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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Walter Dellinger to Melanne Verveer, re: Legal Issues (1 page)	09/27/1993	P5
002. memo	Walter Dellinger to the Health Care Task Force, re: Anticipated Constitutional and Legal Challenges to the President's Health Care Reform Initiative (5 pages)	09/16/1993	P5

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer (Subject Files: H)
OA/Box Number: 20035

FOLDER TITLE:

Health Reform [1]

Kara Ellis
2006-0810-F
ke1041

RESTRICTION CODES

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

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

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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U. S. Department of Justice

Office of Legal Counsel

DETERMINED TO BE AN ADMINISTRATIVE MARKING
INITIALS: NDE DATE: 08/13/09
2006-0810-F

Office of the
Assistant Attorney General

Washington, D.C. 20530

~~CONFIDENTIAL~~

September 27, 1993

MEMORANDUM FOR MELANNE VERVEER

From: Walter Dellinger WED
Acting Assistant Attorney General

Today's N.Y. Times story, "Officials Predict Deluge of Suits on Health Plan" is unnecessarily alarming. The evolving health care plan is legally and constitutionally sound, and once in place, suits for remedies can be handled in a more efficient manner than under present law.

It is possible to include in the plan a constitutionally defensible provision insuring prompt resolution of facial challenges to the plan's legality. [The confidential working draft now provides, at my suggestion, that "any civil action brought to invalidate any provision of this Act on the ground of its being repugnant to the Constitution of the United States on its face" must be brought within one year of enactment in a three-judge court in the District of Columbia with direct appeal to the U.S. Supreme Court.]

We are also working on efficient methods of resolving disputes that arise under the plan. Rather than leading to increased litigation, this plan can be designed to provide for a more rational and streamlined system of remedies in the area of health care than now exists. Of course, we will want to preserve the opportunity of individuals to seek judicial redress for claims of unlawful discrimination. On the other hand, claims for reimbursement, and challenges by providers to reimbursement methodology, should be resolved without extensive judicial involvement. It is also important to limit the opportunity of providers to challenge in court the overall budgetary ceilings that have been established by policymakers.

A 1990 Supreme Court decision, Wilder v. Virginia Hospital Association allows Medicaid providers access to federal court to sue state officials for more money than had been appropriated. This can and should be fixed. Instead of allowing every federal district judge to issue orders for more spending, we can substitute a process of administrative review of reimbursement decisions, and make that the exclusive remedy.

A summary of potential legal issues is attached.

U. S. Department of Justice

Office of Legal Counsel

DRAFT

Office of the
Assistant Attorney General

Washington, D.C. 20530

September 16, 1993

MEMORANDUM FOR THE HEALTH CARE TASK FORCE

Re: Anticipated Constitutional and Legal Challenges to the President's Health Care Reform Initiative

In the 1930s, the United States faced a grave economic crisis that threatened the very fabric of the nation's social and political life. The response of the administration of Franklin D. Roosevelt was a bold and ultimately successful attempt to reinvent much of American government.

As always in our constitutional system, novelty raised constitutional concerns. The Supreme Court greeted these developments at first with caution, and for a brief and dramatic time with constitutional rejection. In the end, however, the Court concluded that the Constitution provided the national government with ample authority to address problems that implicate the health and well-being of the national community.

President Clinton's health care reform legislation will be the most constitutionally innovative national initiative since the New Deal. Like the New Deal, health care reform will necessarily involve the creation of new structures of government and of new relationships between the public and the private sectors. Like the New Deal, some aspects of health care reform are likely to be assailed in Congress and (if enacted) in the courts as unconstitutional. Careful and creative legal advice in the formulation of the President's proposals will be critical to his initiative's success in Congress and to the ability of the Department of Justice to defend health care reform in any lawsuits that ensue.

Health care reform on the scale that the President will be proposing may be challenged as an intrusion on a variety of constitutionally protected interests. <u>It is our preliminary judgement that these challenges should clearly fail under current standards</u>. Even so, the novel context in which the courts would address these substantive issues makes it important to consider with care even those questions that would have uncontroversial answers in more familiar settings.

The Office of Legal Counsel is preparing to provide the President and the Attorney General with the legal advice necessary to ensure that health care reform legislation is effective and constitutional.[1] We anticipate that OLC's review of the legislation will be an ongoing process. We will continue to provide advice during the current, drafting phase, and will comment on the entire bill when it is completed. The process of congressional consideration and debate, furthermore, will produce a need to prepare administration testimony as well as to formulate responses to criticisms of the bill couched in constitutional terms. At each stage, OLC and the other units of the Department of Justice that are involved will need to marshall the resources to provide the President with legal support of the highest quality. This memorandum outlines OLC's current understanding of the legal issues posed by health care reform, and the Office's plan for providing the President and the administration with the necessary advice.

I. Structural Constitutional Issues

- **Federalism:** National health care is dependent by definition on universal availability. At the same time, the President's initiative does not contemplate creation of a vast new federal bureaucracy, but rather the innovative use of state regulatory bodies to administer the national plan wherever possible. The constitutionality of the means chosen for inducing the states to participate in national health care and for ensuring state compliance with federal requirements are vital questions. The extent to which state laws would (or would not) be preempted by provisions of the federal plan should be carefully considered, and deliberate choices made about the desirability of such preemption.

- **Separation of powers:** The President's initiative will propose creative new institutional means of providing and regulating health care. The use of independent federal entities, state officials and private bodies will present constitutional questions under the Supreme Court's decisions interpreting the

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[1] Media reports that the American Medical Association has obtained a report from a major Chicago law firm stating that aspects of health care reform might violate the fifth amendment's takings clause, see "AMA to Fight Limits on Doctors' Fees," *Wall Street Journal* (Sept. 9, 1993), are a reminder that the very scope of the initiative may make it appear worthwhile to opponents to expend serious resources generating legal arguments that will demand response even if they would not ultimately prevail in court.

President's appointments power and the constitutionally ordained separation of powers.

- **Providing for the transition:** The importance of national health care will focus attention on the President's choices of those who will administer it. For that and other reasons, it may be some time before all necessary posts under the plan are filled, especially assuming Senate confirmation is required for members of the National Health Board. At the same time, the gravity of the problems we face counsels the swift inauguration of the plan's initial phases after enactment. The methods chosen for the interim administration of the plan must be tailored to meet any constitutional objections. *[OLC now has a draft memo setting forth several methods for getting a National Health Board up-and-running without delay.]*

II. Remedies Questions

- **Channeling attacks on the legislation as a whole.** It will be important for the full implementation and administration of national health care reform that we obtain swift answers to the general constitutional challenges to the plan. Providing a specific and exclusive jurisdictional framework for such legal actions and imposing a strict statute of limitations on their initiation would address this concern. *[We are exploring a requirement that any actions seeking to invalidate any provisions of the act must be brought within one year and consolidated before a three-judge court district court in the District of Columbia with direct review by the U.S. Supreme Court.]*

- **An effective and efficient system of remedies for problems in the administration of national health care.** Disputes will arise over the general compliance of state, health alliances and private insurers with the reform legislation, as well as over decisions involving individual recipients of health care. An adequate, practical system for resolving these disputes will be crucial to ensuring quality health care and to cost containment. Creating such a system depends in the first instance in proposing and enacting a coherent and constitutional set of remedies.

- **Harmonizing the health care system with existing federal rights and remedies.** The relationship between the specific remedies and substantive rights guaranteed by the health care reform legislation and preexisting federal law must be clear. Among the issues to be addressed are the interaction between the new provisions and federal anti-discrimination legislation and the availability of § 1983 for claims arising under the health care plan. In order to reduce the volume of federal court litigation over disputes arising within the system, it may be necessary to establish alternative remedial mechanisms.

III. Substantive Constitutional Issues

- **Regulation of physicians' compensation:** As noted above, a major law firm reportedly has advised the AMA that in some circumstances interference with the "free" market of health care supply and demand could amount to a taking of private property under the fifth amendment.

- **Required participation in national health care:** The legislation under consideration would include all American citizens and legal residents within the health care plan's benefits and obligations. This could raise questions about the constitutionality of requiring universal participation in a governmental program under constitutional guarantees of liberty and privacy. Among those questions are issues raised by Americans with religious objections to participation and civil-libertarian concerns with universal recordkeeping and national identity cards.

- **Access to health care services:** The health care reform initiative contemplates a restructuring of the availability and provision of services in order to ensure that critical and preventive care is accessible to all. That restructuring necessarily means that the services available within the national health plan will differ from the services provided those who can pay in an essentially unregulated private market. It is possible that those denied some services will raise due process or equal protection challenges to the inclusion and exclusion of procedures and services.

