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GS —

GIMME YOUR EDITS
ON DEFENSE CONVERSION.

(OF COURSE, WE'VE GOT TIME
IN THE A.M., TOO.)

I'LL BE AT 7151 TILL
I GET THRU THE PROPELLOR-
HEADS NIGGLES. (They're minor.)

-Paulie.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

March 10, 1993

PRESS BRIEFING
BY GEORGE STEPHANOPOULOS

The Briefing Room

3:31 P.M. EST

MR. STEPHANOPOULOS: I just want to limit this to the response to the judge's ruling today if we could.

The President is very gratified by the court's decision today. The court has given its stamp of approval to everything the Health Care Task Force has done and everything that the Health Care Task Force plans to do. So as I said, we're gratified by the decision. We intend to go with the plans that we originally had to have the working groups to meet and to have the task force have a meeting before its work is completed. And of course, we will give full notice before that meeting of the Health Care Task Force.

I would point just in the interest of trying to correct any misperceptions that might be out there -- the Health Care Task Force has not yet met, so there is no violation of the law in any way. There has not been violation of the law. And we fully intend to, before there is a meeting of the full task force, to give notice.

Q It is remarkable in light of what the judge said, though. The judge said that he didn't like disagreeing with the administration. I take it from your standpoint that he didn't disagree with the administration in any respect.

Q -- interpretation of what the judge's ruling is?

MR. STEPHANOPOULOS: Well, the judge's ruling as far as we can tell -- he has, first of all and perhaps most importantly, dismissed any of the plaintiff's charges with respect to the working groups. I would point you, first of all, to page 33 of the judge's ruling where he says -- do I have it in front of me -- from the order -- I'm afraid I don't have the order. But he has dismissed it with respect to the working groups in total. The working groups can continue to give their advice to the President as they have always given it.

And he said -- and I quote -- "All claims based on the interdepartmental working groups are dismissed pursuant to Federal Rules, page 12, for failing to state a claim upon which relief may be granted."

At the same time, he also said that the task force -- that any application of FACA to the task force with regard to its giving direct advice to the President is also unconstitutional. So the task force ability to give direct advice to the President is completely and totally protected and it can't be interfered with at all. And I would again quote from page 22: "With respect to the meetings at which the task force formulates its recommendations for the President, the balance weighs in favor of the President. The President's interest in confidentiality is particularly present as the task force directly advises the President as to what legislation

he should propose. And congressional interest in opening these meetings is obviated by plaintiff's opportunities to address the task force in Congress."

Q George, is the President also gratified that this ruling essentially guts the FACA?

MR. STEPHANOPOULOS: Not at all. I mean, I think what we're gratified by is that the Health Care Task Force can continue to proceed with its meetings and with its work as planned.

Q But the larger issue as this applies to all other federal advisory committee acts, and essentially no other federal advisory committee act now can meet to discuss recommendations on a constitutional basis.

MR. STEPHANOPOULOS: As long as it's getting its information -- performing its information gathering functions, they can meet. So that's not true.

Q No, I said to make recommendations. That's the distinction the judge drew, between information gathering and making recommendations.

MR. STEPHANOPOULOS: And the President has an interest in making sure the advice he receives from his advisors is protected and they can act with full candor.

Q Do you believe that this applies to all other advisory committees?

MR. STEPHANOPOULOS: I don't know that I can speak to that at this time. We've just received the ruling and this is very preliminary. But as far as the working of the Health Care Task Force, the Health Care Task Force work can go on as we've always planned it to go on.

Q George, did the administration interpret the judge's language regarding direct advice to the President as meaning that when the President is present and being advised by the task force, that those proceedings are protected but that the Health Care Task Force meeting outside of the President's presence is another matter?

MR. STEPHANOPOULOS: Oh, no, not at all. It shouldn't be limited at all to situations where the President is present.

Q None of us has a copy of the ruling, but we have seen quotes from it in which the judge notes that he disagrees with the administration on certain key points in this case. Would you explain what those disagreements are and what they mean?

MR. STEPHANOPOULOS: I think the disagreement is limited to the very narrow point of whether or not the First Lady is an outside advisor or a government employee under the law.

Q And you disagree on that?

MR. STEPHANOPOULOS: Yes, we continue to contend --

Q Are you going to appeal?

MR. STEPHANOPOULOS: I'm not sure that it's necessary. We're going to look at that and we have to review the case more closely.

Q Repeatedly, in explaining why the suit was groundless here, you cited your interpretation which was that under the meaning of the statute the First Lady is not covered. The judge has now said she is and you guys say that you won on all counts.

MR. STEPHANOPOULOS: We continue to believe that, but it just doesn't have any practical effect. The practical effect is that the judge is saying that the work of the task force is protected because FACA is unconstitutional with regard to giving direct advice to the President. It just doesn't have any practical effect.

Q Are you saying that the task force can now meet behind closed doors, whether the President is there or not, to consider these options because they are eventually for the purpose of advising the President?

MR. STEPHANOPOULOS: Providing direct advice to the President, yes.

Q What if he's not there?

MR. STEPHANOPOULOS: It doesn't matter. It has no bearing whatsoever. The only time it has to be open is when it's in this information-gathering, fact-finding stage, and we intend to have a meeting which we'll take testimony, and I would point out that the plaintiffs will have a full opportunity to present their testimony to the task force.

Q In your filings, or in the judge's rulings, since, as Brit says, we haven't seen it, did you define information-gathering or advising the President, or did the judge -- it would seem that the ruling would turn on that.

MR. STEPHANOPOULOS: Again, when we're discussing recommendations to the President, it is completely protected, according to the judge's ruling.

Q Discussing or giving?

MR. STEPHANOPOULOS: Discussing. When you're just in the process of developing recommendations for the President as opposed to taking in information from outside groups, that is completely protected.

Q You're saying that all the deliberations, because the President is the ultimate beneficiary, that the judge has now ruled that all these deliberations -- deliberations, not fact-finding -- may go forward behind closed doors?

MR. STEPHANOPOULOS: Yes. Yes.

Q That's your interpretation?

MR. STEPHANOPOULOS: Yes.

Q Are you saying the first Health Care Task Force meeting will be a meeting that has no information-collecting, it will just be a recommendation meeting and, therefore, it's okay for it to be closed?

MR. STEPHANOPOULOS: No. I'm saying -- first of all, again, let's get down to facts -- there has been no meeting of the task force. The working groups have been meeting, and they are completely and totally protected by the judge's ruling. It is completely dismissed. And any charge against the working groups is completely dismissed by this judge's ruling.

Q But when you have this first meeting of the task force, what will the ground rules be?

MR. STEPHANOPOULOS: I don't know about the first meeting, but we intend to have a public meeting of the task force, and we will give the appropriate notice, and plaintiffs along -- will have the opportunity to present testimony to the task force.

Q George, your weekling compilation of documents say that Clinton met with the task force on February 7th.

Q At a meeting -- when it held a meeting, when it met on February 7th. That's a Federal Register document.

MR. STEPHANOPOULOS: I'm not sure if it was the full task force; it might have been a group of his health care advisors. I don't know that there was any meeting of the task force. The task force is not --

Q It says, met with the presidential task force --

MR. STEPHANOPOULOS: It might have been a mistake. There has been no meeting of the task force.

Q George, there is a quote on the wires that says the judge -- quote -- "took no pleasure in determining that one of the first acts taken by a new President is in direct violation of a statute enacted by Congress." What does that mean?

MR. STEPHANOPOULOS: Well, I'm not sure. It would have been -- is a violation if the task force meets, but the task force has not met. And we fully intend to comply with the rulings of the judge in terms of having a public notice before a public meeting of the task force to gather information.

Q But are you saying, what, the judge misspoke or miswrote? I don't understand.

MR. STEPHANOPOULOS: Again, there has not been any meeting of the task force. I mean, there's certainly the potential, but there has not been a meeting of the task force.

Q George, are you juggling legal semantics here, because the working groups --

MR. STEPHANOPOULOS: Not at all.

Q -- the working groups -- (laughter) -- the working groups work for the task force, and they are, in fact, are they not in the process now of gathering information?

MR. STEPHANOPOULOS: The working groups are in the process of preparing recommendations for the President.

Q And to prepare that they're gathering information. I mean, it just seems --

MR. STEPHANOPOULOS: But the working groups are completely protected. The President has the right to get advice through his staff from across the country, from anyone he chooses to get advice from. That is separate from the task force. The working groups -- this does not apply in any way whatsoever to the working groups. That is what the judge has said very clearly. It just doesn't apply.

Q So are you using the statement that the task -- why hasn't the task force met then? Is it to avoid this kind of --

MR. STEPHANOPOULOS: We're going along as we always planned to go along. The task force is simply the supervisory -- the ultimate body for recommending to the President. But the working groups are really where all the nuts and bolts work gathering information and drafting the legislation is done. And that is always how it was contemplated. That is how the structure was set up and the judge has given his sanction to the workings of the working groups today.

Q But you're saying that even if a working group is engaged in information gathering that it's protected by the judge's ruling, so you are claiming protection from the spirit of having open meetings by calling it a working group and saying it's protected.

MR. STEPHANOPOULOS: Well, let's get some things straight here first of all.

Q -- this judge's ruling will have no effect whatever --

MR. STEPHANOPOULOS: No practical effect on the task force at all.

Q Do you think the judge might be a little surprised to learn that -- that that's your position, that he entered this order, declared himself to be sorry to have to disagree with the President, and declared illegal one of the President's --

MR. STEPHANOPOULOS: I mean I can't -- I don't know his state of mind but I don't think so, no.

Q George, I mean, does it not strike you that there may be something peculiar and perhaps a bit evasive about the interpretation you're making here when you get this frontal language from the judge about the violation of the law and you're saying, hey, no --

MR. STEPHANOPOULOS: I think the judge's language is very clear. He draws a distinction in the task force between their advisory capacity for the President and between their information-gathering functions for the President. The information gathering is intended, as he says, to be in public. It will be in public. At the same time, the judge has found that FACA is -- it is unconstitutional with regards to direct advice to the President.

Q I know, but what you're saying is that direct advice to the President does not constitute actually saying something to the President, conveying to him a memo or meeting with him, it constitutes any meeting that might be for the ultimate purpose of creating advice which would someday, somehow be passed on to him. Correct?

MR. STEPHANOPOULOS: Yes, as -- then that's separate from the information gathering.

Q Is there any imaginable act that this task force could commit, meeting it could hold that you think would be covered by this judge's order?

MR. STEPHANOPOULOS: Absolutely.

Q What, pray tell, would that be?

MR. STEPHANOPOULOS: In a meeting where we gather public testimony from interest groups, from the plaintiffs, in this case; from anybody else who has an interest in presenting --

Q So you're saying that hearings, that if it holds some hearings, they would be covered?

MR. STEPHANOPOULOS: Absolutely. And they will be public.

Q But the meetings as he describes them are not covered?

MR. STEPHANOPOULOS: No, public meetings where we gather public testimony will be public. We will have notice.

Q The bulk of the information will be gathered by working groups, which are exempt from that ruling, right?

MR. STEPHANOPOULOS: I don't know that I necessarily agree with that because you also have to look at the full -- we are also having hearings through the Robert Wood Johnson Foundation, where the First Lady is going to be presiding this week; and we will have a series of public hearings across the country to gather information from the public. I mean, I think that what's important here is that the Health Care Task Force, as contemplated, will continue its work.

Q Well, as long as that's true, then why did the administration mount as a defense in this proceeding the argument that Hillary Clinton and Mrs. Gore were not covered, did not constitute the kinds of outside presences that the law covered?

MR. STEPHANOPOULOS: We continue to believe that.

Q Well, I understand that. But the point is if they could go ahead and hold the meetings they were going to hold anyway, whether they were or not, why was that defense even relevant?

MR. STEPHANOPOULOS: The defense is relevant because that's how the plaintiff said the law -- that's the reason the plaintiffs chose for saying the law applied.

Q And the judge said it did apply on that position.

MR. STEPHANOPOULOS: Right, but then he also went on to say that FACA's unconstitutional with regard to the advisory functions of the task force.

Q Direct advisory functions.

MR. STEPHANOPOULOS: Yes.

Q May I follow up? The working groups that solicit information from interest groups, but those presentations by a AMA or whomever, those are still going to remain closed? That's what I was asking.

MR. STEPHANOPOULOS: Sure.

Q -- working groups, solicitation of input is going to be done privately?

MR. STEPHANOPOULOS: Absolutely.

Q Since we don't have a copy of this in front of us, could you read that line again from page 33 about the working groups?

MR. STEPHANOPOULOS: Yes. Actually, it's not page 33, it's page two.

Q It's not believed that that was the intention of the judge to make that kind of input open to the public?

MR. STEPHANOPOULOS: All claims based on the interdepartmental working group are dismissed.

Q Because?

MR. STEPHANOPOULOS: For failing to state a claim upon which relief may be granted. In addition, plaintiff's claim -- this is from -- and it follows: Plaintiff's claims based on meetings of the task force which are held for the purpose of formulating advice and recommendations for the President are also dismissed under Rule 12.

Q So the judge specifically said --

MR. STEPHANOPOULOS: Section -- right. Exactly.

Q -- not only direct advice, he said also formulating.

MR. STEPHANOPOULOS: Formulating and recommendations. Section 10A(1), 10A(3) and 10C of FACA are not applicable to these meetings, since their application to these meetings is unconstitutional as a violation of separation of powers principles.

Q Well, you could apply that standard to just about every meeting that's held by this task force or working group, could you not?

MR. STEPHANOPOULOS: Yes. Absolutely. (Laughter.) That's why the President is gratified. (Laughter.)

Q Thank you. (Laughter.)

Q -- task force you form in the future about any subject.

MR. STEPHANOPOULOS: Well, again, I think the judge is clear. If you're formulating recommendations for the President, the President has -- that advice is protected.

Q George, would you come back one more time please, just to finish this thought -- that if the working groups solicit information, it's closed. And I understand the judge said that. You say there's going to be one meeting of the full task force open to solicit testimony. How will -- what is different about the testimony the task force will take than this other testimony that is being taken in private? I mean, how do you decide which groups will give information in private and which ones will come to the public?

MR. STEPHANOPOULOS: Well, I think that -- I don't know how exactly the hearing itself will be structured. I mean, I don't know how much time there will be. But clearly, anybody will have the opportunity to submit their testimony, not necessarily deliver it verbally, but clearly have the possibility of delivering it to the task force.

Q Are they basically people who want the chance to do so and haven't been invited by a working group --

MR. STEPHANOPOULOS: Certainly the plaintiffs will be invited and they'll have the opportunity to present their testimony.

Let me just point out the judge's reasoning for protecting the ability of the President's advisors to formulate their recommendations. He says on page 19 of his ruling: "He must be able to trust that his advisors shall speak with complete candor and that they will not be cowed by the fear of premature public reaction. This candor's risk should FACA-apply to the task force. A realistic and practical appraisal of the application of FACA to these presidential advisors reveals that FACA prevents the President from receiving the full measure of the task force advice," which is exactly what we've been saying for several weeks.

Q Can we get a list of the people -- remember that meeting, it was the first meeting we thought of the task force at OEOB a few weeks ago and there was going to be a photo op and Hillary was going to preside and Mr. Clinton was going to be there as well over in OEOB. Could we get a list of the people who were at that meeting?

MR. STEPHANOPOULOS: I don't know exactly which meeting you're referring to --

Q It was what we thought was the first meeting of the task force. I think it may be --

MR. BOORSTIN: That's incorrect.

Q Well, what was it?

MR. BOORSTIN: It must have been the first tollgate meeting.

Q What's that?

MR. STEPHANOPOULOS: It's one of the working group meetings.

Q -- one more time the judge's specific decision on the status of Hillary Clinton. Your interpretation.

MR. STEPHANOPOULOS: The judge's specific decision is that it's been dismissed with regard to the working groups and it's been dismissed with regard to the ability of the task force to formulate recommendations for the President.

Q On the status of Hillary Clinton?

Q Yes, her status?

Q The issue that the court disagreed with you on.

MR. STEPHANOPOULOS: The judge disagreed with our pleading.

Q So he found what, she is considered an outside --

MR. STEPHANOPOULOS: He said, yes, an outside advisor.

Q The judge also criticized the administration for precipitating a constitutional crisis which he said could have been

avoided if you had had legislation that would have made the First Lady a government employee. How do you respond to that?

MR. STEPHANOPOULOS: Well, what's your question?

Q How do you respond to that? Why didn't you take a legislative course instead of a judicial course?

MR. STEPHANOPOULOS: Well, if the Congress chooses to change it, I mean, I think that's something we would certainly look at.

Q George, you said he did not draw a distinction between the task force itself and the advisory groups. And, again, at the disadvantage of reading you what is obviously a paraphrased wire account, but it quotes the judge as saying -- or paraphrases the judge as saying, the White House violated the law by not formally registering the task force with the Library of Congress and not giving notice in advance of its meetings or meetings of the advisory groups.

MR. STEPHANOPOULOS: I think the AP story is wrong. Clearly the working groups -- it has been dismissed with regard to the working groups. The task force hasn't met; we will make any public filing before the meeting of the task force.

Q You're saying the news account --

MR. STEPHANOPOULOS: The news account just isn't right, as far as our reading of the judge's opinion. And it's -- I mean, it's a plain reading -- again, page two of the order is very plain.

Q You don't plan to appeal any aspects of this ruling?

MR. STEPHANOPOULOS: I said I don't want to make a blanket statement at this time. We're still going to review it and go over it. But as I said, basically, the work of the task force can continue as contemplated.

Q Why should this not be viewed as a setback for open government?

MR. STEPHANOPOULOS: Well, I mean, when the task force receives information from the public, it will be a public meeting.

Q But by calling it a working group it's closed to the public.

MR. STEPHANOPOULOS: This is the President's staff giving him advice. We've had a far more open process than any administration before us. I mean, let me remind everybody we have not even developed a legislation yet. There will be ample time for public involvement when the legislation is presented to Congress, when there are hearings in Congress, and that is -- right now we're having far more accessibility and openness than ever before at this stage of the game.

Q Will Mrs. Clinton be having any comment today?

MR. STEPHANOPOULOS: Not that I know of.

Thanks.

THE PRESS: Thank you.

END

3:51 P.M. EST

Q: What exactly did the judge hold?

A: The judge held, first, that the advisory committee act does not apply in any respect to the interdepartmental working group. He dismissed all claims concerning the working group.

Second, the judge held that it would be unconstitutional -- it would violate the separation of powers -- for the advisory committee act to apply to the task force itself whenever the task force is advising the President or formulating advice for the President.

Finally, the judge simply held that the advisory committee act would apply when the task force gathers or receives information. But the task force was already planning to hold an open public meeting and to give timely notice of that meeting. So this requirement does not really change anything that was planned.

