]** (and Justice Kennedy's) suggested distinction.

The President's constitutional **[**30]** duty to take care that the laws be faithfully executed, moreover, seems far greater in importance than his authority to recommend legislation. The Framers intended the Take Care Clause to be an affirmative duty on the President and the President alone. In contrast, the Recommendation Clause is less an obligation than a right. The President has the undisputed authority to recommend legislation, but he need not exercise that authority with respect to any particular subject or, for that matter, any subject. n7 Only the President can ensure that the laws be faithfully executed, but anyone in the country can propose legislation.

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n7 To be sure, during the Constitutional Convention in Philadelphia, the Framers changed the language of the clause from "may recommend" to "*shall* recommend." As James Madison recorded in his notes of the convention for August 24, 1787:

> On motion of Mr. Govr Morris, "he may" was struck out, & "and" inserted before "recommend" in the clause 2d. sect 2d art: X in order to make it the duty of the President to recommend, & thence prevent umbrage or cavil at his doing it.

J. Madison, Notes of Debates in the Federal Convention of 1787, 464 (G. Hunt & J. Scott, eds. 1987). Gouverneur Morris' amendment suggests that the clause was intended to squelch any congressional objections to the President's *right* to recommend legislation--hence the prevention of "umbrage or cavil." *See* J. Sidak, *The Recommendation Clause,* 77 Geo. L.J. 2079, 2082 (1989).

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The government's focus on the Recommendation Clause seems somewhat artificial. Discussions on policy--whether they take place in executive branch groups or in pure FACA advisory committees--to some extent always implicate proposed legislation. Whenever an executive branch group considers policy initiatives, it discusses interchangeably new legislation, executive orders, or other administrative directives. Thus, virtually anytime an advisory group meets to discuss a problem, it will implicate the Recommendation Clause, from which all executive branch authority to recommend legislation derives. Accordingly, if the application of FACA to groups advising the President or anyone else in the executive branch were constitutionally problematic, insofar as those groups were advising on proposed legislation, FACA would be problematic with regard to virtually all policy advice. Under that reasoning FACA would be constitutionally suspect on its face--an argument the government declined to make.

We do think that the government's alternative, albeit implicit, argument is more persuasive. Application of FACA to the Task Force clearly would interfere with the President's capacity to solicit direct **[**32]** advice on *any* subject related to his duties from a group of private citizens, separate from or together with his closest governmental associates. That advice might be sought on a broad range of issues in an informal or formal fashion. Presidents have created advisory groups composed of private citizens (sometimes in conjunction with government officials) to meet periodically and advise them (hence the phrase "kitchen

cabinets") on matters such as the conduct of a war. n8 Presidents have even created formal "cabinet committees" composed in part of private citizens. n9 This case is no different. Here, the **[*909]** President has formed a committee of his closest advisers--cabinet secretaries, White House advisers, and his wife--to advise him on a domestic issue he considers of the utmost priority.

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n8 For example, President Johnson often sought advice from Clark Clifford and Justice Fortas, "two old and trusted friends from outside the Executive Branch," along with government officials on matters concerning the Vietnam War. *See, e.g.,* L. Johnson, The Vantage Point: Perspectives of the Presidency 1963-1969 at 235-37 (1971) **[**33]**

n9 President Ford, in 1975, convened a "cabinet committee" composed of the Secretary of State, the Secretary of Commerce, the Secretary of Labor, the President of the AFL-CIO, and the President of the Chamber of Commerce to formulate the government's policy toward the International Labor Organization. President Carter continued the same body. *See, e.g., Committee Fails to Agree on U.S. ILO Membership,* Wash. Post, Oct. 13, 1977, A24. Neither President apparently acknowledged FACA's application. *See, e.g.,* General Services Administration, Federal Advisory Committees: Fourth Annual Report of the President Covering Calendar Year 1975 at 54-55 (1976) (no mention of ILO committee in list of presidential advisory committees); *see also* General Services Administration, Federal Advisory Committees: Fifth Annual Report of the President Covering Calendar Year 1976 at 55-56 (1977) (same). In 1980, however, President Carter continued that structure, but explicitly recognized FACA's coverage (after the issue that gave rise to the committee--whether the United States should withdraw from the ILO--had been resolved). *See* Exec. Order No. 12,216, 45 FR 41,619 (1980).

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Applying FACA to the Task Force does not raise constitutional problems simply because the Task Force is involved in proposing legislation. Instead, difficulties arise because of the Task Force's operational proximity to the President himself--that is, because the Task Force provides advice and recommendations directly to the President. The Supreme Court has recognized that a President has a great need to receive advice confidentially:

> [There is a] valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.

United States v. Nixon, 418 U.S. 683, 705-06, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) **[**35]** (footnotes omitted); *see also Nixon v. Administrator of Gen. Servs.,* 433 U.S. 425, 441-49 (1977). *Nixon v. Administrator of General Services* further explains that the President is entitled to confidentiality in the performance of his "responsibilities" and "his office," and " "in the process of shaping policies and making decisions.' " 433 U.S. at 449 (quoting *United States v. Nixon,* 418 U.S. at 708). Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize

his advisers and seek advice from them as he wishes. In *Meyer v. Bush,* 981 F.2d at 1293-97, for example, we held that the President could create a Task Force composed of cabinet secretaries and other close advisers to study regulatory reform without having to comply with FOIA. In this regard, FACA's requirement that an advisory committee must be "fairly balanced in terms of the view represented" would--if enforceable and applied to groups of presidential advisers--restrict the President's ability to seek **[**36]** advice from whom and in the fashion he chooses.

The ability to discuss matters confidentially is surely an important condition to the exercise of executive power. Without it, the President's performance of any of his duties--textually explicit or implicit in Article II's grant of executive power--would be made more difficult. In designing the Constitution, the Framers vested the executive power in one man for the very reason that he might maintain secrecy in executive operations. As Alexander Hamilton wrote in the Federalist Papers:

> *Decision, activity, secrecy, and dispatch* will generally characterise [sic] the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

The Federalist No. 70, at 472 (J. Cooke, ed., 1961) (emphasis added). The Framers thus understood that secrecy was related to the executive's ability to decide and to act quickly--a quality lacking in the government established by the Articles of Confederation. If a President cannot deliberate in confidence, it is hard to imagine how he can decide and act quickly.

This Article II right **[**37]** to confidential communications attaches not only to direct communications with the President, but also to discussions between his senior advisers. Certainly Department Secretaries and White House aides must be able to hold confidential meetings to discuss advice they secretly will render to the President. Congress, in another context, has recognized that the President's **[*910]** right to confidential communications extends to meetings between his top advisers. For example, FOIA, 5 U.S.C. § 552, exempts "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *See Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 156, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1980) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)); *Meyer v. Bush,* 981 F.2d at 1291-92.

A statute interfering with a President's ability to seek advice directly from private citizens as a group, intermixed, or not, with government officials, therefore raises Article II concerns. This is all the more so when the sole ground for asserting that the statute applies is that the **[**38]** President's own spouse, a member of the Task Force, is not a government official. For if the President seeks advice from those closest to him, whether in or out of government, the President's spouse, typically, would be regarded as among those closest advisers.

As we have indicated, we do not place much significance on the government's claim that this sort of interference is qualitatively, in constitutional terms, more troublesome insofar as it relates to advice the President seeks concerning the exercise of an enumerated power. If we were to go on to decide the constitutionality question, we would be obliged to ask whether, in *Morrison v. Olson* terms, this asserted application of FACA "impermissibly" burdens executive power. *Morrison* tells us to balance how much the interference with the President's executive power prevents the President "from accomplishing his constitutionally assigned functions," *Morrison,* 487 U.S. at 695, against the "overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator of Gen. Servs.,* 433 U.S. at 443. We readily confess that this balancing **[**39]** test is not one that, as judges, we can apply with confidence. This is all the more reason to view the constitutional issue soberly. We are

satisfied that the application of FACA to the Task Force seriously burdens executive power. And our reading of *Morrison* does not lead us easily to a conclusion that the burden placed is a permissible one.

The court below correctly recognized the constitutional difficulties that FACA's application to the Task Force created. The court, therefore, ruled the Act partially unconstitutional, insofar as it was applied to the meetings in which the Task Force actually advised the President. When the Task Force was engaged in "information-gathering and information-reporting," however, the court thought that the President's constitutional interests were not so seriously implicated.

We believe it is the Task Force's operational *proximity* to the President, and not its exact function at any given moment, that implicates executive powers and therefore forces consideration of the *Morrison* test. The President's confidentiality interest is strong regardless of the particular role the Task Force is playing on any given day. Indeed, the two functions **[**40]** naturally interrelate and can only be divided artificially. If public disclosure of the real information-gathering process is required, the confidentiality of the advice-giving function inevitably would be compromised. If you know what information people seek, you can usually determine why they seek it. A group directly reporting and advising the President must have confidentiality at each stage in the formulation of advice to him. As we said in *Meyer,* "proximity to the President, in the sense of continuing interaction, is surely in part what Congress had in mind when it exempted [from FOIA] the President's "immediate personal staff.' " 981 F.2d at 1293 (citation omitted). And, as we recognized in *Soucie v. David,* 145 U.S. App. D.C. 144, 448 F.2d 1067 (D.C. Cir. 1971), FOIA's exemption may be constitutionally required to protect the President's executive powers. In any event, the district judge decided to truncate the statute in light of constitutional concerns only because it determined that FACA applied to the Task Force.

We think the district court should have acted otherwise. Prudent use of the maxim of statutory construction allows us to avoid **[**41]** the difficult constitutional issue posed by this case. The question whether the President's **[*911]** spouse is "a full-time officer or employee" of the government is close enough for us properly to construe FACA not to apply to the Task Force merely because Mrs. Clinton is a member. We follow the Supreme Court's lead, if not its strict precedent, in recognizing that [if the Act] were "read unqualifiedly, it would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an executive agency seeks advice." *Public Citizen,* 491 U.S. at 452 (footnote omitted). Because it believed that Congress could not have intended such a result, the *Public Citizen* majority read "utilize" to exclude the ABA committee. If the Supreme Court correctly construed the statute not to cover the advice the Attorney General receives, on behalf of the President, from the ABA, the statutory construction issue we face should be resolved *a fortiori* in favor of the government.

We, therefore, read the phrase "full-time officer or employee of the government" in FACA to apply to Mrs. Clinton. In doing so, we express no **[**42]** view as to her status under any other statute. n10

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n10 We do not need to consider whether Mrs. Clinton's presence on the Task Force violates the Hatch Act, 5 U.S.C. § 7324(a), the Anti-Deficiency Act, 31 U.S.C. § 1342, or any conflict of interest statutes.

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IV.

The district court, having concluded that the Task Force was a FACA advisory committee,

dismissed under Rule 12(b)(6) appellees' claim that the working group was also covered by FACA. The court thought that under *National Anti-Hunger Coalition v. Executive Committee,* 557 F. Supp. 524 (D.D.C.), *aff'd,* 229 U.S. App. D.C. 143, 711 F.2d 1071 (D.C. Cir. 1983) ("*Anti-Hunger* "), subgroups of a FACA committee should be regarded as staff of the advisory committee and not as advisory committees themselves. *See Anti-Hunger,* 557 F. Supp. at 529. Based on Mr. Magaziner's affidavit, the district court determined that the working **[**43]** group merely gathered information to be passed on to the Task Force. Appellees cross-appeal the district court's ruling and its corollary refusal to permit further discovery into the status and operations of the working group.

The government challenges our jurisdiction to consider the cross-appeal because the district court's rulings on the working group are neither independent final judgments, nor covered by the preliminary injunction against the Task Force which is before us on an interlocutory appeal pursuant to 28 U.S.C. § 1292(a). We have said that our jurisdiction over an interlocutory appeal, however, is considerably broader:

> Review quite properly extends to all matters *inextricably bound up with the remedial decision* .... The scope of review may extend further to allow disposition of all matters appropriately raised by the record, including entry of final judgment. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development.

Wagner v. Taylor, 266 U.S. App. D.C. 414, 836 F.2d 578, 585 (D.C. Cir. 1987) **[**44]** (emphasis added) (quoting *Energy Action Educational Found. v. Andrus,* 210 U.S. App. D.C. 20, 654 F.2d 735, 745 n. 54 (D.C. Cir. 1980), *rev'd on other grounds,* 454 U.S. 151 (1981)); *see also* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice & Procedure § 3921, at 17-20 (1977). The district court's final disposition of the claim against the working group was "bound up" with its reasons for granting the injunction against the Task Force. Once it is determined that the Task Force is not covered by FACA, the implicit analytical premises of the district court's decision as to the working group are removed. Moreover, had the district court determined, as have we, that the claim against the Task Force was invalid and then also dismissed the claim against the working group, the latter unquestionably would be appealable as well. Under these circumstances, we think it is appropriate to consider the cross-appeal. n11

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n11 The lower court dismissed appellees' claim under Rule 12(b)(6) because it found that appellees had failed to state a claim upon which relief could be granted. Mem. Op. at 15. It also noted that it could have dismissed appellees' claims under Fed. R. Civ. P. 56, because appellees had failed to state that further discovery was necessary before summary judgment could be granted. *Id.* at 15 n.11. As we will discuss, the legal basis for the Rule 12(b)(6) ruling, or a Rule 56 ruling, was incorrect. Furthermore, contrary to the district court's decision, Rule 56 does not require a party to state in its discovery motion that discovery is necessary before a court may rule on summary judgment. Indeed, a party's filing of a discovery motion would seem implicitly to assert just that. But under Rule 12(b)(6), once the Magaziner affidavit was filed and considered the district judge was obliged to permit reasonable discovery as to the facts set forth in the affidavit. *See First Chicago Int'l v. United Exchange Co.,* 836 F.2d 1375, 1380 (D.C. Cir. 1988).

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[*912] As it argued below, the government claims that the working group is not in contact

with the President and is not, therefore, "utilized" by him. That seems to us a strange argument. There are two exceptions to FACA's inclusion of all presidential advisory groups: (i) where the advisory committee is independently established and operated by a private organization, *see* Public Citizen, 491 U.S. 440 at 457-59, 105 L. Ed. 2d 377, 109 S. Ct. 2558 ; and (ii) where the group is composed wholly of full-time government officials. *See* 5 U.S.C. App. 1, § 3(2)(iii). We have construed the second exception here to extend to a cabinet committee that includes the First Lady. The government now presses upon us a third exception, one for advisory committees that do *not* meet face-to-face with the President. The government's argument, however, conflicts with the serious constitutional concerns we have recognized concerning the Task Force. The statute cannot be properly interpreted as applying only to those advisory committees, established in the Executive Office of the President, that present the most delicate constitutional problems. n12 Otherwise, the government's argument **[**46]** effectively would render almost all presidential advisory committees free from FACA. Committees in direct contact with the President implicate the President's executive power and hence cannot be covered by FACA, while committees not directly in contact are not "utilized." In any event, the statutory language does not remotely support the government. Not only does FACA define an advisory committee as a task force or "any subcommittee or other subgroup thereof," 5 U.S.C. App. 1, § 3(2), but it also specifies that an advisory committee is a group that is either *established* or *utilized* by the President. *See id.* Certainly the President can establish an advisory group that he does not meet with face-to-face. In *Public Citizen* the Court did not suggest that FACA could be avoided merely because the ABA committee communicated with the Justice Department rather than with the President.

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n12 The government, only at oral argument, and rather tentatively, suggested that application of FACA to *any* advisory groups established and utilized by the President, because they advise someone in the Executive Office of the President, raises constitutional problems. We do not think we should entertain a constitutional argument of such enormous significance made in so glancing a fashion. After all, it could be thought to come close to an argument that the government disavowed--that FACA is unconstitutional on its face.

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The district court accepted a variation of the government's argument by concluding that the working group was not really a subgroup of the Task Force within the meaning of FACA, but rather only staff to the Task Force. The court relied, as we noted, on the *Anti-Hunger* case, in which we affirmed Judge Gesell's decision to similarly treat subordinate working groups operating under the Executive Committee of the Private Sector Survey. Although we affirmed the decision, we did not explicitly approve the judge's reasoning relating to the supposed staff groups; rather, we rejected an effort to challenge his decision based on new information not in the record. *See* National Anti-Hunger Coalition v. Executive Committee, 229 U.S. App. D.C. 143, 711 F.2d 1071, 1075 (D.C. Cir. 1983). In any event, *Anti-Hunger* presented crucially different facts. That case involved the Executive Committee of the Private Sector Survey, formed by President Reagan to obtain management and cost control advice from the private sector. The Executive Committee, composed of 150 private citizens, had a subcommittee composed of 30 members and also had 36 task forces that performed the preliminary work of **[**48]** the survey. *Anti-Hunger*, 557 F. Supp. at 525-26. The government conceded, in that litigation, that the Executive Committee and the subcommittee were both FACA committees and it **[*913]** was only thereafter that the district court determined that the task forces were not FACA committees, but staff.

Our conclusion that the Task Force is a committee wholly composed of government officials makes this case entirely different. In contrast to the situation here, in *Anti-Hunger* the top levels of the *outside* advisory groups were covered by FACA--both the executive committee of 150 and the subcommittee of 30. In that scenario, there is less reason to focus on

subordinate advisers or consultants who are presumably under the control of the superior groups. It is the superior groups, after all, that will give the advice to the government, and which, in accordance with the statute, must be "reasonably" balanced. But when the Task Force itself is considered part of the government--due to the government officials exemption--we must consider more closely FACA's relevance to the working group. For it is the working group now that is the point of contact between the public **[**49]** and the government. The district court's conclusion that the working group could be disregarded as staff depended on its determination that the Task Force was covered by FACA. Our disagreement with the district court on the latter issue therefore compels a different analysis of the working group's status.

Alternatively, the government argues that the working group is not, as a matter of law, a FACA advisory committee because it is not expected to offer consensus advice. In making this argument, the government relies on a regulation issued by the General Services Administration:

> The following are examples of advisory meetings or groups not covered by the Act or this subpart; ... (i) Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations.

41 C.F.R. § 101-6.1004(i) (1992).

As we have so often noted, we do not defer to an agency's **[**50]** construction of a statute interpreted by more than one agency, *see, e.g.,* *FLRA v. Department of Treasury,* 280 U.S. App. D.C. 236, 884 F.2d 1446, 1451 (D.C. Cir. 1989), let alone one applicable to all agencies, *see* *Reporters Comm. for Freedom of the Press v. Department of Justice,* 259 U.S. App. D.C. 426, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev'd on other grounds,* 489 U.S. 749, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989). Nevertheless, we think the government's regulation expresses a concept similar to one that we find embedded in the statute. It is not so much that a group is not a FACA advisory committee unless it gives "consensus" advice. To be sure, many committees are convened with that expectation. *See, e.g.,* The Commission on the Future of Worker-Management Relations, 58 FR 27,311 (1993). Others, however, are established presumably with the full expectation that the positions to be taken and the advice to be offered may well be sharply divided. *See, e.g.,* The Presidential Commission or the Assignment of Women in the Armed Forces, 57 FR 49,394 (1992). And since one of the purposes of FACA is to **[**51]** achieve some balance, and thereby diverse views on advisory committees, it would be passing strange if FACA only applied to those committees that would offer consensus recommendations.

