TO => JOHN PODESTA

John -

93 APR 1 AM 11:23

This is a revised draft prepared by DOJ

Steve Neuwirth

FINAL DRAFT

Dr. Jane M. Orient
Executive Director
Association of American Physicians and Surgeons, Inc.
1601 N. Tucson Blvd. Suite 9
Tucson, Az. 85716

Re: Request for Documents and Information

Dear Dr. Orient:

On behalf of the President's Task Force on National Health Care Reform (the "Task Force"), I am responding to your March 17, 1993 request for documents and information pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 § 10(b) and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Task Force received your request on March 18. [Steve- you may want to verify this; only the AMHCR FOIA request was date stamped on my copy]

With regard to your request under FACA, the Court in Association of American Physicians and Surgeons (AAPS), et al. v. Clinton, et al., No. 93-0399 (D.D.C. Mar. 10, 1993) held that the Task Force is an advisory committee under FACA. Although the defendants believe that ruling to be an error as a statutory and constitutional matter, and have appealed it to the United States Court of Appeals for the District of Columbia Circuit, the Task Force intends to make non-exempt documents which have been and will be "made available to or prepared for or by" the Task Force, FACA, § 10(b), available for public inspection and copying (Request 2). As explained in greater detail below, the Court's Opinion permits the Task Force to withhold documents covered by privileges protecting deliberative processes and Presidential communications.

The Task Force has established a public reading room located in Room 101G of the Humphrey Building, U.S. Department of Health and Human Services, 200 Independence Ave., S.W. The reading room is open to the public between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday. Please contact Steven Pigeon at (202) 690-7000 in order to arrange for access to the reading room.

The Task Force's intake center has received over 50,000 pieces of correspondence from the public and is now receiving several thousand letters daily. These and other documents that have been received and reviewed are being moved into this reading room for public inspection. The Task Force will send newly received or created non-exempt Task Force documents to the reading room periodically after they are reviewed.

In particular, the Task Force's charter (Request 1), agendas of any of its meetings (Request 3) and non-exempt Task Force documents (Requests 2 and 4) will be available in the reading room.

The Court also held that the interdepartmental working group is not an advisory committee under FACA. The Task Force regards Request 4 to seek a subset of the documents sought in Request 2. However, to the extent that you request documents not subsumed under Request 2 that were made available to or prepared for or by the working group or its cluster groups, they are not subject to disclosure under § 10(b). In particular, the documents requested in Requests 5 and 6, if they exist at all, would be working group records, not documents made available to the Task Force that are subject to disclosure. As you are probably aware, however, the names of persons on the working group and its consultants have been made public.

In accordance with FACA, § 10(b), 5 U.S.C. § 552(b) and the Court's Opinion and Order, the Task Force has and will withhold documents determined to be covered by privileges protecting deliberative processes and Presidential communications and other applicable privileges.

In particular, the Task Force is withholding the categories of documents listed below. The Task Force may withhold additional categories of material determined to be privileged that have not yet been created or reviewed.

1. Personal letters submitted by members of the public to the Task Force that contain, for example, descriptions of health problems and financial information are withheld pursuant to 5 U.S.C. § 552(b)(6);

2. Personal letters, many attaching resumes, submitted by members of the public offering to help the Task Force are withheld pursuant to 5 U.S.C. § 552(b)(6);

3. Coding and routing slips for correspondence received by the intake center are withheld pursuant to 5 U.S.C. § 552(b)(2);

4. Background and options papers prepared by working group members and seen by Task Force members or the President related to national health care reform are withheld pursuant to privileges protecting deliberative processes and Presidential communications. <u>See</u> 5 U.S.C. § 552(b)(5) and <u>AAPS</u>, slip op. at 18-26.

Insofar as your request may be based on the FOIA, that statute applies only to records maintained by "agencies" within the Executive Branch. <u>See</u> 5 U.S.C. § 552(a)(3). Neither the Task Force nor the interdepartmental working group or its "cluster" groups are agencies for purposes of FOIA because their functions are, respectively, to advise and to assist the President. <u>See</u> <u>Kissinger v. Reporters Comm. for Freedom of the Press</u>, 445 U.S. 136 (1980); <u>Meyer v. Bush</u>, 981 F.2d 1288 (D.C. Cir. 1993). The Task Force, working group and "cluster" groups are, therefore, not subject to FOIA.