Q: Why is the President "gratified" by an opinion which, according to the judge, "declare[s] that the actions of a new President violate the law"?

A: The judge's opinion makes clear that no laws have been violated. In fact, the judge expressly noted that "the Task Force has yet to meet (with the exception of the January 25 photo opportunity)"; and as to the working group meetings that have taken place, the judge expressly held that "defendants' motion to dismiss any claims concerning the working group is granted as plaintiffs fail to state a claim upon which relief may be granted." As I have told you, the requirement imposed by the Court -- that the task force, as opposed to the working group, comply with the Act when gathering information -- does not interfere with our planned process, because we always have contemplated that the task force would hold such a meeting in public and give timely notice of the meeting.

Thus, the President was pleased that the Court made clear that everything the working group has done to date is legal, and that everything the task force and working group plan to do in the coming weeks will also be legal.

Savings Security Simplicity

Q: When the First Lady and Secretary Shalala attend public forums this weekend, will those be subject to the court's ruling?

A: Absolutely not. These are not task force meetings. They are forums sponsored by a private foundation, the Robert Wood Johnson Foundation, that has invited the First Lady, Mrs. Gore and Secretary Shalala to attend. The Court plainly did not consider these to be task force meetings. When the judge wrote that no task force meetings have yet been scheduled, he was fully informed not only of the date, location and sponsor of these forums, but also that the First Lady and Secretary Shalala would be attending.

[NOTE: We sent a letter to the judge on Monday of this week reminding him about these meetings and informing him that both the First Lady and Shalala would be attending.]

Q: When Ira Magaziner meets with the working group, will those meetings be subject to the Advisory Committee Act?

A: No. Plaintiffs in the lawsuit expressly asked the judge to rule that such meetings would be covered by the act. But the judge rejected this claim, and held that plaintiffs had no right to relief on this or any other claim related to the working groups.

Q: But suppose several task force members meet together, or meet with the working group. Won't this be a meeting of the task force subject to the act under the judge's opinion?

A: No. The judge's opinion cites the various cases that have held that the advisory committee act applies only to the body that is actually advising the president -- in this case, the task force as a whole. The judge's opinion only addresses the task force as a whole.

Q: Will the judge's ruling mean that Mrs. Clinton will no longer be a member of the task force?

A: No. Mrs. Clinton will continue to chair the task force. The judge's opinion assumes -- and is premised upon -- the First Lady continuing to play that role.

Q: But didn't the judge rule that Mrs. Clinton is an outsider?

A: Not at all. In fact, other federal statutes expressly provide funding, staff and office space to support the First Lady when she assists the President in carrying out his duties. The judge here concluded only that, when read literalistically, the advisory committee act applies to this Task Force in light of the First Lady's participation. Nothing about this decisions affects Mrs. Clinton's role or the working relationship she and the President have had throughout the period of his service as an elected official.

Q: Does the judge's opinion require that all documents being used by the working group now be made public?

A: No. The judge made clear that the Advisory Committee Act does not apply in any respect to the working group.

Q: Does the judge's opinion require that all documents given by the working group to task force members be made public?

A: No. The judge's opinion applies only to the product that the working group presents to the task force as a whole.

Q: Has the advisory committee act now been rendered ineffective?

A: What the Court has held is simply that Congress cannot intrude when the President receives advice related to the exercise of an executive power. This is a principle reflected elsewhere in the law, including the limitations of the Freedom of Information Act.

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~~CONFIDENTIAL~~ MEMORANDUM

TO: Bernie Nussbaum and George Stephanopoulos
C/O: Gene Sperling
FROM: Larry Tribe
DATE: March 9, 1993

As you know, people are coming out of the woodwork to claim that Hillary Rodham Clinton's health care task force must do all its business in public unless the President puts her on the government payroll and thereby violates the RFK anti-nepotism law. To that insult the Wall Street Journal has today added the injury of arguing that the President's failure to pay his wife violates a nineteenth century law, the Anti-Deficiency Act!

Judge Lamberth of the U.S. District Court for the District of Columbia is likely to rule in favor of Mrs. Clinton this Friday. If he doesn't, it shouldn't be hard to get him reversed in a higher court, but in the court that counts most on this one -- the court of public opinion -- Hillary should come out just fine providing you don't overlook the latent populist sense that the President and First Lady should not treat themselves as being above the law. For what they're worth, here are some thoughts as to why the supreme law of the land -- the Constitution -- shows that the President and

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: LB DATE: 12/16/16

First Lady are in full compliance.

1. Whatever Congress might say, the Constitution clearly protects the power of the President, in carrying out such official functions as nominating officials and formulating proposals to present to Congress, to seek and obtain confidential advice from whatever combination of people he chooses to consult. The contrary interpretation would mean that whenever the President talks to his top advisors and includes private citizens, whether members of his family or not, he would be conducting a "meeting" that is required by the Federal Advisory Committee Act (FACA) to be held in the open. Even in the famous Nixon tapes case, United States v. Nixon (1974), the Supreme Court recognized the inherent constitutional right of the President to obtain confidential advice from whomsoever he chooses.

2. Four years ago, in Public Citizen v. Department of Justice (1989), the Supreme Court held without dissent that the ABA's Committee on Federal Judges, which the President regularly consults through the DOJ when making federal judicial nominations, is not subject to FACA -- and three Justices (Chief Justice Rehnquist and Justices O'Connor and Kennedy) expressly said that requiring the President to comply with FACA in obtaining advice from such a committee would unconstitutionally infringe upon the President's power to make judicial nominations, in violation of the separation of powers. That would be even more clearly true of any

interpretation of FACA that required the President to follow its strictures regarding a task force he appoints to assist him in formulating proposals he wishes to send to Congress.

3. To tell the President that including the First Lady on such a task force compels him to choose between complying with FACA and violating the RFK anti-nepotism law by putting Hillary Rodham Clinton on the federal payroll would even more blatantly violate the separation of powers, not to mention its intrusion on family values. I'm not suggesting that you combine talk of "executive privilege" with talk of "spousal privilege," but, at bottom, placing restrictions on how the President can obtain advice from his closest life companion is incompatible with the fundamental rights that all of us enjoy, whether or not we reside in the White House. The anti-nepotism law, which regulates the payment of money from the public fisc, can provide no justification for attempts to limit the persons with whom the President can speak privately and consult, when no money changes hands.

4. Most recently, the Wall Street Journal (3/9/93) has added the claim that, by failing to pay his wife for her work on the Health Care Task Force, President Clinton is violating the Anti-Deficiency Act of 1884, which forbids the receipt by any government officer of "voluntary services for the government." This law is a particular favorite of the Wall Street Journal; in February and March of 1988, the Journal accused Independent Counsel Lawrence

walsh of breaking the same law when he brought me on board pro bono to write a Supreme Court brief defending the constitutionality of the independent counsel law. (2/25/88; 3/15/88, p. 34). President Reagan's Associate Attorney General, in an official opinion dated 5-19-88, ruled that the Anti-Deficiency Act, which was "principally concerned to ensure that government officials would not 'accept' services from employees in a way that would give rise to subsequent unanticipated claims against the United States," did not rule out my pro bono service for the DOJ.

The very title of the Act shows the absurdity of construing it to require President Clinton to pay his wife. The purpose, one must assume, would be to guard against the risk that Hillary Rodham Clinton might later make a claim for backpay that would unexpectedly swell the government deficit! Even if the text of the Anti-Deficiency Act, read literally, would support so loose a result, the Constitution's core principles of separation of powers stand in the way of any such reading.

* * *

In closing, let me add that the controversy over the Health Care Task Force is not simply a distraction; it is an opportunity to solidify public support for Hillary's role in the Administration. Answering her critics with sensible and convincing arguments each time they mount a groundless and formalistic attack will build a public foundation for the legality and acceptability of her proper role as advisor in the White House.

HEALTH CARE TALKING POINTS

Summary

- **Americans are getting killed by skyrocketing health care costs. What you're charged for health care is rising four times faster than your wages. That doesn't make sense -- and it threatens your family's future and the future of every business, large and small.**
- **President Clinton is committed to fundamentally reforming our nation's health care system. The Clinton plan will control your health care costs and provide security to every American family. We will preserve what is best in the American system -- the highest quality medical care in the world and the individual's right to choose their doctor.**
- **Within days of taking office, President Clinton established the Task Force on National Health Care Reform, chaired by First Lady Hillary Rodham Clinton, to develop a comprehensive health care reform proposal. Hundreds of health care experts -- doctors, nurses, professors and businesspeople -- have been brought in from around the country to work with officials from government agencies and White House staff in a series of policy working groups that have been set up to advise the Task Force. In addition, diverse panels of consumers and health care professionals will be brought in regularly to advise the working groups as they develop their recommendations.**
- **Powerful lobbies and special interests are already lining up to defeat any plan we develop. They oppose change because they profit from the waste and inefficiency of today's system. But we are committed to breaking the gridlock.**
- **The American people demand and deserve change now. Washington can delay no longer. Interest groups can obstruct us no longer. Without immediate reform, the annual cost of health care for American families will more than double by the end of the decade -- to a whopping \$14,000 per family -- while workers will lose an anticipated \$650 increase in their incomes.**
- **It won't be easy and it won't happen overnight. But we will stand with you and take on the special interests. No American will feel secure again unless we bring health care costs under control now -- and make it possible for your family to get ahead again.**

Goals

The Clinton health reform proposal will:

- **Control the rapid spiralling of your health care costs.**
- **Provide security and peace of mind, so that you don't have to worry about losing your insurance when you change jobs or being denied coverage because you're sick.**
- **Root out fraud and overcharges.**
- **Simplify the system and reduce paperwork.**
- **Maintain the highest quality medical care in the world and preserve your health care choices.**

**PLAINTIFFS IN THE FACA CASE FILED AGAINST THE HEALTH CARE TASK FORCE
NATIONAL LEGAL AND POLICY CENTER**

- Formed in 1992 according to New York Times 3/5/93; There is no record of this group in the Encyclopedia of Organizations or any other reference guide to organizations.

Peter T. Flaherty: President

- In a June 1992 fund-raising appeal for "Citizens against Clinton", Flaherty targeted Hillary: "Hillary Clinton is a radical feminist who has little use for religious values or even the traditional family unit." [AP, 6/9/92; see attached]
- In 1992, Flaherty/Conservative Campaign Fund issued a release promising independent expenditure ads, paid for by the "Citizens Against Clinton" fundraising appeal mentioned above, on Clinton taxes, Social Security means-testing, gay rights support, and Hillary. (emphasis added) [Hotline, 8/19/92]
- Current Chairman of the PAC Conservative Campaign Fund; former Chairman and Chief Executive Officer for Citizens for Reagan; Active in the Leadership Institute, a group dedicated to continuing "the Reagan revolution after Reagan leaves office". [WT, 1/18/89]; Former National Director of Young Americans for Freedom. [Boston Globe, 7/15 (13?)/86]

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.

- An "ultra-conservative" and "dissident" group of doctors, this organization has filed a large number of cases over the years to "protect the private practice of medicine" and limit government intrusion into the practice of medicine. [WP, 11/25/89; WP, 6/23/77]

AMERICAN COUNCIL FOR HEALTH CARE REFORM

- Organization has no offices or facilities.
- A September 10, 1989 Washington Post article noted that: "the Alliance of American Homeowners, surfaced early this year in Herndon, Va., ostensibly to 'fight for homeowners' rights'... But, in fact, the group was a division of the American Council of Health care Reform that appeared more intent on selling group life insurance than on representing homeowners. Moreover, no telephone number could be located for either [group] ... neither one was listed in a street directory at the Council's supposed Herndon address."
- William Shaker: Executive Director : Was the Executive Vice President of the National Tax Limitation Committee (1978-1984) and an active supporter of the Reagan agenda. [Christ. Sci. Mon., 7/20/82; UPI, 8/23/83]

KENT MASTERSON BROWN - Lawyer for Plaintiffs

- In the Washington Times [3/6/93], Masterson called managed competition "the sovietization of the medical process [that] will seriously hurt the quality of health care."
- Clients include Association of American Physicians and Surgeons (AAPS); Limited Legal Consultation Service (also AAPS); ITT Life Insurance Corp; CHUBB Insurance Group. [Martindale-Hubbell Law Directory 1992]

DRAFT

TALKING POINTS ON HEALTH CARE TASK FORCE AND AMA

- Let's put this in context. Decisions in government have traditionally been made by a few people sitting in a room, without any input from the outside. In contrast, we have brought together the real-world expertise of more than 400 people from all over the country. These are people -- doctors, nurses, social workers, administrators and consumers -- who know firsthand the problems in our health care system.
- In addition, the First Lady and White House officials have held scores of meetings with representatives of all the groups that have a stake in health care reform. The door is open and has been from the beginning.
- Given the urgency for health care reform and the real possibility of conflict of interest, we cannot let interest groups make policy. For example, if we were to give the AMA a permanent role, we would have to do the same for every drug company or insurance firm that wanted in. That's just not workable -- and it wouldn't be fair to those who don't have representatives in Washington.
- I'm pleased that the AMA agrees with us that change is necessary. We welcome their support -- as we always have -- and look forward to working with them as we are with other groups.

TALKING POINTS ON SINGLE-PAYER HEALTH REFORM BILL

Summary of Bill:

- The American Health Security Act of 1993 was introduced by Senator Wellstone (D-MN) and Representatives McDermott (D-WA) and Conyers (D-MI) on Wednesday, March 3. It is co-sponsored in the Senate by Sens. Metzenbaum (D-OH), Simon (D-IL), and Inouye (D-HI); in the House, there are 54 co-sponsors including Ways and Means Health Subcommittee Chair Pete Stark (D-CA).
- The bill would replace the current system of private insurance, Medicaid and Medicare with a single-payer system of financing health insurance much like the current Canadian system. The program would be paid for and supervised by the federal government -- with much of the administration delegated to states under standards, and a state budget, set by a national board. All prices -- for hospitals, doctors, drugs -- will be negotiated. Taxes, primarily in the form of payroll taxes and income taxes on wealthy Americans, will replace private insurance premiums and patient out-of-pocket costs for health care.
- The bill would cover every American for all medically necessary services, including: inpatient and outpatient care, prescription drugs, long-term care, mental health and substance abuse treatment, and preventive care.

Comments:

- This bill responds to the growing urgency in the demands of the American people for comprehensive health care reform. It is an important contribution to the health care debate and its sponsors should be praised for their leadership on this issue.
- President Clinton has promised a swift response to the health care crisis which threatens every American family and all U.S. businesses -- large and small. Americans deserve to have their skyrocketing health care costs brought under control and to have the security that comprehensive health care reform will bring. Many elements of this bill -- cost containment, simplification, reduced paperwork, high quality health care, a guaranteed benefit package -- are initiatives which the President strongly supports and which will be a central part of the proposal he announces in May.
- This single payer bill however relies on dismantling much of the current system -- good and bad together. Americans enjoy the highest quality health care in the world, based on state of the art technology. President Clinton's health reform plan will squeeze the waste, excess and inefficiency out of our present system and use those savings for health care reform. He is committed to maintaining a uniquely American system -- one that is rooted in the private sector, builds on our employer-based system, and preserves the right of Americans to choose their doctors.

**HEALTH CARE TASK FORCE AND INTEREST GROUPS:
Talking Points**

ATTACK: INTEREST GROUPS ARE BEING LIMITED TO A PERIPHERAL ROLE.

FACT: Mrs. Clinton, Ira Magaziner and other White House officials have met with over 300 groups in more than 100 meetings since the Task Force was formed five weeks ago. This number does not include meetings held with officials at HHS and other departments or the more than 100 meetings held during the transition.

In addition, groups have been strongly urged to send in their specific policy proposals to the Health Care Intake Room. Over 500 policy proposals have been received and channelled to the appropriate working group.

ATTACK: ... UNUSUAL, HIGHLY SECRETIVE DECISION MAKING PROCESS ...

FACT: Let's put this in context. Decisions in government have traditionally been made by a few people sitting in a room, without any input from the outside and sometimes dominated by a single special interest. In contrast, we have brought together the real-world expertise of more than 400 people from all over the country. These are people -- doctors, nurses, social workers, administrators and consumers -- who know firsthand the problems in our health care system.

However, given the possibility of conflict of interest, we cannot let interest groups make policy. For example, if we were to give the AMA a permanent role, we would have to do the same for every drug company or insurance firm that wanted in. That is just not workable given our time frame and the tremendous task we have undertaken -- and it also wouldn't be fair to those who don't have representatives in Washington.

**ATTACK: ... [OUR ADVISORS] STATUS IN THE GOVERNMENT IS MURKY ...
HOW MANY PEOPLE WORKING ON THE PRESIDENT'S PLAN WERE
FULL-TIME GOVERNMENT EMPLOYEES, SPECIAL GOVERNMENT
EMPLOYEES, PAID CONSULTANTS?**

FACT: In accordance with legal requirements, the more than 400 people who are working with the working groups fall into the following three categories: full time government employees, special government employees and consultants.

- **Full-time Government Employees:** **362 Total**
including 98 Congressional
 Individuals who work for the Executive Office of the President, for federal agencies, for Members of Congress or Senate and House committees. Federal employees are subject to the conflict of interest provisions in 18 U.S.C. Section 202-209 and Standards of Ethical Conduct for Employees of the Executive Branch and all related ethics laws and regulations.
- **Special Government Employees:** **48 Total**
 Individuals who are employed by any agency or the Executive Office of the President for less than 130 days in a 365 day period. These employees must abide by the ethical standards of federal employees and can receive compensation from other entities such as universities and nonprofit foundations.
- **Consultants:** **18 Total**
Including 8 from State Governments
 Individuals who attend working group meetings on an intermittent basis with or without compensation from the federal government. They are subject to some provisions of 18 U.S.C. Section 201-208 and Standards of Ethical Conduct for Employees of the Executive Branch and all related ethics laws and regulations. Such individuals are not considered members of the working groups: they may not serve as working group leaders and have other limitations on their participation.

NOTE ON LIST WE ARE RELEASING AND ALL NUMBERS: This is a snapshot as of March 5, 1993. (It differs from numbers included in the court papers submitted Wednesday). These numbers are constantly in flux because people (from all 3 categories) are constantly joining groups and leaving groups as informational needs of the working groups change.

ATTACK: **OUR CONSULTANTS HAVE NO EXPERIENCE MANAGING HEALTH PROGRAMS OR CARING FOR PATIENTS.**

FACT: Not true. In fact, we have over 100 health care professionals including 60 doctors, 20 nurses, 6 social workers. [If pressed on doctors, almost half of them were practicing medicine before they took a leave to help the Task Force.]

In addition, the Task Force is working with the Secretary of HHS to set up diverse panels of health care professionals will be brought in regularly from around the country to advise the working groups as they develop their recommendations.

