

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN	)	
PHYSICIANS AND SURGEONS, INC,	)	
AMERICAN COUNCIL FOR HEALTH	)	
CARE REFORM AND NATIONAL	)	
LEGAL & POLICY CENTER,	)	Civil Action
	)	No. 93-399
Plaintiffs,	)	
	)	(Judge Lamberth)
v.	)	
	)	
HILLARY RODHAM CLINTON,	)	
DONNA E. SHALALA, Secretary of	)	
Health and Human Services,	)	
LLOYD E. BENTSEN, Secretary of	)	
the Treasury, LES ASPIN,	)	
Secretary of Defense, JESSE	)	
BROWN, Secretary of Veterans	)	
Affairs, RONALD H. BROWN,	)	
Secretary of Commerce, ROBERT	)	
B. REICH, Secretary of Labor,	)	
LEON E. PANETTA, Director of	)	
the Office of Management and	)	
Budget, ALICE RIVLIN, Deputy	)	
Director of the Office of	)	
Management and Budget, CAROL	)	
RASCO, IRA MAGAZINER and	)	
JUDITH FEDER, White House	)	
Advisors and THE PRESIDENT'S	)	
TASK FORCE ON NATIONAL	)	
HEALTH CARE REFORM,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION FOR A TEMPORARY RESTRAINING ORDER AND A
TEMPORARY INJUNCTION AND IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

On January 25, 1993, President Clinton announced the creation of the President's Task Force on National Health Care Reform (the "Task Force") to assist him in formulating proposals for health care reform legislation. The Task Force, which has

yet to meet, is composed of six Cabinet secretaries, several senior White House officials, and the First Lady, who serves as chair. The President also announced the formation of an inter-departmental working group (the "working group") charged with gathering and analyzing information that the Task Force will use to advise the President. The working group has begun an intensive effort to document the impact of existing health care policies and to collect information on possible alternatives.

Plaintiffs seek to enjoin on an emergency basis unscheduled meetings of the President's Task Force and meetings of the working group with members of the Task Force. Plaintiffs ask the Court to prevent the President from obtaining policy advice from his closest advisors on an issue of crucial national significance, in the manner he has judged best serves his needs, by claiming that his doing so violates the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2.

FACA was intended to apply only to advisory committees containing government "outsiders" whose private interests could surreptitiously taint recommendations sought by government decision-makers. FACA, consequently, excludes from its scope any committee comprised wholly of full-time federal "officers" or "employees." Plaintiffs assert that the First Lady is not a federal "officer" or "employee," and that, therefore, her presence on the Task Force triggers FACA.

Offering no evidence that their claim has support in legislative intent, plaintiffs' argument is premised on precisely

the type of literalistic interpretation of FACA renounced by the Supreme Court in Public Citizen v. U.S. Department of Justice, 491 U.S. 440 (1989). Recognizing the "almost unfettered breadth" of FACA, the Court in Public Citizen rejected a formalistic reading of FACA that would apply it to every consultation between the President and a private group rendering advice, a result plainly unintended by Congress. Instead, the Court adopted a contextual reading of the Act, grounded in FACA's purpose and legislative history, that avoids its absurd applications and serious questions of its constitutionality.

Here, FACA's language, structure and history evidence Congress' concern about private sector influence in advisory committees and expressly disclaim the need, if not the propriety, to regulate groups of government insiders. There is no evidence that Congress intended FACA to apply to a task force composed solely of Cabinet secretaries, White House officials and the First Lady. The presence of the First Lady on such a committee implicates none of Congress' concerns about private, outside influences on secretive advisory committees. To the contrary, the First Lady's unique position inside our government is not only a matter of historic record, but has been recognized by Congress, which has for many years authorized funding and staff for the President's spouse to assist the President in the performance of his duties.

In addition, plaintiffs' interpretation of FACA yields the same type of absurd results that the Supreme Court in Public

Citizen held should be avoided. Plaintiffs' theory would allow the First Lady's chief of staff (a full-time federal officer or employee) to serve on the Task Force without triggering FACA, but would require application of FACA if the First Lady participates.

Not only does a contextual reading of FACA's language in light of its purpose weigh strongly against plaintiffs' interpretation, but so do the constitutional questions presented by such a construction. The Supreme Court in Public Citizen found that the application of FACA to an ABA committee that advised the President on judicial nominees would raise "undeniable" constitutional questions. It would interfere with the President's express constitutional power to nominate federal judges. If FACA were found to apply to the Task Force and thus regulate the method by which the President obtains recommendations from his closest advisors, it would similarly impair the President's ability exercise his exercise his constitutional power under Art. II, § 3 to make legislative recommendations to Congress. Such an interference with the President's prerogatives would violate separation of powers principles.

Because the Task Force is not subject to FACA, plaintiffs' secondary claim that meetings between any Task Force members and its working group also require public notice and access is meritless. Assuming arguendo that the Task Force is a FACA committee, however, meetings between certain Task Force members and members of the working group are not subject to FACA. This court has held that FACA applies, if at all, only to bodies that

directly furnish advice and recommendations to the President. Neither the working group nor these meetings produce such advice.

Finally, although plaintiffs appear to assert that the Government in the Sunshine Act applies to the Task Force, they do not -- and cannot -- show that groups of this sort trigger the Sunshine Act. For these reasons, plaintiffs' motion for a TRO should be denied. And, because the legal arguments demonstrate that the Complaint fails to state a claim upon which relief can be granted, defendants' motion to dismiss or, in the alternative, for summary judgment be granted.¹

Plaintiffs' assertions of imminent, irreparable injury are also insufficient to support the emergency relief sought. Their claims are wholly contingent on a non-existent right to attend meetings of the Task Force and meetings of its working group. Because the Task Force has not met and is not scheduled to do so in the immediate future, plaintiffs offer no showing of imminent harm. Plaintiffs' interest in attending meetings between Task Force members and the working groups is a newly minted one; they have never sought permission to attend these meetings, which have proceeded unimpeded for over a month without complaint by

¹ We recognize that the Court will not hear defendants' motion to dismiss or, in the alternative, for summary judgment on March 5, but rather intend that our argument on the merits advanced in this brief serve as our initial memorandum on our motion to be further briefed in accordance with the Local Rules. Should our motion be treated as one for summary judgment because the Court relies to some extent on the Declaration of Ira Magaziner, a statement of material facts as to which there is no genuine dispute is provided herewith pursuant to Local Rule 108(h).

plaintiffs, legal or otherwise.

Moreover, plaintiffs' assertion, Complaint, § H, ¶ 36, that they have been denied a right to attend "all" Task Force meetings is belied by the written assurance of the Counsel to the President that some meetings of the Task Force will be open to the public and that citizens and organizations will have an opportunity to present their views at them. Indeed, the Counsel provided plaintiffs with the name and phone number of a White House staff member to contact if they wished to participate in such a meeting. Rather than doing so, plaintiffs filed this lawsuit.

The balance of equities also counsels against injunctive relief. The President created the Task Force and chose its members in a manner he believed best facilitated the prompt development of recommended legislative proposals for health care reform. Consistent with that purpose, the Task Force will hold open meetings that provide members of the public and organizations an opportunity to express their views and learn of the proposals that the Task Force is considering. The inter-departmental working group has already provided, and will continue to provide, numerous formal and informal opportunities for such public input. To subject the Task Force to FACA would, however, deprive it of the structural and procedural flexibility the President judged to be necessary for studying health care reform. To apply FACA to all meetings held between Task Force and working group members would be an administrative nightmare

that would gravely impair the Task Force's urgent work.

Plaintiffs' interests pale by comparison. They will have numerous opportunities to "protect their interests" and to develop responses to whatever legislative proposals the President presents to Congress. Plaintiffs can provide written or oral input to the interdepartmental working group; attend scheduled open health care forums that will be attended by the First Lady, other Task Force members and working group members; and attend the open meetings of the Task Force when they occur. Plaintiffs' policy positions may enrich the public debate over health care reform, but their legal position offers this Court no basis for awarding emergency or permanent injunctive relief.

FACTUAL BACKGROUND

On January 25, 1993, President Clinton announced the formation of his Task Force on National Health Care Reform. See Complaint, Exh. A, and Declaration of Ira Magaziner ("Magaziner Decl."), ¶ 2 [Attachment 1].² The Task Force is charged with developing recommendations to him for legislation on comprehensive health care reform. Id.

The Task Force is chaired by First Lady Hillary Rodham Clinton, and is comprised of Secretary of the Treasury Lloyd

² Few, if any, facts are required to resolve plaintiffs' motion and to dismiss this lawsuit. The Task Force is not a FACA committee as a matter of law and, therefore, neither is its working group. Nonetheless, because plaintiffs have informally requested information about the structure, purpose and operation of the Task Force and working group, we have provided these facts in Mr. Magaziner's detailed declaration. By doing so, we do not concede that most of these facts are relevant or have any legal significance here.