XXX

cc: Kent Masterson Brown
Frank M. Northam

FINAL DRAFT

Mr. William H. Shaker
Executive Director
American Council for Health Care Reform
5155 North 37th St.
Arlington, VA 22207

Re: Request for Documents and Information

Dear Mr. Shaker:

On behalf of the President's Task Force on National Health Care Reform (the "Task Force"), I am responding to your March 17, 1993 request for documents and information pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 § 10(b) and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Task Force received your request on March 18.

With regard to your request under FACA, the Court in Association of American Physicians and Surgeons (AAPS), et al. v. Clinton, et al., No. 93-0399 (D.D.C. Mar. 10, 1993) held that the Task Force is an advisory committee under FACA. Although the defendants believe that ruling to be an error as a statutory and constitutional matter, and have appealed it to the United States Court of Appeals for the District of Columbia Circuit, the Task Force intends to make non-exempt documents which have been and will be "made available to or prepared for or by" the Task Force, FACA, § 10(b), available for public inspection and copying (Request 2). As explained in greater detail below, the Court's Opinion permits the Task Force to withhold documents covered by privileges protecting deliberative processes and Presidential communications.

The Task Force has established a public reading room located in Room 101G of the Humphrey Building, U.S. Department of Health and Human Services, 200 Independence Ave., S.W. The reading room is open to the public between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday. Please contact Steven Pigeon at (202) 690-7000 in order to arrange for access to the reading room.

The Task Force's intake center has received over 50,000 pieces of correspondence from the public and is now receiving several thousand letters daily. These and other documents that have been received and reviewed are being moved into this reading room for public inspection. The Task Force will send newly received or created non-exempt Task Force documents to the reading room periodically after they are reviewed.

In particular, the Task Force's charter (Request 1), agendas of any of its meetings (Request 3), records, reports, transcripts and minutes of Task Force meetings involving fact-finding and fact-reporting (Request 4) will be available in the reading room.

The Court also held that the interdepartmental working group is not an advisory committee under FACA. The documents requested in Requests 5 and 6, if they exist at all, would be working group records, not documents made available to the Task Force that are subject to disclosure.

In accordance with FACA, § 10(b), 5 U.S.C. § 552(b), and the Court's Opinion and Order, the Task Force has and will withhold documents determined to be covered by privileges protecting deliberative processes and Presidential communications and other applicable privileges.

In particular, the Task Force is withholding the categories of documents listed below. The Task Force may withhold additional categories of material determined to be privileged that have not yet been created or reviewed.

1. Personal letters submitted by members of the public to the Task Force that contain, for example, descriptions of health problems and financial information are withheld pursuant to 5 U.S.C. § 552(b)(6);

2. Personal letters, many attaching resumes, submitted by members of the public offering to help the Task Force are withheld pursuant to 5 U.S.C. § 552(b)(6);

3. Coding and routing slips for correspondence received by the intake center are withheld pursuant to 5 U.S.C. § 552(b)(2);

4. Background and options papers prepared by working group members and seen by Task Force members or the President related to national health care reform are withheld pursuant to privileges protecting deliberative processes and Presidential communications. <u>See</u> 5 U.S.C. § 552(b)(5) and <u>AAPS</u>, slip op. at 18-26.