The point, it seems to us, is that 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. The group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally. Advisory committees not only provide ideas to the government, they also often bestow political legitimacy on that advice. As the House Committee that investigated advisory committees before FACA's passage stated: "The work product of a committee composed of distinguished and knowledgeable individuals appointed by the President to advise him is presumed to have value and should be considered." **[*914]** H.R. Rep. No. 1731, 91st Cong., 2d Sess. 12 (1970).

Advisory committees are not just mechanisms for transmitting policy advice on a particular

subject matter to the government. These committees also possess a kind of political legitimacy as representative bodies. Membership on a committee is often highly **[**52]** prized and sought after because it carries recognition and even prestige. When the executive branch endorses its advice and seeks to promote the policy course suggested by the committee, the executive branch draws upon the committee's political legitimacy. Congress' effort to ensure that these committees are balanced in terms of viewpoint recognizes their usefulness for political (and patronage) purposes. But committees bestow these various benefits only insofar as their members act as a group. The whole, in other words, must be greater than the sum of the parts.

Thus, an important factor in determining the presence of an advisory committee becomes the formality and structure of the group. Judge Gesell, in another district court case, *Nader v. Baroody,* 396 F. Supp. 1231 (D.D.C. 1975), seems to have approached the same notion by focusing on the word "established" in FACA. *Nader* involved meetings between an assistant to the President and a changing slate of federal officials and private sector groups. *See id.* The groups met for the express purpose of exchanging views on a variety of subjects. In exempting these meetings from FACA, the court noted **[**53]** that "the committees were not formally organized and there is little or no continuity." *Id.* at 1234.

Since form is a factor, it would appear that the government has a good deal of control over whether a group constitutes a FACA advisory committee. Perhaps, for that reason, it is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch. In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose. The government suggests that the working groups, composed as they are of a crowd of 340 virtually anonymous persons, do not bear the characteristics of the paradigm FACA advisory committee. That may well be so. The working groups, as a whole, seem more like a horde than a committee. On the other hand, the groups have been created ("established") with a good deal of formality and perhaps are better understood as a number of advisory committees. We simply cannot determine how to classify the working groups based on the record before us.

Finally, the government claims **[**54]** that all of the members of the working groups are full-time officers or employees of the government, and, for that reason alone, the working groups are not FACA advisory committees. The three-hundred members drawn from the agencies, the Executive Office of the President, and from the congressional staffs are concededly within that category. The working group also includes, however, 40 "special government employees." The government claims that these individuals are also "full-time" government employees, even though they have been employed by an agency or the Executive Office of the President for less than 130 days in a year, some without compensation. The record does not reflect where these persons come from, nor does it show how many hours they work. We are, moreover, unsure whether FACA's definition of "full-time" extends to a person who works for the government for less than 130 days out of a year. The government directs us to the conflict of interest provisions of Title 18, which define a "special Government employee" as:

> an officer or employee of the executive or legislative branch of the United States Government ... who is retained, designated, appointed, or employed to perform, **[**55]** with or without compensation, for not to exceed [130] days during any period of [365] consecutive days, *temporary duties either on a full-time or intermittent basis.*

18 U.S.C. § 202(a) (1988) (emphasis added). The government argues that section 202 clearly implies that a temporary employee can be "full-time." Intermittent (or non-full-time)

applies, according to the government, to those who work less than a full day.

[*915] We do not believe section 202(a) helps the government. Just as we did not read 5 U.S.C. §§ 2104, 2105 to govern the question of whether Mrs. Clinton is a federal officer or employee, we do not think that Title 18's definitions should necessarily control FACA. We must construe FACA in light of its purpose to regulate the growth and operation of advisory committees. FACA would be rather easy to avoid if an agency could simply appoint 10 private citizens as special government employees for two days, and then have the committee receive the section 3(2) exemption as a body composed of full-time government employees. Moreover, section 202 contrasts "full-time" with "intermittent," and so "full-time" **[**56]** seems to mean no more than not "intermittent." There is no reason to think that not "intermittent" for section 202 purposes has any bearing on whether the employee is "full-time" for FACA purposes. Whether the special government employees are full-time, however, is, in part, a factual issue that was not developed below due to the lack of discovery.

A third class of persons are described as consultants. According to the government, the consultants attend meetings on an intermittent basis, with or without compensation, and have no "supervisory role or decision-making authority." Drawn from the ranks of the medical profession, the academy, and from business, they only provide information and opinion. These consultants raise a different question from that presented by the other two classes of working group employees. The key issue, it seems to us, is not whether these consultants are "full-time" government employees under section 3(2), but whether they can be considered members of the working group at all. When an advisory committee of wholly government officials brings in a "consultant" for a one-time meeting, FACA is not triggered because the consultant is not really a member of the **[**57]** advisory committee. In that situation, the relationship between the temporary consultant and committee is very similar to the one between the White House officials and various private sector representatives exempted from FACA in *Nader*. We are confident that Congress did not intend FACA to extend to episodic meetings between government officials and a consultant. To do so would achieve the absurd result *Public Citizen* warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens.

But a consultant may still be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a "consultant" regularly attends and fully participates in working group meetings as if he were a "member," he should be regarded as a member. Then his status as a private citizen would disqualify the working group from the section 3(2) exemption for meetings of full-time government officials.

* * * *

When we examine a particular group or committee to **[**58]** determine whether FACA applies, we must bear in mind that a range of variations exist in terms of the purpose, structure, and personnel of the group. Perhaps it is best characterized as 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, we think, does not trigger FACA.

We simply have insufficient material in the record to determine the character of the working group and its members. We understand why the district court, believing the Task Force covered by FACA, thought it unnecessary and inappropriate to put the working group under further scrutiny. But, as we have indicated, because we differ with the district court concerning the Task Force, we believe further proceedings, including expedited **[*916]**

discovery, are necessary before the district court **[**59]** can confidently decide whether the working group is a FACA committee.

Accordingly, we reverse the district court and lift the preliminary injunction on the operations of the Task Force. The Task Force need not comply with the requirements of FACA because it is a committee composed wholly of full-time government officials. We also reverse the district court's dismissal of appellees' claims as to the working group under Rule 12(b)(6). We remand for further proceedings, including expedited discovery, regarding the working group.

So ordered.

CONCURBY: BUCKLEY

CONCUR: Buckley, Circuit Judge, concurring in the judgment: I admit at the outset the persuasive force of the majority's opinion--a force derived, I think, from a comparison of the most obvious facts of this case with those of *Public Citizen v. United States Department of Justice,* 491 U.S. 440, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989). *Public Citizen* interpreted the word "utilized" so as to exclude the Justice Department's use of a committee of the American Bar Association whose only mission was to advise on appointments to the federal judiciary. In concluding that Congress did not intend to subject the ABA Committee on the Judiciary to FACA's **[**60]** requirements, the Court acknowledged that what "tipped the balance decisively against FACA's application," *id.* at 465, was the "cardinal principle" that where "a serious doubt of constitutionality is raised, ... the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 465-66. Here, to achieve a similar end, we are asked only to stretch the phrase "officer or employee of the Federal Government" far enough to include a person who is greeted like a head of state, guarded by the Secret Service, and funded from the public fisc. On first appearances, *Public Citizen* would seem to support both the majority's result and the reasoning used to reach it.

If this case is to be distinguished from *Public Citizen,* it is not because of a lack of gravity in the constitutional issues it presents. In *United States v. Nixon,* 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) ("*Nixon I* "), and *Nixon v. Administrator of General Services,* 433 U.S. 425, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977) ("*Nixon II* "), the Supreme Court recognized a constitutionally grounded **[**61]** doctrine of executive privilege which holds that Presidential communications are presumptively privileged against disclosure:

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process....
> ....
>
> A President ... must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Nixon I, 418 U.S. at 705, 708. The Court found that this privilege extends

> to communications in performance of a President's responsibilities ... and made in the process of shaping policies and making decisions.

Nixon II, 433 U.S. at 449 (quoting *Nixon I,* 418 U.S. at 708, 711, 713) (internal quotation marks, **[**62]** brackets, and citations omitted). And it set forth standards for evaluating intrusions on privileged communications:

> In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote **[*917]** objectives within the constitutional authority of Congress.

Id. at 443 (citations to *Nixon I* omitted).

We confront in this case a task force consisting of the President's closest advisors that was established to address a paramount political priority. Because it included his wife--by all accounts, a person whose policy advice he has relied on throughout his public life--the Task Force on National Health Care Reform arguably was bound by law to conduct its proceedings in public. Given these circumstances, the considerations animating the Presidential privilege, like the President's claim of privilege itself, are before us in pointed fashion. My colleagues, sensing the weight of these **[**63]** issues, hold that we may avoid addressing them through "prudent use" of *Public Citizen's* "maxim of statutory construction." Maj. Op. at p. 23, I cannot agree.

I begin with the axiom that in interpreting a statute, a court must ascertain the will of the enacting Congress. Here I admit to detecting something of an implicit argument in the Government's pleadings before this court. To the extent that it may be discerned, this argument begins with an assumption that *Public Citizen* 's result could not have been reached through genuine interpretation--interpretation that is consistent with the will of Congress--and ends with the conclusion that *Public Citizen* authorizes courts to avoid constitutional issues by ascribing implausible meanings to the most unambiguous language. The suggestion, I admit, is tempting. But it is also barred by the very decision on which the Government places its principal reliance. *Public Citizen* states explicitly that courts "cannot press statutory construction to the point of disingenuous evasion, even to avoid a constitutional question." 491 U.S. at 467 (internal quotation marks and citation omitted).

The weakness of **[**64]** the position that FACA may be interpreted to exclude the Task Force is suggested by the Government's vacillation on the question of Mrs. Clinton's status. Before the district court, the Government argued that the Task Force was not subject to FACA because Mrs. Clinton was the functional equivalent of a federal employee. In its opening brief here, it argued that she was either an officer or an employee without saying which. On reply, it said explicitly that Mrs. Clinton was an "officer." And at argument, it retreated to ambiguity and again refused to categorize her. In fact, the Government's only consistent position has been that FACA is not subject to those statutory definitions of "officer" and "employee" that most logically apply to it.

FACA appears in the appendix to Title 5 of the United States Code. Sections 2104 and 2105 of Title 5 contain the following definitions:

§ 2104. Officer(a) *For the purpose of this title,* "officer", except as otherwise provided by this section or when specifically modified, means a justice or judge of the United States and an individual who is--

(1) required by law to be appointed in the civil service by one of the following acting **[**65]** in an official capacity--

(A) the President;

(B) a court of the United States;

(C) the head of an Executive agency; or

(D) the Secretary of a military department;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office....

§ 2105. Employee(a) *For the purpose of this title,* "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--

(1) appointed in the civil service by one of the following acting in an official capacity--

(A) the President;

[*918] (B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive **[**66]** act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position....

5 U.S.C. §§ 2104, 2105 (emphasis added).

The common denominator of these provisions is the requirement that both officers and employees be "appointed in the civil service." In the Executive Branch, the civil service

consists of (1) positions requiring Senate confirmation, (2) the "Senior Executive Service," (3) the "competitive service," and (4) "positions which are specifically excepted from the competitive service by or under statute." 5 U.S.C. § 2102(a). Mrs. Clinton does not wear any of these labels. *See, e.g.,* 5 U.S.C. § 3132(a)(2) (defining "Senior Executive Service position"). The Government's (and the majority's) strategy, then, is to argue that she need not satisfy the section 2104 and 2105 definitions because they do not apply to FACA. Specifically, because FACA has been codified in an appendix to Title 5, not in the title proper, the Government contends that the sections do not govern the meaning **[**67]** of "officer" and "employee" as used in the definition of "advisory committee." For several reasons, I disagree.

First, there is the plain meaning of the statutory language. An appendix to a title of the United States Code necessarily qualifies as a part of that title. If it did not, then the appendix would be part of no title whatever and would be an appendix to the Code as a whole. Yet FACA appears in the Code under the banner, "Title 5, Appendix." Because sections 2104 and 2105 state plainly that they apply "for the purpose of" Title 5, and because FACA is a part of that title, the definitions apply to FACA.

Second, Congress surely knew that FACA would be codified under Title 5. The same statute that adopted sections 2104 and 2105 also stipulated that Title 5 be captioned: "Government Organization and Employees." Pub. L. No. 89-554, 80 Stat. 378, 408-09 (1966). A glance at the captions of the remaining 49 titles in the Code confirms that Title 5 is the only one under which FACA could have been codified.

Third, there are the practical considerations. The Ethics in Government Act, codified alongside FACA in Title 5's appendix, requires financial disclosures from "each officer or employee **[**68]** in the executive branch" who meets certain criteria. Ethics in Government Act of 1978, 5 U.S.C. App. 3, §§ 101(a), 101(f)(3) (1991 Supp.). FACA imposes open-meeting and other requirements on committees not "composed wholly of full-time officers or employees of the Federal Government." 5 U.S.C. App. 1, § 3(2) (1988). And, although each of those statutes contains a sizable definitional section, neither defines either "officer" or "employee." *See* 5 U.S.C. App. 1, § 3 (1988); 5 U.S.C. App. 3, § 109 (1991 Supp.). The Government tells us that those terms are intentionally left undefined even though Congress took the trouble, in those statutes, to define terms that are of far less significance. *See, e.g.,* 5 U.S.C. App. 1, § 3 (4) (1988) ("The term "Presidential advisory committee' means an advisory committee which advises the President"); 5 U.S.C. App. 3, § 109(3) (1991 Supp.) (" "designated agency ethics official' means an officer or employee who is designated to administer the provisions **[**69]** of this title within an agency"). But without definitions of "officer" and "employee," neither statute could be sensibly administered. The better explanation for the absence of these definitions is that their repetition in FACA and the Ethics in Government Act would have been redundant.

Finally, there is the apparent reasoning behind FACA's location in Title 5's appendix. The United States Code is published pursuant to 1 U.S.C. §§ 201-13 (1988). That law **[*919]** requires the codification of new laws in annual Code supplements and permits the publication of an entirely new Code every five years. *See id.* § 202. Thus, the current United States Code and supplement contain all laws of the United States that are "general and permanent in their nature." *Id.* § 204(a). As of 1988, ten of the fifty U.S.C. titles contained an appendix. *See* 5, 10, 11, 18, 26, 28, 40, 46, 49, 50 U.S.C. (1988). Some statutes have been placed in appendices because, while considered more than temporary, they are viewed as less than permanent additions to the Code. *See* 40 U.S.C. App. (Appalachian Regional Development Act of 1965). Other statutes have been relegated to appendices **[**70]** because they were not enacted directly by Congress. *See* 11 U.S.C. App. (Bankruptcy Rules and Official Forms as promulgated by Supreme Court pursuant to 28 U.S.C. § 2075). With respect to Title 5, Congress has divided it into three parts: "The Agencies Generally" (Part I), "Civil Service Functions and Responsibilities" (Part II), and "Employees" (Part III). *See* Pub. L. No. 89-554, 80 Stat. 378 (1966), *as amended by* Pub. L. No. 96-54, § 2(a)(1), 93 Stat. 381 (1979). An

appendix to Title 5, then, is the natural place to codify statutes that relate to "Government Organization and Employees" but do not pertain to "The Agencies Generally," "Civil Service Functions and Responsibilities," or "Employees." As of 1988, five acts, including FACA, had been codified in Title 5's appendix. None of these fits within any of the three pigeonholes into which the main body of the title has been divided.

As against all of this--the statute's plain language, the imputed knowledge of its draftsmen, the practical need for Title 5's definitions to apply to its appendix, and the apparent reasons for FACA's placement there--the Government can offer a bare shred **[**71]** of legislative history. It points out that the Senate version of FACA explicitly incorporated the Title 5 definitions of "officer" and "employee," but that these were dropped at conference. The question, of course, is whether the conferees discarded the definitions because they were redundant (as FACA was destined for codification under Title 5), or because they wished the definitions not to apply to FACA.

The evidence on this issue consists of statements from the reports of the Senate Committee on Government Operations and the House-Senate Conference Committee. Referring to the section of the Senate bill that incorporated definitions to be found in the main body of Title 5, namely, those for "agency" (5 U.S.C. § 551(1)), "officer" (5 U.S.C. § 2104), and "employee" (5 U.S.C. § 2105), the Senate Report stated only that these three definitions had "been chosen to give the broadest interpretation to the coverage commensurate with generally accepted principles of law." S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). The Conference Committee Report merely noted that "the conference **[**72]** substitute deletes the Senate amendment definitions of "officer' and "employee.' " H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 9 (1972). The definition of "agency," however, was retained.

The Government infers, from the deletion of two of the Senate definitions and the retention of the third, that the conferees found the definitions of "officer" and "employee" inapplicable to FACA. There is a far more plausible explanation. As sections 2104 ("officer") and 2105 ("employee") were applicable to all statutes codified under Title 5, they were superfluous. The definition of "agency," by contrast, appears under the heading, "For the purpose of this *subchapter*--," 5 U.S.C. § 551 (emphasis added), and therefore would not apply to FACA unless specifically incorporated into that Act.

Even if we could disregard the definitions found in Title 5, we would still be compelled to attach meanings to the words "officer" and "employee" that Congress might reasonably have had in mind. To this end, I have examined other sources for definitions of these terms. At the outset, I dismiss the possibility that Mrs. Clinton might be considered an employee. In these proceedings, **[**73]** the Government has not attempted to argue that Mrs. Clinton is an employee for purposes of FACA--no doubt because her services are unpaid. *Cf.* Black's Law Dictionary 471 (5th ed. 1979) (defining employee as "one who works for an employer; a person working for salary or wages"). And while the majority **[*920]** does assert that Mrs. Clinton "could still be regarded as an "employee' " under FACA, Maj. Op. at p. 10, it too lacks an argument in support of the proposition. In particular, it ignores the fact that, while subsections (a) and (b) of 3 U.S.C. § 105 explicitly "authorize[ ]" the President "to appoint and fix the pay of [White House] employees," subsection 105(e), the statutory acknowledgment of the First Lady's role, is carefully phrased so as *not* to authorize her appointment as an employee or any remuneration for her services. An "unpaid employee" is an oxymoron, although an "unpaid officer" is not. FACA's strictures can be avoided, then, only if it can credibly be argued that Mrs. Clinton is an officer of the Federal Government. I can find no such argument.

To begin with the beginning, the Constitution imposes certain requirements on those **[**74]** who are to serve as officers of the United States. Such persons must be appointed by the President with the consent of the Senate unless Congress, by law, has vested the power of appointment "in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. art. II, § 2, cl. 2. Furthermore, all officers must take an oath to

support the Constitution. *Id.,* art. VI, cl. 3. Congress has enacted laws to implement these requirements. *See, e.g.,* 5 U.S.C. § 3331 (officers of the United States required to swear an oath); 5 U.S.C. § 2906 (officers' oath to be "preserved"); 5 U.S.C. § 2902 ("officers appointed by the President" must have commissions made out and sealed by the Secretary of State); 5 U.S.C. §§ 3333, 7311 (anyone who accepts either "office or employment in the Government of the United States" required to swear their loyalty by affidavit). We have received no indication that any of these requirements have been met with regard to Mrs. Clinton.