ATTACK: CONSUMER GROUPS HAVE BEEN EXCLUDED

FACT: Many groups representing consumers have been brought in for meetings with the Public Liaison's Office and members of the working groups including: Citizen Action, Consumer Federation of America, Consumers Union, Public Citizen, Consumer League, National Council of Senior Citizens, AARP, National Council on Aging, and the National Association of Community Health Centers.

ATTACK: THE ADMINISTRATION IS NOT LISTENING CAREFULLY TO ORDINARY CONSUMERS.

FACT: In addition to consulting with the Consumer Organizations, diverse panels of 10-12 consumers -- drawn from the membership of these Consumer Organizations and from letters written to the Task Force -- will be brought in regularly from around the country to advise the working groups as they develop their recommendations. The first of these consultations will be on March 11.

Mrs Clinton has also been traveling around the country meeting with the American people to listen to their concerns about rising health care costs. She has accepted the invitation of the Robert Wood Johnson Foundation to participate in roundtable discussions that will be held throughout the country in the next month -- where she can listen to the recommendations of all the people -- consumers, providers, and special interests -- who are eager to contribute to the Task Force as it develops its proposal for comprehensive health care reform.

- Organization has no offices or facilities; it is located in the basement of the \$350K mansion owned by William Shaker in Arlington. Plaintiff is currently on cruise in the Bahamas.
- A September 1989 Washington Post article on homeowners' advocacy groups noted that: "the Alliance of American Homeowners, surfaced early this year in Herndon, Va., ostensibly to 'fight for homeowners' rights'... But, in fact, the group was a division of the American Council of Health care Reform that appeared more intent on selling group life insurance than on representing homeowners. Moreover, no telephone number could be located for either the Alliance of American Homeowners or the American Council of Health Reform, and neither one was listed in a street directory at the Council's supposed Herndon address."

B. Principal: William Shaker

See 1 approval b

- President of Washington Marketing Group, Inc., an advertising agency established in 1987, with 1992 sales of \$420K.
- Was the Virginia Executive Vice President of the National Tax Limitation Committee from 1978-1984.
- In a 1976 Business Week article was listed as the chair of Taxpayers United.
- In 1979, was the witness in a Michigan case representing Taxpayers United Research Institute.
- Worked for Dow Chemical from 1965-1978 in Midland, MI.
- The other principal in the organization, Joanna Shaker, is an independent nurse who owned Patient Care (of Virginia) [NEXIS/LEXIS] from 1979-1987.

III. **National Legal and Policy Center ("NLPC")**

A. Organization:

- From trial papers: "... a private foundation ... established to promote ethics in government by publicizing and distributing a "Code of Ethics for Government" which it believes is essential to the health, vitality and legitimacy of the nation's democratic institutions...the members of NLPC does desire to participate in the meetings...not only due to the Plaintiffs' and its officers interest in health care reform, but their interest in the proper operation of government and the task force itself." [This was abridged to "NLPC is also seriously interested in health care reform as well as the proper and legal operation of the Task Force itself."

Lawyer: Kent Masterson Brown

Plaintiffs: Association of American Physicians and Surgeons, Inc. ("AAPS")
American Council for Health Care Reform ("ACHCR")
National Legal and Policy Center ("NLPC")

I. Association of American Physicians and Surgeons, Inc. ("AAPS")

A. Organization:

- From trial papers: "Was established in 1943 and its purpose is to preserve and protect the private practice of medicine...Specifically, AAPS is deeply committed to limiting government intrusion into the practice of medicine and the physician-patient relationship, and preserving and protecting freedom of choice for consumers of health care services."
- Has a membership base of 3,000.

B. Principal: Jane M. Orient, M.D.

II. American Council for Health Care Reform ("ACHCR")

A. Organization:

- From trial papers: "a national public interest, membership corporation...The purpose of the ACHCR is to represent consumers of health care services in an effort to ensure that the health care market remains free of unnecessary and costly government regulations and for the implementation of reforms within the insurance industry to protect the consumers of health care services"
- From letter: "Established in 1983 as a non-profit organization to protect consumers rights and help lower the cost of health care delivery."
- The National Organizations of the U.S. database [research or self-reported] indicates that the Council was established in 1980 and currently has 15,000 members and a staff of 2. They were "organized to eliminate what the council terms unnecessary and costly federal and state health care regulations and laws, such as certificate of public need restrictions that limit public choice in the selection of health care providers...Coordinates grass-roots support for free market approaches to health care delivery and health, safety, and consumer-oriented projects. Works to achieve public access to medical practice information."

- Formed in 1992.

B. Principal: Peter T. Flaherty

- In a fund-raising appeal for Citizens against Clinton, Flaherty targeted Hillary: "Hillary Clinton is a radical feminist who has little use for religious values or even the traditional family unit."
- In August 1992, the Peter Flaherty and the Conservative Campaign Fund issued a release promising independent expenditure ads ("Citizens Against Clinton") on Clinton taxes, Social Security means-testing, gay rights support, and Hillary. (emphasis added) [Hotline, 8/19/92]
- Current Chairman of the **Conservative Campaign Fund**, a political action committee.
 - In 1991, during the Clarence Thomas controversy, issued a scathing attack after the opening hearing session focusing on Senator Biden's "plagiarism" and accusing Biden of "character assassination" in his questioning. [Hotline, 9/11/91; USA Today, 9/11/91]
 - In that same year, in the midst of the Willie Smith trial, Flaherty filed a complaint with the Senate Ethics Committee demanding an investigation of Senator Kennedy's behavior in Palm Beach. The complaint was dismissed. [The Washington Times, 6/24/91]
 - In 1989, wrote a Washington Post Op Ed piece encouraging "strong action" against then-House Speaker Jim Wright and defending the Conservative Campaign Fund against charges of "jury tampering" of the Ethics Committee.
- Former Chairman and Chief Executive Officer for **Citizens for Reagan** -- a well financed 100,000 member organization dedicated to winning implementation of Reagan's conservative agenda
 - Active in forming coalition of conservative groups to urge Congressional support for aid to the Nicaraguan Contras.
- A September 1989 notice of the Monday Club -- a weekly luncheon meeting of Washington right-wingers -- features Mr. Flaherty as spokesman for the Legal Services Reform Coalition.
- Active in the Leadership Institute: A national organization, headed by Morton Blackwell, dedicated to recruiting and training conservatives for national leadership. The group conducted seminars to teach recruits how to win hiring preference in the executive branch and secure Civil Service jobs in a bid to "continue the Reagan revolution after Reagan leaves

office". [Washington Times, 1/18/89] The group's trainees have been active in campaigns for conservative office-seekers such as Sen. Jesse Helms.

- Former member of **Massachusetts Citizens for Life**.
- Former National Director of **Young Americans for Freedom** -- After being forced out in 1983, filed suit against the organization's leadership to get a temporary restraining order on a board meeting.

IV. Kent Masterson Brown

- Practices in the fields of Constitutional Law and Health Law.
- Belongs to the National Health Lawyers association and the American Society of Law and Medicine.
- In a Washington Times interview, Masterson called mamanged competition "the sovietization of the medical process. It will seriously hurt the quality of health care
- Has written and lectures extensively on the subject of health and law.
- "My cases have involved the adjudication of constitutional issues arising out of the regulation of the health care industry and the administration of the Medicare and Medicaid programs as well as antitrust issues within the health care industry."
- i.e., Mounted a "constitutional challenge to hospital requirement that medical staff members purchase minimum amounts of medical liability insurance."
- Clients include Association of American Physicians and Surgeons; Limited Legal Consultation Service -- AAPS; ITT Life Insurance Corp; CHUBB Insurance Group; and a variety of medical staffs of hospitals and hospital organizations themselves.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN)
PHYSICIANS AND SURGEONS, INC.,)
et al.,)
Plaintiffs,)
v.)
HILLARY RODHAM CLINTON,)
et al.,)
Defendants.)

Civil Action No. 93-0399
(RCL)

FILED

MAR 10 1993

MEMORANDUM OPINION

Clark, U.S. District Court
District of Columbia

This case raises one of the most difficult issues faced by the judiciary: the separation of powers between the legislative and executive branches of government. The case comes before the court on plaintiffs' motion for a temporary restraining order and a preliminary injunction ("Plaintiffs' Motion"); defendants' motion to dismiss or, in the alternative, for summary judgment ("Defendants' Motion"), and plaintiffs' memorandum in opposition to defendants' motion and in support of plaintiffs' motion ("Plaintiffs' Reply"). The issues have been fully briefed and eloquently argued in open court. For the reasons given below, plaintiffs' motion shall be granted in part and defendants' motion shall be granted in part.

I. INTRODUCTION AND BACKGROUND.

President Clinton promised the American people during the recent campaign that he would address the problem of health care in this country. Although expenditures on health care are

rapidly approaching \$ 1 trillion a year and quickly outpacing inflation, dissatisfaction with the present system of administering medical care infects the nation.

Thus, on January 25, 1993, President Clinton announced the creation of the President's Task Force on National Health Care Reform, an advisory body comprised of six Cabinet secretaries, several senior White House officials, and the chairperson, First Lady¹ Hillary Rodham Clinton. The President charged the Task Force with presenting him with a health care reform proposal he could present to Congress; the time limit was set at 100 days. At the same press conference, the President also announced the formation of an inter-departmental working group, comprised of more than 300 federal employees, which is charged with gathering and analyzing the information on which the Task Force will rely in formulating its proposal. The record indicates that the Task Force has yet to meet (with the exception of the January 25 photo opportunity), but the working group has been active, meeting with private individuals and representatives of private organizations; these meetings have not been open to the public. The Task Force's plans are to hold some, but not all, of its meetings in public.

Plaintiffs are three not-for-profit corporations: Association of American Physicians and Surgeons, Inc., represents physicians and osteopaths; American Council for Health Care

¹Although Congress uses the term "spouse of the President," 3 U.S.C. § 105(e), both plaintiffs and defendants use the traditional term "First Lady." The court therefore will adopt their usage.

Reform represents health care consumers; and National Legal & Policy Center seeks to promote ethics in government. Each has sought to gain admittance to all meetings of the Task Force, claiming that § 10 of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 §§ 1-15, mandates that such meetings be open to the public. Plaintiffs' claim is founded on the proposition that since the First Lady is not a federal employee, the Task Force falls within the definition of an advisory committee set forth in § 3 of FACA. See Part III.A.3., below. Each plaintiff subsequently received word from Bernard W. Nussbaum, counsel to the President, that FACA did not apply to the Task Force, but that private citizens would be allowed to take part in some of the Task Force meetings.

Faced with exclusion from some of the meetings, the plaintiffs brought this suit. They seek a temporary restraining order and a preliminary injunction which would bar the defendants from convening a meeting of the Task Force or any subgroup or subcommittee thereof without first meeting the requirements of FACA. Defendants have opposed this suit and moved to dismiss or, in the alternative, for summary judgment. They claim (1) that FACA does not apply to the Task Force; and (2) that even if FACA does apply to the Task Force, that application would violate article II, section 3 of the Constitution. The court will address each of these questions in Part III., below.

II. STANDARDS FOR A PRELIMINARY INJUNCTION.²

A preliminary injunction may be granted in this circuit only when the plaintiffs demonstrate that they have met the four-part test of Washington Metro. Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977):

1. that they have a substantial likelihood of success on the merits;
2. that irreparable injury will result in the absence of a preliminary injunction;
3. that no other parties will be harmed if the injunction is entered; and
4. that the public interest favors entry of the injunction.

The court finds that each of these is present.³ The discussion of the first criteria, likelihood of success on the merits, is contained in Part III., below. The remaining three aspects of the Holiday Tours standard are addressed in Part IV.

III. LIKELIHOOD OF SUCCESS ON THE MERITS.

²This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Defendants have not questioned plaintiffs' standing. Regardless, in light of the Supreme Court's decision in Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989), any objections would be overruled. Therefore, this case and these parties are properly before the court.

³Typically, the district court must balance these factors in order to determine whether an injunction should issue. See, e.g., Foundation on Economic Trends v. Heckler, 756 F.2d 143, 151-52 (D.C. Cir. 1985). However, since the court finds below that plaintiffs have met each of these criteria, the court need not perform this balancing.

A. FACA Applies to the Task Force.

1. FACA's Definition of an Advisory Committee.

The Federal Advisory Committee Act was passed in 1972 with two explicit goals in mind: first, to eliminate unnecessary advisory committees and ensure that future committees be properly justified; and second, to increase the accountability of advisory committees by opening their meetings to the general public and forcing disclosure of their purposes, memberships, costs, and activities. FACA § 2. To this end, Congress imposed several requirements upon the executive branch and most of its advisory committees. These include the filing of a charter (§ 9), timely publication of all advisory committee meetings (§ 10(a)(2)), public participation (§ 10(a)(3)), and disclosure of proceedings (subject to the limited exceptions of the Government in the Sunshine Act (5 U.S.C. § 552b)) (§§ 10(b), (c), and (d)).⁴

Section 3(2) provides the definition of an advisory committee:

any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . .

(b) established or utilized by the President

. . . in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. . . .

5 U.S.C. App. 2 § 3(2) (emphasis added). The definition section

⁴Defendants acknowledge that these requirements apply to all advisory committees. Defendants' Motion at 11 n.5.

then proceeds to exclude from FACA's coverage two enumerated commissions and "(iii) any committee which is composed wholly of full-time officers or employees of the Federal Government."

Plaintiffs argue that the First Lady is not a federal officer or employee; thus, the court should hold that FACA governs the operations of the Task Force. Defendants counter by invoking the legislative intent of Congress - limiting the pernicious influence of "outsiders" on the workings of the federal government - and suggest that the court should view Mrs. Clinton as the "functional equivalent of a federal employee." Defendants' Motion at 20.

At issue, therefore, is the definition of the words "officer" and "employee."

2. Avoiding the Constitutional Question.

Defendants contend, and the court acknowledges, that plaintiffs' reading of FACA - and their literal reading of the words "officer" and "employee" - raises the constitutional issue of the power of Congress to regulate the power of the President.⁵

⁵That this is a serious constitutional question cannot be disputed. Defendants note (Defendants' Motion at 26) that the five-justice majority in Public Citizen regarded the constitutional question as "serious" and "undeniable." 491 U.S. at 466-67. (Through the use of statutory construction, however, the Court was able to avoid the constitutional issues.) Three justices (Justice Kennedy writing for himself as well as Chief Justice Rehnquist and Justice O'Connor) concurred in the judgment and said that, in their view, FACA was unconstitutional as a violation of separation of powers principles when applied to the facts in that case. 491 U.S. at 482-89. Justice Scalia took no part in the case, and Justices Souter and Thomas have since replaced two of the members of the Public Citizen majority.

Therefore, the first task of the court is to determine whether some plausible interpretation of these terms will obviate the need to examine the constitutional question. As the Supreme Court has frequently stated, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932) (footnote omitted).

Therefore, the court's first task is to determine whether defendants' proposed definition of "officer" and "employee," although seemingly contrary to the language of Title 5 of the United States Code, is "fairly possible." If so, the Task Force would be exempted from FACA's requirements, and the constitutional question could be avoided.

3. The Definition of "Employee."

FACA is not a model of legislative drafting,⁶ and the court has several models to follow in its attempt to construe the statute so as to avoid any constitutional issues. For instance, and most importantly, in Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989), the Supreme Court examined the word "utilized" in § 3 of FACA to determine whether the American Bar Association's Standing Committee on the Judiciary,

⁶One of the most vehement critics of FACA was the late Judge Gerhard Gesell, who consistently decried the ambiguity of the statute. See, e.g., National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524, 530 (D.D.C.), aff'd 711 F.2d 1071 (D.C. Cir. 1983); Nader v. Barocdy, 396 F. Supp. 1231, 1232 (D.D.C. 1975).

which has for several decades provided the Department of Justice with a ranking on all proposed nominees for federal judgeships, qualified as an advisory committee subject to FACA's strictures. Justice Brennan, all the while acknowledging that he was rejecting "one common sense of the term [utilize]," 491 U.S. at 452, proceeded to utilize legislative history in order to find that the Department of Justice did not "utilize" the ABA Standing Committee when it "utilized" it. As the Court noted, "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." 491 U.S. at 466. In Public Citizen, the Court was successful in construing the statute in such a fashion and it thereby avoided having to address the constitutional question.⁷ Similar techniques of statutory construction are found in National Resources Defense Council v. Herrington, 637 F. Supp. 116 (D.D.C. 1986), and Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975).

Although the court believes there was little ambiguity in the word "utilize" prior to the Supreme Court's holding in Public Citizen, the court will nonetheless accept that Court's determination that "utilize is a woolly verb, its contours left

⁷District Judge Joyce Hens Green, whose decision was directly appealed to the Supreme Court, had noted that the definition of "utilize" ultimately adopted by the Supreme Court pushed statutory construction to the extreme and was therefore not fairly plausible. She thus held that FACA did apply to the Standing Committee. Washington Legal Foundation v. U.S. Dep't of Justice, 691 F. Supp. 483, 491 (D.D.C. 1988).

undefined by the statute itself." 491 U.S. at 452. However, the terms "officer" and "employee" are shorn of all such ambiguity, and Congress has precisely determined their meanings.

Neither "officer" nor "employee" is included in the definitions section of FACA (§ 3); in fact, in all fifteen sections of FACA, Congress gave absolutely no description or gloss as to who qualifies as "full-time officers and employees of the Federal Government." Of course, the reason for this glaring omission is evident: Congress already had provided, in §§ 2104 and 2105 of Title 5, complete definitions for both words. In relevant part, those sections provide as follows:

Section 2104 - Officer

(a) For the purpose of this title [Title 5], "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 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. . . .

Section 2105 - Employee

(a) For the purpose of this title [Title 5], "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;

- (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 act; and
- (3) subject to the supervision of an individual named by paragraph (1) of this section while engaged in the performance of the duties of his position. . . .

5 U.S.C. §§ 2104 & 2105 (emphasis added). These sections apply to FACA, and it is apparent that Mrs. Clinton meets neither definition. First, Mrs. Clinton is not appointed to the civil service. Second, the President was not required by law to appoint Mrs. Clinton to the civil service when he named her to lead the Task Force. In addition, defendants provide no evidence of other indicia of employment within the Government, such as the filing of a Form 50 or the taking of an oath of office. In short, the statutory language is - unlike that of FACA - exceedingly clear, and Mrs. Clinton simply does not satisfy either definition.⁸

Despite the long-accepted maxim that the plain language of a

⁸Plaintiffs also urge the court to hold that the Kennedy Act, 5 U.S.C. § 3110, similarly precludes a finding that Mrs. Clinton is an employee of the Federal Government. This anti-nepotism statute precludes the spouse of the President from being an officer or employee of the Federal Government. Defendants contend that the statute does not apply. As the court finds that the clear language of §§ 2104 and 2105 are sufficient to establish the fact that the First Lady is neither an officer nor an employee, the court need not address this issue.

statute should control the court's determination, defendants argue that the court nonetheless should examine the legislative history of FACA. Defendants contend that Congress' purpose in enacting FACA was essentially to ensure that "outsiders" - those with private interests - could not advise the federal government without the openness provisions required by FACA. On the other hand, "insiders" - government employees with no self-interested motivations - did not need further public scrutiny; thus, defendants conclude, Congress exempted advisory committees comprised wholly of these insiders from FACA's strictures.⁹ Using this reasoning, the defendants assert that the First Lady is just such an insider as she represents no private interests; she is, in effect, the "functional equivalent of a federal employee." Defendants also assert that this conclusion is bolstered by the fact that Congress has appropriated funds for the spouses of the President and the Vice President and their staffs so that they might perform their government-related functions. 3 U.S.C. §§ 105(e) & 106(c).