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. Complaint, Exh. A; Magaziner Decl. ¶ 3.³

Mr. Magaziner heads an interdepartmental working group comprised solely of federal employees that has approximately 340 members. Magaziner Decl. ¶¶ 11-12. The working group gathers and analyzes information concerning the impact of existing health care policies and possible alternatives to those policies. *Id.*, ¶¶ 5, 10, 19. The working group is divided into fifteen "cluster" groups, each of which is studying a particular health care subject area. *Id.*, ¶ 15. The information compiled by the working group will be used by the Task Force in formulating its recommendations to the President. *Id.*, ¶ 5. Only the Task Force has authority to forward recommendations and advice to the

³ The Complaint names the Task Force, its members (except Mr. Rubin and Dr. Tyson), Alice Rivlin, Deputy Director of OMB and Judith Feder, a White House Advisor, as defendants. The proper defendant in a FACA case is the governmental entity that has established or utilized the committee, not the Task Force or its members. See Washington Legal Foundation v. American Bar Ass'n., 648 F. Supp. 1353, 1359 (D.D.C. 1986). In any event, it is inappropriate to sue the Task Force members in their individual capacities, as plaintiffs have done, or to sue Ms. Rivlin and Ms. Feder, who are not members of the Task Force. Magaziner Decl. ¶ 3.

President. Id. The working group has no such authority and will not directly advise the President. Id.

By letters dated February 9 and 11, plaintiffs asked to attend the meetings of the Task Force pursuant to § 10 of FACA. Complaint, Exhs. B, C, D. The Counsel to the President promptly and separately responded to each. Complaint, Exhs. E, F, G. He explained that the Task Force had not yet met and had not scheduled any meetings. Id. While he advised plaintiffs of defendants' view that FACA did not apply to the Task Force, he did say that the Task Force intended to hold some public hearings at which time citizens, organizations and institutions will have an opportunity to present their views. Id.; see also Magaziner Decl. ¶ 8. These meetings have not been scheduled, but will be announced in advance. Complaint Exhs. E, F, G. The Counsel to the President invited each of the plaintiffs to contact a member of the White House staff to express its interest in attending any such meeting and to arrange for receiving notice of it. Plaintiffs have not done so. See Magaziner Decl., ¶ 30. To date, no meetings of the Task Force have been held or scheduled. Id., ¶¶ 4, 6.

The public is free to present ideas or suggestions to the working group, and thousands of people and groups have done so. Id., ¶¶ 21, 22. In addition, members of the working group have met with numerous outside organizations to obtain public input. Id., ¶¶ 23-25. The First Lady has also participated and will continue to participate in public forums and conferences that

address issues relevant to health care reform. Id., ¶ 26.

STATUTORY BACKGROUND

FACA sets forth two basic sets of congressional policies. First, the Act contains a mechanism to review the need for the panoply of boards, committees and commissions that had existed when FACA was enacted and to eliminate those not determined to be essential. 5 U.S.C. App. 2 § 2(b)(1)-(3). Second, FACA established uniform standards and procedures for the creation and public operation of certain advisory committees. 5 U.S.C. App. 2 § 2(b)(4)-(6).

These provisions are designed to serve two different functions: to reduce the expense of wasteful and unnecessary advisory commissions, and to ensure that those remaining groups falling within FACA's definition of an "advisory committee" operate openly and are not dominated by the special interests of those in the private sector. See H. Rep. No. 92-1017, 92d Cong, 2d Sess. 2, 6 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3492, 3496. The definition of "advisory committee" reflects this latter purpose:

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

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes . . . (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

§ 3(2). Committees composed wholly of full-time officers and employees are exempt from FACA because they do not contain government "outsiders" whose private interests could color the advice provided federal policymakers. S. Rep. No. 92-1098, 92nd Cong., 2d Sess. at 17 [Attachment 2].

Committees covered by FACA are subject to certain structural requirements regarding the nature of their membership, intended to avoid the development of biased advice tainted by the private interests of their members.⁴ In part to ensure compliance with these standards, FACA committees are subject to several procedural requirements generally aimed at opening committee meetings and materials to the public.⁵

⁴ FACA committees are to contain membership that is "fairly balanced in terms of the points of view represented and the functions to be performed." § 5(b)(2). The advice of the committee should not be "inappropriately influenced" by the appointing authority or any special interest, but "will instead be the result of the advisory committee's independent judgment." § 5(b)(3). FACA also requires that, unless otherwise provided, advisory committees be used solely for advisory functions: "determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government." § 9(b).

⁵ Advisory committees must file a charter, § 9(c), and provide advance public notice of their meetings. § 10(a)(2). Such meetings are open to the public, § 10(a)(1), unless the President or agency head determines to close them in accordance with the Government in the Sunshine Act, 5 U.S.C. § 552b(c). § 10(d). An officer or employee of the federal government is required to chair or attend advisory committee meetings. § 10(e). Records, reports, transcripts, minutes and other documents made available to or prepared by the committees are to be made public unless they are exempted from disclosure by the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. § 10(b). The transcripts of advisory committee meetings are to be made publicly available. § 11(a).

ARGUMENT

PLAINTIFFS FAIL TO SATISFY THE PREREQUISITES FOR EMERGENCY INJUNCTIVE RELIEF.

A temporary restraining order is an extraordinary form of relief. The general requirements for obtaining such relief are well established: "Under this circuit's long-standing test, the District Court should consider (1) the plaintiff's likelihood of prevailing on the merits, (2) the threat of irreparable injury to the plaintiff in the absence of injunctive relief, (3) the possibility of substantial harm to other interested parties from the injunctive relief, and (4) the interests of the public." Foundation on Economic Trends v. Heckler, 756 F.2d 143, 151 (D.C. Cir. 1985) (citing WMATC v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977)); See National Treasury Employees Union v. United States, 927 F.2d 1253, 1254 (D.C. Cir. 1991).

A. Plaintiffs Have Demonstrated No Likelihood of Success on the Merits.

1. The Task Force is Not a FACA Committee.

Plaintiffs argue that the Task Force is a FACA committee because it was established by the President in the interest of obtaining advice or recommendations. Plaintiffs' Memorandum of Points and Authorities in Support of Motion for a Temporary Restraining Order and Temporary Injunction ("Pls' TRO Mem.") at 13-17. They assert that the express exception in FACA for committees composed wholly of full-time officers or employees of the federal government does not apply because the First Lady is a member of the Task Force. Id. at 17-20. They conclude that the

Task Force is therefore subject to FACA.⁶ Deceptively simple, plaintiffs' formalistic interpretation of FACA finds no support in FACA's purpose and legislative intent, conflicts with the Supreme Court's method of interpreting FACA set forth in Public Citizen, and, if accepted, would require FACA to be invalidated as violative of the constitutional separation of powers.⁷

⁶ Plaintiffs' Complaint and brief suggest a violation of the Government in the Sunshine Act, 5 U.S.C. § 552b. This is not a Government in the Sunshine Act case. The Sunshine Act's open meeting requirements apply only to agencies that both fall within the Freedom of Information Act's definition of "agency," 5 U.S.C. § 552(f), and are "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." 5 U.S.C. § 552b(a)(1). The Task Force satisfies neither requirement. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980) (units in the Executive Office of the President whose sole function is to advise and assist the President are not FOIA agencies); Meyer v. Bush, No. 92-5029, 1993 U.S. LEXIS 228 (D.C. Cir. Jan. 8, 1993) [Attachment 3] (Task Force on Regulatory Relief is not an agency under FOIA); National Security Archive v. Archivist of the United States, 909 F.2d 541, 545 (D.C. Cir. 1990) (White House Counsel's Office is not a FOIA agency); Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1044-44 (D.C. Cir. 1985) (CEA is not a FOIA or Sunshine Act agency). See also H. Rep. No. 94-880 Part 1, 94th Cong., 2d Sess. 7-8 (1976), reprinted in 1976 U.S.C.C.A.N. 2183, 2189 (definition of agency in Sunshine Act generally does not include advisory committees).

⁷ Plaintiffs offer the views of a Member of Congress contained in a letter to the President in apparent support of their interpretation of FACA. Affidavit of Genevieve M. Young, Att. 1. The interpretation by a single Member of Congress of a law enacted twenty years ago is, however, entitled to no weight. United States v. Clark, 445 U.S. 23, 33 n.9 (1980); Walsh v. Brady, 927 F.2d 1229, 1233 n.2 (D.C. Cir. 1991).

- a. Congress Did Not Intend the Membership of the First Lady on a Task Force of Government Officials to Trigger FACA.

Plaintiffs' literalistic construction of FACA runs afoul of a cardinal rule of statutory interpretation used by the Supreme Court:

[I]n expounding a statute, we are not guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy.