- **Regulation of insurance marketing:** The essential role of private insurance providers in the system may entail public regulation of some aspects of those providers' commercial activities. In defining these restrictions, the health care reform legislation must take careful account of first amendment issues.

- **Tort reform and alternative dispute resolution:** One aspect of health care reform is finding just and effective means of reducing the share of health care expenditures currently spent on and through litigation. Among the changes that may be proposed are caps on tort recoveries and an enlarged role for alternatives to litigation. The validity of these changes under the due process clause is an important concern.

IV. Other Issues

- There are many other important legal questions raised by the health care initiative that demand careful attention from other units of the Department of Justice. The Civil and Criminal Divisions (anti-fraud and anti-waste provisions), the Antitrust Division (coordinating antitrust enforcement with the creation of a coherent system for providing health care), the Civil Rights Division (ensuring non-discriminatory access to health care for all Americans), and the Office of Policy Development (coordinating health care reform with other administration initiatives) should all be involved in the process of reviewing draft legislation and providing legal advice.

Walter Dellinger

Walter Dellinger
Acting Assistant Attorney General

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Cheryl Mills and Beth Nolan to Margaret Williams, re: Staffing Issues Related to the Health Care Interagency Coordinating Committee (3 pages)	10/05/1993	P5
002. memo	Cheryl Mills and Beth Nolan to Jennifer O'Connor, re: Additional Guidance on Health Care Support (2 pages)	10/19/1993	P5
003. memo	Alan Hoffman to Maggie Williams, re: Health Care Task Force Scheduling [partial] (1 page)	04/24/1993	P2 /b6

COLLECTION:

Clinton Presidential Records
First Lady's Office
Domestic Policy Council (Neera Tanden: Correspondence, Health Care, Violence, Drugs)
OA/Box Number: 20357

FOLDER TITLE:

M. Williams Health Files [Folder 3]: Personnel [3]

Kara Ellis
2006-0810-F
ke1040

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
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THE WHITE HOUSE

WASHINGTON

October 5, 1993

MEMORANDUM FOR MARGARET WILLIAMS
CHIEF OF STAFF, OFFICE OF THE FIRST LADY

FROM: CHERYL MILLS
ASSOCIATE COUNSEL TO THE PRESIDENT

BETH NOLAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Staffing Issues Related to the Health Care Interagency Coordinating Committee

This memorandum responds to your inquiry of October 4, 1993. In particular, you inquired as to the appropriate staff arrangements for two aspects of the Health Care Interagency Coordinating Committee -- the telephone and correspondence response units and support staff for agency representatives to the Committee.

The Interagency Coordinating Committee, which we understand began on July 1, 1993, is the coordinating group for the efforts of the White House, Department of Treasury, Department of Health & Human Services, Department of Veterans Affairs, Department of Commerce and the Small Business Association to educate the public about the Administration's Health Care Plan ("the Plan"). It is our understanding from you that the Committee is composed solely of government employees and is based at the White House. You have informed us that government officials from the aforementioned departments are agency representatives to the Committee, and are responsible for representing their agency's positions to the Committee as well as providing input and information from their departments. Thus, each department, through its agency representatives, is part of a coordinated effort to explain the Plan to the public, with primary responsibility for those aspects of the Plan about which it has superior technical knowledge or information.

I. INTERAGENCY COORDINATING COMMITTEE STAFFING NEEDS

Telephone Response Unit

The White House received over 7,000 calls the week of the President's address to Congress from the public asking specific questions about the Plan. The White House continues to receive a high volume of calls seeking responses to particular questions about the Plan. These questions regularly raise issues that are best addressed by knowledgeable individuals from one or more of the coordinating departments, e.g., how will the Plan affect small businesses and how will it be financed. As part of its efforts to educate the public, the Committee would like agency representatives to work in a designated telephone response unit supervising a group of individuals in responding to specific questions about the Plan that relate to their department's area of expertise. Based on the volume of calls and the specificity of questions posed, the Committee anticipates that it will need at least 6 - 8 employees from the coordinating agencies.

Correspondence Response Unit

Similarly, the White House received over 35,000 pieces of mail in the month of September (16,000 addressed to the President; 6,000 addressed to the First Lady; 5,400 addressed to the Health Care Committee) asking specific questions about the Plan and seeking information. As previously mentioned, each coordinating department has particular information about various aspects of the Plan. The Committee anticipates that it will need at least 6 - 8 employees from the coordinating agencies to supervise a group of individuals designated to respond to questions about the Plan that relate to their department's area of expertise.

Support Staff for Coordinating Committee Agency Representatives

It is our understanding that the Interagency Coordinating Committee presently has members -- agency representatives -- from the aforementioned agencies who produce documents and make proposals regarding policy issues affecting the Plan and the public education effort. These agency representatives regularly use support staff to meet their administrative and clerical needs. In response to the growing demand for such support, the Committee anticipates that the agency representatives will need to bring staff from their own agencies or departments to support them in their departments' efforts on the Committee.

II. ANALYSIS OF PROPOSED STAFF

The proposed supervisors for the telephone and correspondence response efforts are properly considered agency representatives. These individuals will be representing their departments and agencies as part of the Coordinating Committee, each responsible for ensuring accurate responses to targeted inquiries in their department's area of expertise. It is our understanding that all of the individuals considered as potential supervisors currently are employed full-time at a department or agency, with regular duties. They will continue to be supervised by, and report to, their own agency supervisors, and provide input and information to the Committee that is consistent with their agency's direction. They will also seek guidance from their departments to respond to inquiries about aspects of the Plan to ascertain their department's position, consistent with the overall efforts of the Coordinating Committee. As agency representatives, these individuals' services, which are provided in furtherance of their agency's and the Coordinating Committee's interests, are non-reimbursable.

Support staff from the coordinating agencies who directly support their agency representatives are properly deemed assignees, not detailees. Such staff clearly meet the criteria for a non-detailee set forth by the General Accounting Office ("GAO") in its report regarding the use of detailees. See GAO Report, "Personnel Practices" (November 6, 1992). Support staff performing services for their agency representatives will be performing their normal agency duties. It is our understanding that these individuals will continue to report to an agency employee (the agency representative), who will supervise them, provide their work assignments and review their work product. These factors enable us to categorize such individuals as an assignee and not a detailee, even under the admittedly heightened standard used by the GAO in its study. Id. at 15. As non-detailees, the support staff's services provided to their agency representatives is non-reimbursable.

III. CONCLUSION

This memorandum defines how the identified staff should be categorized. Staff supervising responses to telephone and correspondence inquiries about the Plan are non-reimbursable agency representatives to the Health Care Interagency Coordinating Committee. Staff providing clerical support to agency representatives currently serving in policy roles on behalf of their agency or department are non-reimbursable assignees.

We should stress that this memorandum provides general guidance. To ensure that specific requirements are met and that individuals understand their roles, anyone identified to perform services for the Health Care Interagency Coordinating Committee pursuant to the arrangements described above, should be approved by Counsel's Office. We will provide specific guidelines for their service as well as approval for access to the complex.

cc: Jim Dorskind
Jennifer O'Connor
John Podesta
Christine Varney

THE WHITE HOUSE

WASHINGTON

October 19, 1993

MEMORANDUM FOR JENNIFER O'CONNOR
OFFICE OF MANAGEMENT AND ADMINISTRATION

FROM: CHERYL MILLS
ASSOCIATE COUNSEL TO THE PRESIDENT

BETH NOLAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Additional Guidance on Health Care Support

This memorandum responds to your inquiry regarding our memorandum of October 5, 1993, "Staffing Issues Related to the Health Care Interagency Coordinating Committee." In particular, you asked whether clerical staff for agency representatives should be categorized differently than assignees as defined in a 1992 General Accounting Office ("GAO") report. See GAO Report, "Personnel Practices" (November 6, 1992).

This inquiry reflects a question of nomenclature rather than legality -- the legal issue is whether these individuals meet the definition of a detailee. Clerical staff who perform their regular duties for agency employees who are representatives to an interagency task force or committee do not meet the definition of a detailee. GAO Report at 15. A detail is "the temporary assignment of an employee to a different position or set of duties for a specified period of time." Id. at 2. Because clerical staff supporting agency representatives would continue to be supervised by an agency employee, remain in their same position and continue to perform the same set of duties, they are not detailees. Id. at 15.

In the 1992 GAO Report, the Office of Administration provided a list of categories of other government employees working at the White House who did not meet the definition of a detailee. This list was not exhaustive; rather, it identified groups of other agency employees who were located at the White House who did not meet the definition of a detailee.