The court disagrees with defendants' position. First,

⁹The government raised a similar theory while defending Washington Legal Foundation v. U.S. Dep't of Justice, 691 F. Supp. 483 (D.D.C. 1988). In that case, however, the government took the position that Congress's intent in FACA was to expose to the light of public scrutiny the activities of "private special interests' groups," 691 F. Supp. at 489, a group the court presumes can be likened to the "outsiders" attacked in this proceeding. The Washington Legal Foundation court, however, did not accept the government's argument because such an interpretation worked too much violence on the plain language of the FACA statute. The court today is faced with language that is even less open to interpretation, and the court thus does not adopt defendants' legislative history arguments.

* although it exempted particular bodies from FACA, Congress did not exclude the First Lady; nor did it then decree (and it has not decreed since) that the President's spouse qualifies as an employee - or even a "quasi-employee" - of the federal government. Second, Congress did not legislate a distinction between "insiders" and "outsiders," but rather between "full-time officers and employees of the Federal Government" and those who do not meet the definitions provided in 5 U.S.C. §§ 2104 and 2105. Third, no court has held that an [individual's or] advisory group's civic, benign, or neutral motives place it beyond the statute's reach." Washington Legal Foundation, 691 F. Supp. at 490. In short, defendants' analysis of the legislative intent of FACA is not persuasive.

4. The Interdepartmental Working Group.

Plaintiffs have also asserted that the interdepartmental working group¹⁰ is an advisory committee to the Task Force and therefore is similarly subject to FACA. Although the court's resolution of the question of the applicability of FACA to the Task Force would seem to resolve this issue in favor of plaintiffs, particularly as defendants have admitted that the working group is meeting with private citizens, the question is significantly more difficult.

Unlike the issue addressed in Part 3., however, this is not

¹⁰The working group been subdivided into fifteen task-specific cluster groups. Declaration of Ira Magaziner ¶ 15.

a question of first impression for the court. The framework for the court's discussion is provided by National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524 (D.D.C.), aff'd 711 F.2d 1071 (D.C. Cir. 1983) ("NAHC"). In that case, President Reagan had created by Executive Order a 150-member Executive Committee comprised almost entirely of representatives of the private sector; FACA clearly applied to this body. Supporting the Executive Committee were thirty-six task forces, each chaired by members of the committee. Plaintiffs brought suit and demanded that FACA's requirements be imposed upon the task forces as well. Judge Gesell dismissed plaintiffs' claims, finding that the task forces

do not directly advise the President or any federal agency but rather provide information and recommendations for consideration to the Committee. Consequently, they are not directly 'established or utilized' by the President or any agency 'in the interest of obtaining advice or recommendations.'

557 F. Supp. at 529. Likening the task forces to staff, the court commented that "[s]taff would be expected to perform exactly the sort of functions performed by the task forces at issue - gathering information, developing work plans, performing studies, drafting reports and even discussing preliminary findings with agency employees." Ibid. Based on this finding, Judge Gesell concluded that "[t]he Act does not cover groups performing staff functions such as those performed by the so-called task forces." Ibid. See also Washington Post v. National Council on the Arts, Civ. A. No. 92-0955 (D.D.C. April 29, 1992) (informal, information-gathering working groups not subject to

FACA). But see Federal Advisory Committee Management Regulations, 41 C.F.R. § 101-6.1004(i) (subgroups subject to FACA when "an agency accepts the group's deliberations as a source of consensus advice or recommendations").

Similarly, the regulations under FACA exclude from the Act's coverage

[m]eetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee.

41 C.F.R. § 101-6.1004(k). Plaintiffs have alleged no activities by the working group that fall outside of these activities.

Based on the case law and the appropriate regulations, therefore, the court finds that the interdepartmental working group (as well as the fifteen cluster groups into which it has been divided) directly compares to the task forces in NAHC and fully meets the exclusion of § 101-6.1004(k). The declaration of Ira Magaziner demonstrates that the various cluster groups are gathering information and formulating proposals to be reported to the Task Force so that the Task Force may present its legislative proposal to the President; the cluster groups are not providing the Task Force with "consensus advice." Moreover, Mr. Magaziner has represented that

[o]nly the Task Force will have authority to forward recommendations to the President, and only the Task Force will provide advice to the President. The interdepartmental working group is not charged with responsibility for making, and will not make, recommendations to the President, and will not otherwise directly advise him.

Magaziner Declaration ¶ 5. In their complaint, plaintiffs have not charged otherwise. To adopt again the language of Judge Casell,

[i]f the [working groups] were in fact providing advice directly to the [President], they might indeed be functioning as advisory committees with the meaning of the Act. However, . . . plaintiffs have wholly failed to demonstrate by deposition or otherwise that such is the case.

NAEC, 557 F. Supp. at 529. Therefore, defendants' motion to dismiss any claims concerning the working group is granted as plaintiffs fail to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6)."

"This is not a fact-intensive case. Therefore, if the court had not dismissed the working group claims on Rule 12(b)(6) grounds, it nonetheless would have granted defendants' motion for summary judgment as to those claims under Rule 56. Plaintiffs have alleged that the cluster groups are doing more than merely gathering information (although they have not, as the court noted above, alleged that the cluster groups are engaging in any activities that fall outside the parameters of 41 C.F.R. § 101-6.1004(k)). Plaintiffs' Memorandum at 23-25. Defendants deny plaintiffs' allegations, however, relying on the declaration of Ira Magaziner. In his declaration, Mr. Magaziner states that "[s]hortly after January 25, the interdepartmental working group began an intensive effort to gather information concerning the present health care system and alternatives for reform." Magaziner Declaration ¶ 10. Mr. Magaziner also averred that the "cluster groups and subgroups [further subdivisions of cluster groups] have been meeting regularly as part of an intensive effort to document the impact of existing health care policies and to gather information on possible alternatives." Id. at ¶ 19.

Plaintiffs have moved for expedited discovery in this case. However, in their memorandum filed March 4, 1993, which was misstyped but served as both a reply brief on their motion for a temporary restraining order as well as an opposition to defendants' motion to dismiss or for summary judgment, plaintiffs did not include a declaration that further discovery was necessary before summary judgment could be granted (as required by Fed. R. Civ. P. 56(f)). Under Fed. R. Civ. P. 56(e) and Local Rule 108, therefore, the court must accept the facts set forth in defendants' affidavit as the facts on which judgment shall be had. There thus are no genuine issues of material fact and summary judgment is appropriate

5. Conclusion.

Thus, although the court has a responsibility to construe FACA so as to avoid a constitutional question if possible, that construction is invalid if it completely subverts the explicit definitions of words provided by Congress. The court concedes that defendants present an attractive option: all the court must do is stretch the scope of the word "employee" just enough so as to include the First Lady within its purview.¹² If the court were to accept defendants' suggestion, it would be able to hold

on this issue.

¹²The record suggests that Congressman William F. Clinger, Jr., the ranking Republican member of the House Committee on Government Operations, is "introducing legislation . . . which will include the spouses of the President and Vice President under the definition of full-time federal officer for the purposes of FACA." Letter from Congressman William F. Clinger, Jr., to President William J. Clinton 2 (Feb. 1, 1993) (attached to affidavit of Genevieve M. Young).

In his letter to President Clinton, Rep. Clinger advised the President that the Task Force violated FACA and asked that the President "take immediate steps to ensure that no further violations of this Act occur." *Ibid.* Rep. Clinger suggested that President Clinton remedy this violation by ensuring that the Task Force comply with FACA or by "submit[ting] legislation to Congress seeking an exemption for this task force from the FACA provisions." *Ibid.* President Clinton's response, through his counsel Bernard W. Nussbaum, was that "[i]t is our opinion that the Federal Advisory Committee Act ("FACA") does not, and was not intended by Congress to, apply to the health care task force." Letter from Bernard W. Nussbaum to the Hon. William F. Clinger, Jr. 1 (Feb. 5, 1993) (attached to affidavit of Genevieve M. Young).

As a result of the court's rejection of this position, President Clinton has now precipitated a constitutional confrontation. Of course, passage of legislation (which presumably would be signed without hesitation by President Clinton) would obviate the need for cases such as this involving the First Lady. Passage of legislation is advantageous for another reason as well: action by Congress, rather than the judicial rewriting of an inconvenient statute which defendants seek, is the proper way for laws to be made in this democracy.

that FACA did not apply to the Task Force and thereby avoid the constitutional question. However, rewriting Congressional statutes sets a dangerous precedent, even when the justification is as popular as this one might be. The courts must stand firm and limit themselves to interpreting the law as it comes before them, not rewriting law as best they see fit. This principle is particularly compelling since in this democracy the judiciary is not elected to serve the popular mandate, but rather appointed to ensure that the constitution and the laws be justly interpreted and applied. While the court takes no pleasure in determining that one of the first actions taken by a new President is in direct violation of a statute enacted by Congress, the court's duty is to apply the laws to all individuals.

X | Thus, having determined that the First Lady is not an officer or employee of the Federal government, it follows that FACA applies to the Task Force. The court must now address the constitutional issue this case presents.

B. Separation of Powers.

The issue the court must face is much more easily stated than resolved: does the application of FACA to the Task Force impinge upon the President's ability to perform his constitutionally mandated tasks? The Supreme Court has long recognized that the Constitution's division of governmental power into three branches endows each branch with a certain autonomy that must remain unchallenged by the other two branches. See,

e.g., Nixon v. Administrator of General Services, 433 U.S. 425 (1977) ("Nixon II"); United States v. Nixon, 418 U.S. 683 (1973) ("Nixon I"). However, there are times when the protection of constitutional interests requires that this division be breached; to this end, the Court has found that there are circumstances which permit one branch to encroach on the domain of another branch.

1. Intruding upon the President's Powers.

When a separation of powers issue arises, the court must first look to whether the statute prevents the President from accomplishing his constitutionally assigned functions. Public Citizen v. U.S. Dep't of Justice, 491 U.S. at 484 (Kennedy, J., concurring in judgment); Morrison v. Olson, 487 U.S. 654, 695 (1988); Nixon I, 418 U.S. at 711-12. The court concludes that FACA does.

FACA applies
GACA
unconstitutional

Article II, section 3 of the Constitution states that the President "shall from time to time . . . recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient."¹³ In order to formulate these measures, defendants claim, the President must be able to meet confidentially with his

Plaintiffs have argued that the Constitution does not obligate the President to propose legislation but rather only permits it. Thus, they conclude, FACA does not impair the President's duties. The court disagrees. Even though the President need not propose legislation under the Constitution, it certainly is within his enumerated powers. Thus, if FACA impedes his ability to recommend measures to Congress, it necessarily impinges upon the exercise of his Constitutional duties.

*
*
* advisors. He must be able to trust that his advisors shall speak with complete candor and that they will not be cowed by the fear of premature public reaction. That candor is risked should FACA apply to the Task Force. A realistic and practical appraisal of the application of FACA to these presidential advisors reveals that FACA prevents the President from receiving the full measure of the Task Force's advice. When confidentiality is compromised and advisors are afraid to speak, the President is necessarily hampered in his ability to obtain the information he needs to offer proposed legislation to Congress. Thus, the court holds that the application of FACA presents "the potential for disruption" of the President's accomplishing his constitutionally assigned functions, Nixon II, 433 U.S. at 443, and that FACA intrudes on the President's powers. See Morrison, 487 U.S. at 695.

2. Balancing the Interests.

The next step in the inquiry, then, is to determine whether this Congressional intrusion "is justified by an overriding need to promote objectives within the constitutional authority of Congress." Ibid. To conduct this inquiry, the court must distinguish between two types of Task Force meetings: those at which the Task Force is gathering or reporting information and facts; and those at which the Task Force is formulating its

recommendations for the President.¹⁴ The executive branch's interests in these two types of meetings are different; thus, when the court weighs them against Congress' interests, it reaches different results.

Before attempting to balance the interests of the respective branches, however, the court must examine the nature of the Presidential power defendants assert: if the Constitution explicitly grants the power to the President, then Congressional regulation of that power cannot be tolerated. As Justice Kennedy recently noted, "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate any intrusion by the Legislative Branch." Public Citizen, 491 U.S. at 485 (Kennedy, J., concurring in the judgment). On issues such as this, the Constitution has struck the balance between Congress and the President, and this court may not permit the legislative branch to impose its restrictions on the President as he performs his constitutional obligations.

Of course, the President's power to propose whatever legislation he deems necessary is a power afforded solely to the

¹⁴Distinguishing between fact-finding and deliberating is not novel. See, e.g., Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921 (D.C. Cir. 1982) (addressing pre-decisional processes under Government in the Sunshine Act), and Washington Post v. National Council on the Arts, Civ. A. No. 92-0955 (D.D.C. Apr. 29, 1992) (informal, information-gathering working groups not subject to FOIA). A similar distinction has also been recognized in the deliberative process privilege in exemption five of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). See, e.g., EPA v. Mink, 410 U.S. 73, 89-91 (1973).

President. However, the explicit power is a limited one: it only precludes Congress from barring the President's proposing of legislation. Thus, if Congress, for whatever reason, regulated the President's ability to propose legislation (for instance, by limiting the president to only ten pieces of proposed legislation each term), that regulation necessarily would be unconstitutional as a violation of separation of powers. However, where Congress does not directly limit an explicit power of the President, but rather indirectly affects a presidential power that is not specifically enumerated in the Constitution (here, the power to obtain the views of his advisors so that he might propose legislation), the statute is not unconstitutional per se; instead, the court must balance the interests of the two branches.

As to the information-gathering and information-reporting meetings of the Task Force, the presidential interest in confidentiality is not present. As the Task Force is not formulating or reporting advice and recommendations at those meetings, there is no concern that the Task Force's members will not be candid or that they will shrink from performing their fact-finding for fear of the public's response. On the other hand, the congressional interest in openness and accountability clearly is present at these meetings. The public has the right to know what information is being presented to the Task Force and by whom it is being given; to learn of the costs involved in the gathering of the facts; and to attend these meetings. As the

court finds that the President's interest is outweighed by Congress' interest, the court holds that the Task Force must comply with FACA and may not conduct any fact-finding or information-gathering meetings until it has complied with its regulations.¹⁵

However, with respect to the meetings at which the Task Force formulates its recommendations for the President, the balance weighs in favor of the President. With respect to these meetings, plaintiffs have demonstrated "no overriding congressional interest . . . that outweighs FACA's intrusion on the . . . power of the President." Washington Legal Foundation, 691 F. Supp. at 492 (addressing U.S. Const. Art. II, § 2). And, it is at these meetings that the President's need for candid advice is at its greatest. The President's interest in confidentiality is particularly present as the Task Force directly advises the President as to what legislation he should propose.

Plaintiffs primarily seek access to the Task Force's

¹⁵The government argues that FACA should be declared unconstitutional in its application to all meetings of the Task Force, including those at which the Task Force merely gathers or reports facts. However, this argument is too broad as it discounts the important balance the court must strike when it faces a constitutional issue of this nature: the balance between the interests of Congress and the interests of the President. To adopt the government's position in toto (by not striking a balance and holding that the President's interest by definition outweigh Congress's) not only would gut FACA but also would immeasurably augment the autonomy and power of the Executive Branch. Just as the court cannot allow Congress impermissibly to impinge upon the President's ability to perform his constitutional duties, it cannot allow the President to augment his power to the detriment of congressional interests.

meetings, presumably so that they may influence the resulting legislative proposals. However, defendants have averred that plaintiffs will have opportunities to address the Task Force and air their views at some of the Task Force's meetings. And, the court's order will ensure that plaintiffs have access to all information-gathering and fact-finding meetings. In addition, any proposed legislation must be presented to Congress, and plaintiffs will have ample opportunity to lobby their representatives and senators. The Task Force's pronouncements are not the final word on the subject of health care reform. Thus, any congressional interest in opening these meetings is obviated by plaintiffs' opportunities to address the Task Force and Congress.

Plaintiffs also claim that the court should not hold FACA unconstitutional because the President's interest in confidentiality and candor are protected by the Government in the Sunshine Act, 5 U.S.C. § 552b, which is incorporated into FACA through § 10(d). However, §§ 552b(c)(1) - (10), which provide ten exceptions to the general proposition that all affected meetings must be open to the public, are narrowly drawn and highly specific; as a result, they hardly allow the President the freedom he needs to perform his constitutional duties.¹⁶

¹⁶Only one of the exemptions even arguably applies to the Task Force. Section (c)(9)(B) exempts from the Act (and thus from FACA) any information "the disclosure of which would - (B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action. . . ." However, several courts have addressed this provision, and all have construed the standard so narrowly that no Task Force meeting could ever meet its terms. For

Therefore, the court holds that the President's interest at these meetings outweighs the interest of Congress as expressed in FACA. The application of FACA to these meetings is unconstitutional as a violation of separation of powers principles.

3. Conclusion.

Thus, the court holds that the imposition of FACA on the President's Task Force on National Health Care Reform impermissibly imposes upon the President's enumerated power, as set forth in Art. II, § 3, to recommend to Congress such measures as he deems necessary and expedient, but only as to those meetings of the Task Force at which the Task Force formulates its recommendations or presents these recommendations to the President. The court therefore declares that the following three sub-sections of § 10 of FACA are unconstitutional as applied to these meetings:

- o Sections 10(a)(1) and 10(a)(3) directly affect the

instance, in Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921 (D.C. Cir. 1982), the Court of Appeals held that § (c)(9)(B) did not exempt pre-decisional deliberations. In fact, the court looked to the regulations accompanying the statute and held that the § (c)(9)(B) provided only a very narrow exemption applicable to very specific circumstances. Similarly, in Public Citizen v. National Economic Comm'n, 703 F. Supp. 113 (D.D.C. 1989), even though the court found that publicizing the Commission's hearings "would alter the outcome of the Commission's work," 703 F. Supp. at 116, the court nonetheless held that § (c)(9)(B) did not apply. Constrained as it is by Common Cause, this court can not now reinterpret § (c)(9)(B) and greatly expand its scope. Thus, plaintiffs' reliance on the Government in the Sunshine Act is misplaced.