More generally, an officer implies an office, and an office implies **[**75]** duties. Title 1 of the United States Code defines "officer" by reference to an "office" with "duties"--" "officer' includes any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. And the Supreme Court has interpreted "officer" similarly with reference to the Constitution. In *Burnap v. United States,* 252 U.S. 512, 516, 64 L. Ed. 692, 40 S. Ct. 374 (1920), the Court reasoned: "Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto." *Burnap* held that a "landscape architect" was an employee, not an officer, because "there [was] no statute which creates an office of landscape architect ... nor any which defines the duties of the position," *id.* at 517, and because "there [was] no statute which provides specifically by whom the landscape architect ... shall be appointed." *Id.*

The undoubted value of the services that the wives of Presidents have rendered their husbands and their country notwithstanding, it cannot be said that they have occupied an **[**76]** office with duties. The provision of the U.S. Code on which the majority relies, 3 U.S.C. § 105(e), is carefully phrased so as not to name a position or prescribe duties a President's spouse is to fulfill. In fact, section 105(e), strictly speaking, does not even *authorize* a First Lady to assist the President; rather it authorizes federal employees to assist the First Lady, and, in the course of doing so, *acknowledges* the assistance that First Ladies commonly render their spouses. In sum, Mrs. Clinton carries none of the indicia of a federal officer. She has neither been appointed to nor confirmed in the position of "First Lady," she has taken no oath of office, and she neither holds a statutory office nor performs statutory duties.

Having searched the U.S. Code and the Government's briefs in vain for definitions of "officer" that might give aid and comfort to the Government, I conclude that under any fair interpretation of the term, Mrs. Clinton is not an officer of the United States. But to complete this tour through the statute books, I note that section 105(e) does not, as the Government and the majority contend, require a finding **[**77]** that Congress has acknowledged that a President's spouse performs the duties of an officer. Another direct congressional statement on the subject of the First Lady's duties appears in the Anti-Nepotism Act. That Act declares that public officials (expressly including "the President") may **[*921]** not employ relatives (expressly including a "wife") in "a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control." 5 U.S.C. § 3110(a), (b). The use of the definite article in the phrase "*the* agency in which he is serving" appears to imply that every "public official" belongs to some agency and that their relatives may not be employed in that agency, whatever it happens to be. Moreover, as a matter of policy and consistency, the restrictions on the President under the Anti-Nepotism Act must be viewed to be as broad as the Executive Branch: It is inconceivable that Congress, in combatting nepotism, intended to forbid Mrs. Clinton's service as Attorney General while permitting her appointment as National Security Advisor. Viewed purely as a matter of congressional intent, the argument that the Anti-Nepotism Act **[**78]** applies only to the Departments and not to the White House, *see* Maj. Op. at p. 12, is a weak one. As a result, any gravitational pull exerted in the direction of congressional acceptance of a President's spouse as a "*de facto* officer" attributable to section 105(e) is overwhelmed by the opposite force exerted by the Anti-Nepotism Act.

One final consideration. Although we may assume that, when drafting FACA, Congress gave no thought to the possibility that a President might appoint his spouse to an advisory committee, we may not assume that it failed to contemplate the relationship between FACA and the legal obligations and sanctions imposed on officers and employees of the Federal Government.

As one reviews the affidavit filed with the district court by Ira Magaziner, Senior Advisor to the President for Policy Development, one is struck by the fact that *every* member of the Task Force and Interdepartmental Working Group, but one, was subject to one or more of the statutes that Congress has enacted to ensure the proper conduct of members of the Federal Government--the "insiders," as the Government describes those who qualify as "full-time officers and employees" within the **[**79]** meaning of FACA. These laws impose burdensome ethics requirements. *See, e.g.,* Ethics in Government Act of 1978, 5 U.S.C. App. 3, § 101(f)(3) (1991 Supp.) (applying financial disclosure requirements on all higher paid "officers and employees" in the Executive Branch); *id.* §§ 501(a)(1), 505(2) (1991 Supp.) (applying outside income limitations on all higher paid officers and employees except "special government employees"); 18 U.S.C. § 205 (1991 Supp.) (prohibiting any "officer or employee" from representing outsiders in "matters affecting the Government"); *id.* § 207 (prohibiting anyone who formerly was an "officer or employee" from participating in certain governmental proceedings and decisions after leaving government employment); *id.* § 208 (prohibiting an "officer or employee" from "participating personally" in a matter affecting "a financial interest"); 5 U.S.C. § 7324 (1988) (prohibiting an "employee in an Executive agency" from taking "an active part" in political campaigns). And even though the Government argues that the Interdepartmental Working Group was not **[**80]** an advisory committee within the meaning of FACA, Mr. Magaziner nevertheless took pains to stress the fact that every member of and consultant to the Group--whether a regular or special government employee, whether working full time or part, for pay or without--was required to file a financial disclosure statement and to comply with other requirements of these laws. *See* Magaziner Affidavit, Gov't App. at 41-43.

These requirements, then, appear as a signal distinction between what would normally be considered to be "inside" and "outside" members of advisory committees. In fact, this distinction--the legal obligations and sanctions imposed on officers and employees of the Government as opposed to private citizens--undoubtedly provides a substantial part of the justification for the very different requirements imposed by FACA on committees that are composed exclusively of federal officers and employees and those that are not. In enacting FACA, Congress found that "one of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns." H.R. Rep. No. 1017, 92 Cong., 2d Sess. 6 **[**81]** (1972). Because committees not composed exclusively of federal **[*922]** officers and employees have members who are not required to foreswear their private associations and insulate themselves against potential conflicts of interest, FACA requires, as an alternative check, that their deliberations be conducted in the open.

When the majority states that we "need [not] consider whether Mrs. Clinton's presence on the Task Force violates ... any conflict of interest statutes," Maj. Op. at p. 24 n.10, it indicates that we have not been presented with claims under these statutes that call for adjudication. The question remains, however, whether Congress, if it had ever considered that the President's spouse might be appointed an official member of a Presidential advisory committee, would have labelled her an "officer or employee" within the meaning of FACA. To put it another way, could Congress have intended that Mrs. Clinton, alone of the twelve members of the Task Force and 340 members of the Working Group, would be entirely exempt from the reach of ethics laws that Congress has imposed on the President himself? I think not.

In visiting these sundry provisions, I doubt I have said very much with **[**82]** which my brethren in the majority would disagree. Our disagreement centers, I think, not on

Congress's intent in enacting the relevant statutes, but on the lens through which we must view that intent in this particular case. The majority argues (1) that construing the phrase, "officers and employees," to exclude Mrs. Clinton would give rise to weighty constitutional issues, Maj. Op. at p. 22; (2) that the *Public Citizen* Court avoided deciding similar issues by embracing "an extremely strained construction of the word "utilized,' " Maj. Op. at p. 14; (3) that "it is reasonable ... to construe section 105(e) as treating the President's spouse as a *de facto* officer or employee," Maj. Op. at p. 11; and hence (4) that the phrase "full-time officer or employee of the government" must *a fortiori* be read to apply to Mrs. Clinton, Maj. Op. at p. 24. I remain unconvinced.

First, I do not think that section 105(e) can reasonably be read to create an officer or employee, either *de facto* or otherwise; and even if it could, I do not think we could avail ourselves of such a reading in this case. I noted above that section 105(e) has been carefully phrased so as *not* to recognize **[**83]** an office, an officer, or an employee. But equally important, I know of no case in which the Supreme Court has saved one provision from constitutional difficulty by liberally construing another, entirely unrelated provision. In *Public Citizen* itself, as well as in *every* case cited in *Public Citizen* in which the Court avoided a constitutional challenge, the Court sidestepped the constitutional claims presented through an interpretation of the statute under attack. See *Public Citizen,* 491 U.S. at 465-66 (citing cases); *see also id.* at 465, 467 (avoiding a constitutional challenge to FACA by construing FACA § 3(2)); *see also, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575, 588, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988) (avoiding a constitutional challenge to the National Labor Relations Act by construing NLRA § 8(b)(4)); *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772, 780-81, 788, 68 L. Ed. 2d 612, 101 S. Ct. 2142 (1981) (avoiding a constitutional challenge to the Federal Unemployment Tax Act by construing FUTA § 3309(b)). Because it is FACA **[**84]** that is under attack, I think that any additional degree of interpretive freedom we enjoy in construing FACA cannot be extended to a statute authorizing expenditures for White House staff.

Second, I cannot believe that *Public Citizen* establishes the rule my colleagues tacitly embrace. In reaching their holding, the majority implicitly distinguishes between "extremely strained construction," which, under their reading, *Public Citizen* permits or even requires, and "disingenuous evasion," which it explicitly forbids. *Compare* Maj. Op. at p. 14 *with* 491 U.S. at 467. The rule the majority appears to adopt, then, is that judges must strain (but may not evade) the plain meaning of a statute before they may entertain an "as-applied" constitutional challenge. If my colleagues are right, the line between "extremely strained construction" and "disingenuous evasion" will determine the outcome in *every* case involving an as-applied challenge presenting "formidable **[*923]** constitutional difficulties." *Public Citizen,* 491 U.S. at 466. While I suspect my colleagues may have some sympathy (as I do) with Justice Kennedy's position **[**85]** that the Supreme Court majority in *Public Citizen* had stretched its interpretation of FACA "beyond the point at which such a construction remains "*fairly* possible,' " *id.* at 481 (Kennedy, J., concurring in judgment) (emphasis in original), I cannot believe the Court intended to establish a rule *requiring* such constructions in cases posing serious constitutional questions.

A review of its reasoning demonstrates that *Public Citizen* neither explicitly nor implicitly sanctions "strained" statutory interpretation. Its holding--that the ABA Committee was not "utilized" by the President within the meaning of FACA--was based principally on three considerations. The first of these was that, in the Court's memorable phrase, " "utilize' is a woolly verb," *id.* at 452, which necessarily requires judicial definition. Second, it recognized that a "dictionary reading [of the word "utilize" in] FACA's definition of "advisory committee' " would lead to a statute of "almost unfettered breadth" and produce "absurd results." *Id.* at 452 & n.8, 452-54. Taken literally, FACA's definition would have **[**86]** endowed the President with Midas ears capable of turning any continuing source of consensus opinion into a FACA committee. In such a world, the physicians jointly consulted to protect the President's health, the editorial board of the President's favorite newspaper, and two dietitians jointly

planning the President's meals could all be classified as "Presidential advisory committees" subject to regulation. Because "the literal reading of [utilize] would "compel an odd result,' " the Court "searched for other evidence of congressional intent to lend the term its proper scope." *Id.* at 454 (citation omitted). Third, on examining FACA's origins and legislative history, the Court concluded that while "it seems to us a close question whether FACA should be construed to apply to the ABA Committee, ... we are fairly confident it should not." *Id.* at 465.

The Court reached this last conclusion in significant part on the basis of the following passage from the FACA Conference Report: "The Act does not apply to persons or organizations which have contractual relationships with Federal agencies *nor to advisory committees not directly* **[**87]** *established by or for such agencies."* *Id.* at 462 (emphasis added by *Public Citizen*). The Court also noted that the relationship between the ABA Committee and the Justice Department had not fallen within the scope of President Kennedy's Executive Order No. 11007, from which FACA was derived. *Id.* at 462-63. From this, the Court concluded that "the phrase "or utilized' therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term," *id.* at 462; and that "read in this way, ... the word "utilize' does not describe the Justice Department's use of the ABA Committee," *id.* at 463.

In applying what the majority, Maj. Op. at p. 8, has laconically (and accurately) described as a "rather sweeping" statutory definition of "advisory committee" to the unique relationship between the Justice Department and the ABA Committee, the Court concluded that it was more probable than not that Congress did not intend that FACA apply to such privately organized groups. Nevertheless, **[**88]** because it considered the question close in light of the broad sweep of the definition, literally interpreted, it applied its venerable rule of statutory construction to tip the balance away from one that would have presented "formidable constitutional difficulties." *Id.* at 466.

In this case, we deal not with woolly terms but with the meaning of two words in common legal usage, "officer" and "employee." Far from creating absurdity, literal interpretations of these terms are necessary in order to give effect to the congressional policy of drawing sharp distinctions between individuals outside the Government and those within it. And in contrast with *Public Citizen,* in which no statutory definition of "utilize" was **[*924]** available and great weight was placed on legislative history, definitions of both "officer" and "employee" have been enacted into law by Congress. In this case, none of the considerations animating *Public Citizen* are remotely presented; and because we do not deal with ambiguous terms, there is no "balance" to be tipped by resort to legal maxims. Despite appearances, *Public Citizen* has little to do with the case we decide today.

Finally, **[**89]** to conclude my statutory analysis, I note that the *Nixon I* Court engaged in a patently straightforward interpretation of Federal Rule of Criminal Procedure 17(c), 418 U.S. at 697-702, even though it recognized that "if we sustain[ ] this challenge, there [will] be no occasion to reach the claim of privilege asserted." *Id.* at 698. Needless to say, the considerations counseling avoidance of difficult constitutional issues were never more pressing than on the facts of *Nixon I.* Because I can find no credible argument to the contrary, and because I cannot bring myself to strain the meaning of "officer" or "employee" to produce one, I would hold that the Task Force was not exempt from the public disclosure requirements of FACA; and having done so, I would address the constitutional implications of that holding.

As I pointed out earlier, the Supreme Court has acknowledged a Presidential right to confidentiality that "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon I,* 418 U.S. at 708. Although the privilege is not **[**90]** absolute, the Court has only twice found that it must yield to competing constitutional interests, such as "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions," *id.* at 707; and in each case, it has protected

the confidentiality of Presidential communications from unwarranted disclosure.

In *Nixon I,* in which President Nixon sought to enjoin the subpoenaing of certain of his papers, the Court found it necessary to

> weigh the importance of the general principle of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice.

Id. at 711-12. It concluded that the President's "generalized interest in confidentiality ... cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713. Accordingly, it ordered the examination *in camera* of the papers subject to an instruction that the district court be scrupulous in "protecting against any release or publication **[**91]** of material not found by the court [to be] probably admissible in evidence and relevant to the issues of the trial for which it is sought." *Id.* at 714.

Nixon II involved a balancing of the President's interest in the confidentiality of his communications against other national interests. In that case, former President Nixon asserted the Presidential privilege in a challenge to the constitutionality of the Presidential Recordings and Materials Preservation Act, which placed his papers in the custody of the Administrator of General Services. *See* 433 U.S. at 429-30. The Supreme Court found that the statute was constitutional because of the Nixon papers' historical importance and their possible significance as aids to the legislative process, and because of "the safeguards built into the Act to prevent disclosure of [confidential] materials and the minimal nature of the intrusion into the confidentiality of the Presidency." *Id.* at 454. Those safeguards included the requirement that "any party's opportunity to assert any ... constitutionally based right or privilege" be protected. *Id.* at 450 **[**92]** (quoting section 104 of the Act). The Court concluded "that the screening process contemplated by the Act [, which was to be conducted by Executive Branch archivists,] ... will not constitute a more severe intrusion into Presidential confidentiality than the *in camera* inspection by the District Court approved in [*Nixon I*]." *Id.* at 455.

In these two cases, the Court permitted only the most limited intrusions on the privilege. FACA, by contrast, would have required that the Task Force operate in the full glare of provisions requiring public meetings **[*925]** and disclosure of records. It is hard to imagine conditions better calculated to suppress the "candid, objective, and even blunt or harsh opinions," *Nixon I,* 418 U.S. at 708, that the President was entitled to receive from the twelve advisors he had appointed to his Task Force. Because none of Congress's purposes in enacting FACA are of a gravity that would justify overriding the Presidential privilege in this case, I would conclude that FACA is unconstitutional as applied to the Task Force.

For the foregoing reasons, I concur only in the majority's conclusion, in Part **[**93]** III of its opinion, that FACA's public disclosure provisions may not be applied to the Task Force. With respect to Part IV, I agree that the district court must develop further facts before it can determine whether the Working Group, or any division thereof, qualified as an advisory committee under FACA.

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Alberto R. Gonzales
02/18/2001 07:00:54 PM

Record Type: Record

To: Courtney S. Elwood/WHO/EOP@EOP, Brett M. Kavanaugh/WHO/EOP@EOP
cc:
bcc:
Subject: Re: More on the ABA's role in judicial selection

Brett, make sure we keep this quote handy for future reference.
Courtney S. Elwood

Courtney S. Elwood
02/15/2001 08:15:05 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: See the distribution list at the bottom of this message
Subject: More on the ABA's role in judicial selection

Brett, I came across the following quotation in a D.C. Circuit decision on FACA: "[T]he ABA committee's role in advising administrations as to the qualifications of putative judges has over the years become more of an impediment (reflecting certain ABA institutional and, perhaps, political interests) than an aid to Presidents." 997 F.2d 898, 906 n.4 (D.C. Cir. 1993).

Message Copied To:

Alberto R. Gonzales/WHO/EOP@EOP
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Bradford A. Berenson/WHO/EOP@EOP
Helgard G. Walker/WHO/EOP@EOP
Courtney S. Elwood/WHO/EOP@EOP
Stuart W. Bowen/WHO/EOP@EOP
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Robert W. Cobb/WHO/EOP@EOP

COPY

THE WHITE HOUSE

WASHINGTON

March 21, 2001

MEMORANDUM FOR HARRIET MIERS

FROM: ALBERTO R. GONZALES
COUNSEL TO THE PRESIDENT

SUBJECT: AMERICAN BAR ASSOCIATION AND
SENATORS LEAHY AND SCHUMER

Attached are two letters conveying the decision by the President regarding the role of the American Bar Association in the judicial selection process. The first letter is to American Bar Association, and the second letter is to Senators Leahy and Schumer.

Please staff this to the appropriate individuals with a deadline for comments to be returned to my office no later than 1:00 pm on Thursday, March 22.

Thank you.

Butt –

Please prepare an appropriate response

Judge

DRAFT – 3/21 @ 8:55 pm

March 22, 2001

Dear Ms. Barnett:

Thank you for taking the time to meet with Attorney General Ashcroft and me on March 19. We very much appreciated the opportunity to visit with you and benefited from your perspective on the judicial selection process. In addition to hearing from you, we have carefully studied and considered the history and practice of American Bar Assocation involvement in judicial selection. We have discussed these issues with the President. He has asked me to inform you that, although the Administration welcomes the ABA's suggestions concerning judicial nominees, it will not notify the ABA of the identity of a nominee before the nomination is submitted to the Senate and announced to the public generally.

There is a long tradition, of course, by which Members of Congress, interest groups, and individual citizens provide suggestions to the President about potential judges. We will continue to welcome such suggestions from all sources, including the ABA. The issue at hand, however, is quite different: whether the ABA alone -- out of the literally dozens of groups and many individuals who have a strong interest in the composition of the federal courts -- should receive advance notice of the identity of potential nominees in order to render a formal, pre-nomination opinion on their fitness for judicial service. In our view, granting any single group such a preferential, quasi-official role in the nomination process would be unfair to the other groups that also have strong interests in judicial selection. As Senator Biden asked in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to numerous other groups.

The question, in sum, is not whether the ABA's voice should be heard in the judicial selection process. Rather, the question is whether the ABA should play a unique, quasi-official role and thereby have its voice heard *before* and *above* all others. We do not think that kind of preferential arrangement is either appropriate or fair.