Insofar as your request may be based on FOIA, that statute applies only to records maintained by "agencies" within the Executive Branch. <u>See</u> 5 U.S.C. § 552(a)(3). Neither the Task Force nor the interdepartmental working group or its "cluster" groups are agencies for purposes of FOIA because their functions are, respectively, to advise and to assist the President. <u>See</u> <u>Kissinger v. Reporters Comm. for Freedom of the Press</u>, 445 U.S. 136 (1980); <u>Meyer v. Bush</u>, 981 F.2d 1288 (D.C. Cir. 1993). The Task Force, working group and "cluster" groups are, therefore, not subject to FOIA.

xxx

cc: Kent Masterson Brown
Frank M. Northam

THE FREEDOM FORUM
FIRST AMENDMENT CENTER
at Vanderbilt University

PAUL K. McMASTERS
Executive Director

TEL: 615-321-9588
FAX: 615-321-9599

93 MAR 3 P4:02

March 2, 1993

John Podesta
Assistant to the President and Staff Secretary
Office of the Chief of Staff
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear John,

Let me say on behalf of the Society of Professional Journalists in particular and the FOI community in general how much we appreciate your taking the time Thursday to brief us on the Clinton administration's early thinking on open government. Obviously, we understand that it will take time to develop specific policies. It is good to find people in the new administration familiar with the issues.

I hope you will have an opportunity to share with your colleagues in the executive branch some of the concerns we broached in our conversation:

- The issues briefing paper sent to President Clinton by several media organizations.
- The suggestion that the president send a memo to all agency heads emphasizing that Freedom of Information requests from the public should be given priority in an open government.
- The hope that there will be a sea change in attitude toward the Freedom of Information Act at the Department of Justice and the Office of Management and Budget and that the administration can support the Leahy bills on FOIA.

If nothing else comes from our meeting, I hope you and your colleagues will feel free at any time to call on me, our attorneys, Bruce Sanford and Henry Hoberman, or anyone else at SPJ if you need information about access to government information and meetings. I've enclosed the survey we spoke of Thursday; it was conducted by the American Society of Newspaper Editors, which, incidentally, has invited President Clinton to speak at its convention -- I hope he will look favorably on that invitation.

We wish you the best in your new venture with a new administration. President Clinton and Thomas McLarty are fortunate to have a person of your talent and experience on their team.

Sincerely,

Paul K. McMasters

Paul K. McMasters
President–elect of The Society of Professional Journalists

P.S.: I understand the administration might be looking at a position for our friend Steve Katz. Speaking only for myself, I think he has become one of the most knowledgeable and effective people on the Hill in open government matters. He would be a wonderful force for good in whatever capacity the adminstration might choose to use him.

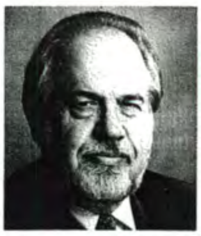
cc: Georgiana Vines
Bruce Sanford
Ernie Ford

PAUL K. McMASTERS
EXECUTIVE DIRECTOR

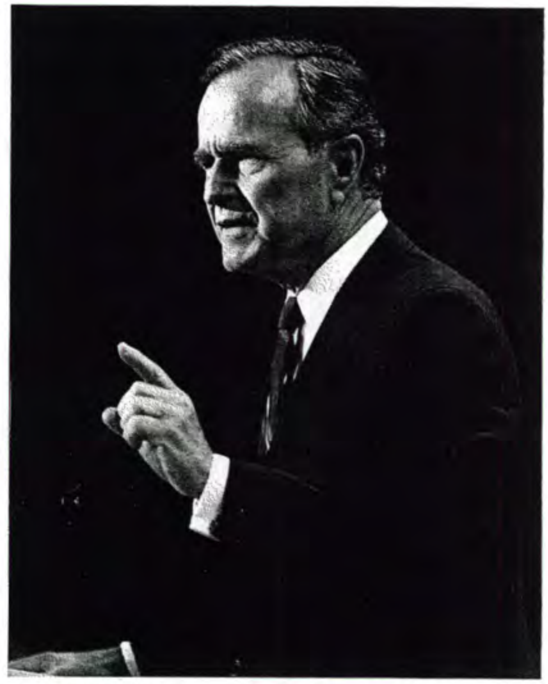
THE FREEDOM FORUM
FIRST AMENDMENT CENTER
at Vanderbilt University

1222 16TH AVENUE, SOUTH
NASHVILLE, TN 37212

TEL: 615-321-9588
FAX: 615-321-9599



Governor Bill Clinton speaks on crime in a July address at the Houston City Hall.
(Photo courtesy of Steve Ueckert/Houston Chronicle.)