Dole v. United Steel Workers of America, 494 U.S. 26, 35 (1990). The Supreme Court has cautioned that "a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 (1991); see also Crandon v. United States, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

As we describe in greater detail below, the Supreme Court employed precisely this mode of statutory analysis in construing FACA in Public Citizen. Plaintiffs, instead, ask this Court to look no further than an handful of words in FACA -- "full-time federal officer or employee" -- to decide this case. The meaning of these words and Congress' intent in using them, however, has a deeper and richer context. FACA's language, structure and purpose reflects a government "insider/outsider" dichotomy, whereby advisory committees comprised of government insiders are not covered by FACA, but those established by the government containing members of the private sector are. History,

legislative enactments and practical realities place this First Lady and all First Ladies among the President's closest advisors and government "insiders."

When Congress drew a line in FACA between federal employees and "non-federal employees," it intended that line as a proxy for distinguishing between those in the public and private sectors.

According to the Senate Report:

After analysis of the hearings and background materials, it was felt that the main problems of proliferation, confusion and operational abuse lay with those advisory committees whose membership in whole or in part comes from the public sector.⁸ Further, it was felt that the manner of controlling the number and activities of inside-government committees was better left to the President, the OMB and the agencies which had sufficient legislative and administrative authority to deal with the problem.

S. Rep. No. 92-1098 at 8 (emphasis added).⁹ Congress plainly saw no need for FACA to cover groups composed wholly of government "insiders," because such people pose no risk of advancing recommendations tainted by the private interests of its

⁸ Read in context, the Senate's use of the term "public sector" obviously refers to the non-governmental "public," a body of people commonly referred to as the private sector.

⁹ See 118 Cong. Rec. 30280 (Sept. 12, 1972) (Statement of Sen. Roth) (bill "addresses itself to the danger of private interests exercising unfair influence on governmental decisions"), 118 Cong. Rec. 30276 (Sept. 12, 1972) (Statement of Sen. Percy (advisory committees may be "nesting places" for special interests); 118 Cong. Rec. 16297 (May 9, 1972) (Statement of Rep. Brown) (bill designed to mitigate dominance by special interests); 118 Cong. Rec. 16298 (May 9, 1972) (Statement of Rep. Thone) (same).

members.¹⁰

In contrast, apart from eliminating unneeded advisory committees and ensuring effective use of those that remained,¹¹ FACA was intended to prevent the creation of advisory committees comprised of members of special interest groups who might seek to advance those interests in providing advice to government decisionmakers:

One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received . . . pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committee which deal with matters in which they have vested interests.

H. Rep. No. 92-1017 at 3496. See Center for Auto Safety v. Federal Highway Admin., No. 89-1045, 1990 U.S. Dist. LEXIS 13733 at 4 (D.D.C. Oct. 12, 1990) (Lamberth, J.) [Attachment 5]; Food Chemical News v. Davis, 378 F. Supp. 1048, 1051 (D.D.C. 1974)

¹⁰ Interestingly, the Senate version of what was to become FACA, S. 3529, contained express definitions of "officer" and "employee" -- those set forth in 5 U.S.C. §§ 2104 and 2105. See S. 3529, § 3(6), (7) [Attachment 4]. The conference committee dropped these definitions from FACA, indicating that it rejected strict definitions of "officer" and "employee." See H. Conf. Rep. No. 92-1403, 92nd Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3508, 3509.

¹¹ When FACA was enacted in 1972, Congress estimated that between 2,600 and 3,200 advisory committees existed. H. Rep. No. 92-1017, 92d Cong, 2d Sess. 2 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3492. The Act was primarily intended to promote the effective use of advisory committees. H. Rep. No. 92-1017 at 3491. To do so, Congress required review of and reports on the activities of then-existing advisory committees established by Congress and the Executive Branch, uniform procedures for their operation and the termination of advisory committees unless rechartered. 5 U.S.C. App. 2 §§ 2, 5(a), 6(c), 7, 8, 14.

(Congress enacted FACA "to open to public scrutiny the manner in which government agencies obtain advice from private individuals" (emphasis added)).

Several provisions of FACA reflect Congress' worry about the influence of government "outsiders" on advisory commissions. Section 5(b)(2),¹² for example, requires the membership of FACA committees to be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."¹³ Adherence to these structural requirements may be monitored publicly through operation of FACA's procedural provisions that:

. . . serve[] to prevent the surreptitious use of advisory committees to further the interests of any special interest group. Along with the provisions for balanced representation contained in § 4 of the bill, this requirement of openness is a strong safeguard of the public interest.

¹² A growing body of case law has held that plaintiffs lack standing to enforce these requirements and that claims that they have been violated are not justiciable. Public Citizen v. Nat'l. Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 426 (D.C. Cir. 1989) (Silberman, J., concurring); Public Citizen v. Dept. of Health and Human Services, 795 F. Supp. 1212 (D.D.C. 1992). This does not detract from the point that these provisions reflect Congress' concern about the unregulated presence of special interests on advisory committees.

¹³ In addition, when creating such committees, Congress and the Executive Branch are to assure that the recommendations of the committee are not "inappropriately influenced" by any special interest, but will "instead be the result of the advisory committee's independent judgment." Section 5(b)(3). An officer or employee of the federal government must attend all FACA committee meetings, § 10(e), in order to "guard against possible antitrust violations and conflicts of interest." S. Rep. No. 92-1098 at 17. Finally, if it were not clear from their inherent nature, § 9(b) provides in no uncertain terms that FACA committees are to be purely advisory and that Executive Branch decisionmakers make policy. See also §§ 2(b)(6), 6(b).

H. Rep. No. 92-1017 at 3500; see also S. Rep. No. 92-1098 at 16.¹⁴ In short, Congress' concern that advisory committees not become vehicles to advance the agendas of special interests underlies FACA's structural "balance" requirements and procedural "openness" provisions. See Center for Auto Safety, No. 89-1045, slip op. at 4 ("by requiring advisory groups to adhere to certain procedural safeguards . . . Congress hoped to expose the advisory process to public scrutiny and curb abuses of the advisory process by private interest groups.").

Analysis of this legislative intent offers two closely connected lessons that should be applied here. First, the First Lady's membership on the Task Force with eleven high-ranking federal officials raises no conceivable specter of inappropriate special interest influence on the Task Force. Cf. Natural Resources Defense Council v. Herrington, 637 F. Supp. 116, 120 (D.D.C. 1986) (group of scientists convened to study safety of nuclear reactor is not a FACA committee because recommendations will not possibly be motivated by private interest). A First Lady is, simply, not the sort of "outsider" whose presence on an advisory committee was of concern to Congress.

Second, and as importantly, the spouse of the President is hardly a private citizen or a regular member of the public.

¹⁴ Subject to exceptions found in the FOIA and the Sunshine Act, every FACA committee meeting must be open to the public following public notice, § 10(a)(1), documents furnished to or prepared by such committees are publicly available, § 10(b), minutes of the committee meetings are kept, § 10(c), and transcripts of the meetings are made public. § 11(a).

Without question, ordinary citizens do not conceive of the First Lady as a member of the private sector. Nor do Presidents, who have long assigned their spouses functions relating to the operation of government. Eleanor Roosevelt gave press conferences, was actively involved in domestic reform efforts and led certain war relief efforts. Lady Bird Johnson headed highway and other beautification projects. Nancy Reagan campaigned against drug use.¹⁵

In recognition of this long tradition, Congress has authorized the expenditure of federal funds for assistance and services, including a staff and office space, provided to the First and Second Ladies in connection with their efforts to assist the President and Vice-President in discharging their duties and responsibilities. 3 U.S.C. §§ 105(e), 106(c).¹⁶ These statutory provisions, enacted in 1978, not only acknowledge that spouses help the President and Vice-President in carrying

¹⁵ See Myra G. Gutin, The President's Partner: The First Lady in the Twentieth Century 81 (1989); Lewis L. Gould, Modern First Ladies in Historical Perspective, 15 Presidential Studies Quarterly 532, 534 (1985); Margaret Brown, The First Ladies (1989).

¹⁶ 3 U.S.C. § 105(e) provides, in pertinent part:

Assistance and services authorized pursuant to this section to the President are authorized to be provided to the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities.

3 U.S.C. § 106(c) is the same with regard to the spouse of the Vice-President, but includes the word "executive" prior to "duties."

out their duties, but permit the expenditure of public funds needed to do so.

Congress' recognition of the singular and important roles that the First and Second Ladies play in assisting and advising the President and Vice-President in their governmental responsibilities supports the view that these spouses are functionally equivalent to federal employees for purposes of FACA. That Congress has allowed federal funds to be spent for assistance and services provided to the spouses in these efforts only underscores the point. Just as it has authorized the payment of federal funds for salaries to federal officers and employees to enable them to discharge their public responsibilities, Congress has authorized the First and Second Ladies the federal resources necessary to enable them to conduct theirs.