The clerical staff who may be brought to the White House to support their agency's representatives to an interagency task force or committee meet the definition of an assignee as described by GAO in its report. However, such individuals are also distinguishable from assignees as described in the report because they will be working for an agency employee who is a representative to a task force on-site at the White House, as opposed to working for an agency employee located at their home agency.

Given the distinction between this group and those defined as "assignees" in the GAO Report, you have inquired whether you may categorize this group of non-detailees as other than "assignees." You have expressed a desire to create more specific categories of non-detailees to reflect potential distinctions in the conditions of their service. While it is permissible for your office to draw such distinctions, they are not required by law.

The legal issue with respect to such employees is only whether or not they are detailees, not what they are labelled if they are not detailees. Thus, narrower categories are not required by law. Ultimately, the delineation of additional categories of non-detailees may make it more difficult to categorize such employees accurately. However, the issue of how such employees are labelled is an administrative issue within the discretion of your Office, so long as the categories created accurately include only those persons who are properly termed non-detailees.

cc: Jim Dorskind
John Podesta
Christine Varney
Maggie Williams

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	David Wilhelm to Hillary Rodham Clinton re: Health Care Campaign (2 pages)	03/10/1993	Personal Misfile
001b. memo	Joe Sandler to Celia Fisher re: Formation of (c)(4) for Health Care Campaign (3 pages)	03/09/1993	Personal Misfile
002. schedule	President's National Health Care Campaign schedule (4 pages)	n.d.	Personal Misfile
003. calendar	Health Care Campaign calendar (3 pages)	n.d.	Personal Misfile
004. memo	Cheryl Mills and Beth Nolan to Margaret Williams, re: Staffing Issues Related to the Health Care Interagency Coordinating Committee (3 pages)	10/05/1993	P5

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FOLDER TITLE:

M. Williams Health Files [Folder 3]: Legal

Kara Ellis
2006-0810-F
ke127

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Health Care
Personnel
Legal

THE WHITE HOUSE

WASHINGTON

October 5, 1993

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CHIEF OF STAFF, OFFICE OF THE FIRST LADY

FROM: CHERYL MILLS
ASSOCIATE COUNSEL TO THE PRESIDENT

BETH NOLAN
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III. CONCLUSION

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001. list	Pros and Cons of Appealing or Not Appealing the FACA Decision (2 pages)	ca. 1993	P5
002. paper	Points Raised By Justice Department and Observations On Them (5 pages)	ca.1993	P5
003. note	Handwritten note from Vince Foster to Hillary Rodham Clinton, re: FACA (1 page)	03/14/1993	P5
004. list	Guidelines From Meetings With The President To Discuss Health Care Reform Issues (1 page)	ca. 1993	P5
005. memo	Robert E. Kopp and David J. Anderson to Vincent Foster and Stephen Neuwirth, re: Compliance Issues and Appeal Prospects in Ass'n. of American Physicians and Surgeons v. Hillary Rodham Clinton, et al., No. 93-399 (D.D.C.) (9 pages)	03/12/1993	P5
006. draft	Draft charter of the President's Task Force on National Health Care Reform (3 pages)	03/1993	P5
007. fax	Material regarding the Leadership Institute (5 pages)	02/19/1993	Personal Misfile
008. letter	Holland H. Coors to Miss Carol Keys (7 pages)	12/08/1989	Personal Misfile
009a. memo	David J. Anderson to Vincent Foster and Stephen Neuwirth, re: Issues Relating to the Document Disclosure Provision of the Federal Advisory Committee Act (10 pages)	03/24/1993	P5
009b. fax	Coversheet for to Steve Neuwirth (1 page)	03/24/1993	P5

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer (Subject Files)
OA/Box Number: 10255

FOLDER TITLE:

HEALTHCARE TASK FORCE [1]

Kara Ellis
2006-0810-F
ke206

RESTRICTION CODES

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

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

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Attorney-Client/Work Product

PROS AND CONS OF APPEALING OR NOT
APPEALING THE FACA DECISION

Appeal

Pros:

-- Only way to undo a ridiculous decision that will undermine President's ability ever again to make First Lady officially in charge of any work effort

-- Only way to free this Task Force (and other Presidential advisory bodies) from untenable restrictions (including advance public notice of all meetings and potential disclosure of every document created by or for the advisory body)

-- Will make it virtually impossible for plaintiffs to seek further relief in district court

-- We have a substantial chance of prevailing in Court of Appeals

-- We define the agenda of any appeal

Cons

-- Appeal could be construed as inconsistent with prior statements to the press

-- Court of Appeals might uphold district court decision -- thereby making it more of a controlling precedent -- or make it worse

-- Reopens issue of secrecy

-- Poses risks to working group

Not Appeal

Pros:

-- Allows us to maintain posture that we have not been hurt in any way by district court

-- Avoids reopening debate in the press

-- Avoids risk that Court of Appeals might convert decision of one district judge into a powerful precedent

-- Avoids immediate risk to working group

-- Forces plaintiffs to appeal (and right now, they have obtained no relief)

Cons:

-- Subjects Task Force and any other body including First Lady, to burdensome restrictions

-- Leaves district court in charge of case, and plaintiffs may seek relief re working group documents and Task Force "subgroup" meetings

-- Leaves in place an absurd and burdensome opinion

-- Makes it difficult to tell Court of Appeals at later time (or in response to an appeal by plaintiffs) that the district court's order is problematic

-- We lose chance to frame the issues on appeal and define public perception of case

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POINTS RAISED BY JUSTICE DEPARTMENT
AND OBSERVATIONS ON THEM

Charter

1. The court's order requires the task force to comply with the FACA charter requirement. This means that the President or a designee must submit a letter and proposed charter to the GSA, which generally must approve or disapprove the establishment of the advisory committee within 15 days. Once approved, a notice that the committee is being established must be published in the Federal Register at least 15 days before the charter is filed with the Congress and the Library of Congress, unless the GSA permits a shorter time for cause.

   Comment: We believe that under the circumstances here and the timetable set by the President for creating a health care reform proposal, there is a good chance that GSA will approve the charter quickly and waive the 15-day requirement for publication of the charter in the Federal Register.

2. Plaintiffs might argue that the working group cannot continue to meet until the charter is filed and approved.

   Comment: Plaintiffs have not made this argument, and it seems a weak one. The Court held that the working group is not subject to FACA. And the statute itself says a charter must be filed prior to any meetings of the advisory committee, or subgroups or subcommittees thereof. The working group is not a subgroup or subcommittee of the task force.

3. Plaintiffs might argue that individual task force members cannot meet together before a charter is filed, because any such meetings involve "subgroups" of the task force.

   Comment: Plaintiffs should not prevail on this argument. The task force has not formally or informally created any subgroups or subcommittees with responsibility or authority for carrying out any portion of the task force's work. Moreover, GSA regulations provide that FACA does not apply to "meetings of two or more advisory committee ... 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."

4. Under the court's order, <u>all</u> task force meetings are subject to 15-days advance public notice in the <u>Federal Register</u>. The 15-day requirement can be waived under "exceptional circumstances."

Comment: The President's tight time frame for receiving a health care reform proposal should constitute the type of "exceptional circumstances" that justify reducing the 15-day notice requirement. But advance notice is required for <u>every</u> task force meeting, whether or not it is the type of meeting that must be open.

5. FACA requires that advisory committees subject to the act must be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." Plaintiffs might argue that the task force here should be reconstituted.

Comment: Again, plaintiffs should not prevail on this argument. The judge did not rule that the task force need be reconstituted, even though the "balance" requirement was addressed at oral argument. Moreover, this committee is balanced with respect to the relevant government agencies that will be charged with implementing the resulting legislation.

<u>"Subgroup" meetings</u>

1. Plaintiffs might argue that the Robert Wood Johnson forums attended by the First Lady are subject to FACA.

Comment: This argument is frivolous. The Court was advised of these forums -- including the scheduled dates and locations -- and of the First Lady's role and nonetheless stated that no Task Force meetings subject to FACA have yet been scheduled.

2. Plaintiffs might challenge a working group meeting attended by a task force member.

Comment: Case law suggests that such meetings would not be subject to FACA for the same reasons the court found that the working group is not subject to FACA.

3. Plaintiffs might argue that any meeting of two or more members of the task force constitutes a "subgroup" of the task force that is subject to FACA and to the court's order. The argument would be particularly aimed at meetings of or attended by the First Lady and Magaziner, under the theory that they are the Chair of the Task Force and the head of

the working group, are doing the actual work of the Task Force and are a de facto subgroup.