President George Bush delivers his acceptance speech at the August Republican Party convention in Houston.
(Photo courtesy of Buster Dean/Houston Chronicle.)

JACK LOFTIS

Jack Loftis is editor of the Houston Chronicle.

The candidates:

Where Bush and Clinton stand on freedom of information, open records and other press freedom issues

The ASNE Freedom of Information Committee asked the Democratic and Republican presidential candidates for their views on specific freedom of information concerns. FOI Committee member Jack D. Loftis drafted the questions, contacted the candidates and collected the responses, which are printed below.

Question: What are your views regarding "government in the sunshine"? What do you think is the president's responsibility for keeping the public informed? How would you carry it out?

President George Bush: An open and accountable government has been a hallmark of our democratic system of government and is a goal I strongly support. Presidential speeches and press conferences address the largest issues of government. Throughout the executive branch, federal agencies respond to innumerable inquiries from the press and the public regarding agency programs. Agencies also provide frequent reports and testimony to the Congress on legislative, management and oversight issues, as well as responding to the concerns of individual constituents. Through these formal and informal means, the American public has access to an unparalleled range of information regarding the operations and activities of its public servants.

This does not mean that there should be no secrets in government or that every denial of access to information somehow violates this principle. Few would doubt, for example, that certain matters relating to national defense capabilities, or to our negotiations and diplomatic relationships with foreign countries, cannot be conducted entirely on the public record. As another obvious example, many law enforcement investigations require secrecy in order to ferret out unlawful conduct and to protect confidential sources. Moreover, the various agencies of the federal government are the repositories of many kinds of personal information on individuals — information that is properly protected by law against improper disclosure in order to avoid infringement of individual rights. Effective government would be severely hobbled if these necessary confidences could not be maintained.

This needed balance between full disclosure of information relating to the activities of the government, while safeguarding the confidentiality of other essential information, is at the heart of the concept of open and accountable government. The key federal laws — the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act — reflect this balance and further the goals of ensuring a well-informed American public.

Governor Bill Clinton: I support "government in the sunshine" and will be committed to fully enforcing the four major public access laws passed by Congress to ensure an open governmental process: the Freedom of Information Act, the Federal Advisory Committee Act, the Privacy Act, and the Government in the Sunshine Act.

I believe the president should conduct business in an open and straightforward manner consistent with these laws, and if elected I intend to do so.

Q What are your views about periodic assaults, even by the courts on occasion, on the free press guarantee of the First Amendment? As president, will you review their First Amendment philosophies with potential nominees to the United States Supreme Court, other federal judicial posts, the attorney general, the solicitor general, and others whose responsibilities include potential First Amendment issues?

Bush: Our right to speak and write free of government intrusion is among the most valuable we hold as Americans. In my appointments to the federal bench and to all high legal offices I have consistently sought men and women faithful to the law, including, of course, to the Constitution and First Amendment. To preserve the essential independence of the federal judiciary a president must stand firm, as I have, against political pressure to apply litmus tests to potential nominees by seeking commitments from them in advance on how they will rule on particular issues.

Clinton: As a former professor of constitutional law, I am deeply committed to the protections outlined in the First Amendment. I will appoint to the Supreme Court and federal bench only men and women of unquestioned intellect, judicial temperament, broad experience and a demonstrated concern for, and commitment to, the individual rights protected by our constitution. Other members of my administration will share my commitment to the First Amendment.

Q Will you hold regular, frequent news conferences? How often? Do you intend to review present ground rules for televised press conferences? In addition to televised news conferences will you also answer questions at informal (non-televised) conferences that permit follow-up in depth?

Bush: As president I have held 273 news conferences, 171 of them in formal settings, such as the White House Briefing Room or East Room. The other 102 were held in informal settings such as Air Force One during my many trips around the country.

Clinton: I expect my administration will hold press conferences and develop press procedures that are as open and fair to all parties as possible.