President's ability to perform his constitutional duty. Because they open the advice and recommendation sessions of the advisory committee to the public, they would affect the candor with which the committee's members deliberate their findings and proposals. This prevents the President from receiving the advice he needs to recommend legislation to the Congress.

o Similarly, § 10(c), by subjecting the advice and recommendation meetings to subsequent public scrutiny, would have the same effect on the candor of the advisors. These meetings, too, must be kept confidential.

However, the rest of FACA does not impose impermissibly upon the President's ability to perform his duties. Section 9(c), for instance, which requires that a charter be filed, will not affect the confidentiality of meetings. Section 10(a)(2)'s mandatory announcement of all meetings - including advice and recommendation meetings - also has no effect on the advisors' deliberations; that the public knows that the Task Force is meeting does not affect confidentiality within the meeting or impinge upon the President's power.

Section 10(b) is also constitutional since the deliberative process exemption of the Freedom of Information Act, 5 U.S.C. § 552, will allow the advisors the confidentiality they need to enable the President to perform his obligations. This section also addresses the product of the working group as all materials prepared for as well as by the Task Force shall be made available to the public. Thus, the public interest in ensuring that

special interests do not overly affect Task Force or working group activities will be preserved.¹⁷

Further, Section 10(d) is not implicated since §§ 10(a)(1) and 10(a)(3) may not to be applied to the Task Force when it meets in advice and recommendation meetings. All other provisions of FACA likewise are enforceable against all proceedings of the Task Force.¹⁸

Since the application of FACA to all other operations of the Task Force does not violate the separation of powers principles, the court will enjoin all further meetings of the Task Force until such time as the Task Force is in full compliance with each of the requirements of FACA.

IV. THE REMAINING THREE PRELIMINARY INJUNCTION CRITERIA.

A. Irreparable Injury.

Plaintiffs argue that the court should follow previous FACA decisions, particularly Public Citizen v. National Economic Comm'n, 703 F. Supp. 113 (D.D.C. 1989), and grant plaintiffs a

¹⁷"This provision coupled with the requirement that complete and accurate minutes of committee meetings be kept serves to prevent the surreptitious use of advisory committees to further the interests of any special interest group." H.R. Rep. No. 92-1017, 92d Congress, 2d Sess. 10 (1972).

¹⁸The court expresses one caveat: The parties have alluded to FACA's balanced viewpoint requirements (§5(b)(2)), but plaintiffs have not raised the issue and the question has not been briefed by the parties. Although it is unlikely that such a requirement could survive the balancing test applied in Part 2., above, the issue is not properly before the court; therefore, the court will not decide whether such a requirement impermissibly interferes with the President's ability to perform his constitutional tasks.

preliminary injunction. Defendants, for their part, claim that plaintiffs will suffer no immediate irreparable injury for three reasons:

- o since the Task Force is not subject to FACA, the plaintiffs have no rights under FACA;

- o since the parties will have opportunities to address some of the Task Force's meetings as well as the opportunity to address Congress (once the Task Force reports to the President and he in turn proposes legislation based upon the Task Force's advice); and

- o since no meetings of the Task Force have been scheduled.

None of defendants' contentions, however, distinguish this case from National Economic Comm'n.

First, the court's holding in Part III., above, is that some of the meetings of the Task Force are subject to FACA; thus, the first objection is not helpful to defendants. Similarly unavailing is defendants' third argument as it is apparent that the Task Force will meet shortly.¹⁹

As to the second argument, defendants address only one-half of the problem. While it may be true that plaintiffs will have other opportunities to affect the course of the legislation,

¹⁹This is merely a matter of logic. Created on January 25th and given only 100 days to report, the Task Force is now in its 45th day of existence. By the court's count, that leaves only 55 days to meet, gather evidence, formulate proposals, and report to the President. This limited period, although probably insufficient for a temporary restraining order, satisfies the criteria for a preliminary injunction.

FACA's purpose is also to open - contemporaneously - to the light of public scrutiny the workings of advisory committees subject to FACA. This goal cannot be met if the court does not enter a restraining order, as the National Economic Comm'n court observed:

The right to view the advisory committee's discussion of policy matters in public and the right to confront, through observation, the decision-making process as it occurs, will be obviated.

703 F. Supp. at 129.²⁰

The court therefore finds that plaintiffs have satisfied the irreparable injury standard.

B. No Injury to Other Parties and the Public Interest.

The third and fourth Holiday Tours criteria are taken together. Plaintiffs argue that the public interest, as set forth in FACA, will be undermined if the Task Force meets without first complying with FACA's strictures. Defendants' two arguments merely parallel their arguments on the merits of the issue: first, that the Task Force should not be subject to FACA; and second, that if the Task Force is subject to FACA, then FACA is unconstitutional. The court has already resolved these issues

²⁰The court recognizes that there may be merit in developing a health care plan of the sort the President apparently envisions largely outside the public's scrutiny; too much "sunshine" is not necessarily productive and may result in half-baked or overcooked plans. However, Congress has determined that public scrutiny is an important element of the decisional process, and the court does not have power to alter this judgment - correct or incorrect as it may be - unless it infringes impermissibly on the President's ability to perform his constitutional duties.

above and found that defendants' positions are unpersuasive (at least in part). In addition, the Task Force may comply with FACA's chartering requirements in quick fashion; this therefore serves more as an inconvenience than an injury. Finally, exposing the fact-gathering and fact-reporting meetings to public scrutiny similarly will not cause any significant injury to the Task Force (which, after all, had planned on opening some of its meetings to the public anyway). Balanced against these minor inconveniences is the great benefit to the public of opening the Task Force's meetings to the public.

Therefore, the court finds that the public interest will be served if the court grants plaintiffs' motion in part. Again, the National Economic Comm'n court is persuasive:

Rather than harm, [applying FACA] will highlight vividly the essence of our democratic society, providing the public its right to know how its government is conducting the public's business.

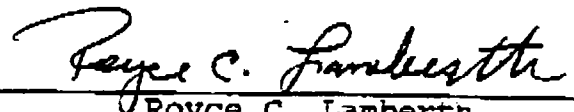
Ibid. Plaintiffs have therefore met all the criteria for a preliminary injunction.

IV. CONCLUSION.

The court today is faced with two difficult tasks: declaring an act of Congress unconstitutional; and declaring that the actions of a new President violate the law. Nonetheless, the Constitution demands that all "judicial Officers . . . shall be bound by Oath or Affirmation[] to support this Constitution," U.S. Const. Art. VI, and this responsibility includes ensuring that no branch of government appropriates the responsibilities of

another branch. It is not a power to be taken lightly, but it is a power that must be taken.

For the reasons stated above, plaintiffs' motion for a temporary restraining order and a preliminary injunction is granted in part; defendants' motion to dismiss or, in the alternative, for summary judgment is also granted in part. An appropriate order accompanies this memorandum opinion.



Royce C. Lamberth
United States District Judge

DATE: MAR 10 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

ASSOCIATION OF AMERICAN)
PHYSICIANS AND SURGEONS, INC.,)
et al.,)
Plaintiffs,)
v.)
HILLARY RODHAM CLINTON,)
et al.,)
Defendants.)

MAR 10 1993

Clerk, U.S. District Court
District of ColumbiaCivil Action No. 93-0399
(RCL)ORDER

The case comes before the court on plaintiffs' motion for a temporary restraining order and a preliminary injunction; defendants' motion to dismiss or, in the alternative, for summary judgment; and plaintiffs' memorandum in opposition to defendants' motion and in support of plaintiffs' motion. Also before the court is plaintiffs' motion for expedited discovery.

For the reasons stated in the accompanying memorandum opinion, and having held that the application of certain sections of FACA to certain meetings of the President's Task Force on National Health Care Reform is unconstitutional as a violation of separation of powers principles, it is hereby ORDERED that:

1. Plaintiffs' motion for a preliminary injunction is GRANTED in part. Defendants are hereby PRELIMINARILY ENJOINED from holding or conducting any meetings of the President's Task Force on National Health Care Reform and any subgroups or subcommittees thereof until such time as the Task Force is in full compliance with the requirements of FACA (except as provided in ¶ 2 of this order). In addition, all fact-finding and fact-

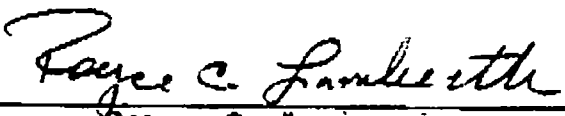
reporting meetings of the Task Force must comply fully with the requirements of FACA.

2. Defendants' motion to dismiss or, in the alternative, for summary judgment is GRANTED in part. All claims based on the interdepartmental working group are DISMISSED, pursuant to Fed. R. Civ. P. 12(b)(6), for failing to state a claim upon which relief may be granted. In addition, plaintiffs' claims based on meetings of the Task Force which are held for the purpose of formulating advice and recommendations for the President are also DISMISSED under Rule 12(b)(6). Sections §§ 10(a)(1), 10(a)(3), and 10(c) of FACA are not applicable to these meetings since their application to these meetings is unconstitutional as a violation of separation of powers principles.

3. Plaintiffs' motion for expedited discovery is DENIED.

4. Plaintiffs shall post with the Clerk of the Court a bond totalling \$ 100.00 in cash or surety.

SO ORDERED.



Royce C. Lamberth
United States District Judge

DATE: MAR 10 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

ASSOCIATION OF AMERICAN
PHYSICIANS AND SURGEONS, INC.,)
et al.,)

Plaintiffs,)

v.)

HILLARY RODHAM CLINTON,)
et al.,)

Defendants.)

MAR 10 1993

Clerk, U.S. District Court
District of Columbia

Civil Action No. 93-0399
(RCL)

ORDER

The case comes before the court on plaintiffs' motion for a temporary restraining order and a preliminary injunction; defendants' motion to dismiss or, in the alternative, for summary judgment; and plaintiffs' memorandum in opposition to defendants' motion and in support of plaintiffs' motion. Also before the court is plaintiffs' motion for expedited discovery.

For the reasons stated in the accompanying memorandum opinion, and having held that the application of certain sections of FACA to certain meetings of the President's Task Force on National Health Care Reform is unconstitutional as a violation of separation of powers principles, it is hereby ORDERED that:

1. Plaintiffs' motion for a preliminary injunction is GRANTED in part. Defendants are hereby PRELIMINARILY ENJOINED from holding or conducting any meetings of the President's Task Force on National Health Care Reform and any subgroups or subcommittees thereof until such time as the Task Force is in full compliance with the requirements of FACA (except as provided in ¶ 2 of this order). In addition, all fact-finding and fact-

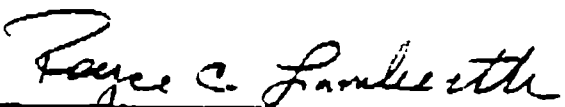
reporting meetings of the Task Force must comply fully with the requirements of FACA.

2. Defendants' motion to dismiss or, in the alternative, for summary judgment is GRANTED in part. All claims based on the interdepartmental working group are DISMISSED, pursuant to Fed. R. Civ. P. 12(b)(6), for failing to state a claim upon which relief may be granted. In addition, plaintiffs' claims based on meetings of the Task Force which are held for the purpose of formulating advice and recommendations for the President are also DISMISSED under Rule 12(b)(6). Sections §§ 10(a)(1), 10(a)(3), and 10(c) of FACA are not applicable to these meetings since their application to these meetings is unconstitutional as a violation of separation of powers principles.

3. Plaintiffs' motion for expedited discovery is DENIED.

4. Plaintiffs shall post with the Clerk of the Court a bond totalling \$ 100.00 in cash or surety.

SO ORDERED.



Royce C. Lamberth
United States District Judge

DATE: MAR 10 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MEMORANDUM OPINION

Clark, U.S. District Court
District of Columbia

This case raises one of the most difficult issues faced by the judiciary: the separation of powers between the legislative and executive branches of government. The case comes before the court on plaintiffs' motion for a temporary restraining order and a preliminary injunction ("Plaintiffs' Motion"); defendants' motion to dismiss or, in the alternative, for summary judgment ("Defendants' Motion"), and plaintiffs' memorandum in opposition to defendants' motion and in support of plaintiffs' motion ("Plaintiffs' Reply"). The issues have been fully briefed and eloquently argued in open court. For the reasons given below, plaintiffs' motion shall be granted in part and defendants' motion shall be granted in part.

I. INTRODUCTION AND BACKGROUND.

President Clinton promised the American people during the recent campaign that he would address the problem of health care in this country. Although expenditures on health care are

rapidly approaching \$ 1 trillion a year and quickly outpacing inflation, dissatisfaction with the present system of administering medical care infects the nation.

Thus, on January 25, 1993, President Clinton announced the creation of the President's Task Force on National Health Care Reform, an advisory body comprised of six Cabinet secretaries, several senior White House officials, and the chairperson, First Lady¹ Hillary Rodham Clinton. The President charged the Task Force with presenting him with a health care reform proposal he could present to Congress; the time limit was set at 100 days. At the same press conference, the President also announced the formation of an inter-departmental working group, comprised of more than 300 federal employees, which is charged with gathering and analyzing the information on which the Task Force will rely in formulating its proposal. The record indicates that the Task Force has yet to meet (with the exception of the January 25 photo opportunity), but the working group has been active, meeting with private individuals and representatives of private organizations; these meetings have not been open to the public. The Task Force's plans are to hold some, but not all, of its meetings in public.

Plaintiffs are three not-for-profit corporations: Association of American Physicians and Surgeons, Inc., represents physicians and osteopaths; American Council for Health Care

¹Although Congress uses the term "spouse of the President," 3 U.S.C. § 105(e), both plaintiffs and defendants use the traditional term "First Lady." The court therefore will adopt their usage.

Reform represents health care consumers; and National Legal & Policy Center seeks to promote ethics in government. Each has sought to gain admittance to all meetings of the Task Force, claiming that § 10 of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 §§ 1-15, mandates that such meetings be open to the public. Plaintiffs' claim is founded on the proposition that since the First Lady is not a federal employee, the Task Force falls within the definition of an advisory committee set forth in § 3 of FACA. See Part III.A.3., below. Each plaintiff subsequently received word from Bernard W. Nussbaum, counsel to the President, that FACA did not apply to the Task Force, but that private citizens would be allowed to take part in some of the Task Force meetings.

Faced with exclusion from some of the meetings, the plaintiffs brought this suit. They seek a temporary restraining order and a preliminary injunction which would bar the defendants from convening a meeting of the Task Force or any subgroup or subcommittee thereof without first meeting the requirements of FACA. Defendants have opposed this suit and moved to dismiss or, in the alternative, for summary judgment. They claim (1) that FACA does not apply to the Task Force; and (2) that even if FACA does apply to the Task Force, that application would violate article II, section 3 of the Constitution. The court will address each of these questions in Part III., below.

II. STANDARDS FOR A PRELIMINARY INJUNCTION.²

A preliminary injunction may be granted in this circuit only when the plaintiffs demonstrate that they have met the four-part test of Washington Metro. Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977):

1. that they have a substantial likelihood of success on the merits;
2. that irreparable injury will result in the absence of a preliminary injunction;
3. that no other parties will be harmed if the injunction is entered; and
4. that the public interest favors entry of the injunction.

The court finds that each of these is present.³ The discussion of the first criteria, likelihood of success on the merits, is contained in Part III., below. The remaining three aspects of the Holiday Tours standard are addressed in Part IV.

III. LIKELIHOOD OF SUCCESS ON THE MERITS.

²This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Defendants have not questioned plaintiffs' standing. Regardless, in light of the Supreme Court's decision in Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989), any objections would be overruled. Therefore, this case and these parties are properly before the court.

³Typically, the district court must balance these factors in order to determine whether an injunction should issue. See, e.g., Foundation on Economic Trends v. Heckler, 756 F.2d 143, 151-52 (D.C. Cir. 1985). However, since the court finds below that plaintiffs have met each of these criteria, the court need not perform this balancing.

A. FACA Applies to the Task Force.

1. FACA's Definition of an Advisory Committee.

The Federal Advisory Committee Act was passed in 1972 with two explicit goals in mind: first, to eliminate unnecessary advisory committees and ensure that future committees be properly justified; and second, to increase the accountability of advisory committees by opening their meetings to the general public and forcing disclosure of their purposes, memberships, costs, and activities. FACA § 2. To this end, Congress imposed several requirements upon the executive branch and most of its advisory committees. These include the filing of a charter (§ 9), timely publication of all advisory committee meetings (§ 10(a)(2)), public participation (§ 10(a)(3)), and disclosure of proceedings (subject to the limited exceptions of the Government in the Sunshine Act (5 U.S.C. § 552b)) (§§ 10(b), (c), and (d)).⁴

Section 3(2) provides the definition of an advisory committee:

any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . .

(b) established or utilized by the President

. . . in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. . . .

5 U.S.C. App. 2 § 3(2) (emphasis added). The definition section

⁴Defendants acknowledge that these requirements apply to all advisory committees. Defendants' Motion at 11 n.5.

then proceeds to exclude from FACA's coverage two enumerated commissions and "(iii) any committee which is composed wholly of full-time officers or employees of the Federal Government."

Plaintiffs argue that the First Lady is not a federal officer or employee; thus, the court should hold that FACA governs the operations of the Task Force. Defendants counter by invoking the legislative intent of Congress - limiting the pernicious influence of "outsiders" on the workings of the federal government - and suggest that the court should view Mrs. Clinton as the "functional equivalent of a federal employee." Defendants' Motion at 20.

At issue, therefore, is the definition of the words "officer" and "employee."

2. Avoiding the Constitutional Question.

Defendants contend, and the court acknowledges, that plaintiffs' reading of FACA - and their literal reading of the words "officer" and "employee" - raises the constitutional issue of the power of Congress to regulate the power of the President.⁵

⁵That this is a serious constitutional question cannot be disputed. Defendants note (Defendants' Motion at 26) that the five-justice majority in Public Citizen regarded the constitutional question as "serious" and "undeniable." 491 U.S. at 466-67. (Through the use of statutory construction, however, the Court was able to avoid the constitutional issues.) Three justices (Justice Kennedy writing for himself as well as Chief Justice Rehnquist and Justice O'Connor) concurred in the judgment and said that, in their view, FACA was unconstitutional as a violation of separation of powers principles when applied to the facts in that case. 491 U.S. at 482-89. Justice Scalia took no part in the case, and Justices Souter and Thomas have since replaced two of the members of the Public Citizen majority.

Therefore, the first task of the court is to determine whether some plausible interpretation of these terms will obviate the need to examine the constitutional question. As the Supreme Court has frequently stated, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932) (footnote omitted).

Therefore, the court's first task is to determine whether defendants' proposed definition of "officer" and "employee," although seemingly contrary to the language of Title 5 of the United States Code, is "fairly possible." If so, the Task Force would be exempted from FACA's requirements, and the constitutional question could be avoided.