Comment: Neither FACA, the GSA regulations nor the Court's opinion or order define "subgroup." We contend that to constitute a "subgroup," two or more members of the task force must be authorized by the task force to perform a certain role, and no such "subgroup" has been so authorized.

4. Plaintiffs might challenge a working group meeting, or a meeting with members of the public, attended by more than one task force member.

Comment: Again, on this issue, we would rely on the GSA regulations which provide that FACA does not apply to meetings of two or more task force members convened solely to gather information, conduct research, analyze relevant issues and facts, or draft position papers for deliberation by the advisory committee as a whole.

It must be noted, however, that the judge held that FACA does apply with full force to meetings of the task force or subgroups that are solely for the purpose of gathering factual information. In this respect, among others, the court's order conflicts with applicable regulations.

Our position is buttressed when the meeting is initiated by the working group or a cluster group and merely attended by one or more task force members, in contrast, e.g., to a cluster group meeting called by the First Lady.

5. For a discussion of meetings between the President and members of the task force (or also attended by working group members), please see our separate guidelines. Note also the court's reliance on the statement in the Magaziner declaration that the working group will not make recommendations directly to the President. We construe this statement to apply to the working group as an entity or to individual working group members speaking for the working group as an entity.

Advice regulation vs. fact-finding

1. The Justice Department believes that, in practice, it will be difficult to distinguish between fact-gathering and advice formulation, and that this will make it difficult to

know which task force meetings or portions thereof must comply with which portions of FACA.

COMMENT: The court's order uses ambiguous language to describe which fact-gathering functions are subject to FACA. We feel strongly, however, that the court intended to limit full application of FACA to those meetings at which the task force is gathering facts from outside source.

Although the order also requires that "fact-reporting" meetings be open, we believe the more reasonable interpretation to be that this refers to "fact-reporting" to the task force, not "fact-reporting" by the task force to the President. Under either category, however, each meeting is subject to the 15-day advance public notice requirement except under "exceptional circumstances."

Public access to documents and information

1. The court's order contemplates that all documents produced for and received by, or produced by, the task force are subject to public disclosure under FACA (unless subject to exemptions under FOIA).

   COMMENT: We have an argument that task forces created solely for the purpose of advising the President are not "FOIA agencies" and therefore should not be required to produce documents under FACA. This argument is problematic, however, in light of prior case law applying FACA's disclosure requirements to committees advising only the President.

2. Documents received from the public by the working group intake center are arguably subject to disclosure because those documents were, in fact, intended to be for the use of the task force.

3. Documents received by Ira Magaziner might be made subject to disclosure because of his dual role as a task force member and the head of the working group.

4. Documents produced by the working group and given to individual task force members may be subject to disclosure.

   COMMENT: While an argument can be made that the only documents subject to disclosure are documents given to the task force as a whole or intended to be used in connection with work by the task force as a whole, we believe this position would not likely prevail.

5. The court's opinion does not expressly exclude from public disclosure any document by which the task force gives advice to the President, even though the court held that meetings for the purpose of giving advice to the President could not constitutionally be required to be open.

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: KDE DATE: 08/13/09

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2006-0810-F

GUIDELINES FOR MEETINGS WITH THE PRESIDENT TO DISCUSS HEALTH CARE REFORM ISSUES[1]

1. Each meeting is convened by the President.

2. The persons attending the meeting are attending in their individual capacities, either as government officials or members of the Task Force or working group. The persons attending are not representing the Task Force or working group, and do not have authority to speak on behalf of the Task Force or working group.

3. The persons attending the meeting have been invited by the President. Neither the Task Force nor the working group has appointed individuals to attend the meeting.

4. The meetings are for the purpose of allowing the President, at his request, to obtain information and/or advice from the individuals attending. The President does not seek advice from the group as a whole, and the group does not form a consensus opinion to present to the President.

5. No business of the Task Force or the working group is conducted at these meetings.

6. Those present at the meeting have not been designated either a subgroup or subcommittee by either the Task Force or the working group.

7. No documents will normally be presented to the President during these meetings. Any documents that are presented will not be documents produced by the working group for the purpose of advising the President.

8. If such meetings are listed in the President's schedule, they shall be described as "meetings with individuals to discuss health care reform."

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1 These guidelines are set forth in response to the opinion and order of the district court in Association of American Physicians and Surgeons, Inc. v. Clinton, Civ. No. 93-0399 (RCL) (D.D.C. Mar. 10, 1993). These guidelines are not intended to reflect the requirements of the Federal Advisory Committee Act or any federal regulations promulgated thereunder, and are not intended to assume the constitutionality of congressional regulation of meetings for the purpose of advising, or providing information to, the President.

U.S. Department of Justice

DRAFT

Washington, D.C. 20530

Memorandum

To: Vincent Foster
Deputy Counsel to the President

Stephen Neuwirth
Associate Counsel to the President

From: Robert E. Kopp
Director, Appellate Staff

David J. Anderson
Director, Federal Programs Branch
Civil Division

PRIVILEGED ATTORNEY-CLIENT AND WORK PRODUCT MATERIAL

Re: Compliance Issues and Appeal Prospects in Ass'n. of American Physicians and Surgeons v. Hillary Rodham Clinton, et al., No. 93-399 (D.D.C.)

INTRODUCTION

You asked us to provide you with an analysis of the compliance issues arising from Judge Lamberth's March 10 Order, likelihood of success of litigation involving them and the prospects of reversing the award of preliminary injunctive relief to plaintiffs on appeal. The memo does not represent definitive legal conclusions based on exhaustive analysis, but should serve as our initial views on the problems you presented to us yesterday.

Neither the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, implementing General Services Administration ("GSA") regulations, 41 C.F.R. Subpart 101-6.10, nor the Judge's Opinion and Order are models of clarity or provide certain answers to many of the compliance issues you have raised. Actions taken in reliance on narrow readings of these three sources of guidance pose litigation risks, and plaintiffs may well challenge them through an amended complaint, motions for further relief or motions for contempt in the district court. Overly broad constructions of defendants' obligations, on the other hand, may unduly hamper the work of the Task Force. *

It is, in part, for these reasons that we strongly recommend an expedited appeal of the March 10 Order. The Court's Order undoubtedly impairs the Task Force's work to a measurable degree and questions over compliance with its less-than-certain requirements may cloud its efforts with uncomfortable uncertainty. However, an expedited appeal may diminish the likelihood that these or other plaintiffs will file compliance-related papers in the district court, or that Judge Lamberth will be inclined to rule on them.

Even if we were to file an expedited appeal and demonstrated a likelihood of success on most compliance-related questions, there is a good chance that plaintiffs will return to the district court in effort to ensure compliance with FACA and the Order. Plaintiffs will likely seek discovery, and it will be difficult to resist such discovery without leaving the public impression that something is being hidden. The prospect of discovery requires us to be particularly careful in ensuring full compliance with the Order's written and implicit requirements.

The opinion is, of course, favorable in many respects. All claims regarding the working group were dismissed and the Court recognized the constitutional dimensions of the President's effort to obtain advice on recommended legislation. Nonetheless, the Order does place some significant roadblocks in the Task Force's effort to continue its work unimpeded,[1] and, because it does, it offers the plaintiffs a chance to divert the Task Force's energies and resources to defending against compliance motions.

We also believe that Judge Lamberth's opinion poses significant long-term concerns. The Court's ruling potentially weakens Presidential power by allowing Congress to regulate the process by which he and his close advisors receive both factual and policy information. The opinion also narrows potential opportunities for the First Lady to perform valuable public service and to assist the President in the same private manner allowed other close government advisors.

On balance, we believe that the advantages to taking an expedited appeal far outweigh the risks. As detailed below, we believe that the prospect for success of appeal are quite good.

DISCUSSION

Compliance Issues

Judge Lamberth's Order raises four categories of compliance issues: 1) charter and membership, 2) "subgroup" meetings, 3) the fact-finding vs. advice formulation function and 4) public access

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[1] We underline those requirements that appear to us to be particularly onerous.

to information. Each imposes significant administrative burdens on the Task Force, may potentially delay its work and diminish its flexibility.