It would be particularly inappropriate, in our view, to grant a preferential, quasi-official role to an interest group, such as the ABA, that takes public positions on divisive political, legal, and social issues that come before the courts. This is not to suggest that the ABA should not adopt policy positions or express its views. But considerations of sound constitutional government suggest that the President not grant a preferential, quasi-official role in the judicial selection process to a politically active interest group.

Our decision to treat the ABA in the same manner as all other interested parties mirrors the approach taken in recent decades by Presidents of both parties with respect to Supreme Court nominees, as well as the approach taken by the Senate Judiciary Committee in 1997 when it

ended the ABA's quasi-official role in the Senate confirmation process. As Chairman Hatch explained at that time, "[p]ermitting a political interest group to be elevated to an officially sanctioned role in the confirmation process not only debases that process, but, in my view, ultimately detracts from the moral authority of the courts themselves."

Finally, let me reiterate that the Administration fully welcomes the ABA, like other interested parties, to provide suggestions regarding potential judges. Similarly, once the President submits a nomination to the Senate, the ABA like every other interested party is free to evaluate and express its views concerning the President's nominee.

Thank you again for your time and your views, as well as for your service to the ABA and the profession. The Administration looks forward to working with you in the months ahead on issues of concern to the legal profession.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

Ms. Martha W. Barnett
President, American Bar Association
c/o Holland & Knight, LLP
315 South Calhoun Street, Suite 600
Tallahassee, FL 32301

DRAFT – 3/21 @ 8:55 pm

March 22, 2001

Dear Senators Leahy and Schumer:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the role of the American Bar Association in the President's judicial selection process. The President has asked me to inform you that the Administration welcomes the suggestions of the ABA as to judicial nominees. The Administration will not, however, grant the ABA a preferential, quasi-official role by notifying the ABA of proposed judicial nominations before such nominations are submitted to the Senate and announced to the public generally. A copy of my letter to the President of the ABA informing her of this decision is enclosed.

We are highly confident that this procedure, in which the President will welcome and receive input from a variety of interested and diverse parties, will enable the President to nominate candidates of the highest intellect, integrity, and professional qualification. Of course, we appreciate that individual members of the Senate Judiciary Committee may choose to seek the ABA's views on judicial nominees. Based on the ABA's representation to me that it can complete an evaluation in every case in 20 to 30 days, I am confident that any post-nomination ABA evaluation would not delay the Committee's timely consideration of the President's nominees.

Thank you very much for your letter. The Administration looks forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

Senator _____
United States Senate
Washington, DC

ABA Judicial Evaluation Criteria

The ABA Standing Committee on the Federal Judiciary is the entity within the ABA responsible for vetting and rating judicial nominees. Its pamphlet, entitled "The ABA Standing Committee on the Federal Judiciary: What It is and How It Works," describes the criteria the Committee applies in rating candidates. The following criteria are excerpted from the pamphlet:

1. Integrity:

   "character and general reputation in the legal community"
   "industry and diligence"

2. Professional competence

   - Must have been admitted to the bar for *at least twelve years*
     [The pamphlet goes on to note that: "the Committee recognizes that women and members of certain minority groups have entered the profession in large numbers only in recent years and that their opportunities for advancement in the profession may have been limited."]

   - "*Substantial courtroom and trial experience* (as a lawyer or a trial judge) is important"

     - Serving on or before administrative agencies or boards, teaching clinical legal courses, or "significant evidence of distinguished accomplishment in the field of law" may compensate in some cases for a lack of courtroom experience.
     - Courtroom experience is given slightly less weight for nomination to appeals courts

   - For appeals court nominees:

     "Especially high degree of scholarship and academic talent and an unusual degree of overall excellence," including:
     --ability to write lucidly
     --ability to harmonize a body of law
     --ability to "give guidance to the trial courts for future cases"

   - Other factors considered include:

     "intellectual capacity"
     "judgement"
     "writing and analytical ability"
     "knowledge of the law and breadth of professional experience"

3. Temperament
"Compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice"

4. "Health" (Age)
"The public is entitled to the appointment to the federal judiciary of persons who are able to render long and vigorous service."

Ratings

Well Qualified: "the prospective nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, wide experience, the highest reputation for integrity and either have shown, or have exhibited the capacity for, judicial temperament, and have the Committee's strongest affirmative endorsement."

Qualified: "the prospective nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and . . . the Committee believes that the prospective nominee will be able to perform satisfactorily all of the responsibilities required by the high office of a federal judge."

Not Qualified: "the prospective nominee does not meet the Committee's standards with regard to integrity, professional competence or judicial temperament."

ABA Defending Liberty Pursuing Justice

MARTHA W. BARNETT
President

AMERICAN BAR ASSOCIATION

750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

April 4, 2001

RECEIVED April 5, 200

Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20530

Dear Mr. Gonzales:

It was a pleasure to meet you and Attorney General Ashcroft recently and to have the opportunity to discuss the role the American Bar Association has had in assisting the administration in evaluating the professional qualifications of potential nominees to the federal bench. We are disheartened by the decision of the President to end a process which we believe for a half-century has served every administration well.

As we discussed, the ABA through its Standing Committee of Federal Judiciary evaluates the professional qualifications of judicial candidate on three criteria: professional competence, integrity and judicial temperament. It does not consider ideology or political views. It is a peer review process and our rating are based on interviews with the candidate and with those individuals who can best comment on the candidates professional qualifications – other lawyers, judges and community leaders who know and work with the individual. The process is an objective one and totally confidential with the result that those interviewed know they can be candid and forthright.

The members of the Standing Committee come from each of the federal judicial circuits and are highly respected lawyers. The work of the Standing Committee is insulated and isolated from the ABA itself. The policies of the ABA adopted by our House of Delegates are not binding on the committee and indeed have no impact on its peer review evaluations.

We understand that the President will no longer provide the ABA with the names of judicial candidates prior to their nomination. The experience of other Administrations has shown that this pre-nomination vetting of the candidate by his or her peers has been very helpful, especially in those circumstances where problems with a candidate's professional qualifications surfaced. This

information was provided to the candidate and to the Administration in confidence and allowed each to decide the appropriate response prior to the nomination becoming part of the public arena. Indeed, the ratings of the Standing Committee are never disclosed unless and until the President formally nominates the candidate.

The ABA has provided this volunteer function as a service to each of the last nine administrations and to the public. We will continue to do so. Over the years the public has come to expect this independent and objective evaluation of a candidate's professional qualification by his or her peers. The ratings, the vast majority of which indicate that the candidate is qualified to serve, have done much to instill public confidence and trust in the judiciary.

We will continue to work with the Administration in every way possible in insuring what I know is our shared goal of having a qualified and independent federal judiciary. The public deserves no less.

Thank you again for the courtesies extended to my colleagues and to me.

Sincerely,

Martha W. Barnett

Martha W. Barnett
President, American Bar Association

Judge—
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Document Originally
Attached to
Following Page

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CORRESPONDENCE TRACKING WORKSHEET PAGE 1

OK

DATE RECEIVED: 4/5/01

NAME OF CORRESPONDENT: Martha Barnett

SUBJECT: follow up thoughts from the meeting w/ AG and Ashcroft

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	C D	DISPOSITION COMPLETED YY/MM/DD
CUGONZ		A	4/5/01			/ /
	ACTION COMMENTS:					
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COMMENTS

ADDITIONAL CORRESPONDENTS: MEDIA:

ACTION CODES:
A - APPROPRIATE ACTION
C - COMMENT/RECOMMENDATION
D - DRAFT RESPONSE
F - FURNISH FACT SHEET
I - INFO COPY/NO ACT NECESSARY
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CODE = A
COMPLETED = DATE OF OUTGOING

REFER QUESTIONS AND ROUTING UPDATES TO RECORDS MANAGEMENT (ROOM 72, OEOB) EXT 6-2590.
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

Defending Liberty
Pursuing Justice

MARTHA W. BARNETT
President

AMERICAN BAR ASSOCIATION

750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

April 4, 2001

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Counsel to the President
The White House
Washington, D.C. 20530

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Thank you again for the courtesies extended to my colleagues and to me.

Sincerely,

Martha W. Barnett

Martha W. Barnett
President, American Bar Association

THE FEDERALIST SOCIETY
FOR LAW & PUBLIC POLICY STUDIES

February 13, 2001

Mr. Brett Kavanaugh
Associate Counsel to the President
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dear Brett:

I thought you might find the enclosed issue of *ABA WATCH* to be of some interest. The lead story features an examination of the American Bar Association's Standing Committee on the Federal Judiciary, and includes biographical material on the current ABA evaluators.

To provide some historical background, I also have enclosed a chart highlighting the respective ratings of Clinton/Carter and Bush/Reagan nominees to the federal bench. The differences in the ratings was the subject of discussion during 1997 Senate hearings on the role of the ABA in the judicial evaluations process.

My vest wishes.

Very truly yours,

Leonard A. Leo
Vice President, Lawyers Division

Enclosures

1015 18th Street, N.W. • Suite 425 • Washington, D.C. 20036 • 202-822-8138
fax 202-296-8061 • fedsoc@radix.net • www.fed-soc.org

Senator Hatch Ends ABA Role in Judicial Evaluations

continued from page 9

with professional qualifications—never ideology. Since 1960 26 judicial nominees have been rated "not qualified"—three were Republican candidates and 23 were Democratic. In fact, during the 12 years of the Reagan and Bush Administrations, only one candidate nominated was found not qualified; four Clinton nominees have received a "not qualified" rating.

* The ABA Committee has played a key role in ensuring the high professional quality of the federal bench. Others recognize its value as well. In the spring of 1996, a national bipartisan commission under the direction of the Miller Center made recommendations aimed at lessening the role of politics in appointing federal judges. The bipartisan commission found the ABA Committee plays an important role in the judicial selection process. They concluded: "Although the role of the American Bar Association's Standing Committee on the Federal Judiciary has been criticized, alternately by liberals and conservatives, the Committee does serve a useful function in evaluating judges." The ABA will continue to play this advisory role and, sadly, we will continue to be criticized and attacked as a result.

But we will not be dissuaded. For, we know that a strong, independent judiciary is the bedrock on which our democracy is founded. The qualifications of our federal judges must transcend party affiliations and ideological dogmas. The truth is that the ABA helps ensure that the women and men who receive appointment to the federal bench have the highest professional standards.

Judging the Judges: A Boxscore of ABA Ratings

[Editors' note: Critics of the ABA cited before the Senate Judiciary Committee what is reflected in the charts below as political bias. The ABA has responded that "when one examines judges on a case-by-case basis, the charges of bias prove false."]

Table One: Rating Incidence (U.S. Court of Appeals, 1977-1997)

	Majority Voting at Least "Well Qualified" (WQ)	Majority Voting "Qualified Only" (Q)	Minority Voting "Not Qualified" (NQ)
Carter	74%	26%	5%
Reagan	57%	43%	20%
Bush	61%	39%	8%
Clinton	87%	13%	3%

Table Two: Some Selected Ratings Comparisons (1977-1997)

Democrat–Rating	Circuit	Republican–Rating
Guido Calabresi-WQ/Q	Second	Ralph K. Winter-Q
Diane Wood-WQ	Seventh	Richard Posner-Q/NQ
Karen Nelson Moore-Q/WQ	Sixth/Seventh	Frank Easterbrook-Q/NQ
William Fletcher-WQ	Ninth	John Noonan-Q/NQ
Mary Beck Briscoe-WQ	Tenth	Deanell Reece Tacha-Q/NQ
Patricia Wald-WQ	D.C.	Laurence Silberman-Q/NQ
Abner Mikva-WQ	D.C.	James Buckley-Q/NQ
Harry Edwards-WQ/Q	D.C.	Stephen Williams-Q/NQ
Judith Rogers-WQ	D.C.	Clarence Thomas-Q
James Dennis–Q	Fifth	Jerry Smith–Q/NQ
Stephen Reinhardt–Q	Ninth	Alex Kozinski–Q/NQ
M. Blaine Michael–WQ	Fourth	J. Michael Luttig–Q/NQ
Martha Daughtrey–WQ	Sixth	Alice Batchelder–Q
Charles "Bud" Stack–Q	Eleventh	J.L. Edmondson–Q/NQ

Source: Senate Judiciary Committee charts



ABA WATCH

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES FEBRUARY 2001

THE ABA AND FEDERAL JUDICIAL SELECTION

For more than a decade, there has been much controversy over the role of the ABA in evaluating prospective nominees to the federal bench. Most recently, in 1997, Senate Judiciary Committee Chairman Orrin Hatch terminated the ABA's quasi-official status in the Senate confirmations process on the ground that the Association's role could not be reconciled with its political advocacy on a wide variety of controversial issues such as the death penalty and abortion. During the 1996 presidential campaign, Robert Dole promised to eliminate the ABA's special role in evaluating prospective nominees for the Executive Branch, citing similar concerns. And, in connection with Judge Robert Bork's failed nomination to the Supreme Court in 1987, there was considerable criticism of the Association from all sides of the political spectrum (including the *Washington Post*) because a substantial minority of members of the evaluations committee found Bork "not qualified" to serve on the Court. The minority of the committee members in their dissent stated explicitly as a reason that they disagreed with Bork's views "respecting constitutional principles or their application, particularly within the ambit of the 14th Amendment."

In each of these instances, and others where the ABA's evaluations role has been attacked, the Association's standards for judging a putative nominee's qualifications have been criticized for making it all too easy for political and ideological preferences to affect a candidate's qualification rating. With a new presidential administration and Congress about to embark upon the

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POLICY POSITIONS DUE FOR CONSIDERATION AT FEBRUARY MIDYEAR MEETING

The ABA House of Delegates will consider a number of new resolutions at the Midyear meeting in San Diego. The House votes on these resolutions will determine whether several important proposals will stand as policies of the Association, which entitles it to engage in lobbying and other forms of advocacy. In addition to two proposals in the criminal justice area, the proposed resolutions touch on immigration law, the International Criminal Court, and election law reform, to name just a few subjects. The following is a summary of some of the proposals listed by the ABA:

Criminal Justice. Two proposals address the issue of criminal justice: one dealing with domestic concerns and one dealing with international prosecutions. Recommendation 103B resolves to "support safe schools while propos-

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From the Editors. . .

In its mission statement, the American Bar Association declares that it is the "national representative of the legal profession." And, not surprisingly, as the largest professional legal organization in the world, many policy makers, journalists and ordinary citizens do in fact look to the ABA as a bellwether of the legal profession on matters involving law and the justice system. This is why debate about the work and activities of the ABA—and the role that it plays in shaping our legal culture—is so very important.

ABA Watch has a very simple purpose—to provide facts and information on the Association, thereby helping readers to assess independently the value of the organization's activities and to decide for themselves what the proper role of the ABA should be in our legal culture. We believe this project is helping to foster a more robust debate about the legal profession and the ABA's role within it, and we invite you to be a part of this exchange by thinking about and responding to the material contained in this and future issues.

In this issue, we are pleased to present a breakdown of the ABA Standing Committee on the Federal Judiciary. The article aims to address past controversies and the function of the Committee, as well as profile the professional and political backgrounds of the current evaluators.

This issue also includes features on ABA activity in relation to the death penalty, the Stop Ashcroft! campaign, the Fund for Justice and Education, and state judicial selection. In addition, this issue details AALS activity and summarizes the Federalist Society's Pro Bono Activity at the AmLaw100. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticism about this publication are most welcome. You can email us at fedsoc@radix.net.

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The Federalist Society for Law and Public Policy Studies, 1015 18th Street, N.W., Suite 425, Washington, D.C. 20036
(202) 822-8138

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Email: fedsoc@radix.net

The ABA and the Death Penalty

For a number of years, the ABA has been involved with efforts to secure representation of capital defendants and death row inmates. But more recently, the Association's role in the capital punishment arena has intensified, with the organization lobbying vigorously for a moratorium on the death penalty.

Early Role: The Death Penalty Representation Project

The Association created the Death Penalty Representation Project in 1986 in order to "better inform the bar and the public about the lack of representation available to death row inmates, to address this urgent need by recruiting competent, volunteer attorneys and to offer counsel training and assistance." Another goal of the project was "to propose systematic changes that would assure those facing death are represented at all stages of the proceedings—from trial through clemency—by qualified, adequately compensated counsel."

Since its inception the Project has enlisted 60 major law firms to volunteer pro bono time in representing defendants and inmates in capital cases. The ABA Death Penalty Project also awards grants to death penalty centers throughout the country.

From representation to a "Call to Action": The Moratorium Campaign

On September 15, 2000, the ABA sent a letter to President Bill Clinton in response to the Department of Justice's report entitled "Survey of the Federal Death Penalty System." The letter urged the President to impose an executive moratorium on executions until the capital punishment system is further appraised. The Association requested that the President ensure that any review of the federal death penalty system take place with transparency and public participation. This Association action is a natural extension of its 1997 initiative on capital punishment, which called for a moratorium on state and federal executions until "policies are in place in every death penalty jurisdiction that guarantee fundamental fairness and due process."

More than any other ABA President, Martha Barnett has used her office to support the moratorium. She has urged lawyers across the country to fight to suspend the death penalty in their states until there is proof that the death penalty is imposed fairly. "No defendant should be executed until we assure that the imposition of the ultimate sanction is not a result of inadequate counsel or lack of due process," Barnett said. She maintained: "Empirical evidence indicates that several states have gross injustices in their administration of the death penalty.... State officials, therefore, should undertake a review of their systems." Barnett concluded: "We cannot ignore that there is unfairness in the way the death penalty is imposed in this country. Lawyers have the responsibility to solve those problems."

> ***"We cannot ignore that there is unfairness in the way the death penalty is imposed in this country. Lawyers have the responsibility to solve those problems."***
>
> *- Martha Barnett*
> *ABA President*

To promote a moratorium, the ABA held an invitation-only conference on October 11-12 in the Atlanta, GA Carter Center titled "Call to Action: A Moratorium on Executions." The conference consisted of sessions that addressed a number of issues, including: the need to provide greater representation to defendants at all stages of capital proceedings; the loss of state and federal post-conviction review and the impact of the AEDPA; the need for an independent state judiciary and a review of practices by law enforcement agencies and prosecutors; the impact of racial discrimination on application of the death penalty; and the application of capital punishment to juveniles and the mentally retarded. The stated goal of these sessions was "to convince attendees that the key concerns that prompted the [moratorium] resolution in 1997 have reached crisis proportions in 2000."