I would expect members of my administration to establish press policies consistent with my own.

— Bill Clinton

Q What philosophy will you pursue with regard to your press secretary or other authorized spokesperson? Will he or she have access to Cabinet-level and other meetings at which basic policy regarding foreign and domestic matters will be discussed and formulated? Will he or she hold daily briefings? Will he or she or the staff be available around-the-clock to deal with important questions on an urgent basis? Would you instruct other federal appointed executives to follow similar open government practices?

Bush: My press secretary is included in all top-level policy meetings. It is very important to me that the individual who is most responsible for explaining my policies to the press and public have the full breadth of knowledge and understanding of my views.

The press office has a duty officer who responds to press queries around-the-clock. In addition, my press secretary is readily accessible any time an urgent situation requires an immediate response. In my administration I like to see all departments and agencies respond quickly and skillfully to pressing public concerns.

(CONTINUED ON THE NEXT PAGE)

(CONTINUED FROM THE PRECEDING PAGE)

Clinton: Throughout this campaign, my chief spokespeople have always had access to me and to meetings where important campaign decisions are made. As president, I expect to continue this practice. And as has been the case during this campaign, my spokespeople will be widely available to all members of the press, both through regular press briefings and through individual contact.

I would expect members of my administration to establish press policies consistent with my own.

Extending the FOIA to the president and his closest advisers would raise a very serious constitutional problem.

— George Bush

Q Events in recent years sparked the press's interest in several specific areas, as follows:

• The press was extremely frustrated over the military's policy during Desert Storm not to allow reporters access to American troops and units without military escorts, even during times of calm. As commander-in-chief will you attempt to effect a change in this policy that many reporters felt served to manage the news that eventually got to the American people? Or do you feel that such restrictions are necessary in times of national emergencies such as Desert Storm?

• What are your views regarding governmental agencies using press credentials as a cover for their operations?

• Would you use lie detector tests to discover those in your administration who were responsible for leaking unauthorized information to the press?

Bush: *(Concerning Desert Storm press restrictions.)* Secretary Cheney and Defense Department spokesman Pete Williams have been working with media representatives to find ways to ensure that both the military and press can operate as efficiently as possible.

The media plays a vital role during times of national and international crisis. I will continue to have my administration work with media representatives, no matter what the field, to better our ability to serve the public quickly, accurately, and directly.

(Concerning government agencies using press credentials.) This issue does not arise with regard to the operations of the Department of Justice. The Department's policy is not to permit undercover agents to pose as journalists as part of their operations.

(Concerning lie detector tests.) In some instances, unauthorized disclosure of certain kinds of information can constitute a violation of the criminal law — for example, individual tax return information or national security records. But whether or not a specific unauthorized disclosure of information is a criminal offense, it may well be important to try to identify and prevent the causes of such breaches of confidentiality in order to maintain the integrity of the government's processes.

Clinton: While I would generally like press procedures to be as open as possible, some restrictions may be required during times of national emergencies.

I do not foresee using lie detector tests to trace leaks.

Q What are your views regarding the Freedom of Information Act and current amendments proposed in Senate Bill 1939 by Sen. Patrick Leahy, D-Vermont, to: a) improve public access to electronic records; b) curb delays in processing FOI requests; c) restrict federal agencies' use of exemptions; d) make Congress, the presidency and the administrative office of the U. S. Courts subject to the Act?

Bush: This administration is firmly committed to the implementation of the Freedom of Information Act, to the act's underlying principles of openness in government, and to the refinement of the act where necessary to meet changing circumstances over time. The Freedom of Information Act stands as a delicate balance of countervailing societal interests — the important public interests that are served by ready disclosure of information, and the equally compelling private and governmental interests that warrant protection of certain kinds of sensitive information. While my administration has not taken a position on the provisions of S. 1939, which would narrow several of the act's exemptions, I believe that any amendments to the Freedom of Information Act should be examined carefully to ensure that the act's delicate balance is not damaged by restrictions on agency use of the act's exemptions.