3. The Definition of "Employee."

FACA is not a model of legislative drafting,⁶ and the court has several models to follow in its attempt to construe the statute so as to avoid any constitutional issues. For instance, and most importantly, in Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989), the Supreme Court examined the word "utilized" in § 3 of FACA to determine whether the American Bar Association's Standing Committee on the Judiciary,

⁶One of the most vehement critics of FACA was the late Judge Gerhard Gesell, who consistently decried the ambiguity of the statute. See, e.g., National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524, 530 (D.D.C.), aff'd 711 F.2d 1071 (D.C. Cir. 1983); Nader v. Barocody, 396 F. Supp. 1231, 1232 (D.D.C. 1975).

which has for several decades provided the Department of Justice with a ranking on all proposed nominees for federal judgeships, qualified as an advisory committee subject to FACA's strictures. Justice Brennan, all the while acknowledging that he was rejecting "one common sense of the term [utilize]," 491 U.S. at 452, proceeded to utilize legislative history in order to find that the Department of Justice did not "utilize" the ABA Standing Committee when it "utilized" it. As the Court noted, "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." 491 U.S. at 466. In Public Citizen, the Court was successful in construing the statute in such a fashion and it thereby avoided having to address the constitutional question.⁷ Similar techniques of statutory construction are found in National Resources Defense Council v. Herrington, 637 F. Supp. 116 (D.D.C. 1986), and Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975).

Although the court believes there was little ambiguity in the word "utilize" prior to the Supreme Court's holding in Public Citizen, the court will nonetheless accept that Court's determination that "utilize is a woolly verb, its contours left

⁷District Judge Joyce Hens Green, whose decision was directly appealed to the Supreme Court, had noted that the definition of "utilize" ultimately adopted by the Supreme Court pushed statutory construction to the extreme and was therefore not fairly plausible. She thus held that FACA did apply to the Standing Committee. Washington Legal Foundation v. U.S. Dep't of Justice, 691 F. Supp. 483, 491 (D.D.C. 1988).

undefined by the statute itself." 491 U.S. at 452. However, the terms "officer" and "employee" are shorn of all such ambiguity, and Congress has precisely determined their meanings.

Neither "officer" nor "employee" is included in the definitions section of FACA (§ 3); in fact, in all fifteen sections of FACA, Congress gave absolutely no description or gloss as to who qualifies as "full-time officers and employees of the Federal Government." Of course, the reason for this glaring omission is evident: Congress already had provided, in §§ 2104 and 2105 of Title 5, complete definitions for both words. In relevant part, those sections provide as follows:

Section 2104 - Officer

(a) For the purpose of this title [Title 5], "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 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. . . .

Section 2105 - Employee

(a) For the purpose of this title [Title 5], "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;

- (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 act; and
- (3) subject to the supervision of an individual named by paragraph (1) of this section while engaged in the performance of the duties of his position. . . .

5 U.S.C. §§ 2104 & 2105 (emphasis added). These sections apply to FACA, and it is apparent that Mrs. Clinton meets neither definition. First, Mrs. Clinton is not appointed to the civil service. Second, the President was not required by law to appoint Mrs. Clinton to the civil service when he named her to lead the Task Force. In addition, defendants provide no evidence of other indicia of employment within the Government, such as the filing of a Form 50 or the taking of an oath of office. In short, the statutory language is - unlike that of FACA - exceedingly clear, and Mrs. Clinton simply does not satisfy either definition.⁶

Despite the long-accepted maxim that the plain language of a

⁶Plaintiffs also urge the court to hold that the Kennedy Act, 5 U.S.C. § 3110, similarly precludes a finding that Mrs. Clinton is an employee of the Federal Government. This anti-nepotism statute precludes the spouse of the President from being an officer or employee of the Federal Government. Defendants contend that the statute does not apply. As the court finds that the clear language of §§ 2104 and 2105 are sufficient to establish the fact that the First Lady is neither an officer nor an employee, the court need not address this issue.

statute should control the court's determination, defendants argue that the court nonetheless should examine the legislative history of FACA. Defendants contend that Congress' purpose in enacting FACA was essentially to ensure that "outsiders" - those with private interests - could not advise the federal government without the openness provisions required by FACA. On the other hand, "insiders" - government employees with no self-interested motivations - did not need further public scrutiny; thus, defendants conclude, Congress exempted advisory committees comprised wholly of these insiders from FACA's strictures.⁹ Using this reasoning, the defendants assert that the First Lady is just such an insider as she represents no private interests; she is, in effect, the "functional equivalent of a federal employee." Defendants also assert that this conclusion is bolstered by the fact that Congress has appropriated funds for the spouses of the President and the Vice President and their staffs so that they might perform their government-related functions. 3 U.S.C. §§ 105(e) & 106(c).

The court disagrees with defendants' position. First,

⁹The government raised a similar theory while defending Washington Legal Foundation v. U.S. Dep't of Justice, 691 F. Supp. 483 (D.D.C. 1988). In that case, however, the government took the position that Congress's intent in FACA was to expose to the light of public scrutiny the activities of "private special interests' groups," 691 F. Supp. at 489, a group the court presumes can be likened to the "outsiders" attacked in this proceeding. The Washington Legal Foundation court, however, did not accept the government's argument because such an interpretation worked too much violence on the plain language of the FACA statute. The court today is faced with language that is even less open to interpretation, and the court thus does not adopt defendants' legislative history arguments.

although it exempted particular bodies from FACA, Congress did not exclude the First Lady; nor did it then decree (and it has not decreed since) that the President's spouse qualifies as an employee - or even a "quasi-employee" - of the federal government. Second, Congress did not legislate a distinction between "insiders" and "outsiders," but rather between "full-time officers and employees of the Federal Government" and those who do not meet the definitions provided in 5 U.S.C. §§ 2104 and 2105. Third, no court has "held that an [individual's or] advisory group's civic, benign, or neutral motives place it beyond the statute's reach." Washington Legal Foundation, 691 F. Supp. at 490. In short, defendants' analysis of the legislative intent of FACA is not persuasive.

4. The Interdepartmental Working Group.

Plaintiffs have also asserted that the interdepartmental working group¹⁰ is an advisory committee to the Task Force and therefore is similarly subject to FACA. Although the court's resolution of the question of the applicability of FACA to the Task Force would seem to resolve this issue in favor of plaintiffs, particularly as defendants have admitted that the working group is meeting with private citizens, the question is — significantly more difficult.

Unlike the issue addressed in Part 3., however, this is not

¹⁰The working group been subdivided into fifteen task-specific cluster groups. Declaration of Ira Magaziner ¶ 15.

a question of first impression for the court. The framework for the court's discussion is provided by National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524 (D.D.C.), aff'd 711 F.2d 1071 (D.C. Cir. 1983) ("NAHC"). In that case, President Reagan had created by Executive Order a 150-member Executive Committee comprised almost entirely of representatives of the private sector; FACA clearly applied to this body. Supporting the Executive Committee were thirty-six task forces, each chaired by members of the committee. Plaintiffs brought suit and demanded that FACA's requirements be imposed upon the task forces as well. Judge Gesell dismissed plaintiffs' claims, finding that the task forces

do not directly advise the President or any federal agency but rather provide information and recommendations for consideration to the Committee. Consequently, they are not directly 'established or utilized' by the President or any agency 'in the interest of obtaining advice or recommendations.'

557 F. Supp. at 529. Likening the task forces to staff, the court commented that "[s]taff would be expected to perform exactly the sort of functions performed by the task forces at issue - gathering information, developing work plans, performing studies, drafting reports and even discussing preliminary findings with agency employees." Ibid. Based on this finding, Judge Gesell concluded that "[t]he Act does not cover groups performing staff functions such as those performed by the so-called task forces." Ibid. See also Washington Post v. National Council on the Arts, Civ. A. No. 92-0955 (D.D.C. April 29, 1992) (informal, information-gathering working groups not subject to

FACA). But see Federal Advisory Committee Management Regulations, 41 C.F.R. § 101-6.1004(i) (subgroups subject to FACA when "an agency accepts the group's deliberations as a source of consensus advice or recommendations").

Similarly, the regulations under FACA exclude from the Act's coverage

[m]eetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee.

41 C.F.R. § 101-6.1004(k). Plaintiffs have alleged no activities by the working group that fall outside of these activities.

Based on the case law and the appropriate regulations, therefore, the court finds that the interdepartmental working group (as well as the fifteen cluster groups into which it has been divided) directly compares to the task forces in NAHC and fully meets the exclusion of § 101-6.1004(k). The declaration of Ira Magaziner demonstrates that the various cluster groups are gathering information and formulating proposals to be reported to the Task Force so that the Task Force may present its legislative proposal to the President; the cluster groups are not providing the Task Force with "consensus advice." Moreover, Mr. Magaziner has represented that

[o]nly the Task Force will have authority to forward recommendations to the President, and only the Task Force will provide advice to the President. The interdepartmental working group is not charged with responsibility for making, and will not make, recommendations to the President, and will not otherwise directly advise him.

Magaziner Declaration ¶ 5. In their complaint, plaintiffs have not charged otherwise. To adopt again the language of Judge Casell,

[i]f the [working groups] were in fact providing advice directly to the [President], they might indeed be functioning as advisory committees with the meaning of the Act. However, . . . plaintiffs have wholly failed to demonstrate by deposition or otherwise that such is the case.

NAEC, 557 F. Supp. at 529. Therefore, defendants' motion to dismiss any claims concerning the working group is granted as plaintiffs fail to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6)."

"This is not a fact-intensive case. Therefore, if the court had not dismissed the working group claims on Rule 12(b)(6) grounds, it nonetheless would have granted defendants' motion for summary judgment as to those claims under Rule 56. Plaintiffs have alleged that the cluster groups are doing more than merely gathering information (although they have not, as the court noted above, alleged that the cluster groups are engaging in any activities that fall outside the parameters of 41 C.F.R. § 101-6.1004(k)). Plaintiffs' Memorandum at 23-25. Defendants deny plaintiffs' allegations, however, relying on the declaration of Ira Magaziner. In his declaration, Mr. Magaziner states that "[s]hortly after January 25, the interdepartmental working group began an intensive effort to gather information concerning the present health care system and alternatives for reform." Magaziner Declaration ¶ 10. Mr. Magaziner also averred that the "cluster groups and subgroups [further subdivisions of cluster groups] have been meeting regularly as part of an intensive effort to document the impact of existing health care policies and to gather information on possible alternatives." Id. at ¶ 19.

Plaintiffs have moved for expedited discovery in this case. However, in their memorandum filed March 4, 1993, which was misstyped but served as both a reply brief on their motion for a temporary restraining order as well as an opposition to defendants' motion to dismiss or for summary judgment, plaintiffs did not include a declaration that further discovery was necessary before summary judgment could be granted (as required by Fed. R. Civ. P. 56(f)). Under Fed. R. Civ. P. 56(e) and Local Rule 108, therefore, the court must accept the facts set forth in defendants' affidavit as the facts on which judgment shall be had. There thus are no genuine issues of material fact and summary judgment is appropriate

5. Conclusion.

Thus, although the court has a responsibility to construe FACA so as to avoid a constitutional question if possible, that construction is invalid if it completely subverts the explicit definitions of words provided by Congress. The court concedes that defendants present an attractive option: all the court must do is stretch the scope of the word "employee" just enough so as to include the First Lady within its purview.¹² If the court were to accept defendants' suggestion, it would be able to hold

on this issue.

¹²The record suggests that Congressman William F. Clinger, Jr., the ranking Republican member of the House Committee on Government Operations, is "introducing legislation . . . which will include the spouses of the President and Vice President under the definition of full-time federal officer for the purposes of FACA." Letter from Congressman William F. Clinger, Jr., to President William J. Clinton 2 (Feb. 1, 1993) (attached to affidavit of Genevieve M. Young).

In his letter to President Clinton, Rep. Clinger advised the President that the Task Force violated FACA and asked that the President "take immediate steps to ensure that no further violations of this Act occur." *Ibid.* Rep. Clinger suggested that President Clinton remedy this violation by ensuring that the Task Force comply with FACA or by "submit[ting] legislation to Congress seeking an exemption for this task force from the FACA provisions." *Ibid.* President Clinton's response, through his counsel Bernard W. Nussbaum, was that "[i]t is our opinion that the Federal Advisory Committee Act ("FACA") does not, and was not intended by Congress to, apply to the health care task force." Letter from Bernard W. Nussbaum to the Hon. William F. Clinger, Jr. 1 (Feb. 5, 1993) (attached to affidavit of Genevieve M. Young).

As a result of the court's rejection of this position, President Clinton has now precipitated a constitutional confrontation. Of course, passage of legislation (which presumably would be signed without hesitation by President Clinton) would obviate the need for cases such as this involving the First Lady. Passage of legislation is advantageous for another reason as well: action by Congress, rather than the judicial rewriting of an inconvenient statute which defendants seek, is the proper way for laws to be made in this democracy.

that FACA did not apply to the Task Force and thereby avoid the constitutional question. However, rewriting Congressional statutes sets a dangerous precedent, even when the justification is as popular as this one might be. The courts must stand firm and limit themselves to interpreting the law as it comes before them, not rewriting law as best they see fit. This principle is particularly compelling since in this democracy the judiciary is not elected to serve the popular mandate, but rather appointed to ensure that the constitution and the laws be justly interpreted and applied. While the court takes no pleasure in determining that one of the first actions taken by a new President is in direct violation of a statute enacted by Congress, the court's duty is to apply the laws to all individuals.

Thus, having determined that the First Lady is not an officer or employee of the Federal government, it follows that FACA applies to the Task Force. The court must now address the constitutional issue this case presents.

B. Separation of Powers.

The issue the court must face is much more easily stated than resolved: does the application of FACA to the Task Force impinge upon the President's ability to perform his constitutionally mandated tasks? The Supreme Court has long recognized that the Constitution's division of governmental power into three branches endows each branch with a certain autonomy that must remain unchallenged by the other two branches. See,

e.g., Nixon v. Administrator of General Services, 433 U.S. 425 (1977) ("Nixon II"); United States v. Nixon, 418 U.S. 683 (1973) ("Nixon I"). However, there are times when the protection of constitutional interests requires that this division be breached; to this end, the Court has found that there are circumstances which permit one branch to encroach on the domain of another branch.

1. Intruding upon the President's Powers.

When a separation of powers issue arises, the court must first look to whether the statute prevents the President from accomplishing his constitutionally assigned functions. Public Citizen v. U.S. Dep't of Justice, 491 U.S. at 484 (Kennedy, J., concurring in judgment); Morrison v. Olson, 487 U.S. 654, 695 (1988); Nixon I, 418 U.S. at 711-12. The court concludes that FACA does.

Article II, section 3 of the Constitution states that the President "shall from time to time . . . recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient."¹³ In order to formulate these measures, defendants claim, the President must be able to meet confidentially with his

¹³Plaintiffs have argued that the Constitution does not obligate the President to propose legislation but rather only permits it. Thus, they conclude, FACA does not impair the President's duties. The court disagrees. Even though the President need not propose legislation under the Constitution, it certainly is within his enumerated powers. Thus, if FACA impedes his ability to recommend measures to Congress, it necessarily impinges upon the exercise of his Constitutional duties.

advisors. [He must be able to trust that his advisors shall speak with complete candor and that they will not be cowed by the fear of premature public reaction. That candor is risked should FACA apply to the Task Force. A realistic and practical appraisal of the application of FACA to these presidential advisors reveals that FACA prevents the President from receiving the full measure of the Task Force's advice. [When confidentiality is compromised and advisors are afraid to speak, the President is necessarily hampered in his ability to obtain the information he needs to offer proposed legislation to Congress. Thus, the court holds that the application of FACA presents "the potential for disruption" of the President's accomplishing his constitutionally assigned functions, Nixon II, 433 U.S. at 443, and that FACA intrudes on the President's powers. See Morrison, 487 U.S. at 695.

2. Balancing the Interests.

The next step in the inquiry, then, is to determine whether this Congressional intrusion "is justified by an overriding need to promote objectives within the constitutional authority of Congress." Ibid. To conduct this inquiry, the court must distinguish between two types of Task Force meetings: those at which the Task Force is gathering or reporting information and facts; and those at which the Task Force is formulating its

Recommendations for the President.¹⁴ The executive branch's interests in these two types of meetings are different; thus, when the court weighs them against Congress' interests, it reaches different results.

Before attempting to balance the interests of the respective branches, however, the court must examine the nature of the Presidential power defendants assert: if the Constitution explicitly grants the power to the President, then Congressional regulation of that power cannot be tolerated. As Justice Kennedy recently noted, "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate any intrusion by the Legislative Branch." Public Citizen, 491 U.S. at 485 (Kennedy, J., concurring in the judgment). On issues such as this, the Constitution has struck the balance between Congress and the President, and this court may not permit the legislative branch to impose its restrictions on the President as he performs his constitutional obligations.

Of course, the President's power to propose whatever legislation he deems necessary is a power afforded solely to the

¹⁴"Distinguishing between fact-finding and deliberating is not novel. See, e.g., Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921 (D.C. Cir. 1982) (addressing pre-decisional processes under Government in the Sunshine Act), and Washington Post v. National Council on the Arts, Civ. A. No. 92-0955 (D.D.C. Apr. 29, 1992) (informal, information-gathering working groups not subject to FOIA). A similar distinction has also been recognized in the deliberative process privilege in exemption five of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). See, e.g., EPA v. Mink, 410 U.S. 73, 89-91 (1973).

President. However, the explicit power is a limited one: it only precludes Congress from barring the President's proposing of legislation. Thus, if Congress, for whatever reason, regulated the President's ability to propose legislation (for instance, by limiting the president to only ten pieces of proposed legislation each term), that regulation necessarily would be unconstitutional as a violation of separation of powers. However, where Congress does not directly limit an explicit power of the President, but rather indirectly affects a presidential power that is not specifically enumerated in the Constitution (here, the power to obtain the views of his advisors so that he might propose legislation), the statute is not unconstitutional per se; instead, the court must balance the interests of the two branches.

As to the information-gathering and information-reporting meetings of the Task Force, the presidential interest in confidentiality is not present. As the Task Force is not formulating or reporting advice and recommendations at those meetings, there is no concern that the Task Force's members will not be candid or that they will shrink from performing their fact-finding for fear of the public's response. On the other hand, the congressional interest in openness and accountability clearly is present at these meetings. The public has the right to know what information is being presented to the Task Force and by whom it is being given; to learn of the costs involved in the gathering of the facts; and to attend these meetings. As the

court finds that the President's interest is outweighed by Congress' interest, the court holds that the Task Force must comply with FACA and may not conduct any fact-finding or information-gathering meetings until it has complied with its regulations.⁵

However, with respect to the meetings at which the Task Force formulates its recommendations for the President, the balance weighs in favor of the President. With respect to these meetings, plaintiffs have demonstrated "no overriding congressional interest . . . that outweighs FACA's intrusion on the . . . power of the President." Washington Legal Foundation, 691 F. Supp. at 492 (addressing U.S. Const. Art. II, § 2). And, it is at these meetings that the President's need for candid advice is at its greatest. The President's interest in confidentiality is particularly present as the Task Force directly advises the President as to what legislation he should propose.