Turning to nuts-and-bolts advocacy, the conference featured discussions about the process of enacting a moratorium. The program featured legislators who have introduced bills for moratoria as well as experts who had experience with coalition building and shaping communication strategies in this area. One panel—"How Can We Join Forces to Achieve A Moratorium?"— focused on "recent media coverage about fundamental unfairness in the administration of capital punishment." The panel reviewed "revelations about large numbers of wrongful convictions" and offered observations about how the system "tolerates, and even rewards, poor lawyering, whether incompetent defense counsel or dishonest prosecutors." Conference materials suggest: "Serious questions have been raised about the politics of the death penalty and improper influences on members of the judiciary, including the failure to afford individuals facing the death penalty fair trials and meaningful review of their convictions and sentences. And, voices from abroad and from the corporate world are asking why, con-

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ing that school responses to alleged student misbehavior are individualized and fair." It also opposes "zero tolerance" policies that mandate either expulsion or referral of students to juvenile or criminal court without regard to the circumstances or nature of the offense or the student's history. Because "zero tolerance" policies are "unfair and similar to mandatory sentencing policies which the ABA has long opposed," the recommendation urges that these policies be resisted. The report notes, "Children are able to understand that there is a difference between being treated equally and being treated fairly. Zero tolerance mandates equal treatment, but does not require fairness. In addition, there is increasing evidence that zero tolerance policies, while facially neutral, are having a disproportionate impact on students of color." The policy aims to make state and local jurisdictions implement "thoughtful, individualized responses to alleged student misbehavior" and would "prohibit a single, mandatory response, no matter what the student is accused of doing."

Proposed Resolution 103C, also sponsored by the Criminal Justice Section, urges Congress to enact legislation requiring the President to inform Congress, within 30 days of receiving notice, that a United States National committed an act within the jurisdiction of the International Criminal Court and may be a target of such a prosecution. It also urges that all reasonable steps be taken to ensure that the U.S. retain complete jurisdiction and that the President report to Congress on subsequent actions by the International Criminal Court with respect to the alleged criminal act. The proposal aims to "put a legislative process in place that will ensure that the Untied States retains jurisdiction over its nationals for the purposes of investigation and potential prosecution of crimes that may otherwise fall under the jurisdiction of the International Criminal Court."

International Law. Proposed Resolution 105C, offered by the Section of International Law and Practice, the Criminal Justice Section, the Section of Individual Rights and Responsibilities, and the Association of the Bar of the City of New York, proposes that the United States sign and ratify the Rome Statute of the International Criminal Court, which will be "for the first time, a permanent, internationally constituted court" that "will try individuals accused of genocide, war crimes and crimes against humanity that would otherwise escape prosecution." The recommendation aims to encourage the U.S. to accede to the statute and "thus become eligible to participate in the Assembly of States Parties which will shape the court at the outset on such important issues as the adoption of the Rules of Procedure and Evidence, the Elements of Crimes, and the definition of aggression." This is not the first time the Association has recommended U.S involvement in an international criminal court. The House of Delegates has adopted at least three resolutions in favor of the creation of an international criminal court.

Immigration Law. Proposed Resolution 106A, recommended by the Coordinating Committee on Immigration Law and the Criminal Justice Section, supports the appointment of government-paid counsel for unaccompanied children for all stages of immigration processes and proceedings. The resolution urges the Department of Justice to establish an independent office with child welfare expertise that would have an oversight role and "ensure that children's interests are respected at all stages of immigration processes and while in immigration custody." Additionally, the recommendation proposes that children in immigration custody who are unable to be released to family members, legal guardians or other appropriate adults "should be housed in culturally-appropriate family-like settings and not detained in facilities with or for juvenile offenders." The proposal aims to address the problem of immigrant children not having counsel and supports a system where unaccompanied immigrant children would be appointed counsel at government expense where children have liberty interests at stake.

The Section of Individual Rights and Responsibilities is recommending that gender-based persecution be recognized as grounds for asylum under the Immigration and Nationality Act and supports federal legislative or administrative action to ensure in interpretations or applications for asylum that the terms "social group" and "persecution" are more inclusive. Under Proposed Resolution 110, the term social group includes "women who have been persecuted or have a well founded fear of persecution on account of their gender" and persecution encompasses "domestic violence, sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, and forced abortion." This proposal "would complement and reinforce existing INS guidelines that recognize gender persecution as a ground for asylum, but that do not provide adequate assurance that this basis for asylum will be considered fully or consistently from case to case."

Election Law. An individual delegate has recommended that the ABA establish a Commission on Presidential Election Disputes to be appointed by the ABA President to review the causes of the problems encountered in connection with the 2000 presidential election and recommend administrative, statutory and/or constitutional changes as are appropriate to improve and simplify the process. The Commission would consist "of up to 21 members, representing a diverse and broad-based constituency."

Federalist Society Unveils Survey of Pro Bono Activity at the AmLaw100

In January 2001, The Federalist Society released ***Pro Bono Activity at the AmLaw100***, a study that is the product of a survey that the Federalist Society developed and executed in order to examine the various kinds of pro bono work undertaken by the legal community. The Federalist Society initiated this project because press and public interest organizations often inquire about whether the pro bono work undertaken by the nation's leading law firms is politically/ideologically balanced. However, no comprehensive survey had been completed on this subject to date.

The Society began its survey of the 100 largest American law firms in the spring of 2000. The study aims to provide an unbiased breakdown of the type of work that these leading firms handle. The reader can decide for himself whether this work reflects particular political or ideological preferences on the part of the law firm community. The full study can be accessed on the Federalist Society's web site, www.fed-soc.org.

The Federalist Society used *The American Lawyer's* 1998 list of America's 100 biggest law firms as its survey pool and sought to obtain data about these firms for 1998 as well as 1999. Volunteers collected information from publicly available sources, such as law firm Web sites, annual reports, or firm-generated pro bono summaries. The information collected comes only from the official literature or materials that are prepared and readily made available by the firm itself.

This survey is *not* intended to be a comprehensive listing of pro bono work performed by the AmLaw100, and certain limitations are inherent in the study. For example, it is possible that a firm undertakes work that it chooses not to advertise or disclose. Firms cannot highlight all the work they do. And, a number of senior partners have suggested that firms may choose not to disclose pro bono work that might be considered "conservative" or "libertarian" in its orientation. The project at least attempted to offset the possibility that some of the law firms do not advertise work identified as "conservative" or "libertarian" by polling all of the litigating organizations listed in the Heritage Foundation's *Policy Experts 2000* guide asking each whether any AmLaw100 firms have undertaken a matter for it on a pro bono basis. About 73 percent of these organizations responded to our inquiry.

Throughout the process, the Federalist Society assiduously sought to avoid making any substantive or normative judgments about the kind, quantity, or range of pro bono work undertaken. In this regard, it provided a complete list of groups which the firm represented and would be recognizable by or familiar to the general legal community; it listed a broad range of litigation for each firm (when available); and it chose not to label particular kinds of pro bono work as liberal, conservative, or libertarian. The Society also did not make its own choices regarding how to describe the ideology of the groups supported by law firms, using instead the independently published and widely respected *The Left Guide* and *The Right Guide* as independent benchmarks.

Some Findings

Within the AmLaw100, 70 law firms identified public interest groups that they represent or assist on a pro bono basis. Several public interest litigating groups that are listed in *The Left Guide* recur frequently as organizations represented by these 70 firms.

In all, of the 697 organizations listed as represented by the 70 firms which provide such information, 157 (22.5%) can be found in *The Left Guide*. Only 3 (0.4%) of the listed organizations can be found in *The Right Guide* or the Heritage Foundation's *Policy Experts 2000* guide.

To account for the possibility that firms are representing conservative and libertarian organizations but not advertising that fact, the Federalist Society conducted an independent survey of the litigating organizations listed in the Heritage Foundation's guide of "conservative" and "libertarian" organizations and experts. Each organization was asked whether an AmLaw100 firm had undertaken a matter for them on a pro bono basis. The survey results revealed that 22 of the 70 (31.4%) AmLaw100 firms that list the groups they represent assisted or represented conservative or libertarian groups on a pro bono basis (19 more than we had discovered using data obtained from or made available by the law firms themselves). By way of comparison, 60 of the 70 (85.7%) AmLaw100 that list the groups they represent assisted organizations which are contained in *The Left Guide*.

PUBLIC INTEREST GROUP	# OF FIRMS REPRESENTING GROUP AS CLIENT
ACLU or other "CLU" Group	21 (30%)
Lawyers Committee for Civil Rights	21 (30%)
Lawyers Committee for Human Rights	17 (24.3%)
NY Lawyers for the Public Interest	10 (14.3%)
NAACP	9 (12.9%)

The Federalist Society's survey also provides much information about the types of pro bono work that 80 of the AmLaw100 have undertaken. The kinds of cases and other legal matters that these firms have handled are, not surprisingly, quite varied. Here is a summary of some of the work that may be of special interest:

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AALS WATCH

From January 3-6, 2001, law professors and administrators gathered in San Francisco for the Annual Meeting of the Association of American Law Schools (AALS). The AALS is an organization of 162 law schools which bills itself as "the learned society of law teachers and ... legal education's principal representative to the federal government and to other national higher education organizations and learned societies." Given the importance of the legal academy and the close relationship between the ABA and the AALS, we thought it appropriate to report on the AALS Annual Meeting in *ABA Watch*.

Following up on last year's meeting theme, "A Recommitment to Diversity," this year's meeting featured the title "Pursuing Equal Justice." Elliott Milstein, AALS President and Professor of Law at American University, expanded on the theme in this description:

> "Our society's ideal of providing equal justice to all cannot be fulfilled until competent affordable legal representation is available for all who need it. The legal services programs for the poor are in turmoil as challenges to their fundamental mission of legal and social justice have intensified in recent years. The system of criminal representation is deeply flawed. Representation in death penalty cases has been exposed as a near sham in many cases, and inadequate representation is common throughout the criminal justice system. Recent studies on the systems of representation in juvenile delinquency cases have exposed entrenched incompetence. The field of public interest law is riddled with examples of inadequate or nonexistent legal resources for those harmed, whether they be children in foster care, persons with disabilities, migrant, low-wage, or displaced workers, communities exposed to environmental risks, and others."

To expand on this theme, the AALS invited AFL-CIO President John Sweeney to deliver the only solo speech of the convention at the Annual Meeting Luncheon. Sweeney's address was followed by the AALS's Plenary Session on "Teaching, Scholarship and Service in Pursuit of Equal Justice." Led by Conrad Johnson of Columbia, the session attempted to answer the question, "What can law professors and law schools do, through teaching, scholarship and service, to address the injustices caused by the unavailability of competent legal services for large numbers of people in the United States?" Panelists, including Susan Bryant of CUNY-Queens, Bill Ong Hing of California-Davis, and Marina Hsieh of Maryland, highlighted the 50% decrease in Legal Services Corporation funding since 1980 (and compared the decrease to the 56% increase in law firm revenue during the same period) and discussed how the AALS's Equal Justice Project fills in the resultant gaps in legal services. The speaker's remarks were interspersed with a multimedia presentation of pro bono projects at various law schools – such as the American University "Share the Vote" campaign in which students successfully led a move to change the city charter of Takoma Park, Maryland, to allow non-U.S. citizens to vote. The panel was rounded out by James S. Liebman of Columbia University who discussed the challenges he faced in preparing last summer's report on "A Broken System: Error Rates in Capital Cases 1973-1995." The audience gave Liebman enthusiastic applause, and the panel praised him with David Broder's description that his work was "one of the few pieces of social research which has decisively affected the course of the policy debate." The Equal Justice Project will sponsor a series of regional colloquia at law schools across the country this academic year to "explore the many ways in which law schools and law faculty can promote the ideal of equal justice."

The bulk of the Annual Meeting was handled by the AALS Sections, which sponsored most of the numerous programs and panel presentations. The Section on Gay and Lesbian Legal Issues sponsored two programs at the meeting. The first, held jointly with the Section on Minority Groups, was entitled "Intersecting Race, Gender and Sexual Orientation: Theoretical and Activist Perspectives," which addressed "the continuing problem facing gay, lesbian, bisexual and transgender people of color of having the multilayered aspects of their identity recognized by the law and other societal institutions. ... both for community of colors in the United States [and] for sexual minority communities in Africa." "Respecting All Families; Responding to All Persecutions: Gays/Lesbians/Bis/Transgenders Persons and Immigration and Refugee Laws," a program with the Section on Immigration Law, featured this description:

> "This program will explore the issues arising in immigration and refugee laws as these legal paradigms begin to recognize gay/lesbian/bisexual/transgender people. More countries around the world are addressing the human rights issue of allowing same sex families to unify through immigration laws. Even the United States has a new proposed bill, the Permanent Partners Act, which was introduced February 14, 2000, proposing just such respect for glbt families. These new laws and their interaction with "gay" marriages and marriage like institutions will be explored in this panel. Also the increasing recognition by different nations, including the United States, that persecution because of sexual orientation is cognizable under current refugee/asylee law."

Of particular interest in this panel were the prospects facing "glbt families" under the new Bush/Ashcroft Justice Department, which one panelist referred to as "The Evil Empire." Moderated by Kevin Johnson of California-Davis, the panel also featured

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Bar Groups, State Supreme Court Justices Weigh in on Judicial Elections

Selected representatives of the organized bar, state supreme court bench, legal academy, and public policy world convened in Chicago this past December to discuss what is becoming one of the most controversial issues facing state legal systems nationwide—state methods of judicial election and appointment. Battle lines have been drawn: individuals opposed to judicial elections say that this method of selection leads to corruption and threatens the independent judgment of the courts, and that "merit selection" or various methods of campaign finance and ethics reform are needed. Many critics respond that opponents of elections are facilitating the capture of the judicial selection process by the organized bar and the resulting closed structure shuts out those not part of the legal establishment and, to put it less kindly, those not beholden to it.

The Williamsburg, Virginia-based National Center for State Courts and Georgetown Law Professor Roy Schotland organized this meeting at the urging of Texas Supreme Court Chief Justice Thomas Phillips and Texas Senate Judiciary Committee Chairman Rodney Ellis. Phillips and Ellis proposed the summit to gather state judicial and legislative leaders to identify perceived problems with state judicial elections, to establish a network of support for reform efforts, and to attract national attention to the reform movement. Background papers detailing the relevant issues were presented, with the summit resulting in a "Call for Action" statement by the principals in attendance.

The conference was funded by the Chicago-based Joyce Foundation as well as the Open Society Institute, an arm of the Soros Foundation. Both organizations have long been supporters of abolishing state judicial elections or instituting stringent campaign finance restrictions. The Joyce Foundation's mission statement declares: "To ensure that public policies truly reflect public rather than private interests, we support efforts to reform the system of financing election campaigns." The Joyce Foundation awarded $213,376 in grants in the year 2000 to the American Bar Association to "develop and promote standards for and models of public financing for state judicial elections." Joyce also awarded $68,876 to the National Center for State Courts for this summit to "address judicial election abuses and to develop strategies and a support network for state-based reform efforts."

Soros's Open Society Institute Program on Law and Society awards grants to groups that believe that access to a fair and independent judiciary is being threatened "by the growing influence of special interest campaign contributions and partisan litmus tests in judicial selection." Grants are awarded to "support initiatives to reform selection of federal and state judges to encourage merit selection and to reduce the corruptive influence of money and special interest politics." Groups that have met these criteria and that therefore receive funding include the Brennan Center for Justice at NYU, the Century Foundation's Constitution Project, and the National Institute on Money in State Politics. These organizations are on record as having supported campaign finance restrictions.

Participation in the summit was limited. The chief justices of the 17 largest states where judicial elections take place were invited to attend. Chief justices from Florida, Illinois, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Missouri, North Carolina, Ohio, Tennessee, Texas, Washington, and Wisconsin were in attendance. Each chief justice brought a four-person team of his own choosing to the summit to represent his state's interests. These team members were drawn out of state legislatures and state judiciaries, law firms, state bar associations, and organizations such as the League of Women Voters and Common Cause. Further, the conference included delegates representing California, Georgia, Maryland, and New York, as well as representatives from the funders of the summit and the National Center for State Courts. The summit included representatives from a select number of national organizations as well, including: the American Bar Association (represented by President Martha Barnett, lobbyist Luke Bierman, and Judicial Independence Standing Committee Chairman A.P. Carlton), the League of Women Voters, the Brennan Center for Justice, the Justice at Stake Campaign, the National Institute on Money in State Politics, the Constitution Project of the Century Foundation, the Conference of State Court Administrators, and the American Judicature Society. Faculty members serving as facilitators, the authors of the background papers presented at the conference, and a few other handpicked representatives rounded out the attendance list.

Prominent and vocal supporters of judicial elections and skeptics of campaign finance reform were noticeably absent from the session. Alabama, Texas, Washington, and Michigan justices who are on record as supporting the electoral method of judicial selection—including Justices Harold See, Richard Sanders, Nathan Hecht, Stephen Markman, Robert Young, and Clifford Taylor—were not invited. The same can be said for business groups such as the U.S. Chamber and the American Corporate Counsel Association, and legal organizations such as the Federalist Society. Indeed, in the interest of full disclosure, the Federalist Society's request to attend as an observer was rejected by the National Center for State Courts.

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Policy and Activity Roundup: ABA 2000 Annual Meeting

Association leaders convened in New York as well as London this past summer for the ABA Annual convention. Over several days, the Association's Board of Governors and House of Delegates debated resolutions and adopted policies, and the organization held a wide variety of panels and events regarding the activities of the ABA, current public policy controversies, and the future of the Association.

Key leaders addressed policy meetings throughout the convention. ABA President William Paul made a plea for greater diversity in the profession and called for a moratorium on the death penalty "until minimum due process standards are assured." Incoming President Martha Barnett reiterated the call for a moratorium on the death penalty, asserting that "the issue is not the death penalty, the issue is ensuring competent counsel." President-Elect Robert E. Hirshon's remarks urged unyielding support for the Legal Services Corporation, suggesting that, but for the ABA, there would be no Corporation.

Also addressing the convention was Susan McDougal, who had been charged with obstruction of justice for her refusal to cooperate with former Independent Counsel Kenneth Starr. McDougal used her appearance to state that, if she were a New York resident, she would vote for Hillary Clinton for senator "in a heartbeat." Ms. Clinton is a woman who "uses her power for what she believes in. New York couldn't have a better advocate fighting in the Senate." Turning to Whitewater, McDougal maintained that she repeatedly told Starr's investigators that she knew of "no financial impropriety by Hillary Clinton related to Whitewater or anything else." McDougal also touched on her experiences with incarceration. In her 22 months in jail, McDougal was appalled with the way women are treated in prison, and encouraged those in attendance to keep tabs on their clients and to "[f]ind out how they're doing in jail. When a lawyer starts asking questions, things begin to happen."

House of Delegates Approves New Policies

The House of Delegates approved over 20 resolutions, including several recommendations addressing issues being considered on Capitol Hill. Some of the topics debated by the delegates included campaign finance reform, funding for the United Nations, ratification of international treaties, use of biological evidence in criminal cases, fee revenues for the U.S. Patent and Trademark Office, domestic violence, and judicial selection and administration.

The House failed to take action on Resolution 11-1, a proposal to amend Article 1.2 of the ABA Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born." No action could be taken because there was no one in the 540-member chamber who would speak in favor of the provision.

The House approved Resolution 10A, which recommends that Congress and state legislatures enact campaign finance reform that "opposes the solicitation and use of soft money contributions in federal election campaigns, and supports public financing of congressional and presidential campaigns." The House also adopted an initiative recommending that Congress and the states review their respective election laws as they relate to campaign activity on the Internet, ensuring that these laws encourage political activity on the internet, advance First Amendment guarantees of free speech and association, and prevent opportunities for unfairness, corruption or undue influence.