1. Charter and Membership

a. Section 9(c) of FACA prohibits an advisory committee from meeting or taking any action until a charter is filed with GSA. Prior to filing a charter, the President or designee must submit a letter and proposed charter to the GSA's Committee Management Secretariat in accordance with 41 C.F.R. § 101-6.1007(b)(2). The GSA will, if possible, approve or disapprove establishment of the advisory committee within 15 days. § 101-6.1007(c). Once approved, a notice that the committee is being established must be published in the Federal Register. § 101-6.1015(a)(1). An exception for committees established by Executive Order would not apply here. Id. Such notice shall appear 15 days before the charter is filed with the Congress and Library of Congress, unless the Secretariat permits a shorter time for good cause. § 101-6.1015(a)(2). These regulations could effectively bar the Task Force or any subgroups of it from working at all for 30 days, but this delay could be overcome if the GSA is asked to, and does, expedite this process.

b. It is unlikely that this moratorium applies to the inter-departmental working group, although the matter is not free from doubt. Section 9(c) of FACA bars an "advisory committee" from meeting or taking action until the charter is filed. "Advisory committee" is defined to include "subgroups" or "subcommittees" thereof that meet the requirements of § 3(2). The Court held, however, that the interdepartmental working group is not an "advisory committee." Nevertheless, to allow a working group to begin work prior to the chartering of a just-established parent advisory committee would be of dubious legality. Under the unusual circumstances of this case, we have a reasonably strong argument, however, that neither the Court nor FACA intended the working groups to stop their work for days or weeks pending filing of the charter.

c. However, there is a serious question whether, under the Order, a "subgroup" of the Task Force may meet at all until the charter is approved and filed. What constitutes a "subgroup" is discussed in ¶ 2(c), infra. Paragraph 1 specifically enjoins meetings of a Task Force subgroup until the Task Force as a whole complies with FACA, of which filing the charter is the first step. While the Magaziner Decl. ¶ 9 explains that there are no "formal" subgroups of the Task Force, neither FACA nor the Order expressly distinguish between formal and informal subgroups, and a meeting between Mr. Magaziner and the First Lady, for example, may be a subgroup. The Order may, therefore, bar meetings between members of the Task Force, whatever their purpose, at least until charter is filed.

d. FACA committees must be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." FACA, § 5(2). Several FACA cases have dealt with this provision and, while the law is not yet settled, the better view in this District is that plaintiffs generally lack standing to enforce this provision and that it is judicially unreviewable. This may not prevent these or other plaintiffs, possibly frustrated by a perceived lack of influence, from bringing suit to reconstitute the Task Force. But, in addition to these jurisdictional defenses, defendants can argue that the "fairly balanced" requirement does not require the seating of representatives of medical, public interest and insurance organizations on the Task Force, but that the relevant point of view and function here is that of the government agencies that will be charged with implementing the resulting legislation.

2. Subgroup meetings

It is clear under the Court Order that working group meetings are not subject to FACA and that the fact-finding meetings of the Task Force are. The Opinion does not explain whether meetings of two or more Task Force members together or with members of the working group or the public are subject to FACA.

a. It is reasonably clear that members of the Task Force may attend forums or meetings organized by private groups on health care without triggering FACA's procedural requirements. Those requirements apply to meetings of the advisory committee, §§ 10(a)(1), (2), not meetings of private groups attended by FACA committee members.

b. For the same reason, it is unlikely that a meeting convened by the interdepartmental working group, or one of its cluster groups, that is attended by a Task Force member is an advisory committee meeting. National Anti-Hunger Coalition, which involved working groups chaired by FACA committee members, supports this conclusion.

c. Meetings initiated by more than one Task Force member with members of the working group and/or the public, which would in all likelihood be informational in nature, might lead to a different result. The Order enjoins meetings of "subgroups" or "subcommittees" until the requirements of FACA are satisfied. Order, ¶ 1. The issue is whether an informal meeting between, for example, the First Lady, Mr. Magaziner and Ms. Rasco constitutes a "subgroup."

We could argue that the term "subgroup" refers only to groups of two or more Task Force members that are convened with some degree of formality or structure, and not to chance or informal meetings. A GSA regulation, 41 C.F.R. § 101-6.1004(k), would support this view. It provides that meetings of two or more advisory committee members to gather information or to analyze facts is not covered by FACA. While the regulation, which would apply as much to the full Task Force as to a subgroup of two or three, is helpful, reliance on it poses a some risk of contempt. Paragraph 1 of the Order plainly says that "all fact-finding and fact-reporting meetings of the Task Force must comply fully with the requirements of FACA." FACA and the order could be circumvented by dividing into "informal" subgroups to engage in fact-finding and fact-reporting meetings. This may violate the spirit, if not the letter of the Order. <u>As a result, it can plausibly be argued that two or more members of the Task Force cannot meet to discuss factual or deliberative issues unless public notice is provided.</u>

d. <u>"Formal" fact-reporting meetings described in (c), any meetings of the Task Force or two or more members thereof involving the formulation of advice, and, perhaps, "informal" subgroup meetings require public notice.</u> 41 C.F.R. § 101-6.1015(b) requires notice of <u>15 calendar</u> days prior to the meeting unless "exceptional circumstances" exist that are stated in the <u>Federal Register</u>. What such circumstances might be are not stated in the GSA regulations. That 15 days (or really any) notice is required prior to a fact-reporting meeting seriously hampers the ability of the Task Force to produce prompt recommendations to the President. Such notice prior to deliberative meetings, which would presumably occur near the end of the process, might not be as burdensome. Nevertheless, under these circumstances, there would be an understandable inclination to exercise this exception frequently, presenting fertile ground for litigation. Challenges might be filed in order to disrupt the Task Force's work. A strong defense lies in the President's imposition of a 100-day time-table, although we may need explain why such a compressed time-table is needed in somewhat more detail. Defendants' chances of prevailing would likely depend on the nature of the meeting, how much less than 15 days notice was provided and how often the exception was exercised. Defendants might have a better chance of prevailing on such cases involving shortened notice to deliberative meetings because the public would not be able to attend, but, again, these meetings might be the easiest ones to provide full notice.

e. Meetings of two or more Task Force members for either fact-finding or deliberative purposes may be subject to the Order. It is possible to imagine, however, meetings of Task Force members that fall into neither category. If the First Lady and Mr. Magaziner meet to discuss operational or logical issues, such as when to schedule a meeting or the general progress of the working group, it is doubtful that FACA would apply. FACA's legislative history suggests that operational groups or meetings are not covered by FACA.

f. Finally, it would seem likely that, at the end of the process, the Task Force as a whole or a subgroup of it, would present its advice and recommendations to the President. Such a meeting would be a meeting of the advisory committee and would, therefore, require public notice.

These meetings also raise a tricky issue about public access. It may well be that these meetings would not involve fact-reporting or advice formulation, but, instead, "advice-reporting." The Order is not clear on whether public access to such a meeting would be required. It is very difficult to believe, even following the reasoning in Judge Lamberth's opinion, that FACA could constitutionally require public access to meetings in which the President receives advice. Public interest may be greatest in meetings between the Task Force and the President, and, it is, therefore, more likely that a lawsuit or a motion for contempt by plaintiffs would be filed in this context. Defendants' chances of prevailing in such litigation would appear quite strong.

p. 21 of opinion

[redacted]

3. <u>Advice Formulation vs. Fact-Finding</u>

The Court's Order affords public access to Task Force fact-reporting or fact-finding meetings, but not to those involving advice formulation. <u>Perhaps the most difficult part of complying with the Court's order is trying to determine if and how such a distinction can be drawn in free-flowing meetings.</u>

Perhaps it is possible for the Task Force or subgroups thereof to structure their meetings in a way such that some are plainly intended to involve fact reporting, such as meetings in which the public is invited to speak, and some clearly involve deliberation. The problem is in dealing with meetings likely to involve both.

Paragraph 2 of the Order, which refers to meetings scheduled for the "purpose" of formulating advice, offers a partial solution. Meetings may well be called, and so described in the public notice, for the purpose of deliberation. Factual discussion that is part and parcel of the deliberative process would not violate the Order. Other meetings, however, may not have such a specific agenda. There is precedent in the FOIA context that, if facts and opinion are inextricably intertwined in an inter-agency document such that deliberative material cannot easily be redacted, the entire document may be withheld. The problem of possible "intertwining" seems much more likely in oral discussions. Under such circumstances, it is hard to imagine the Court holding defendants in contempt if the Task Force made a good faith effort to segregate meetings or portions of meetings between fact finding and deliberation, but could not do so in other portions without completely disrupting the gathering.