Significantly, 3 U.S.C. §§ 105(e) and 106(c), which reflect a contemporary appreciation for the distinctive responsibilities of Presidential and Vice-Presidential spouses in our government, were enacted in 1978, six years after FACA. See Pub. L. No. 95-570, 92 Stat. 2445 (1978). While subsequent legislation is not conclusive in constructing previously enacted laws, sections 105(e) and 106(c) should inform a flexible and appropriate interpretation of FACA. Cf. Great Northern Ry. Co. v. United States, 315 U.S. 262, 277 (1942); Doe v. DiGenova, 779 F.2d 74, 82 (D.C. Cir. 1985).¹⁷

¹⁷ Plaintiffs formulate a Catch-22 that is easily sidestepped. They suggest that, if the First Lady is not a federal employee, FACA is violated; if she is a federal employee,

Notwithstanding that First Ladies have long served as agents of the President and the functional equivalent of federal employees, plaintiffs argue that a statute designed to regulate the process by which outsiders provide advice to the government applies to a task force composed of federal employees and the First Lady. Not surprisingly, plaintiffs offer no legislative history or evidence of legislative intent that Congress meant to exempt from FACA a group that contains all federal employees but to apply it to the same group that adds the First Lady to its ranks. No such evidence exists to support plaintiffs' claim.

b. The Supreme Court in Public Citizen Has Rejected Literalistic Interpretations of FACA That Produce Odd and Unintended Results.

The analysis defendants offer is neither novel nor requires a departure from time-honored methods of statutory construction. In fact, precisely the same contextual approach to applying FACA in a manner that is faithful to both FACA's language and purpose was advanced by the Supreme Court in Public Citizen v. U.S.

then the anti-nepotism law, 5 U.S.C. § 3110, is violated. Pls' TRO Mem. at 17 n.2; Complaint, ¶¶ 22-23. Again, plaintiffs labor under the misconception that the First Lady can or should be placed in one category or the other.

In any event, 5 U.S.C. § 3110 does not apply to the First Lady's appointment to the Task Force regardless of FACA. 5 U.S.C. § 3110(b) precludes public officials from appointing relatives to positions in the "agency" in which they exercise jurisdiction or control. "Agency" is defined as an executive agency, an office in the legislative or judicial branches or the government of the District of Columbia. 5 U.S.C. § 3110(a)(1). The Task Force falls into none of these categories. See 5 U.S.C. §§ 551(1), 552(f) (defining "agency" for purposes of FOIA) and fn. 6, supra, citing cases that exclude from the definition of "agency" units of the Executive Office of the President whose sole function is to advise and assist the President.

Department of Justice, 491 U.S. 440 (1989).

In Public Citizen, plaintiffs argued that the ABA's Standing Committee on Federal Judiciary was a FACA committee because the Justice Department sought the Committee's advice on potential judicial nominees. Although the Committee was not "established" by the Justice Department, it did provide "advice or recommendations" to it. See 5 U.S.C. App. 2 § 3(2). The issue in the case was whether the Committee was "utilized" by the President or Justice Department and thus subject to FACA. See Public Citizen, 491 U.S. at 452.

The Court readily acknowledged that the Justice Department "utilized" the Committee in the ordinary meaning of that term. Public Citizen, 491 U.S. at 452. The Court, however, recognized the ramifications of the "unfettered breadth of a dictionary-reading of FACA's definition of 'advisory committee.'" Id. at 452 n.8. Strict adherence to the statutory language would, according to the Court, yield the nonsensical result that FACA applies to every "formal and informal consultation between the President or an Executive agency and a group rendering advice." Id. at 453.¹⁸

The Court rejected the "plain-meaning rule" as a guide for interpreting FACA because "[a] literalistic reading . . . would

¹⁸ See Natural Resources Defense Council v. EPA, 806 F. Supp. 275, 277 (D.D.C. 1992) (describing such a construction of FACA as a "Pandora's box"); Natural Resources Defense Council, 637 F. Supp. at 118-19 (noting that, literally read, FACA applies to "virtually any convocation of two or more persons from whom any federal official desired information").

catch far more groups and consulting arrangements than Congress could conceivably have intended." Id. at 462-63.¹⁹ Seeking to avoid a literal reading of FACA that would "compel an odd result," id. at 454 (citation omitted), the Court turned to a "search for other evidence of congressional intent." Id. Analysis of legislative history allowed the Court to develop principles for understanding Congress' intent in employing the term "utilized." So understood, the Court concluded that the Executive Branch did not "utilize" the ABA Committee for purposes of FACA. Id. at 455-65.²⁰

Offering the same sort of formalistic reasoning as that rejected by the Court in Public Citizen, plaintiffs assert that the First Lady is not a federal employee and conclude that the Task Force is, therefore, a FACA committee. Plaintiffs' interpretation of FACA, however, produces as curious a result here as those avoided in Public Citizen. Plaintiffs' construction would

¹⁹ The Supreme Court was "convinced" that Congress did not intend to

extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice.

Public Citizen, 491 U.S. at 452.

²⁰ Ignoring Public Citizen, plaintiffs cite Center for Auto Safety v. Cox, 580 F.2d 689 (D.C. Cir. 1978), as suggesting that a "plain language" rule of statutory interpretation must always be applied to FACA. Pls' TRO Mem. at 19-20. Neither such a rule, nor the holding of Center for Auto Safety that FACA applies to all pre-existing, private entities utilized by the government for advice, survive Public Citizen. See Center for Auto Safety v. Federal Highway Admin., No. 89-1045, slip op. at 4-8.

require FACA to cover the Task Force because it includes the First Lady, but would not cover it if the First Lady's chief of staff (a paid federal employee) were a member instead. In short, plaintiffs' reading of FACA yields the perverse result that Presidents could not appoint their spouses to committees comprised of federal employees without triggering FACA, but would allow the committee to operate in private without them. Surely Congress intended no such result.

The principle we advance is really no different than the one articulated by the Supreme Court in Public Citizen. When a literal interpretation of FACA's provisions yields applications to situations Congress plainly could not have intended, these provisions should be construed with reference to FACA's structure and purpose. Such an interpretation here may reasonably be based on the proposition, undenied by plaintiffs, that the First Lady is not a typical private citizen or "outsider" whose presence on the Task Force implicates any of the concerns that Congress enacted FACA to prevent.

c. FACA Should Be Narrowly Construed to Avoid Constitutional Questions.

Plaintiffs devote but a footnote in their brief to addressing the constitutional question raised if FACA is applied in this context. Pls' TRO Mem. at 22 n.4. Neither the Supreme Court in Public Citizen nor several judges on this Court have been as reluctant to recognize the separation of powers issues inherent in FACA.

The district court in Public Citizen held FACA to apply to

the ABA Committee, but also held that doing so would impair the President's constitutional authority to appoint federal judges, Art. II, § 2, cl. 2, and thus would violate separation of powers principles. Washington Legal Foundation v. Department of Justice, 691 F. Supp. 483, 491-96 (D.D.C. 1988). On direct appeal, the Supreme Court in Public Citizen, however, applied the well-established principle that:

where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Public Citizen, 491 U.S. at 466 (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988)); see also Natural Resources Defense Council, 806 F. Supp. at 278 (applying same principle in support of limited interpretation of FACA); National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524, 530 (D.D.C.), aff'd, 711 F.2d 1071 (D.C. Cir. 1983) (same); Nader v. Baroody, 396 F. Supp. 1231, 1234-35 (D.D.C. 1975) (same).

Holding FACA to be unconstitutional, the district court applied the balancing analysis set forth in Nixon v. Administrator, General Services, 433 U.S. 425 (1977).²¹ The court

²¹ Under that test, ". . . in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. (citation omitted). Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within

found that applying FACA's open meeting provisions to the ABA Committee would potentially hinder frank discussions about potential nominees and thus inhibit the "President's freedom to investigate, to be informed, to evaluate, and to consult during the nomination process." Washington Legal Foundation, 691 F. Supp. at 493. In contrast, the court found no overriding congressional interest in applying FACA to the ABA Committee because the public accountability purposes of FACA would be satisfied through the subsequent Senate confirmation hearings. Id. at 495-96.

The majority of Justices in Public Citizen regarded the constitutional question as "serious" and "undeniable," 491 U.S. at 466-67, but avoided it through statutory construction. Justice Kennedy, writing for the three Justices concurring, found FACA to apply to the ABA Committee, id. at 467-82, but believed, like the district court, that such an application would violate separation of powers principles. Id. at 482-89.²²

the constitutional authority of Congress." Nixon, 433 U.S. at 443.

²² Again avoiding Public Citizen, plaintiffs rely solely on Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921 (D.C. Cir. 1982), for the proposition that FACA presents no separation of powers concerns. Pls' TRO Mem. at 22 n 4. Common Cause, which pre-dated the Supreme Court's decision in Public Citizen, dealt with whether NRC budget deliberations were exempt from the Government in the Sunshine Act. The D.C. Circuit concluded that they were not, and was, without explanation, not persuaded that separation of powers principles required closure of the NRC's budget process. Common Cause, 674 F.2d at 935.