Addressing the role of DNA evidence in the criminal justice system, the House approved Resolution 115, which urges federal, state, local and territorial jurisdictions to adhere to various principles concerning the collection of biological evidence collected in a criminal investigation. In particular, the accompanying report states, "Making DNA and other biological evidence available to defendants at trial and to convicted persons for post conviction proceedings and investigations is essential....DNA evidence has provided concrete, reliable evidence establishing conclusively a significant number or cases where the judicial process has failed. Since it retains reliability over time, DNA evidence challenges the foundation upon which restrictions of post conviction relief have historically been predicated." There is much debate over the allocation of resources between crime-solving and post-conviction relief. The Association has focused much of its attention on post-conviction review.

The House adopted two resolutions touching on women's issues. Regarding domestic violence, the House approved Resolution 111, which calls for "the extension of remedies, protections and services within domestic violence statutes to adolescents, and urges educational authorities, law enforcement officials, juvenile courts, and other government agencies to support more effectively adolescent dating awareness programs, domestic violence awareness programs, adolescent victim services and teen offender intervention programs." Addressing breast cancer, the House approved a recommendation that "the ABA partner with the public health community to improve access to legal services for breast cancer patients; and urges Congress, states, territories and local governments to provide adequate funding for basic research and clinical trials to find a cure for breast cancer and other women's health conditions in that the present level of spending is not adequate."

Turning to international concerns, the House of Delegates reaffirmed its support for an effective United Na-

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WHICH FOUNDATIONS HELP FUND THE FJE?

To support law related public education and service projects, The American Bar Association's 501(c)(3) entity, the Fund for Justice and Education ("FJE") solicits and accepts tax-deductible grants and gifts. *The Left Guide*, an independently published book that profiles left-of-center organizations, notes that the FJE is an affiliate of the ABA that funds public service and educational projects (with an emphasis on education of law students) through award grants to legal groups focusing on issues of immigration, law and the elderly, juvenile law, homelessness, and professionalism. According to the ABA, "Donors represent the legal profession, including the annual gifts of lawyers and law firms, corporations, foundations and government agencies. Through the fund, ABA public service and educational projects have received more than $20 million annually. Through the nearly 200 projects supported by the fund, the association has an impact on individual members of the pubic as well as on laws affecting all citizens."

The FJE receives substantial financial contributions from prominent foundations, also profiled in *The Left Guide*. Some of the ABA's more prominent foundation grants include grants from the Open Society Institute (part of the Soros Foundations Network), the Ford Foundation, the Robert Wood Johnson Foundation, the Annie E. Casey Foundation, and the John D. and Catherine T. MacArthur Foundation in fiscal year 1996.

The Open Society Institute, financed by billionaire financier George Soros, funds several programs with different purposes. They include: The Center on Crime, Communities & Culture; The Emma Lazarus Fund for Immigrants' Rights; the Lindesmith Center for Drug Legalization; the Program on Death in America; the Reproductive Rights Program, and Urban Initiatives. The Institute has a special consultative status with the United Nations Economic and Social Council. According to the Institute, its main issues of concern include "the gulf between the prosperous and the poor, particularly in the inner cities; the exaltation of the marketplace to the detriment of professional values in law, medicine, and journalism; the debasement of politics by vast sums of money; the need to improve care of the dying; the shredding of the social safety net; and the continued reliance on imprisonment as a response to crime, particularly for drug offenses."

In addition to the $675,000 grant ($600,000 for the Immigration Pro Bono Project and $75,000 for the Immigration Policy Project) that the Open Society Institute contributed to the FJE in 1996, the Institute also contributed to several other groups to further its goals. These grants include $100,000 grants to the National Organization for Women (NOW) Legal Defense Fund, the Lawyers Committee for Civil Rights of the San Francisco Bay Area, and Women of Color Reproductive Health Forum; $80,000 to the Alliance for Justice; $50,380 for National Public Radio; $50,000 for Western Center on Law and Poverty and the Welfare Law Center; $25,000 grants to the National Network of Abortion Funds and the National Abortion Rights Action League Foundation (NARAL).

The Ford Foundation, one of the nation's largest foundations, is also a large contributor to the FJE. The Foundation's purported mission is to "advance the public well-being by identifying and contributing to the solution of problems of national and international importance." Ford's grantees include organizations that concentrate on "governance and public policy, education and culture, urban poverty, rural poverty and resources, international affairs, rights and social justice, and reproductive rights and population."

Ford contributed $325,000 to the FJE in 1996. Other Ford Foundation recipients include $4,500,000 for National Public Radio; $1,985,000 to the American Civil Liberties Union (ACLU) Foundation; $1,300,000 to Catholics for a Free Choice; $1,000,000 to the Alan Guttmacher Institute; $950,000 for the National Women's Law Center; $675,000 to the Women's Legal Defense Fund; $600,000 to the National Council of Churches of Christ; $525,000 for the Center for Women Policy Studies; $500,000 to the National Organization for Women (NOW) Legal Defense and Educational Fund; $450,000 to the NAACP Legal Defense Fund; $340,000 to the Council on Foreign Relations; $300,000 to the Rainforest Foundation and to the Welfare Law Center; $215,000 to the Population Council; $202,000 to the Brookings Institution; $135,000 to the Feminist Press; and $125,000 to the Religious Coalition for Reproductive Choice.

The Robert Wood Johnson Foundation, a grant-making foundation that focuses on health care, health-care reform, drug abuse, and anti-tobacco reforms, also contributes to the FJE. The Capital Research Center notes that the Foundation worked closely with the Clinton Health Care Task Force headed by Hillary Rodham Clinton and with other Clinton administration officials including former Surgeon General Jocelyn Elders.

The Robert Wood Johnson Foundation awarded $137,882 to the FJE in 1996. The Foundation also donated $592,506 for National Public Radio; $335,179 for the Carter Center; $250,000 for the National Council of the Churches of Christ; $165,000 for the Tides Center; $103,043 for Planned Parenthood Federation of America; $48,367 for the Rock the Vote Education Fund; $25,906 for the Alan Guttmacher Institute; and $10,395 for the Center for Reproductive Law and Policy.

The Annie E. Casey Foundation aims to fund organizations that aid disadvantaged children in the U.S. In 1996, Casey contributed $75,000 to the FJE. Other donations included $625,000 to the Carter Center; $400,000 to the Children's Defense Fund; $163,000 to the American Public Welfare Association; $90,000 to the Woodstock Institute; $82,320 to the Child Welfare League of America; $76,000 to the Brookings Institution; $51,010 to Population Services Inter-

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important task of judicial selection, *ABA WATCH* dedicates the lead article of this issue to the role and composition of the Association's judicial evaluations arm, known as the Standing Committee on the Federal Judiciary.

Background: The Nature and Function of the ABA Evaluations Committee

For more than 50 years, the instrument for the ABA's evaluation of federal judicial candidates has been the Standing Committee on the Federal Judiciary. This Committee evaluates and recommends to the President whether prospective nominees to the United States Supreme Court and the Circuit and District Courts are qualified for appointment. The Committee has been consulted by every President concerning most federal judicial appointments since 1952, and the United States Senate, through the Senate Judiciary Committee, has been provided with the Committee's evaluation of every federal judicial nomination since 1948.

The fifteen-member Standing Committee is recognized by the Association as one of its most important institutions. According to the ABA:

> "This standing committee, created in 1946, evaluates and reports on the professional qualifications of persons under consideration for federal judicial appointments. Since 1952, every President has consulted the committee on almost every judicial appointment. The purpose of the evaluation is to provide an outside and objective evaluation of a prospective nominee's professional qualifications to serve on the federal bench. The ABA committee considers candidates referred by the Attorney General and restricts its review to issues bearing on integrity, professional competence and judicial temperament. In making its evaluation, the committee serves as a conduit for the views of the legal community on candidates. The committee's standards and procedures are structured to ensure that the evaluation is thorough, objective and fair."

Association leadership has long maintained that the Standing Committee is an impartial evaluator of the qualifications of prospective nominees to the federal bench. For example:

"Do we have the ability, in an impartial way and with integrity, to rate the professional qualifications of those people who are proposed to be candidates for lifetime tenure on the federal bench? It is simply, I think, absolutely and positively the case, and I think...we have absolute separation between the work of the committee that reviews Federal judges and any positions that the house of delegates or the ABA takes on anything."
Roberta Cooper Ramo
Former ABA President

"[T]here is a total and absolute disconnect between the policies adopted by the ABA House of Delegates and the ratings of judicial candidates by the ABA Committee on the Judiciary. These two bodies are not connected by phone, fax, E-mail, or policy....Our wall of separation is longer, bigger, and taller than the Great Wall of China, which I think is the only man-made object that can be seen from space. The committee's own governing principles govern the independence and ensure its position as a neutral evaluator."
N. Lee Cooper
Former ABA President

"[L]et me stress that the ABA entered into this process more than 40 years ago to provide an outside and objective evaluation of a prospective nominee's qualifications to serve on the federal bench. In the highly charged political atmosphere of judicial selection, I am convinced the ABA Committee performs a most useful role in helping to promote a more qualified and better federal judiciary...."
Robert Raven
Former ABA President

Critics have disagreed with Association leadership on three grounds. First, they maintain that the organization's highly visible and controversial political agenda, at a minimum, casts an appearance of partisanship in its evaluation of nominees. *The Left Guide*, a widely respected and independently published directory of left-of-center organizations, notes that "comparing the ABA's positions on issues that came before Congress with the Congressional voting monitored by Americans for Democratic Action (an organization that rates legislators according to liberal criteria) shows that a member of the 104th Congress who voted as urged by the ABA received a 100% rating from the Americans for Democratic Action. Only one Democratic Senator, ten Democrat House members, and Rep. Bernie Sanders (Socialist, VT) received this high a rating."

Responding to this record, former U.S Attorney General Richard Thornburgh observed:

"ABA expressions of points of view on highly-charged issues....rightly or wrongly, fosters a view that the ABA Standing Committee will look more favorably on judicial candidates whose views are aligned with the 'ABA view.'...[T]he American Bar Association can't have it both ways. It can't portray its Standing Committee as an impartial assessor of professional qualifications at the same time the association increasingly involves itself in issues that don't relate to any particular expertise of the association, but in general reflect the kinds of political and ideological differences that we see in most of the political process in this country."

Second, critics cite the Association's ratings record from the Carter, Reagan, Bush, and Clinton administrations. During the 1997 Senate hearings on the Association, an enumeration of ratings introduced by Senator Hatch strongly implied that prominent U.S. Court of Appeals nominees

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from the Reagan and Bush administrations often received lower ratings than similarly qualified or less qualified nominees from the Carter and Clinton administrations (for a copy of this chart, consult the Winter 1997 issue of *ABA WATCH*.)

Third, critics believe that the "temperament" prong of the Association's evaluations criteria is too susceptible to political bias. In relevant part, and as set forth by the ABA's publications, temperament is measured by factors such as "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice." Commenting on this standard, U.S. Court of Appeals Judge Laurence Silberman has noted:

> "[C]ompassion is a desired trait in human beings generally, but it is susceptible to misuse as a criterion for judicial temperament. It seems to me that it suggests that a putative nominee will permit emotion to overrule reason. Or it may mean the prospective judge will consistently violate his or her oath to dispense equal justice to the rich and the poor—presumably by favoring the poor. In other words, there may be tension between fairness and compassion....As for insensitivity, that term—during the skirmishes between the Reagan Justice Department and the Committee—seemed to refer to either those political views identified with the conservative wing of the Republican party or notions of judicial restraint."

The Current Evaluators. The ABA Standing Committee on the Federal Judiciary consists of 15 members: an at-large member who serves as Chairman, and one member from each of the 13 federal circuits, with the exception of the Ninth Circuit, for which there are two members. Each member is appointed to a staggered 3-year term by the President of the ABA, and, during their tenure, cannot contribute funds to political campaigns.

The following is a list of the current members, along with some information on their professional and political backgrounds. Political contributions are noted simply in order to provide some information regarding political background—based on public records, it appears that all of the current Committee members are in full compliance with the ABA's rule of refraining from such contribution activity while serving on the Committee.

1. Chairman and Member-at-large (through 2001), Patricia M. Hynes of New York, NY

Patricia Hynes is Partner at the recognized leading plaintiffs' class action law firm—Milberg, Weiss, Bershad, Hynes & Learch. Milberg is recognized as one of the pioneers of high-stakes class action litigation, having brought highly visible cases against tobacco companies, online ad companies (financial privacy lawsuits), and other high-dollar industries. The firm is currently pursuing class actions against Firestone and Cardura, and is handling the settlements for Holocaust Survivors.

At Milberg, Hynes is a trial lawyer who specializes in complex securities and commercial litigation. Hynes was recently the lead trial counsel in a massive securities fraud class action case against Oxford Health Plans, Inc. She was also the lead trial counsel for the City of San Jose in a six-month jury trial in the United States District Court for the Northern District of California against thirteen brokerage firms and an accounting firm involving losses to the City as a result of leveraged bond trading. The jury returned a verdict in favor of the City of San Jose. She also served as one of the lead plaintiffs' counsel in the settlement reached in the Drexel Bankruptcy and the $1.3 billion settlement reached with Michael Milken and others and has been co-lead counsel in numerous other class action lawsuits.

In addition to her position as Chairman of the Standing Committee on the Federal Judiciary, Hynes previously served as the Association's Second Circuit representative on the Committee since 1995 and has served as a member of the ABA's Litigation Section Council. She was Chairman of the Litigation Section's Securities Litigation Committee and was Co-Chairman of its Pre-Trial Practice and Discovery Committee and the Litigation Section's Task Force on Civil Rights Standards. Hynes was a member of New York Governor Mario Cuomo's Commission on Government Integrity from 1987-1990, and is a Fellow at the American College of Trial Lawyers.

Between 1992 and 1997, Hynes donated $13,200 to Democratic members of the Senate and House (or candidates for such Congressional office), including Charles E. Schumer, Paul S. Sarbanes, Diane Feinstein, Jim Sasser, Joel Hyatt, Geraldine Ferraro, and John Conyers. She contributed to Republican Senator Alfonse D'Amato and Emily's List in 1992, and in 1991, supported the Democratic Congressional Campaign Committee with a $2,000 contribution.

The contributions of Milberg, Weiss make it the fourth largest political contributor among law firms nationally, with the majority of the donations going to Democrat PACs ($50,000 and $35,000 to the DNC and the DCC, respectively, in 1998; an additional $150,000 was contributed to the DNC in 1996).

2. First Circuit (through 2002), Roscoe Trimmier Jr. of Boston, MA

Roscoe Trimmier, Jr., Partner at Ropes & Gray, is a lawyer who specializes in litigation matters for corporate clients, utilities, high technology entities, and governmental authorities in state and federal courts. His practice includes trial experience in economics, statistics, modeling, scientific, and high-technology issues.

Trimmier has represented health care providers in HMO opera-

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tion and management disputes, major corporations and investors regarding acquisitions, and represented the Massachusetts Port Authority in its "Logan 2000" airport redevelopment program. Trimmier has authored a number of articles on environmental litigation, including a chapter in a monograph published by the National Legal Center for the Public Interest.

Trimmier is the assistant head of Ropes & Gray's litigation department and has served as the head of the firm's environmental practice group, a member of the hiring committee, and a member of the associates committee. In addition to his position on the Standing Committee, Trimmier is a Fellow of the American College of Trial Lawyers, the Massachusetts Bar Foundation, and the American Bar Foundation. He is also a member of the American Law Institute.

There is no public record of federal election political contributions by Mr. Trimmier.

3. Second Circuit (through 2003), George S. Frazza of New York, NY

George S. Frazza is Of Counsel at the New York office of Patterson, Belknap, Webb & Tyler and previously served as General Counsel and Executive Committee Member at Johnson & Johnson. Frazza is a lawyer who specializes in corporate law. Some clients Frazza has represented include prominent individuals in philanthropic activities, international real estate developers, manufacturers, technology companies, internet companies, and media/publishing companies. Frazza is a member of the ABA Board of Governors Council of the Fund for Justice and Education and a New York Delegate-At-Large of the ABA House of Delegates. At the ABA, he has been Chairman of the Business Law Section and a member on the Committee on Judicial Independence, Ad Hoc Committee on Judicial Campaign Finance, and the Mass Tort Commission. He has also been the Chairman of the American Arbitration Association Complex Cases Program, on the Legal Advisory Committee of the New York Stock Exchange, and President of the Association of General Counsel. He is a Director of Nelson Communications and of IMPATH, a Trustee of the Robert Wood Johnson Foundation, and Chairman of the business community's Civil Justice Reform Group.

Mr. Frazza donated $2,250 to Republican House member Dick Zimmer between 1990 and 2000, as well as $1,500 to Democratic Senator Frank Lautenberg.

4. Third Circuit (through 2002), George J. Kenny of Roseland, NJ

George J. Kenny is Partner at Patterson, Belknap, Webb & Tyler. Kenny is a trial lawyer who represents his clients in insurance, product liability, tort liability, and professional malpractice matters. Kenny's ABA experience includes serving as a member of the Litigation Section Council, as Co-Chairman of the Professional Liability Litigation Committee, and as Chairman of the Insurance Coverage Litigation Committee. Kenny has served as a member of a number of New Jersey Supreme Court Committees including: Committee on Relations with the Medical Profession; Civil Practice Subcommittee on Attorney Fees; the District Ethics Committee; Workshops on Civil Case Management Reform; Special Committee on Minors' Funds; Committee on Relations with the Media; Committee on Court Reporting; and the Ad Hoc Committee on Law Firm Names. He is currently the Chairman of the New Jersey Supreme Court Committee on Lawyer Advertising. He is an Adjunct Professor of Law at Rutgers University School of Law and a member of the Editorial Board of the *New Jersey Law Journal*. Kenny is a Trustee for the Legal Services Foundation of Essex County and has served as Trustee for Essex County College. Kenny is also a Diplomat to the American Board of Trial Advocates and a Fellow of the American College of Trial Lawyers and the American Bar Foundation.

Mr. Kenny has contributed $3,310 to several Democratic U.S. Senators—Robert Torricelli, Bill Bradley, and Frank Lautenberg. He also has donated to two Republican politicians—New Jersey Governor Christine Todd Whitman ($360) and Republican House Member John Fox ($200). In 1992, he made a $750 contribution to the Clinton presidential campaign.

5. Fourth Circuit (through 2001), William C. Hubbard of Columbia, SC

William C. Hubbard is Partner at Nelson Mullins Riley & Scarborough, where he concentrates his practice in the areas of contracts, business torts, and unfair trade practices. Hubbard has extensive ABA experience. He has been a member of the Long Range Program and Financial Planning Committee, of the Special Coordinating Committee on Professionalism, and the Board of Directors of the American Bar Endowment Board. He has been Young Lawyers Liaison and Assistant Secretary of the Board of Governors. Hubbard has also served on the Select Committee of the House, and the ALI-ABA Committee on Continuing Professional Education. He is currently State Delegate for South Carolina in the ABA House of Delegates and a member of the Steering Committee of the Nominating Committee. Hubbard is extensively involved in the South Carolina Bar, currently holding positions as a member of the Civil Justice Reform Committee and the House of Delegates. His other relevant experience includes having been Chairman of the Professionalism Committee, the Professional Responsibility Committee, and the Long Range Planning Committee. Hubbard is a member of the South Carolina Defense Trial Attorneys Association and the American Judicature Society. He has been elected to membership of the American Board of Trial Advocates, the American Law Institute and the John Belton O'Neall Inn of Court. He is a Fellow of the American Bar Foundation and a permanent member of the U.S. Fourth Circuit Judicial Conference.