4. Public Access to Information

a. Section 10(b) requires documents prepared by and furnished to the Task Force to be made publicly available. An argument can be made that the "subject to section 552 of Title 5" language in § 10(b) exempts non-agencies such as certain components of the Executive Office of the President, and the Task Force, from FACA's document access requirements. Such a result would exempt many, if not all, Presidentially-established FACA committees from these requirements and would be contrary to intent of Congress. After all, if open committee meetings are to be truly meaningful for the public, interested persons should have access to the documents at issue in these meetings. As a result, we believe that Task Force documents, except those protected by a FOIA privilege other than deliberative process,[2] are subject to public inspection "until the Task Force ceases to exist." § 10(b). Non-privileged documents received in the "intake center," Magaziner Decl. ¶ 22, for example, are subject to public disclosure.

b. Although the First Lady and the other Task Force members serve in public capacities other than on the Task Force, it is likely that most of the documents that they have received are readily identifiable as having been sent to them because of their role on the Task Force. Indeed, Magaziner Decl. ¶ 22 states that mail sent to the First Lady and Mr. Magaziner on health care issues has been handled by the "intake center." These documents would be subject to disclosure.

c. Documents received by the First Lady during her meetings with outside groups, the Hill or the working group are subject to disclosure as well. It would be difficult to argue that she received these documents in her capacity as First Lady rather than her capacity as Chair of the Task Force.

d. Documents received by Mr. Magaziner during similar meetings presents a somewhat more difficult issue. Documents received or produced by the working group are generally not subject to disclosure because the working group is not a FACA committee. But see ¶ e, infra. When they are furnished to or made directly available to the Task Force, they become Task Force documents subject to disclosure. Mr. Magaziner serves a dual role as Task Force member and head of the working group. Whether documents he receives or produces are subject to disclosure, such as the decision tree he has prepared for the President, may turn on the capacity in which he received or produced the document.

[2] The Office of Legal Counsel has concluded that agency documents transmitted to a FACA committee would be subject to deliberative process privilege protection if sought from the Task Force.

The problem is that Mr. Magaziner serves in two capacities at once, and it would be difficult to argue that documents he produces or receives as working group chair are not effectively in his possession as Task Force member as well. <u>Such documents, therefore, are likely to be subject to disclosure.</u>

e. Documents currently in the possession of the working group are likely not considered Task Force documents and are not subject to disclosure. However, § 10(b) of FACA provides that documents "made available to" or "prepared for" the FACA committee must be disclosed. This suggests that documents need not be in the FACA committee's physical custody to be disclosable. Neither can it mean, however, that all staff documents are disclosable. Even if the Task Force does not possess a document, <u>it would seem that the Task Force must disclose documents that the Task Force has 1) specific knowledge were prepared for them, or 2) specific knowledge are available to them and 3) access to them.</u> Whether we could prevail in a challenge in which we take the position that only documents possessed by the Task Force must be made public is questionable.

f. Finally, those working group documents which have not been "made available to" or "prepared for" the Task Force are not subject to disclosure. The working group is neither a FACA committee nor a FOIA agency. Working group documents prepared by executive branch agencies are, however, subject to FOIA requests on the agency if the document remains in the agency's custody and control. Such documents may be withheld pursuant to any FOIA privilege. Deliberative process may, however, be difficult to assert because that privilege applies, in part, to "inter-agency" documents, and, as noted, the working group is not an agency.

<u>Appellate Prospects</u>

While prospects for success cannot, of course, be predicted with any certitude, we believe that the advantages of appeal outweigh the risks. We believe that our statutory argument is far stronger than the district court recognized and that we have a strong basis for asserting that the court erred in believing it was bound by the Title 5 definitions of "officer" and "employee." With respect to the constitutional argument, the D.C. Circuit is particularly sensitive to Executive Branch prerogatives and will certainly recognize the seriousness of the issues presented. In short, there is a very good prospect that the D.C. Circuit may remove doubts cast by the district court on the status of the First Lady and the scope of Presidential privilege.

The worst case scenario, of course, is that the D.C. Circuit would find both our statutory and constitutional arguments unpersuasive and would also disagree with the district court's analysis of the working group issue. Even under this scenario, however, it is unlikely that the court would order that working group meetings be opened to the public. Even assuming the worst, the court would almost certainly remand the case to the district court for further factual development as to the relation of the working groups in relation to the Task Force. As noted, however, we think that our chances of totally losing on both the statutory and constitutional issues is small. The judges who will be most troubled by our statutory argument will be those most likely to support us on the constitutional issues. Conversely, those least inclined to a broad ruling on executive powers may be those most willing to interpret the statute broadly to comport with congressional purpose.

cc: Judge Webster Hubbell
Nancy McFadden

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THE PRESIDENT'S TASK FORCE ON
NATIONAL HEALTH CARE REFORM

CHARTER

I. Official Designation

This task force shall be designated the "President's Task Force on National Health Care Reform," as set forth in the Statement of the President, dated January 25, 1993. See 29 Weekly Compilation of Presidential Documents 96 (Feb. 1, 1993).

II. Membership

This Task Force is chaired by Hillary Rodham Clinton, the First Lady, who in this capacity is assisting the President in the discharge of his duties and responsibilities. See 3 U.S.C. § 105(e). The other members of the Task Force are Secretary of the Treasury Lloyd Bentsen; Secretary of Defense Les Aspin; Secretary of Commerce Ron Brown; Secretary of Labor Robert Reich; Secretary of Health and Human Services Donna Shalala; Secretary of Veterans Affairs Jesse Brown; Office of Management and Budget Director Leon Panetta; Assistant to the President for Domestic Policy Carol Rasco; Assistant to the President for Economic Policy Robert Rubin; Council of Economic Advisors Chair Laura Tyson; and Senior Advisor to the President for Policy Development Ira Magaziner.

This membership includes those officials who presently have principal responsibility for the administration and regulation of government-related health care services; for developing domestic and economic policies that affect, and are affected by, public and private health care systems; and for advising the President on health care and economic issues.

III. Objectives and Duties

The Task Force~~'s mission is~~ to build on the work of the 1992 ~~Presidential Campaign~~ and Transition in the area of health care reform; to gather ~~and analyze~~ information provided by federal, state and local governmental entities and employees, private organizations and individuals on the state of existing health care policies and delivery services; to assess possible alternatives to such policies and services; and to recommend to the President within the first 100 days of his Administration a proposal for comprehensive health care reform legislation to be enacted by Congress.

The Task Force shall not delegate its responsibilities to subcommittees or subgroups. ?

IV. Timing and Duration

The creation of the Task Force was announced by the President on January 25, 1993. The Task Force will terminate on May 30, 1993, unless terminated earlier by the President. This charter is subject to renewal.

V. Official Reporting and Agency Support

The Task Force shall report to the President. Support shall be provided to the Task Force by the Executive Office of the President, the Department of Health and Human Services, the Department of Defense, the Department of Veterans Affairs, the Department of Labor, the Department of Commerce, the Department of Justice, the Department of the Treasury, the Office of Management and Budget, the Council of Economic Advisors, and Congress.

Mr. Magaziner, the Senior Advisor to the President for and policy option Policy Development, leads an interdepartmental working group that is gathering information for, and will provide information to, the Task Force. The working group consists of government employees and is consulting with a wide range of citizens in the public and private sectors. The Task Force, in turn, will review information provided by the working group and make recommendations to the President.

VI. Estimated Costs

The estimated cost of the Task Force is expected to be below $100,000. ~~The total number of man-hours to be devoted by task force members to the work of the task force cannot be estimated in advance.~~

VII. Meetings

The Task Force shall conduct meetings as necessary. The Task Force has not yet met, and as of the date of the filing of this Charter no meetings of the Task Force have yet been scheduled.

* * *

This Charter is filed as a result of ~~pursuant to~~ the order of the district court in Association of American Physicians and Surgeons, Inc. v. Clinton, No. 93-399 (D.D.C. Mar. 10, 1993). The Task Force was not established pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2, because I do not believe that the Task Force is, or may constitutionally be, subject to the Act. I reserve the right to withdraw this Charter should the order of the district court be reversed or vacated.

Filed this _____ day of March 1993.

William Jefferson Clinton

U.S. Department of Justice

DRAFT

Washington, D.C. 20530

Memorandum **ATTORNEY-CLIENT PRIVILEGED/ATTORNEY WORK PRODUCT**

To: Vincent Foster
Deputy Counsel to the President

Stephen Neuwirth
Associate Counsel to the President

From: David J. Anderson
Director, Federal Programs Branch
Civil Division

Re: Issues Relating to the Document Disclosure Provision of the Federal Advisory Committee Act

You have asked that we analyze the obligations of the Task Force on National Health Care Reform to make documents available to the public under the provisions of the Freedom of Information Act ("FOIA") and the Federal Advisory Committee Act ("FACA"). The issues are specifically raised by the March 17 request for documents by two of the plaintiffs in American Ass'n of Physicians and Surgeons, but we canvass the area more comprehensively below.