Common Cause is easily distinguishable. First, Common Cause involved an agency, the procedures of which Congress has broad power to regulate. At issue here is Presidential power, derived

Application of FACA to the Task Force raises similar, and similarly avoidable, constitutional concerns. Cf. Franklin v. Massachusetts, 112 S. Ct. 2767, 2775-76 (1992) ("out of respect for the separation of powers and the unique constitutional position of the President," Court holds that the President's actions are not reviewable for abuse of discretion under the APA). As noted, the Task Force is charged by the President with developing his legislative proposals for the reform of the health care system. Such proposals are central to the President's overall economic recovery package and commitment to help the millions of Americans without health coverage. They must, therefore, be prepared thoughtfully and expeditiously. The President designed the Task Force, structurally and procedurally, to best accomplish his objectives.

The public has had and will have substantial opportunity to participate and to offer a diversity of views. To subject the President's Task Force to FACA's procedural requirements would, however, upset the operational flexibility he judged necessary to

directly from the Constitution. Second, Common Cause entertained a separation of powers argument based on Art. II, § 2, that allows the President to require opinions of the principal officers of his departments. Here, in contrast, we contend that the President's prerogatives under Art II, § 3 are impaired, not that application of FACA threatens an agency's permissive authority under Art. II, § 2. Third, that the Public Citizen majority regarded the constitutional question as serious and that the concurring Justices found it meritorious should put to rest any assertions that the constitutional issue here is insubstantial.

best produce timely and quality recommendations.²³ See Magaziner Decl. ¶ 31; National Anti-Hunger, 557 F. Supp. at 530 ("Congressional concerns must be accommodated in a manner that produces a constitutional result, in this instance to leave the President with substantial freedom to formulate policy recommendations free from excessive intrusion.").

Thus, applying FACA to the Task Force would raise the same constitutional problems as those identified by the district court in Washington Legal Foundation and by the concurrence in Public Citizen. The President has express authority to "recommend to [Congress'] consideration such measures as he shall judge necessary and expedient." Art. II, § 3. Just as opening the ABA Committee to the public would impair the President's power to nominate judges, applying FACA to the Task Force would interfere in his efforts to develop legislative proposals for Congress.

Such logic would respect the choice of the President to select his advisors from either inside or outside government without requiring them to engage in the advisory process in public. It is indeed difficult to imagine that a federal law that required public notice of and access to meetings of the President or his advisors and any private individual convened for the purpose of discussing legislative initiatives could survive constitutional scrutiny. See United States v. Nixon, 418 U.S. 683, 708 (1973) (separation of powers principles presumptively

²³ To subject the President's Task Force to FACA's structural requirements, such as a balanced membership, raises even more serious and fundamental concerns.

protects the constitutionality of a President's communications with his advisors). It is equally difficult to believe that FACA may be constitutionally applied to supply the exclusive method by which the President can lawfully and privately obtain advice from private sources.²⁴

The avoidable constitutional question before the Court, however, is both narrower and even clearer: whether FACA can be constitutionally applied to task forces comprised only of federal employees and the First Lady. Put differently, can Congress impose significant structural and procedural regulations, such as public access and "balanced membership," on meetings involving the President's closest advisors that may include the First Lady? To ask the question is to answer it. Such interference with the President's reasonable efforts to obtain the advice needed to assist him in discharging his constitutional duties plainly violates fundamental notions of the separation of powers.

As in Washington Legal Foundation, there is no overriding legislative need for FACA to apply to the Task Force. Just as the public accountability purposes of FACA would have been furthered through public Senate judicial confirmation proceedings, Congressional consideration of the President's health care reform proposal provides the public, including plaintiffs, a forum for their participation in analyzing and debating the proposal. Indeed, Congress has itself implicitly

²⁴ Congress has effectively recognized these constitutional limits by not applying FOIA to the work of Presidential advisors. See fn. 6, supra.

determined in FACA that its application to advisory committees composed solely of all federal employees outweighs any benefits of public access to them. Such a balance should be struck no differently with regard to a task force that is no different but for the addition of the First Lady.

In sum, the effective discharge of his Article II powers permits the President to obtain advice from those he wishes in a manner of his choosing. To interpret FACA to supplant the method chosen by the President here to obtain advice would violate separation of powers principles. As shown, FACA can and should be applied constitutionally by adopting a limiting interpretation of it that is nevertheless faithful to legislative intent. For these reasons, plaintiffs have little likelihood of success on their primary claim, and our motion to dismiss or, in the alternative, for summary judgment should be granted.

2. Meetings Between Members of the Task Force and the Working Groups Are Not Covered by FACA.

Plaintiffs also assert that FACA applies to meetings between the working group, which provides information and analysis to the Task Force, and any members of the Task Force itself.²⁵ Pls' TRO Mem. at 23. In effect, plaintiffs seem to claim that the working group can lawfully provide information to the Task Force or any of its members in writing, but cannot present this written

²⁵ We do not understand plaintiffs to argue that meetings of the working group members alone or with outside parties who provide them information are covered by FACA. Rather, it is the presence of one of the Task Force members at such meetings that seems to concern plaintiffs.

product, or an oral summary of it, in a meeting without public access. They apparently find support in FACA's definition of "advisory committee" to include "subcommittee[s] or other subgroup[s] thereof." The claim is meritless for three reasons.

First, a subcommittee or subgroup is subject to FACA only if it is a subcommittee or subgroup of a FACA committee. See 5 U.S.C. App. 2 § 3(2) (advisory committee defined to include subgroups or subcommittees "thereof"). Since, as we have shown, the Task Force is not a FACA committee, the working groups are not either.²⁶

Second, even if the Task Force were a FACA committee, plaintiffs appear to read § 3(2) of the FACA to apply to meetings between certain Task Force members and the working groups by definition, regardless of their function and purpose. This Court has rejected such an interpretation in The Washington Post v. National Council on the Arts, No. 92-0955, 1992 LEXIS 5885 (D.D.C. Apr. 29, 1992) [Attachment 6].

Washington Post dealt with informational meetings between NEA staff members and certain members of the National Council on the Arts, which is a FACA advisory committee. As in this case, plaintiffs in Washington Post argued that any meetings between committee members and others were automatically covered by FACA and should be open to the public. This Court disagreed.

²⁶ If plaintiffs are concerned that working group members have met with Mr. Magaziner, such meetings would not be covered by FACA. All working group members, like Mr. Magaziner, are federal employees. Magaziner Decl. ¶ 11.

Just like a "committee, board, commission, council, conference, panel or task force," a subcommittee or subgroup is an "advisory committee" under FACA only if it was "established or utilized . . . in the interest of obtaining advice or recommendations." 5 U.S.C. App. 2 § 3(2) (emphasis added). Washington Post, slip op. at 3-4. Simply put, working groups of FACA committees are themselves not automatically subject to FACA; they must meet the statutory definition of "advisory committee" themselves. Otherwise, FACA would allow "interested parties to have access to every hearing at every level of the information-gathering and preliminary decision-making process," a result this Court has determined Congress did not intend. Id. at 4.

Third, the working group meetings that include Task Force members do not satisfy FACA's definition of an "advisory committee" because they are not established or utilized to obtain advice or recommendations for the President.²⁷ See Washington Post, slip op. at 5 (since the working groups do not engage in "substantive deliberations and decision-making" or "supplant

²⁷ Regulations promulgated by the GSA pursuant to FACA, § 7(c), support our position. In an extensive list of advisory meetings or groups not covered by FACA, the GSA included the type of meeting challenged by plaintiffs:

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

41 C.F.R. § 101-6.1004(k).

later consideration and thorough deliberation" by the advisory committee, they are not FACA committees). Indeed, in National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524 (D.D.C.), aff'd, 711 F.2d 1071 (D.C. Cir. 1983), this Court found structured working groups chaired by FACA committee members not to be FACA committees themselves.

In 1982, President Reagan chartered the Executive Committee of the Private Sector Survey pursuant to FACA. National Anti-Hunger Coalition, 557 F. Supp. at 526. The Executive Committee was a group of no more than 170 citizens charged with reviewing Executive Branch operations and advising the President and Executive Branch agencies on ways to cut costs in the public sector. Id. & n.2. A subcommittee, also operating under FACA and consisting of 30 members, was charged with reviewing findings and recommendations of 36 task forces. These task forces were co-chaired by two or more members of the Executive Committee and performed the preliminary survey work. Id. The task forces had no authority to make recommendations or to provide advice to the President or agencies, id., but did formulate recommendations to the subcommittee. Id. at 527, 529; National Anti-Hunger Coalition, 711 F.2d at 1072.

Plaintiffs in National Anti-Hunger Coalition argued that the task forces were "subcommittees" under FACA and therefore subject to FACA's open meeting and other procedural requirements. This court rejected that claim, holding that:

There is no question that the task forces are intimately involved in the gathering of information about federal programs and the formulation of possible recommendations for consideration of the Committee. That is not enough, however, to render them subject to the FACA. . . . The task forces at issue do not provide advice directly to the President or any agency, but rather are utilized by and provide advice to only the Executive Committee, which then provides advice to the President or agency.