Mr. Hubbard's publicly disclosed federal political contributions between 1992 and 1994 totaled $1,000, with half of that going to the Clinton presidential campaign and the

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remainder contributed to Democrat candidate for State Representative Robert Barber and Democrat State Senator James Bryan.

6. Fifth Circuit (through 2002), Harry S. Hardin III of New Orleans, LA

Harry S. Hardin, III is Senior Partner at Jones, Walker, Waechter, Poitevent, Carrere & Denegre, where he represents clients in commercial business litigation, including contract, antitrust, trademark, copyright, and appellate law. His ABA experience includes membership in the Litigation, Antitrust, Tort and Insurance Practice, and Intellectual Property Sections. He is a State Delegate for the ABA House of Delegates and a member of the Steering Committee of the Nominating Committee. Hardin is heavily involved in the Louisiana legal community, holding positions in the Louisiana State Law Institute, Louisiana Association of Defense Counsel, and the Louisiana Association of Professional Responsibility Lawyers. The Louisiana Supreme Court appointed Hardin to serve on several committees, including the Permanent Advisory Committee for Continuous Revision to the Code of Judicial Conduct, the Ad Hoc Committee to Study the Creation of Judicial Campaign Oversight Committee, the Committee to Study Judicial Disciplinary Enforcement Procedures, and the Committee on the Prevention of Lawyer Misconduct. He is a Fellow at the American College of Trial Lawyers, the American Bar Foundation, and the Louisiana Bar Foundation. Hardin is a member of the National Association of Railroad Trial Counsel. Hardin was elected to the University of South Carolina Board of Trustees.

Apart from annual contributions to his law firm's political action committee, Mr. Hardin made $250 contributions to the RNC in 1994 and 1996, a $250 contribution to Republican House member Robert Livingston in 1993, and a $1,500 contribution to U.S. Republican Congressman Jimmy Hayes.

7. Sixth Circuit (through 2003), David C. Weiner of Cleveland, OH

David C. Weiner is Partner at Hahn Loeser & Parks, where he represents clients in litigation, complex litigation and alternative dispute resolution. Some of the companies he has litigated on behalf of include: Exxon Mobil, Otis Elevator Company, Wells Fargo, Reynolds and Reynolds, Shell Oil, and J.C. Penney. Weiner has also engaged in constitutional litigation with respect to First Amendment issues, drug paraphernalia laws, and attorneys' fees matters where he represented clients including Gannett, Inc., Combined Communications Corp., American Business for Constitutional Rights, the National Paraphernalia Association, and the Legal Aid Society of Cleveland. He currently is State Delegate for Ohio in the ABA House of Delegates and was former Chairman of the Young Lawyer's Division and a former Council member of the Fund for Justice and Education. He has been a Fellow at the American Bar Foundation and the National Legal Aid and Defender Association. His community involvement includes his position as former Chairman of the Attorneys' Division for United Way Services, former Trustee of the Great Lakes Theatre Festival, former President of Cleveland Works, Inc., and a member of the Ohio Governor's Advisory Board for Drug Treatment.

Weiner testified before Congress in 1997 on behalf of the ABA regarding product liability reform. In his statement, Weiner reiterated the ABA's opposition to broad federal product liability legislation, supporting instead the continued right of the states and territories to regulate product liability law. Weiner argued that S. 5 (which would eliminate a product seller's liability for a breach of warranty except for breach of express warranties) would result in "legal chaos" and would create "endless interpretation and disputes." Weiner also maintained that there is no product liability "crisis" and explained that according to recent statistics, tort filings decreased nine percent from 1990-1993 and remained stable in 1994-1995. Weiner also cited a 1995 study by the Consumer Federation of America to illustrate that product liability insurance premiums paid by businesses have decreased by just under half since 1987 and that the average settlement per product liability claim by insurance companies over the last decade was under $6,000.

Between 1992 and 1998, Mr. Weiner's publicly disclosed federal election contributions amounted to $1,250. Each contribution was received by a Democrat—candidate for U.S. Congress Jay Nixon, U.S. Congressman Stephanie Tubbs Jones, Ohio State Senator Eric Fingerhut, and Ohio State Representative Timothy Hagan.

8. Seventh Circuit (through 2003), Laurel G. Bellows of Chicago, IL

Laurel G. Bellows is Partner at Bellows & Bellows, where she practices business litigation, employment termination, employment discrimination, investment fraud, commodities regulation, and securities regulation. In connection with her employment practice, Bellows has criticized Wall Street, asserting, "It's one of the last bastions of discriminatory treatment and unequal standards in the country." She has argued that "Law firms tend not to take sexual harassment complaints seriously enough." She has also hailed the Clinton administration for doing an "excellent job in promoting women to positions of influence. A record 31 percent of President Clinton's federal judicial appointments were women, compared with 19 percent under the Bush administration and only 8 percent under President Reagan." On Hillary Clinton's contributions to the effort to "break the glass ceiling," Bellows remarked, "I speak to women every day who are tremendously proud and grateful that she has put herself on the firing line, but, boy, has she paid a price for stepping forward for women professionals."

Bellows is an Illinois member of the House of Delegates and the Select Committee of the House. She is the former Chairman of the ABA Commission on Women in the Profession. She

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is also a leader of the National Conference of Bar Presidents, where she represents the state of Illinois.

Since 1992, Ms. Bellows's publicly disclosed campaign contributions of $5,650 all went to Democrats, including: Carol Moseley Braun, Paul Simon, Richard Durbin, Patty Murray, Geraldine Ferraro, Jim Burns, and Barbara Mikulski. During this same period, she also has made $2,950 in contributions to two PACs (Emily's List and Personal PAC) and $4,050 in contributions to the Democratic National Committee and the Democratic Senatorial Campaign Committee.

9. Eighth Circuit (through 2001), H. William Allen of Little Rock, AR

H. William Allen is Managing Partner at the Allen Law Firm, where he represents clients in banking, business, insurance, securities, and commercial litigation. He was Deputy Attorney General under President Jimmy Carter and a former Assistant U.S. Attorney for the Northern District of Illinois. He is a member of the ABA House of Delegates for the state of Arkansas, has been on the Council for the Section on Litigation, was Chairman for the Standing Committee on Ethics and Professional Responsibility, and has been a member of the Board of Governors. He is a member of the American Bar Foundation Executive Committee. He has also been a member of the American Judicature Society and the American Law Institute.

There is no public record of federal election campaign contributions.

10. Ninth Circuit (through 2002), Rudy A. Englund of Seattle, WA

Rudy A. Englund is Partner at Lane Powell Spears Lubersky, where he deals with class action litigation, complex commercial litigation, intellectual property disputes, and business dispute resolution. In addition to his service on the Standing Committee, Englund has been a Council Member of the ABA Section of Litigation and Co-Chairman of the Litigation National Institutes Committee. He is also a member of the Washington Defense Trial Lawyers Association.

There is no public record of federal election contributions by Mr. Englund.

11. Ninth Circuit (through 2003), Jane H. Barrett of Los Angeles, CA

Jane H. Barrett is Partner at Preston Gates & Ellis, where she litigates in a number of fields, including infringement cases in the computer software industry and labor employment matters. Barrett represented the largest manufacturer of computer software in a case that resulted in one of the largest counterfeit software seizures in U.S. history. She also represents Amtrak, a major airline, and other clients in employment discrimination matters, OSHA investigations, FELA matters, and Railway Labor cases. The first woman on the ABA Board of Governors, Barrett has served as Chairman for the Special Committee on Delivery of Legal Services and the Young Lawyers Division of the ABA. She is on the Board of Directors of the American Bar Endowment and on the Board of Directors of the American Judicature Society.

Ms. Barrett's only publicly disclosed federal campaign contribution is a $250 donation to Emily's List, in 1991.

12. Tenth Circuit (through 2003), Judy Hamilton Morse of Oklahoma City, OK

Judy Hamilton Morse is Partner at Crowe & Dunlevy, where she concentrates her practice on business litigation, commercial litigation, and bankruptcy. Heavily involved in her state bar, Morse is a member of the Oklahoma Bar Association's Bankruptcy Section, Bench and Bar Committee, and Legal Ethics Committee. She was Vice-Chairman of the Civil Justice Reform Act of 1990 Advisory Group for the Western District of Oklahoma. She is Trustee of the Oklahoma Bar Foundation.

There is no public record of federal political contributions by Ms. Morse.

13. Eleventh Circuit, 2003, Harold T. Daniel, Jr. of Atlanta, GA

Harold T. Daniel, Jr. is Partner at Holland & Knight, where he engages in trial practice, appellate practice, antitrust law, and commercial litigation. At Holland & Knight, he serves as Chairman of the firm's Antitrust, Trade Regulation and Competition Law National Practice Group. In addition to his Standing Committee duties, Daniel is a member in the ABA's Litigation and Antitrust Sections. He is a member (and former President) of the State Bar of Georgia, and a member of the Atlanta Bar Association, and the Lawyers Club of Atlanta. He is a Director for the Lawyers' Committee for Civil Rights Under the Law and a Fellow of the American College of Trial Lawyers and the American Bar Foundation. Daniel is also Master Barrister of the Joseph Henry Lumpkin American Inn of Court. He is Trustee for the Lawyers Foundation of Georgia and the Georgia Legal Services Program.

All of Mr. Daniel's direct federal campaign contributions were to Democrats between 1994 and 1998—U.S. Senator Max Cleland, candidate for U.S. Congress Michael Coles, Georgia State Representative McCracken "Ken" Poston, candidate for U.S. Congress Fred Overby, and former U.S. Congressman Don Johnson.

14. D.C. Circuit (through 2002), Fred F. Fielding of Washington, D.C.

Fred F. Fielding is Partner at Wiley, Rein & Fielding, where he specializes in government affairs, white-collar crime, legal counseling, and strategic planning and coordination for individual and corporate clients. He was Deputy Counsel to President Richard Nixon and Deputy Counsel to President Ronald Reagan, Conflict of Interest Counsel to the Bush-Quayle campaign, Republican National Committee Advisor, Campaign Counsel to Senator Quayle, Deputy Director of the Bush-Quayle transition, and Senior Legal Advisor for the Bush-Quayle campaign. He serves on the Board of Directors at the Center for Democracy,

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Gettysburg College, and the Arlington Health Foundation. He is also on the Miller Center Commission of the Selection of Federal Judges.

All of Mr. Fielding's federal election contributions are to Republican candidates or the Republican National Committee (with the exception of $500 to Democrat, John Murtha). The RNC has received $2,175 since 1989. Also since 1989, the following Republican candidates received a combined total of $18,200—Georgia State Senator Mack Mattingly, U.S. Senator John Warner of Virginia, Presidential candidate Robert Dole, Virginia Republican Congressional candidate James Miller, Illinois U.S. Senate candidate Richard Williamson, Pennsylvania Senator Arlen Specter, President George Bush, Texas Gubernatorial candidate Thomas Pauken, House Speaker Newt Gingrich, California Congressman Tom Campbell, Texas Senator Phil Gramm, Alaska Senator Frank Murkowski, Illinois U.S. Senate Candidate Thomas Kindness, Illinois Senatorial candidate Lynn Martin, New Mexico Senator Pete Domenici, Oregon Senator Mark Hatfield, Alaska Senator Ted Stevens, and Virginia Congressman Thomas Bliley.

15. Federal Circuit (through 2002), Pauline A. Schneider, Washington,

Pauline A. Schneider is a partner at Hunton & Williams and practices in the areas of public finance and government relations. She currently represents the District of Columbia in the ABA House of Delegates, is on the Steering Committee of the Nominating Committee, and is Council to Legal Education and Admissions to the Bar. Schneider is Director of the National Partnership for Women & Families, the Lawyers Committee for Civil Rights, and the Joint Center for Political and Economic Studies. She is Vice-Chairman of the Women's Legal Defense Fund. She is a member of the American Law Institute and the American Bar Foundation and a Director of the Lawyers Committee for Civil Rights. She was Staff Assistant in the White House Office of Intergovernmental Affairs from 1978-1981. Schneider was former head of the Judicial Recommendation Committee for Delegate Eleanor Holmes Norton.

She is the recipient of a number of awards, including the ABA Commission on Women's *Margaret Brent Award*, the National Association of Women Lawyers *President's Award*, the Women's Bar Association of the District of Columbia *Woman Lawyer of the Year Award*, and the Women's Legal Defense Fund's *Women Who Shape the Future Award*. At a 1996 dinner, President Clinton publicly acknowledged Schneider's contributions to the Women's Legal Defense Fund.

All of Ms. Schneider's $4,496 in federal campaign contributions from 1990-1999 went to Democrats—President Bill Clinton, Virginia Senator Charles Robb, and D.C. Delegate Eleanor Holmes Norton. She also donated $750 to Emily's List and $1,300 to the Democratic National Committee.

16. Board Liaison, James B. Lee of Salt Lake City, UT

James B. Lee is Partner at Parsons Behle & Latimer, where he represents clients in various areas of the law: mining law, natural resources law, environmental litigation, government relations, civil litigation and alternative dispute resolution. He is on the ABA Board of Governors Program and Planning Committee, represents Utah in the House of Delegates, and is on the Judicial Independence Standing Committee of the ABA. Lee has served as President of the Utah State Bar. He is currently on the Board of Directors for the Legal Aid Society of Salt Lake and Utah Legal Services. He has served both as Vice President and on the Board of Directors of the Salt Lake Area Chamber of Commerce.

Between 1992 and 1997, public records reflect a total of $1,500 in federal contributions to three Republicans—U.S. Senators Orrin Hatch and Robert Bennett of Utah, and Utah Lieutenant Governor Olene Walker.

Pro Bono Activity at the AmLaw 100

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♦ Representation of inmates in capital and prisoner rights cases appears to be a common feature of big-firm pro bono work, with about 54 percent of the firms mentioning cases in these areas.

♦ Civil rights is an area that receives substantial attention as well from the AmLaw100. About 23 percent of the 80 firms for which data is available undertake matters in this area. Only 1 (1.25%) law firm referenced work that challenges affirmative action. All other firms list groups supportive of preferences in conjunction with its mention of civil rights work (e.g., NAACP, Lawyers Committee for Civil Rights, etc.).

♦ Amongst the 80 firms identifying types of pro bono work, 13 (16.25%) firms cited matters pertaining to "education," "welfare," or "public benefits." At least one of these firms states that it conducted some work in support of charter schools, and through the survey of conservative and libertarian organizations, it appears that at least one other AmLaw100 firm is defending school voucher programs.

♦ About 18 percent of the firms (14) listed "environmental protection" as one area of pro bono work. This area is normally listed alongside references to the Sierra Club, the Natural Resources Defense Council, and related groups. Two of the firms specifically mentioned their efforts to broaden environmental standing. One firm undertook "property rights" litigation on behalf of a conservative or libertarian group listed in *The Right Guide*; though the firm did not report this case in its materials, that information was obtained through the independent survey of conservative and libertarian litigating groups.

The reader is encouraged to review the full set of findings on the Federalist Society's Web site, www.fed-soc.org. A copy of the Executive Summary and report for the study can be obtained by contacting the Federalist Society by phone (202-822-8138) or email (fedsoc@radix.net).

Death Penalty

Continued from page 3

fronted by an overwhelming [reduction in violent crime] executions in the U.S. are increasing."

Representatives of the ABA testified before the House Judiciary Subcommittee on June 20, 2000, arguing that administration of capital punishment is a "legal process stood on its head."

DNA Testing and Capital Punishment

James Coleman, chairman of the ABA Section of Individual Rights and Responsibilities, has maintained that "inadequate, indeed, grossly inadequate resources are devoted to state court trials, appeals and post-conviction review of capital cases...Capital cases are the most visible and charged of all criminal cases, and frankly our legal system is not doing a good job handling them today."

Through Coleman, the ABA has suggested that Congressional enactment of the Innocence Protection Act of 2000 would be a crucial step in the right direction because state eligibility for federal grants would be contingent on the foundation and conservation of an "effective system" for providing sufficient legal aid to destitute defendants at every step of death penalty prosecution. The bill would mandate that such a system include a centralized and independent authority for the appointment of attorneys. It would also require "reasonable compensation," payment of reasonable expenses incurred, and payment of reasonable costs of support services necessary in the defense of a capital case.

In relevant part, Title I of the Innocence Protection Act would require that biological material be preserved and that DNA testing be accessible in every appropriate case. There is much debate over the appropriate allocation of scarce DNA testing resources between reopening capital cases and addressing presently unsolved crimes. The Association's attention to DNA testing, however, has focused almost exclusively on the re-evaluation of capital convictions.

ABA 2000 Annual Meeting

Continued from page 8

tions. It urged the United States to pay its outstanding dues to the U.N.

The most intense debate concerned relaxing restrictions on multidisciplinary practice (MDP), a topic that has been studied by the ABA for the last two years. The delegates approved a final resolution emphasizing that the sharing of legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are generally inconsistent with the core values of the legal profession. But the resolution also says that "in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or otherwise be permitted to direct or regulate the professional judgment of the lawyer or the law firm in rendering legal services to any person."

FJE

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national; and $50,000 to National Public Radio.

The John D. and Catherine T. MacArthur Foundation "supports projects that promote diversity in the media;" health programs that "award fellowships to exceptionally creative individuals, regardless of field of endeavor;" population programs that "address complex issues related to population, reproductive rights, and women's reproductive health;" peace programs; and environmental programs. The MacArthur Foundation also contributes to the FJE, donating $18,000 in 1996. Other organizations that received sizeable donations from the MacArthur Foundation in 1996 include: $875,000 for the Carter Foundation; $300,000 for the ACLU Foundation's National Prison Project; $280,000 for the Lawyers Committee for Human Rights; $250,000 for the Children's Defense Fund, the Population Council, and the Global Fund for Women; $215,000 for the Fund for Peace; $200,000 for Catholics for a Free Choice; and $100,000 for the Film Arts Foundation and the Council on Foreign Relations.

Judicial Elections

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Discussion of background papers dominated the conference's agenda. The papers covered subjects such as judicial campaign conduct, publicly financed judicial elections, problems with partisan elections, vacancy appointments, interest group involvement, voter knowledge and ability, the impact of money in judicial politics, and judicial retention elections. Smaller working groups met to focus on these topics and reported their findings and conclusions at a plenary session at the close of the summit.

The background papers were supposed to "objectively present both the simple facts and complex developments that have raised so much national concern." The tenor of the papers was decidedly anti-judicial elections. The paper on judicial campaign conduct declared that "the increasingly contentious nature of judicial elections and the current methods of political campaigning have created an inexorable conflict between some judicial candidates and the codes of conduct that regulate their campaign activity." The paper's author, Ohio Supreme Court Legal & Legislative Services Director Richard Dove, praised campaign conduct standards that have been developed by the groups most hostile to judicial elections—Citizens for Independent Courts, Common Cause, and the League of Women Voters, for example. Dove concludes that, despite some promising reform efforts, "We are faced with the distinct prospect, in the not too distant future, of seeing judicial campaigns that are indistinguishable from those conducted by legislative and executive branch candidates, replete with misleading 'buzzwords' and labels, implied, if not express, promises of conduct in office, and negative campaigning. Indeed, some feel as though this day is already here."