Plaintiffs primarily seek access to the Task Force's

⁵The government argues that FACA should be declared unconstitutional in its application to all meetings of the Task Force, including those at which the Task Force merely gathers or reports facts. However, this argument is too broad as it discounts the important balance the court must strike when it faces a constitutional issue of this nature: the balance between the interests of Congress and the interests of the President. To adopt the government's position in toto (by not striking a balance and holding that the President's interest by definition outweighs Congress's) not only would gut FACA but also would immeasurably augment the autonomy and power of the Executive Branch. Just as the court cannot allow Congress impermissibly to impinge upon the President's ability to perform his constitutional duties, it cannot allow the President to augment his power to the detriment of congressional interests.

meetings, presumably so that they may influence the resulting legislative proposals. However, defendants have averred that plaintiffs will have opportunities to address the Task Force and air their views at some of the Task Force's meetings. And, the court's order will ensure that plaintiffs have access to all information-gathering and fact-finding meetings. In addition, any proposed legislation must be presented to Congress, and plaintiffs will have ample opportunity to lobby their representatives and senators. The Task Force's pronouncements are not the final word on the subject of health care reform. Thus, any congressional interest in opening these meetings is obviated by plaintiffs' opportunities to address the Task Force and Congress.

Plaintiffs also claim that the court should not hold FACA unconstitutional because the President's interest in confidentiality and candor are protected by the Government in the Sunshine Act, 5 U.S.C. § 552b, which is incorporated into FACA through § 10(d). However, §§ 552b(c)(1) - (10), which provide ten exceptions to the general proposition that all affected meetings must be open to the public, are narrowly drawn and highly specific; as a result, they hardly allow the President the freedom he needs to perform his constitutional duties.¹⁶

¹⁶Only one of the exemptions even arguably applies to the Task Force. Section (c)(9)(B) exempts from the Act (and thus from FACA) any information "the disclosure of which would - (B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action. . . ." However, several courts have addressed this provision, and all have construed the standard so narrowly that no Task Force meeting could ever meet its terms. For

Therefore, the court holds that the President's interest at these meetings outweighs the interest of Congress as expressed in FACA. The application of FACA to these meetings is unconstitutional as a violation of separation of powers principles.

3. Conclusion.

Thus, the court holds that the imposition of FACA on the President's Task Force on National Health Care Reform impermissibly imposes upon the President's enumerated power, as set forth in Art. II, § 3, to recommend to Congress such measures as he deems necessary and expedient, but only as to those meetings of the Task Force at which the Task Force formulates its recommendations or presents these recommendations to the President. The court therefore declares that the following three sub-sections of § 10 of FACA are unconstitutional as applied to these meetings:

- o Sections 10(a)(1) and 10(a)(2) directly affect the

instance, in Common Cause v. Nuclear Regulatory Comm'n, 574 F.2d 921 (D.C. Cir. 1982), the Court of Appeals held that § (c)(9)(B) did not exempt pre-decisional deliberations. In fact, the court looked to the regulations accompanying the statute and held that the § (c)(9)(B) provided only a very narrow exemption applicable to very specific circumstances. Similarly, in Public Citizen v. National Economic Comm'n, 703 F. Supp. 113 (D.D.C. 1989), even though the court found that publicizing the Commission's hearings "would alter the outcome of the Commission's work," 703 F. Supp. at 116, the court nonetheless held that § (c)(9)(B) did not apply. Constrained as it is by Common Cause, this court can not now reinterpret § (c)(9)(B) and greatly expand its scope. Thus, plaintiffs' reliance on the Government in the Sunshine Act is misplaced.

President's ability to perform his constitutional duty. Because they open the advice and recommendation sessions of the advisory committee to the public, they would affect the candor with which the committee's members deliberate their findings and proposals. This prevents the President from receiving the advice he needs to recommend legislation to the Congress.

o Similarly, § 10(c), by subjecting the advice and recommendation meetings to subsequent public scrutiny, would have the same effect on the candor of the advisors. These meetings, too, must be kept confidential.

However, the rest of FACA does not impose impermissibly upon the President's ability to perform his duties. Section 9(c), for instance, which requires that a charter be filed, will not affect the confidentiality of meetings. Section 10(a)(2)'s mandatory announcement of all meetings - including advice and recommendation meetings - also has no effect on the advisors' deliberations; that the public knows that the Task Force is meeting does not affect confidentiality within the meeting or impinge upon the President's power.

Section 10(b) is also constitutional since the deliberative process exemption of the Freedom of Information Act, 5 U.S.C. § 552, will allow the advisors the confidentiality they need to enable the President to perform his obligations. This section also addresses the product of the working group as all materials prepared for as well as by the Task Force shall be made available to the public. Thus, the public interest in ensuring that

special interests do not overly affect Task Force or working group activities will be preserved.¹⁷

Further, Section 10(d) is not implicated since §§ 10(a)(1) and 10(a)(3) may not to be applied to the Task Force when it meets in advice and recommendation meetings. All other provisions of FACA likewise are enforceable against all proceedings of the Task Force.¹⁸

Since the application of FACA to all other operations of the Task Force does not violate the separation of powers principles, the court will enjoin all further meetings of the Task Force until such time as the Task Force is in full compliance with each of the requirements of FACA.

IV. THE REMAINING THREE PRELIMINARY INJUNCTION CRITERIA.

A. Irreparable Injury.

Plaintiffs argue that the court should follow previous FACA decisions, particularly Public Citizen v. National Economic Comm'n, 703 F. Supp. 113 (D.D.C. 1989), and grant plaintiffs a

¹⁷"This provision coupled with the requirement that complete and accurate minutes of committee meetings be kept serves to prevent the surreptitious use of advisory committees to further the interests of any special interest group." H.R. Rep. No. 92-1017, 92d Congress, 2d Sess. 10 (1972).

¹⁸The court expresses one caveat: The parties have alluded to FACA's balanced viewpoint requirements (§5(b)(2)), but plaintiffs have not raised the issue and the question has not been briefed by the parties. Although it is unlikely that such a requirement could survive the balancing test applied in Part 2., above, the issue is not properly before the court; therefore, the court will not decide whether such a requirement impermissibly interferes with the President's ability to perform his constitutional tasks.

preliminary injunction. Defendants, for their part, claim that plaintiffs will suffer no immediate irreparable injury for three reasons:

- o since the Task Force is not subject to FACA, the plaintiffs have no rights under FACA;

- o since the parties will have opportunities to address some of the Task Force's meetings as well as the opportunity to address Congress (once the Task Force reports to the President and he in turn proposes legislation based upon the Task Force's advice); and

- o since no meetings of the Task Force have been scheduled.

None of defendants' contentions, however, distinguish this case from National Economic Comm'n.

First, the court's holding in Part III., above, is that some of the meetings of the Task Force are subject to FACA; thus, the first objection is not helpful to defendants. Similarly unavailing is defendants' third argument as it is apparent that the Task Force will meet shortly.¹⁹

As to the second argument, defendants address only one-half of the problem. While it may be true that plaintiffs will have other opportunities to affect the course of the legislation,

¹⁹This is merely a matter of logic. Created on January 25th and given only 100 days to report, the Task Force is now in its 45th day of existence. By the court's count, that leaves only 55 days to meet, gather evidence, formulate proposals, and report to the President. This limited period, although probably insufficient for a temporary restraining order, satisfies the criteria for a preliminary injunction.

FACA's purpose is also to open - contemporaneously - to the light of public scrutiny the workings of advisory committees subject to FACA. This goal cannot be met if the court does not enter a restraining order, as the National Economic Comm'n court observed:

The right to view the advisory committee's discussion of policy matters in public and the right to confront, through observation, the decision-making process as it occurs, will be obviated.

703 F. Supp. at 129.²⁰

The court therefore finds that plaintiffs have satisfied the irreparable injury standard.

B. No Injury to Other Parties and the Public Interest.

The third and fourth Holiday Tours criteria are taken together. Plaintiffs argue that the public interest, as set forth in FACA, will be undermined if the Task Force meets without first complying with FACA's strictures. Defendants' two arguments merely parallel their arguments on the merits of the issue: first, that the Task Force should not be subject to FACA; and second, that if the Task Force is subject to FACA, then FACA is unconstitutional. The court has already resolved these issues

²⁰The court recognizes that there may be merit in developing a health care plan of the sort the President apparently envisions largely outside the public's scrutiny; too much "sunshine" is not necessarily productive and may result in half-baked or overcooked plans. However, Congress has determined that public scrutiny is an important element of the decisional process, and the court does not have power to alter this judgment - correct or incorrect as it may be - unless it infringes impermissibly on the President's ability to perform his constitutional duties.

above and found that defendants' positions are unpersuasive (at least in part). In addition, the Task Force may comply with FACA's chartering requirements in quick fashion; this therefore serves more as an inconvenience than an injury. Finally, exposing the fact-gathering and fact-reporting meetings to public scrutiny similarly will not cause any significant injury to the Task Force (which, after all, had planned on opening some of its meetings to the public anyway). Balanced against these minor inconveniences is the great benefit to the public of opening the Task Force's meetings to the public.

Therefore, the court finds that the public interest will be served if the court grants plaintiffs' motion in part. Again, the National Economic Comm'n court is persuasive:

Rather than harm, [applying FACA] will highlight vividly the essence of our democratic society, providing the public its right to know how its government is conducting the public's business.

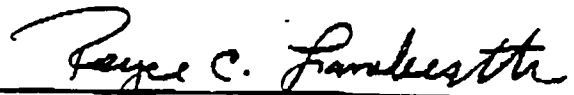
Ibid. Plaintiffs have therefore met all the criteria for a preliminary injunction.

IV. CONCLUSION.

The court today is faced with two difficult tasks: declaring an act of Congress unconstitutional; and declaring that the actions of a new President violate the law. Nonetheless, the Constitution demands that all "judicial Officers . . . shall be bound by Oath or Affirmation[] to support this Constitution," U.S. Const. Art. VI, and this responsibility includes ensuring that no branch of government appropriates the responsibilities of

another branch. It is not a power to be taken lightly, but it is a power that must be taken.

For the reasons stated above, plaintiffs' motion for a temporary restraining order and a preliminary injunction is granted in part; defendants' motion to dismiss or, in the alternative, for summary judgment is also granted in part. An appropriate order accompanies this memorandum opinion.



Royce C. Lamberth
United States District Judge

DATE: MAR 10 1993

DRAFT
MARCH 10, 1993

President William Jefferson Clinton
Remarks Prepared for Delivery
Announcing a Program of Defense Conversion
Baltimore, Maryland
March 11, 1993

It's been said that while change is certain, progress is not. That is certainly true of the challenge of increasing our national economic strength even as we adjust our national military strength. It is certain that defense cuts will come. What is not certain is whether those changes will make us stronger or weaker.

If we do nothing in the face of change, we risk being the victims of change. But if we take bold action, we can be the beneficiaries of change.

The folks here at Westinghouse Electronic Services Division are proof positive that change can be our friend. In 1986, just 16% of the work done here was non-defense. Today that number has nearly doubled -- and 50% of their work will be non-defense by 1995.

What they've done here I want to do nationally. They've taken some of the most talented people in the world, who've produced the most sophisticated military technology, and put them to work in the civilian economy. Their military surveillance technology is now being used to help commercial airliners avoid wind shears. Their military security technology is now being used to help police officers on the street. And their work on state-of-the-art batteries is helping them develop electric cars.

Clearly defense conversion can be done and done well. Change can be our friend and not our enemy. But to do that we must act now, not react later.

Last year I outlined a bold plan to create new jobs in the civilian economy. Anticipating our present challenge, Congress appropriated about one and a half billion dollars for defense conversion. Today I want to explain how we're going to put that money to work, putting Americans to work, and how we're planning for the future by investing in our people, encouraging our companies, and assisting our communities.

Our first priority is investing in our people -- or, as it's been called -- putting people first. Our Defense Reinvestment and Conversion Initiative will dedicate \$350 million right away to helping working people affected by defense reductions with employment services, job training, and transition assistance.

\$150 million of that will go to government and employer-sponsored job training programs, \$112 million will help members of the Guard and Reserves make the transition to civilian life, and provide severance pay and health benefits to civilians who are leaving government employment. We'll create early retirement benefits for military personnel with 15 years of service, and start a new program to encourage and train military and defense workers to put their skills to work in areas of vital need like teaching, law enforcement and health care.

We must also recognize the ripple effect of defense readjustment -- and target assistance to hard-hit communities. In 1993 alone, we will triple the budget of the Defense Department's Office of Economic Adjustment. The \$30 million we have committed to this task will be invested in helping communities find the tools and expertise to adjust to the changed nature of their local economy. It will be an investment that pays off in the long-term. In addition, through the Commerce Department we will invest another \$80 million this year in setting up a revolving loan and grant program to directly and immediately aid communities hit hardest by defense cuts.

But all the worker training in the world, and all the community assistance in the world, will do no good if there are no jobs for those workers and no businesses for those communities. Because I believe the private sector is the engine of lasting economic growth, our plan helps our companies compete and win. I refuse to go back to the brain-dead politics of the past in which some thought government alone could do everything and others claimed government could do nothing.

There are two things government can do to aid our companies: promote dual-use research and promote civilian technology. I intend to see that we do both.

One of the success stories of the Cold War was the Defense Advanced Research Agency, or DARPA. DARPA helped keep America on the cutting edge of defense research. To meet the new challenges of the new world, we are giving DARPA a new mission and restoring its old name. Before 1972 the agency was known as simply the Advanced Research Products Agency. By going back to that name and re-focusing ARPA's efforts on dual-use technology rather than strictly military applications, we will better integrate research on national security and national economic security.

Starting now ARPA will allocate more than \$500 million to technology and industrial programs. ARPA will support industry-led consortia in dual-use technologies, and promote efforts to commercialize technological breakthroughs. Programs will be selected on the basis of merit, and require matching funds from the corporation. We'll even set up a toll-free number to attract good ideas from good companies. 1-800-DUAL-USE.

ARPA will work with four other agencies: the Department of Commerce, the National Science Foundation, the Department of Energy and NASA, on a Technology Reinvestment Project, to hold a series of regional outreach meetings in the next few weeks to help companies benefit from this initiative.

We'll promote government-industry partnerships to develop advanced materials. We'll help companies form regional technology alliances so they can share information and develop new products and new markets. Our manufacturing extension programs will help bring state-of-the-art technology to companies in much the same way as the agricultural extension service helped our farmers become the most productive in the world.

Dual-use technology is just the beginning. We will also explore new opportunities in civilian technology. This year alone we will invest \$400 million in emerging non-defense technology. The Department of Energy will speed the transfer of technology to private industry from the national labs. And when Congress passes my stimulus package, we will have millions more to invest in R&D partnerships, in advanced technology programs and computer networks for schools and libraries.

As with every aspect of my program for change, defense conversion will require us to reinvent government. I have asked the National Economic Council to take the lead in an effort to streamline and coordinate the conversion efforts of our government. Shifting to a civilian economy is of obvious concern to the Defense Department. It is also the business of the Commerce Department, the Labor Department, the Energy Department, NASA and so many other agencies. The National Economic Council will cut through red tape, break through turf battles, and help us deliver services to our customers quickly and efficiently.

None of this will be easy. All of it will take time. But the choice we face is between bold action to build a stronger, safer, smarter America and continued neglect as our national strength erodes.

The soldier-statesman Dwight Eisenhower once observed once that the resourceful "American makers of plowshares could, with time and as required, make swords as well." Our challenge is to reverse the process. I know today that the world's finest makers of swords can and will be the world's finest makers of plowshares. And they will lead America into a new century of strength, growth and opportunity.

Washington, DC
March 8, 1993

FOR IMMEDIATE RELEASE
Contact: Bob Boorstin
(202) 456-7151

THE TASK FORCE ON NATIONAL HEALTH CARE REFORM AND THE "TOLLGATE" POLICY DEVELOPMENT PROCESS

THE TASK FORCE

President Clinton established the Task Force on National Health Care Reform to develop a proposal that would bring spiralling health care costs under control and give American families the peace of mind and security they deserve. The President gave his Task Force a clear charge: by building on the work of the campaign and the transition, and incorporating suggestions and advice from all corners, prepare health care reform legislation that he can submit to Congress within 100 days. President Clinton's Joint Address to Congress emphasized that Washington can delay no longer: the American people demand health care reform now.

Demonstrating level of his commitment to solving this complex problem, the President appointed First Lady Hillary Rodham Clinton to chair the Task Force. As President Clinton said, the First Lady is not only experienced but is capable and effective at bringing people together around complex and difficult issues to hammer out consensus and get things done.

The Task Force also includes representation from the highest levels of the government -- including the Secretaries of Health and Human Services, Labor, Treasury, Commerce, Defense, and Veterans Affairs -- as well as senior White House officials.

POLICY DEVELOPMENT: THE "TOLLGATE" PROCESS

The overall policy evaluation effort of the Task Force is being coordinated by the President's Senior Adviser for Policy Development, Ira Magaziner, and is based on the "Tollgate" system -- a research and evaluation process commonly used in the business world for large-scale projects that need to be completed quickly. To advise the Task Force, Mr. Magaziner has formed over 25 working groups. These working groups, which are divided into health policy subject areas, will guide their research efforts through a series of tests, or "tollgates", before a comprehensive set of options is presented to the Task Force for consideration.

The first series of tollgates -- the broadening phase -- require the working groups to put all serious options "on the table" -- ensuring that all issues are considered, all questions are discussed, and that the correct methodology is being used. The next phase of the tollgate process narrows this broad group of options and makes draft recommendations.

which will later be synthesized into a comprehensive set of proposals. At that point, auditors will check to ensure that all cost and savings projections are sound, and that all legal concerns are addressed.

AN INCLUSIVE PROCESS

The President feels strongly that this be an open and inclusive process, and has structured the system to encourage participation from all levels of government, all segments of the health care industry, the business community, and the American people.

Hundreds of people -- including officials from various agencies, Congressional staff, health care experts, and White House personnel -- are directly involved in developing policy within the working groups.

In an attempt to make health care reform respond to the concerns of both those who receive health care and those who provide health care, there are doctors, nurses, social workers, and hospital administrators working on and contributing to many of the working groups. In addition, diverse panels of consumers and health care professionals will be brought in regularly from around the country to advise the working groups as they develop their recommendations.

Representatives from several White House departments -- including Congressional Relations, Inter-Governmental Affairs, and the Public Liaison's Office -- are actively reaching out for advice from members of Congress, state and local governments, organized health care interest groups, representatives from small and large businesses, and the American people. All groups have been encouraged to submit written proposals and many are being brought into the White House to meet personally with Ira Magaziner and other working group members.