National Anti-Hunger Coalition, 557 F. Supp. at 529. Even though members of the FACA committee chaired the task forces, because they were not directly established or utilized by the President to obtain advice or recommendations, the task forces were not subject to FACA. National Anti-Hunger Coalition puts to rest any assertion that meetings between Task Force members and the working groups can be covered by FACA solely by virtue of the presence of Task Force members.

Here, the working group and its "cluster groups" gather and analyze the enormous body of facts and opinion relating to aspects of our health care system. Magaziner Decl. ¶¶ 5, 10, 19. The working group merely obtains and analyzes information; it has no authority to furnish advice and recommendations directly to the President. Id. ¶ 5. That is the Task Force's job. Id. Whether or not Task Force members attend working group meetings, because the working group does not offer advice or recommendations directly to the President, they are not FACA committees.

Moreover, referring to FACA as an example of "unimpressive legislative drafting," id. at 530, this Court recognized that an alternative interpretation would "threaten to impinge unduly upon

prerogatives preserved by the separation of powers doctrine."

Id. Noting that the President must have "substantial freedom to formulate policy recommendations free from excessive intrusion," id., the Court's interpretation of FACA rested on the legislation's purpose:

. . . surely Congress did not contemplate that interested parties like the plaintiffs should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering and preliminary decision-making process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy recommendations.

Id. at 529.²⁸

That is apparently what plaintiffs seek -- access to meetings between shifting groups of Task Force and working group members during which information and views are exchanged. Must each meeting be considered a FACA committee requiring a charter and reasonable public notice and access prior to the exchange of views? Each time a Task Force member meets with a working group member, must a reporter be present to take a transcript? Must each such meeting be expanded to include additional and unnecessary personnel to render it "fairly balanced?" To impose FACA's detailed requirements on these meetings would prevent Task

²⁸ On appeal, the D.C. Circuit observed that, if the task forces transmitted their recommendations directly to federal decisionmakers or, if the Executive Committee's subcommittee, which first reviewed these recommendations, rubberstamped them, then the task forces may be subject to FACA. National Anti-Hunger Coalition, 711 F.2d at 1075-76. The court held that the record supported the district court's finding that the task forces served as the Executive Committee's "staff," that they were not providing advice directly to the President or agencies and thus were not subject to FACA. Id. at 1075.

Force members from receiving timely information in a manner that fosters candid interchange. Its work would be severely handicapped. Magaziner Decl. ¶ 31. Congress plainly intended no such result, but, if it did, impairing the President's ability to obtain advice to this degree would violate the constitutional separation of powers.

Plaintiffs distinguish National Anti-Hunger Coalition on the ground that the task forces in that case were separated by both the subcommittee and Executive Committee from the President. Pls' Mem. at 24. They suggest that only one layer of review exists between the working groups and the President here -- the Task Force. Plaintiffs ignore both the facts and reasoning of National Anti-Hunger Coalition. There, the subcommittee was empowered to formulate recommendations directly to the President. Id. at 527. In any event, the issue is not how many committees lie between the appointing official and the working groups alleged to be covered by FACA, but what the working groups do. If, as here and in National Anti-Hunger Coalition, they do not directly furnish advice to the President, they can not be FACA committees.

Plaintiffs also suggest that Task Force members have met with private and public sector consultants. Pls' Mem. at 24. As we have shown, that alone is hardly a reason why these meetings are subject to FACA. Indeed, in both National Anti-Hunger Coalition and Washington Post, FACA committee members met with outside parties to obtain and exchange information without

turning these meetings into ones covered by FACA. Cf. Center for Auto Safety, No. 89-1045, slip op. at 6-7 (presence of federal employees on non-federal task force does not convert the task force into a FACA committee). Meetings attended by Task Force members that do not involve the formulation of advice and recommendations to the President are not covered by FACA.

B. Plaintiffs Have Not Demonstrated that They Will Suffer Irreparable Injury in the Absence of an Emergency Injunction.

Plaintiffs argue little more than that they have "serious interests" in health care reform, Pls' TRO Mem. at 2-3, that they want to "protect and advance" these interests, Complaint, ¶¶ 5-6, and that closure of the meetings "will forever prevent the Plaintiffs from attending and participating in those meetings." Pls. TRO Mem. at 22. The threshold flaw in this claim of irreparable injury is that it is wholly contingent on the existence of a cognizable legal right to attend the Task Force meetings under FACA. Since, as we have shown, no such right exists, no cognizable legal interest has been irreparably injured. Washington Post, slip op. at 5-6.

The American Council for Health Care Reform evidently wishes to attend the meetings to that it can determine whether it supports the President's proposals. Complaint Exh. C. Attendance at the Task Force meetings will not necessarily advance this interest because the Task Force's ultimate recommendations are just that -- recommendations. Only when the President, after review of the Task Force report, fashions and forwards a

legislative proposal to Congress will his proposal be known. Plaintiffs will then have ample opportunity to study it, formulate a response to it, and seek to influence Congressional and public opinion.

Furthermore, plaintiffs' apparent interest in presenting their views to the Task Force has not been foreclosed. They have been advised that some meetings will be open and have been invited to contact a White House staff member to express their interest in attending. Complaint Exhs. E-G. They have chosen not to do so. Magaziner Decl. ¶ 30.

Nor have plaintiffs shown, as they must, that any irreparable injury is imminent. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (injury claimed must be of such imminence that there is a "clear and present" need for injunctive relief to avert irreparable harm). At least as to the Task Force as a whole, no meetings have been scheduled. Magaziner Decl. ¶¶ 4, 6. Plaintiffs' interest in attending meetings between Task Force members and the subgroups seems little more than an afterthought. No request for access to these meetings was made in their letters, Complaint Exhs. B-D, and the working groups have been operating for over a month. Immediate, emergency relief is, therefore, not required to prevent the injury claimed by plaintiffs. See Natural Resources Defense Council, 637 F. Supp. at 121 (finding plaintiff's exclusion from attending advisory committee meetings is neither a substantial nor an irreparable injury).

C. An Injunction Would Harm the Work of the Task Force and Thus Would Be Contrary to the Public Interest.

The analysis of the merits of plaintiffs' claim has already identified the competing equities the Court must examine in determining the propriety of injunctive relief. Perhaps the best place to review the equities is FACA itself. As shown in the Senate Report, Congress decided that the public interest did not support extending FACA's coverage to task forces composed wholly of federal employees. They pose no risk of creating biased proposals, and thus do not warrant public access to ensure against it. Any benefits of such access were determined to be outweighed by the potential adverse impact access would have on the committee's work. The Task Force presents essentially the same balance.

The second source upon which the equities may be assessed is the Constitution. As discussed, applying FACA to the Task Force and its working group meetings would severely hamper the President in obtaining advice and recommendations for his health care proposal, in the manner and time frame he desires. Magaziner Decl. ¶ 31. Interfering with the President's ability to advance such a proposal has constitutional dimensions, powerfully arguing against award of injunctive relief.

Compared to impairing the process chosen by the President to best obtain recommendations on this vital and urgent policy issue, the harm to plaintiffs from being excluded from some of the Task Force meetings is, as discussed, ephemeral. Significantly, this is not the sort of advisory group that will present

recommendations to a decisionmaker empowered to make binding and legally effective policy choices. Plaintiffs therefore cannot claim that exclusion from the meetings precludes them from eventually influencing decisions that will affect them. Rather, the product of the Task Force's work will be reviewed by the President, who will, in turn, present a health care proposal to Congress where the policy choices will ultimately be made. It is there that plaintiffs will have ample opportunity to press their policy preferences and to try to influence the debate. Consequently, plaintiffs can offer little prospect of harm, much less immediate, irreparable harm, if their application for emergency relief is denied.

CONCLUSION

For the foregoing reasons, plaintiffs' application for a temporary restraining order should be denied and this action should be dismissed or, in the alternative, summary judgment awarded to defendants.

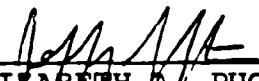
Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

JAY B. STEPHENS
United States Attorney



DAVID J. ANDERSON



ELIZABETH A. PUGH
JEFFREY S. GUTMAN

Department of Justice
Civil Division - Room 952
901 E St., N.W.
Washington, D.C. 20530
Telephone: (202) 514-4775

Dated: March 3, 1993

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN
PHYSICIANS AND SURGEONS, INC.,
AMERICAN COUNCIL FOR HEALTH
CARE REFORM AND NATIONAL
LEGAL & POLICY CENTER,

Plaintiffs,

v.