Section 10(b) of FACA requires public disclosure of all records "made available to or prepared for or by" an advisory committee, unless exempted from disclosure. Accordingly, there is a two-part process for determining what documents must be released under § 10(b). First, it must be decided whether a given record is a Task Force document. Second, a decision must be made whether to withhold these records and, if so, under what FOIA exemption. Of particular concern is the question of the extent to which the Task Force may withhold documents under the deliberative process privilege of FOIA exemption 5 or under a constitutionally-based Presidential privilege.

A. Procedure for Responding to FOIA Requests

As discussed in the accompanying memorandum, the D.C. Circuit in Food Chemical News v. Department of Health and Human Services, 980 F.2d 1468 (D.C. Cir. 1992), held that parties are not required to file a FOIA request to obtain non-privileged documents under § 10(b). An advisory committee has an affirmative obligation to make its non-privileged documents publicly available without such a request. If the Task Force presently is not in custody or control of any privileged documents, the Task Force need not respond to the FOIA request as a technical matter, other than, perhaps, to report that responsive materials are located at a given location for public review.

The Food Chemical News court, however, strongly indicated that a FACA committee can require a FOIA request for "those materials that the agency reasonably claims to be exempt from disclosure pursuant to FOIA." Food Chemical News, 980 F.2d at 1469. Denial of such a FOIA request then may trigger an administrative appeal process that may culminate in federal court litigation.

Depending on the numbers of documents to which plaintiffs are entitled under § 10(b), the Task Force can (although is not required to) simply send plaintiffs the requested documents. Alternatively, the Task Force could decline to produce any documents under FOIA and simply advise the requestors that all Task Force documents are available in a given location. Or, the Task Force could send certain documents to the plaintiffs as a courtesy (for example, the charter of the Task Force) and direct the plaintiffs to the document reading room for all other Task Force materials.

If the Task Force intends to withhold privileged documents, a response should be provided within the requisite ten day period. 5 U.S.C. § 552(a)(6)(A). That response should generally identify the sorts of documents responsive to the request which are withheld and the grounds for doing so. If the Task Force withholds any documents, it should notify plaintiffs of the procedures for an administrative appeal of this decision. The White House component to which the Task Force is "assigned" will not have regulations governing FOIA, because it will not be FOIA agency. In this case, there is no reason why it cannot borrow the appeal procedures of another component that is subject to FOIA. Under 5 U.S.C. § 552(a)(6)(A)(ii), the Task Force would have to decide any such appeal within twenty business days. Normally, plaintiffs would not be able to challenge withholding of documents in court until they had exhausted this administrative appeal process. See Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990). Given the time frame involved, however, plaintiffs might seek judicial review prior to exhausting their remedies by arguing that, otherwise, they would be denied meaningful relief.

B. Applicability of Section 10(b) to the Task Force

An argument can be made that the "subject to section 552 of Title 5" language of § 10(b) exempts non-FOIA agencies, such as certain components of the Executive Office of the President to which the Task Force may be "assigned" and, thus, the Task Force itself from FACA's document access requirements. Such a result would exempt at least all Presidentially-established FACA committees assigned to non-FOIA offices from FACA's document access provisions. We believe that such a position would not ultimately prevail. Cf. Food Chemical News, 980 F.2d 1468. In the first place, such a result would be contrary to the intent of Congress to open advisory committee deliberations to the public. Nor would it make much sense for Congress to require such FACA committees to conduct open meetings, but allow them to shield their documents from the public. If open committee meetings are to be truly meaningful for the public, interested persons should presumably have access to the documents at issue in these meetings. See Food Chemical News, 980 F.2d at 1472. As a result, we conclude that Task Force documents, except those protected by a privilege, are subject to public inspection "until the Task Force ceases to exist." § 10(b).

C. Scope of Section 10(b)

The difficulty in applying § 10(b) to the Task Force arises in construing the requirement that records "made available to or prepared for" the Task Force be subject to disclosure. FACA's legislative history offers no interpretive guidance and no cases have dealt with the question. The issue is further confused by the fact that Task Force members may act in multiple official capacities. In the course of their other duties, Task Force members undoubtedly receive documents that might be relevant to the work of the Task Force. Section 10(b) cannot logically extend to *all* materials in the possession of individual Task Force members which might relate to health care reform issues. Nonetheless, determining in what capacities Task Force members act when they receive such documents may not be a simple task.

1. Documents in the Possession of the Task Force

As an initial matter, it seems clear that any documents in the possession of the Task Force as a group are "available to" the Task Force. Magaziner Decl. ¶ 22 states that mail sent to the First Lady and Mr. Magaziner on health care issues has been handled by the "intake center." This intake center is apparently part of the Task Force's office. Accordingly, we believe that documents stored within this Task Force repository are "available to" the Task Force and subject to § 10(b), even if the Task Force members have not read them.

Similarly, any records that have actually been distributed to all Task Force members in their Task Force capacities are subject to disclosure, unless privileged. Such records might not be housed in the intake center, but any documents that have been in the possession of each Task Force member, even if temporarily, are Task Force documents, subject to disclosure unless privileged.

2. Documents in the Possession of Individual Task Force Members

A more difficult issue is presented when documents are (or have been) in possession of some, but not all, Task Force Members. As a preliminary matter, records made available to Task Force members in their separate capacities as high-ranking government officials should not be regarded as Task Force documents. We would expect, for example, that most health care related documents made available to the First Lady and Ira Magaziner were furnished to them as either a member of the Task Force, or, in Mr. Magaziner's case, head of the working group. It may well be, however, that many health care related documents made available to other Task Force members, such as Secretary Shalala, were furnished to them in their non-Task Force capacities.

That being said, an argument could be made that § 10(b) applies only to documents provided to the Task Force as a whole -- that is, to <u>every</u> Task Force member. Section 10(b) refers to documents made available to the "advisory committee," <u>see</u> FACA, § 3(2), rather than, for example, "advisory committee members." To some extent, this question parallels an issue discussed previously about whether some, but not all, Task Force members could meet without public notice. We expressed concern that dividing the Task Force into informal "subgroups" for meetings might be seen as circumventing FACA and the Court's Order. Similarly, if an advisory committee could shield its documents simply by refraining from distributing them to all members, the statutory goal of openness would arguably be frustrated.

To be sure, one could hypothesize a "typical" FACA committee in which individuals representing private interests ("balanced" out in the committee as a whole) each receive documents from their interest group allies containing facts and evidence for discussion purposes. Although the documents are not generally circulated, it is not difficult to assume that Congress would have intended the public to have access to such documents so that it could determine the extent to which private interests were at work on the committee. The better view, therefore, is that documents made available to one or more Task Force members are Task Force documents as such documents may play a role in the Task Force's deliberations as a whole. As we discuss below, many such documents may be subject to a claim of privilege.

3. Working Group Documents

The working group has been held not to be a FACA committee and is therefore exempt from the document disclosure provision of FACA. Documents created or received by the working group are not covered by § 10(b). Nonetheless, any working group documents which are prepared for or made available to the Task Force are subject to § 10(b). Thus, to the extent the working group forwards any materials to the Task Force for its consideration, those documents must be released, unless privileged.

4. Documents Available to Mr. Magaziner

Documents received by Mr. Magaziner present a somewhat more difficult issue, because Mr. Magaziner serves a dual role as Task Force member and head of the working group. In order to preserve the confidentiality of working group documents, it will be necessary to draw a bright line between those documents received by Mr. Magaziner in his capacity as head of the working group, and those made available to him as a Task Force member.

We recommend drawing the line sharply in favor of Mr. Magaziner's capacity as head of the working group. Specifically, we believe it should be presumed that Mr. Magaziner receives all documents in his capacity as head of the working group unless he takes affirmative steps to make such materials available to the Task Force. Cf. National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524 (D.D.C. 1983) (FACA committee members chaired task forces found not to be covered by FACA). Such a view is supported by the fact that the work of the Task Force is far more limited than that of the working group. Most of Mr. Magaziner's day-to-day dealings apparently involve the working group and not the Task Force itself.

D. Availability of the Deliberative Process Privilege

Once it is determined that a document is a Task Force document within the meaning of § 10(b), it may only be withheld if it falls within a FOIA exemption. The question has arisen whether the Task Force may withhold under § 10(b) materials covered by the deliberative process privilege of FOIA exemption 5. In his order, Judge Lamberth assumed, without analysis, that the deliberative process privilege does apply to advisory committee documents. This assumption provided the basis for his finding that § 10(b) did not violate the separation of powers as applied to the Task Force.