Indiana University Law Professor Charles Gardner Geyh's paper reviews publicly financed judicial elections. He begins by listing problems

Continued on next page

associated with privately funded campaigns, such as the high cost, the negative perception that the public holds regarding the impartiality of judges, and allegations of favoritism. His paper proceeds to outline a number of public financing options for judicial campaigns, some theoretical and others already in practice. In particular, he highlights Wisconsin's experience at public financing; the state has faced difficulties in funding the program from funds provided by $1 taxpayer state tax return check-off. To combat this problem of finding adequate funds, Geyh suggests alternative means of financing such as supplementing taxpayer check-off amounts, using monies generated by court system users, setting contribution limits, or using ABA-adopted recusal standards in cases of partial public financing to prevent the appearance of impropriety problems. While acknowledging a number of problems that would exist by using public financing, he suggests the benefits outweigh any drawbacks. He concludes, "For states that are unwilling to jettison elections in favor of an appointive method of judicial selection, public financing should remain on the table as an alternative means to control some of the adverse effects of private fundraising on judicial elections."

Professor Anthony Champagne of the University of Texas at Dallas detailed problems he sees associated with interest groups in judicial elections. Champagne writes that interest groups "often draw no distinction between achieving their goals through the courts or through the political process. The result can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve and retain judicial office." Champagne singles out a few groups by name in his article, such as the "pro-business" M-Law of Michigan, which was created by the Michigan Chamber of Commerce, the Michigan State Medical Society, and the American Tort Reform Association, a "national pro-business interest group." He also noted that the actions of the U.S. Chamber of Commerce's Institute for Legal Reform illustrate how interest group involvement currently extends to national coalition groups. Other groups singled out by Champagne include: the Mississippi Prosecutors Association; Citizens for Judicial Review, "an organization created by a Tulsa public relations firm with ties to conservative interests"; Oklahomans for Judicial Excellence, which created scorecards distributed by the Christian Coalition; the Tennessee Conservative Union; the Idaho Trial Lawyers Association; the Idaho Christian Coalition; the Concerned Citizens for Family Values; Citizens for a Conservative Court; Citizens for a Strong Ohio; and the Christian Coalition of Florida. Champagne concludes that interest group involvement leads to the perception that the election process "introduces bias and unfairness into the state courts."

Champagne, in a second background paper, surveys the role of political parties in judicial elections. Five of the 17 states with partisan judicial elections are in the south, and until recently, had predominantly Democratic judiciaries. According to Champagne, as the Republican Party in North Carolina and elsewhere in the South gained strength during the 1980s, "political" interest groups such as Citizens for a Conservative Court become further involved in judicial elections. Only then had "partisanship...come to judicial elections in North Carolina as it came to the rest of the South that for years had actually had nonpartisan elections under the façade of a partisan system." He opines: "One explanation for this greater and more vicious partisanship is that the parties in some states have become more competitive. In the South that competitiveness has come about in the past two decades as the Republican Party has become a major force in the region." Champagne proceeds to describe judicial races in Texas, Ohio, Michigan, and Tennessee, and concludes that Republican Party politicking and related interest group lobbying determined which judicial candidates won.

At the summit's conclusion, attendees offered several recommendations for structuring a Call to Action for reform. They suggested removing party designation from ballots for judicial candidates, imposing contribution limits for donors to judicial campaigns, forming citizen screening groups to monitor campaign conduct, and promoting voter education initiatives in judicial campaigns, possibly through the Internet. Only the Texas and Illinois delegations opposed the removal of party affiliation from the ballots. The chief justices tentatively agreed to urge states that employ retention elections to publish "official ratings" of judges seeking another term. The judges also advocated requiring training sessions for judicial candidates and their campaigns' staffs and pushed for states to establish hotlines that candidates and supporters could call to get quick answers regarding adherence to judicial canons. The attendees decided to commission a study on issue advocacy ads before making a specific recommendation. The ABA was also encouraged to update the portion of its model judicial canons that deal with campaign conduct. Finally, the feasibility of publicly financed elections was considered.

Among the additional proposals set forth in the summit's official *Call to Action: Statement of the National Summit on Improving Judicial Selection* were: term limits are not appropriate for judicial offices; states should adopt systems for disclosing campaign contributions; and states should discuss creative ways, consistent with the right of free speech, in which state rules as to contribution limits and financial disclosure can be applied to outside groups and individuals as well as candidates and political parties.

AALS *continued from page 6*

Dusty Araujo of the International Gay and Lesbian Human Rights Commission, James Willets of Nova Southeastern, and Richard Boswell of California-Hastings.

A Joint Program of the Sections on Africa, Law and Anthropology and Native American Rights was held Friday addressing "Comparative Decolonization Theories and Practice in Africa, Canada and the United States." The program was premised on the idea that: "The indigenous nations and peoples of North America have long been subject to the colonizing activities of European nations and peoples. ... [causing] great loss of life, land and resources ... [and] a considerable erosion of culture and identity. Throughout this process, law has played a critical role in supporting the actions of the colonizing nations." Moderated by Beverly Moran of Wisconsin and Robert Porter of Kansas, speakers included James Youngblood Henderson of the Native Law Centre of Canada, William O'Barr of the Duke Cultural Anthropology Department, and Richard Ralston of the Wisconsin Department of Afro-American Studies. As described in the Annual Meeting Program, the panel went on to explore the following issues:

> "So deeply established have these colonial concepts become in the present day, that much legal scholarship and practice no longer deem it practical or feasible to consider their rejection or withdrawal. Instead, much effort is focused on 'tweaking and bending' these colonial doctrines to accommodate contemporary legal, political, and economic problems. Moreover, the colonialism associated with these doctrines has reached the level of neo-colonialism as advocates for indigenous nations and even indigenous peoples themselves now accept, rely upon, and even encourage further assertions of American power over their affairs. The cost of this continued legal incorporation is the risk of completely eliminating the inherent self determination of these nations and peoples. This panel will explore the prospects for decolonization of the indigenous nation 'control' laws in Canada and the United States. ... The theory and actual practice of this decolonization process will be explored for purposes of generating ideas as to how the indigenous nations in North America might be decolonized."

Programs on Friday, January 5, also included "Public Lands at the Millennium: A Transformation in Progress or Business as Usual?" that posed the question, "Will these lands increasingly become recreation meccas or biodiversity strongholds rather than an asset base for industrial development?" "Aging with Diversity" looked at "the legal issues of adequate income, and quality health and long term care in later life through the lens of three disparate populations: older Asian immigrants; gay, lesbian and bisexual elders; and older African Americans." The Section on Poverty hosted "New Perspectives in Anti-Poverty Advocacy: Promoting Equal Justice in the Post-Welfare Era." The Section on Constitutional Law held its "Town Hall Meeting: Election 2000, the Electoral College and the Constitution." Wrapping up Friday's programs, the Section on Women in Legal Education sponsored "Categories of Entitlement: Race, Gender, Age Disability, Sexual Orientation and the Social Policy of Public and Private Wealth." Among the papers presented at this program were Temple professor Nancy Knauer's "Heteronormativity and Federal Tax Policy" which discussed "the use of categories of sexual orientation in U.S. tax policy to govern wealth transmission and contributions to the public tax revenue." Also presented at the session was a paper by Judith Allison Marie Scully of West Virginia on "Reproductive Wrongs: Women's Sterilization and Inequalities."

On Saturday, January 6, the AALS Taskforce on Racial Diversity held a session for all Annual Meeting participants, "Sustaining Diversity after *Hopwood* and Proposition 209: Lessons for All of Us." This program was followed by "Advancing the Legal Academy: Strategies for Recruiting People of Color as Law Professors" presented by the Committee on the Recruitment and Retention of Minority Law Teachers. Other Saturday programs included "The Popular QTIP Marital Deduction: Sexism in Estate Planning?" and "One Year after Seattle: Assessing the Global Democratic Deficit." Saturday's session on "Property, Wealth, and Inequality" further considered issues raised in the "Workshop on Property, Wealth and Inequality" held earlier in the week. In that session, participants discussed the "unequal distribution of property and wealth" and heard the following presentations:

> "Dean [John C.] Brittain [of Texas Southern] ... [discussed] the reflexive relationship between housing and education, attending particularly to the effects that residential racial and economic segregation have on education and the prospects for equality of opportunity to accumulate wealth. Professor [Martha] Mahoney [of Miami], also addressing cases dealing with housing and education [critically examined] the concepts of 'white flight,' arguing that the concept tends to make change appear aversive; makes racism and withdrawal appear deceptively as spontaneous and universal; masks white norms by recognizing whiteness only in retreat from the presence of non-whiteness; and provides a flawed but widely believed rational (sic) for legal decisions resisting transformation. Professor [Frank] Michelman [of Harvard] [described and analyzed] recent developments in South Africa, focusing on the South African Constitution's equality clause and its guarantee of a right to adequate housing."

The meeting concluded on Saturday, January 6, with the election of Dale A. Whitman of Missouri-Columbia as President-Elect. Also elected to the AALS's Executive Committee were Mark Tushnet of Georgetown and Mildred Wigfall Robinson of Virginia. The next Annual Meeting of the AALS is planned for January 2002, in New Orleans.

During that intervening period, the Association had received a letter from Professor Paul E. Salamanca of University of Kentucky College of Law and several other law professors which criticized the ABA if it was involved in LCCR meeting. In part, the letter reads:

> For the ABA to take a position against Senator Ashcroft's nomination reflects a degree of disrespect for difference of opinion that is deplorable for a professional organization. The American Bar Association represents all lawyers and should not participate in a partisan political campaign against a cabinet nominee.

Ultimately the Association released the following statement to the editors of *National Review*:

> The American Bar Association has never supported or opposed a nominee for Attorney General and has not considered doing so in this case. The Association is not a part of any coalition to either defeat or support the John Ashcroft nomination. If any individual at the reported meeting claimed to represent the ABA, he or she did so in violation of Association rules. We have contacted Wade Henderson of the Leadership Conference on Civil Rights to clarify that the ABA is not involved with this coalition and will not take a position on the Ashcroft nomination.

Additionally, the ABA representative attending the meeting offered the following explanation to *National Review*:

> I have been informed that you are in receipt of a list of e-mail addresses of individuals who attended a public meeting on Tuesday, January 9th. We received information about this meeting from other juvenile justice advocates and attended this meeting to obtain additional information. At this meeting there was a sign-in sheet requesting the name, phone number, and e-mail address of anyone in attendance. This was not a statement of support for the positions expressed at the meeting, a statement of organizational endorsement, or anything else, merely a sign-in sheet which everyone in attendance, myself included, signed. I did not sign anything else while in attendance at the meeting for informational purposes, did not volunteer to do any work, and did not volunteer for any of the committees there established, and did not say anything, other than to introduce myself when everyone else did so. My attendance was for informational purposes only and should not be construed as an endorsement of any position taken by any organization. The American Bar Association does not take a position on any executive branch nominee and my presence at an informational meeting should not be construed as such. Further, I have asked that my e-mail address be removed from this list.

PROFILE: ABA PRESIDENT-ELECT ROBERT E. HIRSHON

At its annual meeting last July, the ABA House of Delegates elected Robert E. Hirshon to serve as President-elect of the ABA. Hirshon will begin his term as President at the ABA's annual meeting this August. Hirshon is a partner in the Portland, Maine office of Drummond, Woodsum & MacMahon. At the ABA, Hirshon has served as Chairman of the Tort and Insurance Practice Section. He was a founding member and the first Chairman of the Steering Committee for the Center for Pro Bono from 1990-1996; and served as a member and Chairman of the Standing Committee on Lawyers' Public Service Responsibility from 1987-1993. He has been a member of the House of Delegates since 1987.

Hirshon notes that his proposed agenda for his ABA presidential tenure reflects his lifelong affinity for immigrants. He would like to concentrate on providing legal services to immigrants and those traditionally served by legal services programs, and he promises to fight congressional attempts to further erode funding for the Legal Services Corp., which funds legal aid groups throughout the country. "We must be unyielding in our efforts to guarantee funding for the Legal Services Corp," Hirshon stated in his nomination speech to the House of Delegates.

As Chairman of the Standing Committee on Lawyers' Public Service Responsibility, Hirshon held hearings on a proposal that would have toughened lawyers' obligation to perform *pro bono* work. Concerning the proposal, Hirshon explained, "Although we believe that the government has the primary responsibility to provide more funding for these services, increased *pro bono* services for the poor are also important because of the enormity of the unmet need."

The next President-elect will be nominated at the ABA's meeting this February and voted on in July. Although the ABA constitution provides a procedure for people to run against the nominee, no one has ever forced a contested election in the House of Delegates. Candidates for president-elect are required to announce their intent to seek nomination 18 months before the meeting in which they hope to be nominated.

THE ABA AND THE "STOP ASHCROFT!" CAMPAIGN

Did the ABA join the battle against Attorney General nominee John Ashcroft with the Leadership Conference on Civil Rights (LCCR)? The presence of ABA staff at an anti-Ashcroft meeting seemed to signal such opposition. But the ABA has issued a statement distancing itself from the effort and disclaiming that the staff present at the meeting represented the organization.

At a January 10 meeting, Wade Henderson, head of the Conference, launched the "Stop Ashcroft!" campaign. According to the Leadership Conference, the purpose of the "Stop Ashcroft!" campaign is to "educate the American public, the media, and most importantly, the United States Senate about Senator Ashcroft's public record, the responsibilities of the Attorney General, and what is at stake should the Senate vote to confirm him." Henderson stated that the organizations present at the January 10 meeting were "here this morning to announce the formation of an extraordinary and unprecedented nationwide campaign of coalitions representing over 200 national organizations to oppose the nomination of John Ashcroft to be the Attorney General of the United States." The Association had at least one representative present at the meeting.

In addition to the ABA, there were representatives from the American Association of University Women, the AFL-CIO, the American Federation of State, County, and Municipal Workers, the Feminist Majority, the Center for Reproductive Law and Policy, Handgun Control, the Human Rights Campaign, the Lawyers Committee for Civil Rights Under Law, the National Abortion Rights Action League, the NAACP, the National Association of Criminal Defense Lawyers, the National Black Women's Health Project, the National Organization for Women (NOW), the National Education Association, People for the American Way, Planned Parenthood, the Religious Coalition for Reproductive Choice, and the Sierra Club. Staff members from the offices of both leading Senate Democrats and the Senate Democratic Policy Committee were on hand as well.

The Leadership Conference on Civil Rights Web site notes that "A number of LCCR organizations, including the AARP, American Civil Liberties Union, Anti-Defamation League, American Jewish Committee, League of Women Voters, and the U.S. Catholic Conference, do not generally take positions supporting or opposing confirmation of federal officials and for that reason have abstained from joining this endorsement. There are a number of other LCCR organizations that have not yet taken a position on this nomination." With prompting from a *National Review* article, some concluded that the ABA's failure to state its neutrality, in light of its attendance at the meeting, should be interpreted as the organization having concerns with Ashcroft. But the ABA is not identified on the Web site as an LCCR organization, and thus, the fact that the Association was not listed among those that have avoided taking a position is unrevealing. This caused much confusion in the press, and the ABA did not clarify its position—or state its decision not to take one—until five days after news by *National Review* and others indicating that the ABA was part of the coalition working against Senator Ashcroft.

Continued on page 19



The Federalist Society for Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036

Jim

April 9, 2001

Dear Ms. Barnett:

Thank you for your April 4 letter. As we discussed in our meeting last month, we recognize that the ABA will likely evaluate the President's judicial nominees after their names are made public and submitted to the Senate. We welcome this review, as we also welcome the views of other groups in this process.

Recent press reports suggesting that the ABA's review will delay the Senate's processing of nominations concern me. I recall that in our meeting you indicated that the rules of the ABA's Standing Committee on the Judiciary provide that reviews must be completed within 30 days of the time the committee receives the name of a judicial candidate. You also said that the committee is generally able to complete its work within 21 days. Assuming that at least three weeks will generally elapse between nomination and confirmation, the committee's review should cause no delays in the Senate's consideration of nominees.

We look forward to working with you in the months ahead on many issues of mutual concern. I am particularly interested in hearing your views on the topic of improving judicial salaries.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

Ms. Martha W. Barnett
President, American Bar Association
c/o Holland & Knight, LLP
315 South Calhoun Street, Suite 600
Tallahassee, FL 32301

Defending Liberty
Pursuing Justice

MARTHA W. BARNETT
President

AMERICAN BAR ASSOCIATION

750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

April 23, 2001

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Gonzales:

Thank you for your letter of April 10 regarding the time frames for the ABA's review of judicial nominees. As we advised you, the starting point of an investigation has been the receipt of the candidate's responses to the ABA's Personal Data Questionnaire (PDQ), which traditionally has been provided to the candidate by the Attorney General's Office. After receipt of the PDQ, the time frames are as follows:

- In non-problem cases, the Circuit representative is expected to complete the investigation within 30 days, with five days thereafter to conduct the Committee's vote. Thus, the usual time frame would be 35 days from receipt of the PDQ. If the Standing Committee is not given immediate access to the PDQ, or its Senate Judiciary Committee counterpart, the investigation would necessarily be slower.

- In cases where problems are identified and a further investigation has been required, the Standing Committee has notified the Administration within the 30-day period that problems would require a longer time frame. Generally, these are exceptional cases.

- In special situations, when the Administration had a particularly urgent need to have an investigation completed more promptly than usual because, for example, the Congressional session was drawing to a close, the Standing Committee has attempted to complete those few selected investigations in a period of time shorter than 30 days, but that has been and would be the exception to the rule and not an achievable standard on a regular basis.

The Standing Committee intends to make every effort to complete its investigations as rapidly as possible while maintaining its standards and treating the candidates with the utmost

fairness. Subject to the prompt availability of the PDQ or the Senate Judiciary questionnaire and the cooperation of the candidate, the Standing Committee would attempt to complete its investigations in accordance with the traditional timetable described above. It will certainly expedite the process if the Administration shares the PDQ with the Standing Committee at the time of nomination and asks the candidates to cooperate with the Standing Committee process.

For your information I enclose a copy of the brochure "American Bar Association Standing Committee on the Federal Judiciary: What It Is and How It Works." My very best wishes.

Sincerely,

Martha W. Barnett

Martha W. Barnett

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 4/23/01

NAME OF CORRESPONDENT: Martha Barnett

SUBJECT: Response from ABA regarding time frame of judicial reviews

ROUTE TO:		ACTION		DISPOSITION		
OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	DATE M/D/YR	TYPE RESP	C D	COMPLETED M/D/YR
	CUGONZ	A	4/23/01		C	
		A	4/23/01			

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

COMMENTS:

ADDITIONAL CORRESPONDENTS:

MEDIA:

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

Governmental Affairs Office
740 Fifteenth Street, NW
Washington, DC 20005-1022

Preservation Copy

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, DC 20500

X-RAYED