HILLARY RODHAM CLINTON,
DONNA E. SHALALA, Secretary of
Health and Human Services,
LLOYD E. BENTSEN, Secretary of
the Treasury, LES ASPIN,
Secretary of Defense, JESSE
BROWN, Secretary of Veterans
Affairs, RONALD H. BROWN,
Secretary of Commerce, ROBERT
B. REICH, Secretary of Labor,
LEON E. PANETTA, Director of
the Office of Management and
Budget, ALICE RIVLIN, Deputy
Director of the Office of
Management and Budget, CAROL
RASCO, IRA MAGAZINER and
JUDITH FEDER, White House
Advisors and THE PRESIDENT'S
TASK FORCE ON NATIONAL
HEALTH CARE REFORM,

Defendants.

Civil Action
No. 93-399

(Judge Lamberth)

DECLARATION OF IRA MAGAZINER

I, IRA MAGAZINER, declare and state as follows:

INTRODUCTION

1. I am Senior Advisor to the President for Policy Development. I have been advised by my counsel in this action that plaintiffs have sought certain information concerning the President's task force on health care reform (the "Task Force")

and the interdepartmental working group created in connection therewith. This declaration is intended to provide information in response to that request, as well as to otherwise assist the Court in resolving the pending motions.

2. On January 25, 1993, the President announced the formation of the Task Force to assist him in developing legislation for comprehensive health care reform.

3. The President asked me to serve as a member of the Task Force. The Task Force is chaired by the First Lady. The Task Force also includes the following other members: 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; and Council of Economic Advisors Chair Laura Tyson. These are the only members of the Task Force.

4. The members of the Task Force were present on January 25 when the President announced the Task Force's formation. No meeting of the Task Force occurred at that time and no business was conducted or discussed by the Task Force members.

5. In addition to serving as a member of the Task Force, I am also leading an interdepartmental working group that is gathering information concerning the impact of existing health

care policies and delivery services, and possible alternatives to those policies. The information that is gathered and analyzed by the working group will be used, in turn, by the Task Force in formulating its recommendations to the President. Only the Task Force will have authority to forward recommendations to the President, and only the Task Force will provide advice to the President. The interdepartmental working group is not charged with responsibility for making, and will not make, recommendations to the President, and will not otherwise directly advise him.

TASK FORCE MEETINGS

6. No Task Force meetings have been convened to date, and none have yet been scheduled.

7. The Task Force intends to hold several meetings once the interdepartmental working group has had an opportunity to gather and analyze the information needed by the Task Force to make its recommendations to the President.

8. The Task Force intends to hold some public meetings, at which members of the public will have an opportunity to be heard.

9. No formal sub-groups or committees of the Task Force have been established, and none are presently contemplated. I have met regularly with the First Lady and, less frequently, with Carol Rasco, Assistant to the President for Domestic Policy, to keep them apprised of the working group's efforts and to receive their input on the working group's efforts. Other

members of the interdepartmental working group have, from time to time, been present during my discussions with the First Lady and with Ms. Rasco. These meetings do not involve the formulation of advice or recommendations to be provided to the President, but instead are operational and informational in nature. The First Lady and Ms. Rasco have, on occasion, also met individually, for informational purposes, with representatives of outside groups.

THE INTERDEPARTMENTAL WORKING GROUP

10. Shortly after January 25, the interdepartmental working group began an intensive effort to gather information concerning the present health care system and alternatives for reform. It was a guiding principle of the working group that a wide breadth of outside parties be consulted, and that members of the public and interested organizations have meaningful opportunities for input.

11. Only federal government employees serve as members of the interdepartmental working group. These federal employees fall into two categories. The first category includes full-time, permanent employees, who work for the Executive Office of the President, for federal agencies, for Members of Congress or for Senate or House committees. I have arranged for these federal employees to be informed that they are subject to the conflict of interest provisions set forth in 18 U.S.C. §§ 202-209; the Standards of Ethical Conduct for Employees of the Executive Branch; and all related ethics laws and regulations. As of March 1, approximately 300 such permanent employees were

serving as members of the working group. These employees have been provided by the White House, members of Congress, and several agencies, including the Department of Health and Human Services, the Office of Management and Budget, the Department of Defense, the Department of Veterans Affairs, the Department of Labor, the Department of Commerce, the Department of the Treasury, and the Council of Economic Advisors.

12. The second category of federal employees serving as members of the working group includes "special government employees" who have been employed by an agency or the Executive Office of the President for less than 130 days in a 365-day period, either with or without compensation. I have arranged for these special government employees to be informed that throughout the period of their special employment, they are subject to a limited version of the conflict of interest provisions set forth in 18 U.S.C. §§ 202-209; the Standards of Ethical Conduct for Employees of the Executive Branch; and all related ethics laws and regulations. I have also arranged for these special government employees to be informed that they are required to abide by limitations on public speaking and by applicable post-employment restrictions. As of March 1, approximately 40 such special government employees were serving as members of the interdepartmental working group. These special government employees have been retained, and provided to the interdepartmental working group, by the White House and several agencies, including the Department of Health and Human Services,

the Department of Defense, and the Office of Management and Budget.

13. The working group has also retained a wide range of consultants, who attend working group meetings on an intermittent basis, either with or without compensation. I have arranged for these consultants to be informed that in connection with their services to the working group, they too are subject to a limited version of the conflict of interest provisions set forth in 18 U.S.C. §§ 201-208; the Standards of Ethical Conduct for Employees of the Executive Branch; and all related ethics laws and regulations. These consultants have not had any supervisory role or decision-making authority in connection with the consulting services they have provided to the working group, but instead provide information and opinion to the working group members. These consultants have been retained by the White House and other agencies, including the Department of Health and Human Services, the Office of Management and Budget, and the Department of Defense. These consultants come from a wide-range of backgrounds, including physicians, nurses, health and political economists, sociologists, human resource management experts, health educators, health administrators, public health experts, health researchers and policy analysts.

14. All decisions to hire permanent employees and special government employees, or to retain consultants, have been made by the office or agency that has hired or retained the individual involved.

15. The interdepartmental working group has been organized into fifteen "cluster" groups, each of which addresses a subject area relevant to health care reform. To date, fifteen such cluster groups have been created or planned, and include groups addressing new system organization; new system coverage; infrastructure/integrated health plans; integration of health programs into new system; ethical foundations of a new system; transition to the new system/short-term cost containment; financing; health policy initiatives for underserved populations; mental health; long-term care; economic impact; quantitative analysis; legal audit; numbers audit; and a drafting group.

16. Several of these cluster groups have, in turn, been further divided into subgroups. The new system organization cluster includes subgroups addressing principles and operation of purchasing cooperatives; health plans, providers and patients in the new system; special issues in purchasing cooperatives; governance issues; a global budget; and insurance reform.

17. The new system coverage cluster includes subgroups addressing benefits packages; coverage for working families; and coverage for low-income and non-working families. The infrastructure/integrated health plans cluster includes subgroups addressing quality measurement; information systems; malpractice and tort reform; and health care workforce development. The integration of health programs cluster includes subgroups addressing Medicare; the Department of Defense; veterans; federal

employees' health benefits programs; and other government health programs.

18. The cluster addressing the transition to the new system includes subgroups addressing acceleration of new system development; short-term steps toward administrative simplification; and interim cost containment. The cluster addressing underserved populations includes subgroups addressing high risk populations; urban/rural populations; and women and children. The mental health cluster includes subgroups addressing benefits packages; substance abuse; children's services; and public system impact. And the long-term care cluster includes subgroups addressing background; public care; private care; and cost and revenue.

19. These cluster groups and subgroups have been established since January 25 at my direction. The cluster groups and subgroups have been meeting regularly as part of an intensive effort to document the impact of existing health care policies and to gather information on possible alternatives.

20. I am the only member of the Task Force who has attended meetings of the interdepartmental working group, and who has attended meetings of cluster groups and subgroups. On one occasion, Carol Rasco briefly attended a portion of one such meeting.

OPPORTUNITIES FOR PUBLIC INPUT

21. As noted above, it has been a high priority of the interdepartmental working group to ensure opportunities for input

by, and consultation with, private citizens and organizations representing a broad range of interests and concerns. We have sought to open the working group to ideas from literally all corners of the country, and I am aware of no individual or group that has been denied an opportunity to present ideas or suggestions to the working group.

22. Several mechanisms have been established to facilitate public input. First has been the establishment of an "intake center" in the Old Executive Office Building in Washington, D.C. This intake center accepts letters and phone calls; acknowledges receipt of all correspondence; and forwards all information and recommendations received to appropriate working group members, cluster groups or subgroups. It is my understanding that, to date, this intake center has received between 10,000 and 12,000 pieces of correspondence and several thousand phone calls. The First Lady and I have also received several thousand additional pieces of correspondence, on health care issues, addressed directly to our attention. This correspondence is also being handled by the intake center.

23. The White House Office of Public Liaison has also served an important function in facilitating public input to the interdepartmental working group. The Public Liaison office has set up a series of meetings with outside groups, attended by various members of the interdepartmental working group. I have personally attended many of these meetings. To my knowledge, no other Task Force member has attended any of these meetings. A

list of the outside groups that have attended such meetings is attached as Exhibit A hereto.