1. Application of the Deliberative Process Privilege to Advisory Committees

Judge Lamberth's holding marks a departure from views expressed in other cases in this District as well as the position taken by the Department of Justice that the deliberative process privilege does not apply to advisory committee documents. The wording of § 10(b) itself suggests that Congress did not intend to permit committees to withhold deliberative materials. Section 10(b) specifically requires advisory committees to release their "drafts" and "working papers." These materials are per se deliberative, and therefore Congress could not have intended to permit withholding under Exemption 5. Exemption 5 itself only applies to "inter-agency" or "intra-agency" documents. Since an advisory committee is not an agency, it is doubtful that Exemption 5 applies to documents prepared by an advisory committee. In addition, the entire purpose of FACA, as evidenced by the legislative history, is to open up the deliberations of advisory committees to public scrutiny.

Finally, two judges in the District of Columbia have considered this issue. In Wolfe v. Weinberger, 403 F. Supp. 238, 242-3 (D.D.C. 1975), Judge Richey explicitly held that Exemption 5 does not apply to advisory committee documents. More recently, Judge Joyce Green described as "entirely unpersuasive" the argument that the deliberative process exemption may shield advisory committee documents. Washington Legal Foundation v. Department of Justice, 691 F. Supp. 483, 495 (D.D.C. 1988), aff'd sub nom. on other grounds Public Citizen v. Department of Justice, 491 U.S. 440 (1989).

In litigation, the Justice Department has consistently taken the position that advisory committees may not withhold deliberative documents under Exemption 5. This is the position the Department took before the D.C. Circuit in National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir 1983). In the Washington Legal Foundation case, the Department argued this position in both the District Court and the Supreme Court. Establishing this point was critical to our argument that the application of FACA to Presidential commissions was an unconstitutional infringement on Executive powers. We argued that, because FACA does not permit invocation of the deliberative process privilege, it infringes upon this Executive power when applied to Presidential commissions.

2. Application of the Deliberative Process Privilege to the Task Force

While we therefore disagree with Judge Lamberth's view of the applicability of that part of exemption 5, we reach the same non-disclosure conclusion by a different route. The other side of Judge Lamberth's exemption 5 coin is that separation of powers requires recognition of a deliberative process privilege in the context of a presidential advisory committee. Cf. United States v. Nixon, 418 U.S. 683 (1974).

There are three purposes for the deliberative process privilege: 1) to encourage open, frank discussions on matters of policy; 2) to protect against premature disclosure of proposed policies before they are adopted and 3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for the agency's action. Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982). Application of the privilege to Task Force documents should reflect these policy considerations.

In brief, the deliberative process privilege applies to materials that are both "predecisional" and "deliberative." EPA v. Mink, 410 U.S. 73, 88 (1973); Wolfe v. Department of Health and Human Services, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). The former requirement is easily applied in this context, and the D.C. Circuit has held a document to be deliberative if it "reflects the give-and-take of the consultative process." Access Reports v. Department of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991). Generally, factual material contained in a deliberative document must be disclosed while opinion can be withheld. Mink, 410 U.S. at 88. Yet, the rule cannot be applied mechanically. Wolfe, 839 F.2d at 774. When release of the factual materials "would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its function," the factual material may be withheld. Quarles v. Department of the Navy, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). The same is true if factual information and opinion are so inextricably intertwined that they cannot be segregated.

It is difficult to discern which Task Force documents are subject to deliberative process privilege in the abstract. Plainly, however, Judge Lamberth's motivating concern about confidentiality of the advice formulation process suggests that documents prepared by the Task Force itself for purposes of its deliberations designed to arrive at recommendations for the President would be privileged. It would be anomalous to permit the Task Force to deliberate in private but then require it to release the substance of those deliberations in writing. Indeed, such documents may well be subject to a claim of presidential communications privilege, but Judge Lamberth's implicit recognition of such a privilege in his constitutional analysis of the advice-formulation work of the Task Force does not require the Task Force to made a formal claim of it.

The deliberative process privilege would also apply to certain materials provided to the Task Force by other Executive Branch officials. In the same opinion that concluded that a FACA committee could not generally claim deliberative process protection over its documents, the Office of Legal Counsel concluded that agency documents transmitted to a FACA committee would be subject to deliberative process privilege protection if sought from the Task Force. Moreover, the D.C. Circuit has held that agency materials covered by the deliberative process privilege retain their privileged status even after they have been disclosed to an advisory committee. Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107 (D.C. Cir. 1976).[1]

The most difficult situation is presented by deliberative materials created by the working group for the Task Force. Under FACA, as soon as the working group makes, for example, an analysis of policy options available to the Task Force, they are subject to disclosure. Because the working group is not an agency, their materials would not normally be considered to be "intra- or inter-agency" for purposes of the deliberative process privilege.

It is not entirely clear whether the court has left an opening for such an argument. In one of the most confusing passages of his opinion, Judge Lamberth stated:

> Section 10(b) is also constitutional since the deliberative process exemption of the [FOIA] 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.

Slip op. at 25-26 (emphasis in original). Judge Lamberth probably did not specifically consider whether the deliberative process privilege would apply to working group documents that are made available to the Task Force because he accepted Mr. Magaziner's statement that such materials would be factual, and thus not ordinarily subject to the privilege. That admittedly does not explain the third sentence of the paragraph. Withholding working group documents presented to the Task Force would not necessarily impair the public's ability to ensure that special interests do not overly affect the Task Force or the working group. Public disclosure of documents presented by the public to the Task Force or working group would serve that purpose.

If, as Mr. Magaziner has suggested, documents presented to the Task Force from the working group are factual in nature, they are presumptively disclosable. However, depending on the

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[1] In 1976, Congress amended FACA expressly to reverse the Washburn Court's ruling that an advisory committee may close its meetings to conduct deliberations. However, these amendments do not disturb the Court's separate holding that an agency's deliberative documents remain privileged in the hands of an advisory committee.

document, it is quite possible that the presumption can be overcome. If these documents are factual, but reflect the exercise of judgment over what facts are relevant and worthy of reporting, deliberative process can be claimed. See Quarles, 893 F.2d at 392-93 (cost estimates prepared by the Navy are deliberative). If other documents go further and contain policy options or even recommendations, the argument in favor of claiming deliberative process is even stronger. Public disclosure could chill the candor by which staff report facts or policy options to those regarded as superiors. See Quarles, 893 F.2d at 393. Moreover, because the fact gathering and option selection process is an integral part of the system that the President has chosen to assist him in exercising his constitutional powers, a claim of privilege has constitutional dimensions. Given Judge Lamberth's constitutional line between fact gathering and advice formulation, we hesitate to rely on this latter point alone to support a claim of privilege, but the constitutional arguments made in our appeal brief might help shape a framework for dealing with documents that may not have been specifically addressed in Judge Lamberth's opinion and order.

E. A Specific Response to Plaintiffs' FOIA Request

We add, in conclusion, our thoughts on an appropriate response to each of the six requests made by the AAPS, which are broader and encompass the six requests made by the American Council for Health Care Reform.

a. The charter is, of course, a Task Force document and should be provided to plaintiffs.

b. The second request, which parallels § 10(b), has been discussed above. We note, however, that plaintiffs ask for documents that "will be" made available to the Task Force. Ordinarily, FOIA requests are not handled in a prospective nature; agencies have no continuing obligation to supply documents in response to a FOIA request after a reasonable search is made. However, the Task Force, under Food Chemical News, has a continuing obligation to make its documents publicly available. We do not believe that the Task Force has an obligation to inform the requestors each time a privileged document comes into its possession.

c. Schedules and agendas of the Task Force would ordinarily be Task Force documents. If, however, the Task Force intends to conduct its meetings without a written agenda, it has no obligation to create one.

d. This request largely overlaps the second one to the extent that working group or cluster group documents are made available to the Task Force, and is discussed in detail above.

To the extent that the request seeks documents simply made available to the working group or cluster groups or prepared by them, such documents need not be disclosed.

e. Assuming schedules and agendas of working and cluster group meetings exist, the Task Force has no obligation to make them available to plaintiffs unless the schedules and agendas of the working groups are made available to the Task Force.

f. The Task Force has no obligation to provide the requestors with the names and background histories of all consultants or advisors to the Task Force unless such information has been made available to the Task Force in a written form. The Task Force need not create documents to comply with this request.

U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE: 3/24/93

TO: Steve Neuwirth

White House Counsel's Office

FAX NUMBER: 456-6279

FROM: Jeff Gutman

Fax No. (202) 616-8202 (LOCAL) -- 369-8202 (FTS)
9th FLOOR

THERE ARE A TOTAL OF 11 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.