In addition, the Task Force operates a round-the-clock "War Room" -- which receives the thousands of speaking requests, policy papers, letters and phone calls from Americans concerned about solving our health care problems. And whether it be a hospital administrator's treatise on malpractice reforms or a widow's handwritten letter expressing outrage at her skyrocketing prescription drug costs, each inquiry is taken seriously, channeled to the appropriate working group, and given immediate consideration.

The First Lady has been travelling throughout the nation talking to the American people about their health care concerns and their suggestions on how to reform the system. She has accepted several invitations to participate in roundtable discussions that will be held throughout the country in the next month -- where she can listen to the recommendations of all the people -- consumers, providers, and special interests -- who are eager to contribute to the Task Force as it develops its proposal for comprehensive health care reform.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

March 10, 1993

PRESS BRIEFING
BY GEORGE STEPHANOPOULOS

The Briefing Room

3:31 P.M. EST

MR. STEPHANOPOULOS: I just want to limit this to the response to the judge's ruling today if we could.

The President is very gratified by the court's decision today. The court has given its stamp of approval to everything the Health Care Task Force has done and everything that the Health Care Task Force plans to do. So as I said, we're gratified by the decision. We intend to go with the plans that we originally had to have the working groups to meet and to have the task force have a meeting before its work is completed. And of course, we will give full notice before that meeting of the Health Care Task Force.

I would point just in the interest of trying to correct any misperceptions that might be out there -- the Health Care Task Force has not yet met, so there is no violation of the law in any way. There has not been violation of the law. And we fully intend to, before there is a meeting of the full task force, to give notice.

Q It is remarkable in light of what the judge said, though. The judge said that he didn't like disagreeing with the administration. I take it from your standpoint that he didn't disagree with the administration in any respect.

Q -- interpretation of what the judge's ruling is?

MR. STEPHANOPOULOS: Well, the judge's ruling as far as we can tell -- he has, first of all and perhaps most importantly, dismissed any of the plaintiff's charges with respect to the working groups. I would point you, first of all, to page 33 of the judge's ruling where he says -- do I have it in front of me -- from the order -- I'm afraid I don't have the order. But he has dismissed it with respect to the working groups in total. The working groups can continue to give their advice to the President as they have always given it.

And he said -- and I quote -- "All claims based on the interdepartmental working groups are dismissed pursuant to Federal Rules, page 12, for failing to state a claim upon which relief may be granted."

At the same time, he also said that the task force -- that any application of FACA to the task force with regard to its giving direct advice to the President is also unconstitutional. So the task force ability to give direct advice to the President is completely and totally protected and it can't be interfered with at all. And I would again quote from page 22: "With respect to the meetings at which the task force formulates its recommendations for the President, the balance weighs in favor of the President. The President's interest in confidentiality is particularly present as the task force directly advises the President as to what legislation

MORE

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he should propose. And congressional interest in opening these meetings is obviated by plaintiff's opportunities to address the task force in Congress."

Q George, is the President also gratified that this ruling essentially guts the FACA?

MR. STEPHANOPOULOS: Not at all. I mean, I think what we're gratified by is that the Health Care Task Force can continue to proceed with its meetings and with its work as planned.

Q But the larger issue as this applies to all other federal advisory committee acts, and essentially no other federal advisory committee act now can meet to discuss recommendations on a constitutional basis.

MR. STEPHANOPOULOS: As long as it's getting its information -- performing its information gathering functions, they can meet. So that's not true.

Q No, I said to make recommendations. That's the distinction the judge drew, between information gathering and making recommendations.

MR. STEPHANOPOULOS: And the President has an interest in making sure the advice he receives from his advisors is protected and they can act with full candor.

Q Do you believe that this applies to all other advisory committees?

MR. STEPHANOPOULOS: I don't know that I can speak to that at this time. We've just received the ruling and this is very preliminary. But as far as the working of the Health Care Task Force, the Health Care Task Force work can go on as we've always planned it to go on.

Q George, did the administration interpret the judge's language regarding direct advice to the President as meaning that when the President is present and being advised by the task force, that those proceedings are protected but that the Health Care Task Force meeting outside of the President's presence is another matter?

MR. STEPHANOPOULOS: Oh, no, not at all. It shouldn't be limited at all to situations where the President is present.

Q None of us has a copy of the ruling, but we have seen quotes from it in which the judge notes that he disagrees with the administration on certain key points in this case. Would you explain what those disagreements are and what they mean?

MR. STEPHANOPOULOS: I think the disagreement is limited to the very narrow point of whether or not the First Lady is an outside advisor or a government employee under the law.

Q And you disagree on that?

MR. STEPHANOPOULOS: Yes, we continue to contend --

Q Are you going to appeal?

MR. STEPHANOPOULOS: I'm not sure that it's necessary. We're going to look at that and we have to review the case more closely.

Q Repeatedly, in explaining why the suit was groundless here, you cited your interpretation which was that under the meaning of the statute the First Lady is not covered. The judge has now said she is and you guys say that you won on all counts.

MR. STEPHANOPOULOS: We continue to believe that, but it just doesn't have any practical effect. The practical effect is that the judge is saying that the work of the task force is protected because FACA is unconstitutional with regard to giving direct advice to the President. It just doesn't have any practical effect.

Q Are you saying that the task force can now meet behind closed doors, whether the President is there or not, to consider these options because they are eventually for the purpose of advising the President?

MR. STEPHANOPOULOS: Providing direct advice to the President, yes.

Q What if he's not there?

MR. STEPHANOPOULOS: It doesn't matter. It has no bearing whatsoever. The only time it has to be open is when it's in this information-gathering, fact-finding stage, and we intend to have a meeting which we'll take testimony, and I would point out that the plaintiffs will have a full opportunity to present their testimony to the task force.

Q In your filings, or in the judge's rulings, since, as Brit says, we haven't seen it, did you define information-gathering or advising the President, or did the judge -- it would seem that the ruling would turn on that.

MR. STEPHANOPOULOS: Again, when we're discussing recommendations to the President, it is completely protected, according to the judge's ruling.

Q Discussing or giving?

MR. STEPHANOPOULOS: Discussing. When you're just in the process of developing recommendations for the President as opposed to taking in information from outside groups, that is completely protected.

Q You're saying that all the deliberations, because the President is the ultimate beneficiary, that the judge has now ruled that all these deliberations -- deliberations, not fact-finding -- may go forward behind closed doors?

MR. STEPHANOPOULOS: Yes. Yes.

Q That's your interpretation?

MR. STEPHANOPOULOS: Yes.

Q Are you saying the first Health Care Task Force meeting will be a meeting that has no information-collecting, it will just be a recommendation meeting and, therefore, it's okay for it to be closed?

MR. STEPHANOPOULOS: No. I'm saying -- first of all, again, let's get down to facts -- there has been no meeting of the task force. The working groups have been meeting, and they are completely and totally protected by the judge's ruling. It is completely dismissed. And any charge against the working groups is completely dismissed by this judge's ruling.

Q But when you have this first meeting of the task force, what will the ground rules be?

MR. STEPHANOPOULOS: I don't know about the first meeting, but we intend to have a public meeting of the task force, and we will give the appropriate notice, and plaintiffs along -- will have the opportunity to present testimony to the task force.

Q George, your weekling compilation of documents say that Clinton met with the task force on February 7th.

Q At a meeting -- when it held a meeting, when it met on February 7th. That's a Federal Register document.

MR. STEPHANOPOULOS: I'm not sure if it was the full task force; it might have been a group of his health care advisors. I don't know that there was any meeting of the task force. The task force is not --

Q It says, met with the presidential task force --

MR. STEPHANOPOULOS: It might have been a mistake. There has been no meeting of the task force.

Q George, there is a quote on the wires that says the judge -- quote -- "took no pleasure in determining that one of the first acts taken by a new President is in direct violation of a statute enacted by Congress." What does that mean?

MR. STEPHANOPOULOS: Well, I'm not sure. It would have been -- is a violation if the task force meets, but the task force has not met. And we fully intend to comply with the rulings of the judge in terms of having a public notice before a public meeting of the task force to gather information.

Q But are you saying, what, the judge misspoke or miswrote? I don't understand.

MR. STEPHANOPOULOS: Again, there has not been any meeting of the task force. I mean, there's certainly the potential, but there has not been a meeting of the task force.

Q George, are you juggling legal semantics here, because the working groups --

MR. STEPHANOPOULOS: Not at all.

Q -- the working groups -- (laughter) -- the working groups work for the task force, and they are, in fact, are they not in the process now of gathering information?

MR. STEPHANOPOULOS: The working groups are in the process of preparing recommendations for the President.

Q And to prepare that they're gathering information. I mean, it just seems --

MR. STEPHANOPOULOS: But the working groups are completely protected. The President has the right to get advice through his staff from across the country, from anyone he chooses to get advice from. That is separate from the task force. The working groups -- this does not apply in any way whatsoever to the working groups. That is what the judge has said very clearly. It just doesn't apply.

Q So are you using the statement that the task -- why hasn't the task force net then? Is it to avoid this kind of --

MR. STEPHANOPOULOS: We're going along as we always planned to go along. The task force is simply the supervisory -- the ultimate body for recommending to the President. But the working groups are really where all the nuts and bolts work gathering information and drafting the legislation is done. And that is always how it was contemplated. That is how the structure was set up and the judge has given his sanction to the workings of the working groups today.

Q But you're saying that even if a working group is engaged in information gathering that it's protected by the judge's ruling, so you are claiming protection from the spirit of having open meetings by calling it a working group and saying it's protected.

MR. STEPHANOPOULOS: Well, let's get some things straight here first of all.

Q -- this judge's ruling will have no effect whatever --

MR. STEPHANOPOULOS: No practical effect on the task force at all.

Q Do you think the judge might be a little surprised to learn that -- that that's your position, that he entered this order, declared himself to be sorry to have to disagree with the President, and declared illegal one of the President's --

MR. STEPHANOPOULOS: I mean I can't -- I don't know his state of mind but I don't think so, no.

Q George, I mean, does it not strike you that there may be something peculiar and perhaps a bit evasive about the interpretation you're making here when you get this frontal language from the judge about the violation of the law and you're saying, hey, no --

MR. STEPHANOPOULOS: I think the judge's language is very clear. He draws a distinction in the task force between their advisory capacity for the President and between their information-gathering functions for the President. The information gathering is intended, as he says, to be in public. It will be in public. At the same time, the judge has found that FACA is -- it is unconstitutional with regards to direct advice to the President.

Q I know, but what you're saying is that direct advice to the President does not constitute actually saying something to the President, conveying to him a memo or meeting with him, it constitutes any meeting that might be for the ultimate purpose of creating advice which would someday, somehow be passed on to him. Correct?

MR. STEPHANOPOULOS: Yes, as -- then that's separate from the information gathering.

Q Is there any imaginable act that this task force could commit, meeting it could hold that you think would be covered by this judge's order?

MR. STEPHANOPOULOS: Absolutely.

Q What, pray tell, would that be?

MR. STEPHANOPOULOS: In a meeting where we gather public testimony from interest groups, from the plaintiffs, in this case; from anybody else who has an interest in presenting --

Q So you're saying that hearings, that if it holds some hearings, they would be covered?

MR. STEPHANOPOULOS: Absolutely. And they will be public.

Q But the meetings as he describes them are not covered?

MR. STEPHANOPOULOS: No, public meetings where we gather public testimony will be public. We will have notice.

Q The bulk of the information will be gathered by working groups, which are exempt from that ruling, right?

MR. STEPHANOPOULOS: I don't know that I necessarily agree with that because you also have to look at the full -- we are also having hearings through the Robert Wood Johnson Foundation, where the First Lady is going to be presiding this week; and we will have a series of public hearings across the country to gather information from the public. I mean, I think that what's important here is that the Health Care Task Force, as contemplated, will continue its work.

Q Well, as long as that's true, then why did the administration mount as a defense in this proceeding the argument that Hillary Clinton and Mrs. Gore were not covered, did not constitute the kinds of outside presences that the law covered?

MR. STEPHANOPOULOS: We continue to believe that.

Q Well, I understand that. But the point is if they could go ahead and hold the meetings they were going to hold anyway, whether they were or not, why was that defense even relevant?

MR. STEPHANOPOULOS: The defense is relevant because that's how the plaintiff said the law -- that's the reason the plaintiffs chose for saying the law applied.

Q And the judge said it did apply on that position.

MR. STEPHANOPOULOS: Right, but then he also went on to say that FACA's unconstitutional with regard to the advisory functions of the task force.

Q Direct advisory functions.

MR. STEPHANOPOULOS: Yes.

Q May I follow up? The working groups that solicit information from interest groups, but those presentations by a AMA or whomever, those are still going to remain closed? That's what I was asking.

MR. STEPHANOPOULOS: Sure.

Q -- working groups, solicitation of input is going to be done privately?

MR. STEPHANOPOULOS: Absolutely.

Q Since we don't have a copy of this in front of us, could you read that line again from page 33 about the working groups?

MR. STEPHANOPOULOS: Yes. Actually, it's not page 33, it's page two.

Q It's not believed that that was the intention of the judge to make that kind of input open to the public?

MR. STEPHANOPOULOS: All claims based on the interdepartmental working group are dismissed.

Q Because?

MR. STEPHANOPOULOS: For failing to state a claim upon which relief may be granted. In addition, plaintiff's claim -- this is from -- and it follows: Plaintiff's claims based on meetings of the task force which are held for the purpose of formulating advice and recommendations for the President are also dismissed under Rule 12.

Q So the judge specifically said --

MR. STEPHANOPOULOS: Section -- right. Exactly.

Q -- not only direct advice, he said also formulating.

MR. STEPHANOPOULOS: Formulating and recommendations. Section 10A(1), 10A(3) and 10C of FACA are not applicable to these meetings, since their application to these meetings is unconstitutional as a violation of separation of powers principles.

Q Well, you could apply that standard to just about every meeting that's held by this task force or working group, could you not?

MR. STEPHANOPOULOS: Yes. Absolutely. (Laughter.) That's why the President is gratified. (Laughter.)

Q Thank you. (Laughter.)

Q -- task force you form in the future about any subject.

MR. STEPHANOPOULOS: Well, again, I think the judge is clear. If you're formulating recommendations for the President, the President has -- that advice is protected.

Q George, would you come back one more time please, just to finish this thought -- that if the working groups solicit information, it's closed. And I understand the judge said that. You say there's going to be one meeting of the full task force open to solicit testimony. How will -- what is different about the testimony the task force will take than this other testimony that is being taken in private? I mean, how do you decide which groups will give information in private and which ones will come to the public?

MR. STEPHANOPOULOS: Well, I think that -- I don't know how exactly the hearing itself will be structured. I mean, I don't know how much time there will be. But clearly, anybody will have the opportunity to submit their testimony, not necessarily deliver it verbally, but clearly have the possibility of delivering it to the task force.

Q Are they basically people who want the chance to do so and haven't been invited by a working group --

MR. STEPHANOPOULOS: Certainly the plaintiffs will be invited and they'll have the opportunity to present their testimony.

Let me just point out the judge's reasoning for protecting the ability of the President's advisors to formulate their recommendations. He says on page 19 of his ruling: "He must be able to trust that his advisors shall speak with complete candor and that they will not be cowed by the fear of premature public reaction. This candor's risk should FACA-apply to the task force. A realistic and practical appraisal of the application of FACA to these presidential advisors reveals that FACA prevents the President from receiving the full measure of the task force advice," which is exactly what we've been saying for several weeks.

Q Can we get a list of the people -- remember that meeting, it was the first meeting we thought of the task force at OEOB a few weeks ago and there was going to be a photo op and Hillary was going to preside and Mr. Clinton was going to be there as well over in OEOB. Could we get a list of the people who were at that meeting?

MR. STEPHANOPOULOS: I don't know exactly which meeting you're referring to --

Q It was what we thought was the first meeting of the task force. I think it may be --

MR. BOORSTIN: That's incorrect.

Q Well, what was it?

MR. BOORSTIN: It must have been the first tollgate meeting.

Q What's that?

MR. STEPHANOPOULOS: It's one of the working group meetings.

Q -- one more time the judge's specific decision on the status of Hillary Clinton. Your interpretation.

MR. STEPHANOPOULOS: The judge's specific decision is that it's been dismissed with regard to the working groups and it's been dismissed with regard to the ability of the task force to formulate recommendations for the President.

Q On the status of Hillary Clinton?

Q Yes, her status?

Q The issue that the court disagreed with you on.

MR. STEPHANOPOULOS: The judge disagreed with our pleading.

Q So he found what, she is considered an outside --

MR. STEPHANOPOULOS: He said, yes, an outside advisor.

Q The judge also criticized the administration for precipitating a constitutional crisis which he said could have been

avoided if you had had legislation that would have made the First Lady a government employee. How do you respond to that?

MR. STEPHANOPOULOS: Well, what's your question?

Q How do you respond to that? Why didn't you take a legislative course instead of a judicial course?

MR. STEPHANOPOULOS: Well, if the Congress chooses to change it, I mean, I think that's something we would certainly look at.

Q George, you said he did not draw a distinction between the task force itself and the advisory groups. And, again, at the disadvantage of reading you what is obviously a paraphrased wire account, but it quotes the judge as saying -- or paraphrases the judge as saying, the White House violated the law by not formally registering the task force with the Library of Congress and not giving notice in advance of its meetings or meetings of the advisory groups.

MR. STEPHANOPOULOS: I think the AP story is wrong. Clearly the working groups -- it has been dismissed with regard to the working groups. The task force hasn't met; we will make any public filing before the meeting of the task force.

Q You're saying the news account --

MR. STEPHANOPOULOS: The news account just isn't right, as far as our reading of the judge's opinion. And it's -- I mean, it's a plain reading -- again, page two of the order is very plain.

Q You don't plan to appeal any aspects of this ruling?

MR. STEPHANOPOULOS: I said I don't want to make a blanket statement at this time. We're still going to review it and go over it. But as I said, basically, the work of the task force can continue as contemplated.

Q Why should this not be viewed as a setback for open government?

MR. STEPHANOPOULOS: Well, I mean, when the task force receives information from the public, it will be a public meeting.

Q But by calling it a working group it's closed to the public.

MR. STEPHANOPOULOS: This is the President's staff giving him advice. We've had a far more open process than any administration before us. I mean, let me remind everybody we have not even developed a legislation yet. There will be ample time for public involvement when the legislation is presented to Congress, when there are hearings in Congress, and that is -- right now we're having far more accessibility and openness than ever before at this stage of the game.

Q Will Mrs. Clinton be having any comment today?

MR. STEPHANOPOULOS: Not that I know of.

Thanks.

THE PRESS: Thank you.

END

3:51 P.M. EST