24. I have also participated in a number of other meetings with representatives of organizations. Through March 1, I met with the Washington Business Group; the National Governors' Association; the American Medical Association; the National Committee to Preserve Social Security and Medicare; the National Federation of Independent Businesses; the American Hospital Association; the National Small Business Legislative Council; the Jackson Hole Group; the National Association of Public Hospitals; the Health Insurance Association of America; the National Association of Counties; and Professional Insurance Agents. No other Task Force members attended any of these meetings with me.

25. On February 24, 1993, the interdepartmental working group sponsored a meeting on Health Insurance Purchasing Cooperatives ("HIPC") Prototypes and state-based reform efforts. Participants included representatives of the California Public Employees' Retirement System; the Alpha Center; the Minnesota Department of Employee Relations; Xerox Corporation; Bank of America; the offices of the governors of Oklahoma, Pennsylvania and Colorado; the health departments of Hawaii, New Mexico, Wisconsin and Arkansas; the Arizona Health Care Cost Containment Program; the West Virginia Public Employee Insurance Agency; the New York State Department of Social Services; the City of Milwaukee; the Agency for Health Care Administration; Medimetrix; the California Major Risk Medical Insurance Board; the Health

Care Purchaser's Association; and the California Department of Insurance. I was the only Task Force member to attend this meeting.

26. Moreover, the First Lady has also participated, and plans further participation, in public forums and conferences addressing issues relevant to health care reform. On February 11, 1993, the First Lady attended and participated in a health care conference in Harrisburg, Pennsylvania, sponsored by Senator Harris Wofford and the Pew Charitable Trust. On February 22, 1993, the First Lady attended a forum at Bunker Hill Community College with representatives of health delivery services. The First Lady also plans to attend four regional health care forums in March 1993 being sponsored by the Robert Wood Johnson Foundation.

CORRESPONDENCE WITH PLAINTIFFS

27. On February 9, 1993, Jane M. Orient, M.D., executive director of plaintiff Association of American Physicians and Surgeons, Inc., wrote to the First Lady to "advise" that she and the Association's members "desire to attend the next and all subsequent meetings of the President's Task Force on National Health Care Reform." See Complaint, Exhibit B. Ms. Orient stated that her request was made pursuant to the Federal Advisory Committee Act. Ms. Orient also stated that "[a]dvance notice of the next meeting and any and all subsequent meetings would be appreciated so that I and other members may make plans to travel to Washington to be in attendance." Similar

requests, dated February 9 and February 12, 1993, respectively, were delivered to the First Lady by the Executive Director of plaintiff American Council for Health Care Reform and the President of plaintiff National Legal & Policy Center. See Complaint, Exhibits C and D.

28. Bernard Nussbaum, Counsel to the President, responded to plaintiffs' requests in writing. See Complaint, Exhibit E (February 12, 1993, letter to Association of American Physicians and Surgeons, Inc.); Exhibit F (February 12, 1993, letter to American Council for Health Care Reform); Exhibit G (February 16, 1993, letter to National Legal & Policy Center).

29. In his letters to plaintiffs, Mr. Nussbaum advised plaintiffs of his office's opinion that the Federal Advisory Committee Act does not apply to the Task Force. He also advised plaintiffs that the Task Force had not yet met, that no Task Force meetings were presently scheduled, but that the task force will be holding public meetings at which citizens, organizations and institutions will have an opportunity to present their views. Mr. Nussbaum explained that such public meetings would be announced in advance. Finally, Mr. Nussbaum informed each of the plaintiffs that if they are interested in attending such a public meeting, they should contact a member of the White House staff, Mike Lux, whose name and phone number were set forth in the letters.

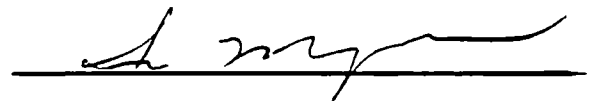
30. I have been informed that none of the plaintiffs has contacted Mr. Lux, or any other person affiliated with the

Task Force or the interdepartmental working group, to express an interest in attending, or to make arrangements for attending, public meetings of the Task Force.

CONCLUSION

31. Although the Task Force contemplates holding some meetings in public, I believe it is critical -- in light of the magnitude of the Task Force's charge and the short time frame in which it is operating -- that the Task Force and the interdepartmental working group be able to retain flexibility in their operations and be free from formalistic reporting or mandatory public meeting requirements. I believe that such requirements, if imposed on either the Task Force or the working group, would impede the Task Force's ability to address, within the urgent time frame set out by the President, the literally hundreds of complex issues that must be considered in formulating proposals for comprehensive health care reform.

Under penalty of perjury, I swear that the foregoing is true and accurate to the best of my belief.



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DATED: March 3, 1993

EXHIBIT A

Page 1

American Medical Association
American College of Physicians
American Academy of Family Physicians
National Medical Association
American Academy of Pediatrics
American Society for Internal Medicine
American Academy of Ophthalmology
American College of OBGYN
American College of Preventive Medicine
America College of Surgeons
College of American Pathologists
Society on General Internal Medicine
Society of Thoracic Surgeons
Physicians Who Care
Steve Gleason
Ron Dozoretz, MD
Kevin Fickenscher, MD
American College of Emergency Physicians.
Citizen Action
Consumer Federation of America
Consumers Union
Public Citizen
National Council on Senior Citizens
Consumer League
AARP
National Council on Aging
American Managed Care and Review Association
American Association of Preferred Providers
Group Health Association
Managed Health Care Association
HealthCare Compare Corp.
Managed Health Care Inc.
Health Care Working Groups
National Association for Home Care
American Health Care Association (Nursing Homes)
American Association of Homes for Aging
National Institute on Adult Daycare
American Association for Respiratory Care
Hospice Association of America
American Federation of Home Health Agencies
Vidas Organization
Health Insurance Association of America
Aetna
Prudential
Cigna
Travelers
Metropolitan Life
Mass Mutual
NY Life
Mutual of Omaha

EXHIBIT A

Page 2

General American Life
Phoenix Home Life
Delta Dental Plans
American Family Life Assurance Company
Blue Cross/Blue Shield
Independent Insurance Agents of America
Self Insurance Institute
Julie Norrell & Associates
The Principal
Disability Rights Education Defense Fund
United Cerebral Palsy
The Arc
Epilepsy Foundation of America
American Speech-Language-Hearing Association
National Independent Living Center
AIDS Action Council
Employment of People with Disabilities
Pharmaceutical Manufacturers Association
GeneriC Pharmaceutical Industry Association
National Association of Pharmaceutical Manufacturers
National Pharmaceutical Alliance
Pfizer Inc.
Merck & Co., Inc.
Johnson and Johnson
Eli Lilly and Company
SmithKline Beecham
SYNTEX
Schering-Plough
Searle
Marion Merrell Dow, Inc.
Bristol-Myers Squibb
Upjohn
Glaxo
Warner-Lambert
American Home Products
Abbott Laboratories
IVAX
PAR Pharmaceutical
American Nurses Association
Service Employees International Union
American Federation of State, County and Municipal Employees
American Federation of Teachers
Association for Practitioners in Infection Control
National Association of Pediatric Nurse Associates and
Practitioners
AFSCME
Teamsters
International Association of Machinists
Communication Workers of America
ACTWU
Church Women United
American Public Health Association

EXHIBIT A

Page 3

Physicians for National Health Program
National Association of Social Workers
National Council of Senior Citizens
Graphic Artists Union
National Farmers Union
National Hispanic Council on Aging
Neighbor to Neighbor
Network
Oil, Chemical and Atomic Workers
United Electrical Workers
United Church of Christ
Public Citizen
Older Womens League
American Hospital Association
The Catholic Health Association
American Protestant Health Association
Jewish Hospitals
University/Research Hospitals
National Association of Children's Hospitals and Related
Institutions
American Osteopathic Hospital Association
American Association of Medical Colleges
Federation of American Health Systems
Primer Hospital Alliance
National Association of Psychiatric Hospital Systems
Healthcare Financial Management Association
American Pharmaceutical Association
American Society of Consultant Pharmacists
American Society of Hospital Pharmacists
National Association of Chain Drug Stores
National Association of Retail Druggists
People's Drug
Bob Ostohaus
Medco Containment Services, Inc.

Exhibit A

Page Four

ABC Home Health Services, Inc.
Opticians Association of America
American Group Practice Association
Camden-Clark Hospital
Alzheimer's Association
American Nurses Association
National Black Women's Health Project
National Committee to Preserve Social Security and Medicare
National Multiple Sclerosis Society
United Cerebral Palsy Association, Inc.
Health Care Leadership Council
Chartered Health Inc.
American Pharmaceutical Association
American Health Care Management
Interactive Health Network
Generic Pharmaceutical Industry
Health Industry Manufacturers
Pharmaceutical Manufacturers
Medics Pharmaceutical Corp.
Association of Maternal and Child Health Programs
National Association of Children's Hospital and Regulated
Institutes
National Commission on Infant Mortality
American Academy of Pediatrics