As regards public access to "electronic"records under the Freedom of Information Act, that subject is addressed by the provisions of Senator Leahy's companion bill introduced as S. 1940. This latter bill was the subject of a hearing held by the Senate Judiciary Committee's Subcommittee on Technology and the Law on April 30 of this year, at which the Department of Justice testified. As indicated in the department's testimony, it is most appropriate to seek a legislative resolution of the exceptionally complex and controversial FOIA issues that are raised by "electronic" records, but the provisions of S. 1940 do not fully take into consideration the practicalities of administering the act with respect to such records. The Department of Justice is committed to working in close cooperation with Congress, and with all other interested agencies and organizations, to refine the "electronic record" provisions of S. 1940

(CONTINUED ON P. 19)

Several students wrote briefs or conducted interviews for publication, under the guidance of their mentors. One did some fact-checking for a megagraphic on earthquakes.

Paul Tran, 17, from the Long Beach Polytechnic High School, said he enjoyed the program and benefited from being in the newsroom atmosphere. His favorite experience was accompanying a reporter on an interview following a drive-by shooting.

"It was exciting, though I was kind of scared," he reported. Tran has not decided whether he wants to become a journalist. "Sometimes I'm really sure, but sometimes I change my mind," he said.

But Analisa Castro, 17, from Valencia High School in Placentia, said the program definitely made her more interested in journalism. Others said they became less interested in a journalism career upon learning what reporters really do. One said she didn't think she could perform under the daily deadline pressure.

Now that the summer program is over we plan to stay in contact with the students, perhaps using them as resources for stories about teen-agers. Those who stick with journalism may return here as interns or as part-time news assistants. Eventually, we might hire them into our two-year reporter training program.

The program was intended for the students' benefit, but it also proved satisfying to the mentor reporters, most of whom said they would volunteer again. The high school mentor program is a low-cost effort that can serve the newspaper, its community and, ultimately, the journalism profession. ■

Bush and Clinton respond to questions on freedom of information

(CONTINUED FROM P. 12)

in light of practical agency concerns and to achieve consensus legislation on this very important subject.

S. 1940 also addresses the subject of administrative delays under the Freedom of Information Act. The Department of Justice's testimony on S. 1940 explains that the problem of Freedom of Information Act backlogs at many federal agencies is a longstanding and largely intractable one with multiple underlying causes, including the volume and complexity of FOIA requests received, the rigidity of the Act's existing time limits, and the limitations of agency resources. (For example, the Department of Justice alone received over 106,000 FOIA requests in 1991, an average of 424 per work day, and some individual requests cover thousands of pages of records.) As is indicated in the Department of Justice's testimony, the provisions of S. 1940 do not adequately address these underlying causes of the problem, but the department stands willing to further explore this major area of possible FOIA reform with Congress.

Lastly, the administration proposes that Congress be made subject to the Freedom of Information Act to the same extent that the executive branch is now covered. As the Freedom of Information Act now covers the entire executive branch except for the offices of the president and the vice president, this administration has proposed that it be applied to all analogous portions of the legislative branch — except for the personal offices of individual members or the leadership offices of either House. This is set forth in the administration's proposed "Accountability in Government Act of 1992," transmitted to Congress on April 9 of this year.

S. 1939 would extend the Freedom of Information Act to "the legislative branch of the government," without any evident limitation, and would include the offices of the president and the vice president as well. (S. 1939, 102nd Cong., No. 5.) However, extending the FOIA to the president and his closest advisers would raise a very serious constitutional problem. It would place a severe burden on the president's performance of his executive functions both by "chilling" the president's immediate staff in their communications with the president and by requiring the president and his staff to spend an inordinate amount of time responding to FOIA requests. It would also interfere with the president's constitutional duty to supervise and guide executive branch officials. The administration believes that the parallelism of its proposal would be an appropriate resolution of this matter, by providing the desired openness in both the executive and legislative branches, while still complying with important constitutional strictures.

Clinton: The Freedom of Information Act (FOIA) is a landmark piece of legislation, and I support its full enforcement. Before FOIA's enactment in 1966, the burden to establish a right to review government documents and records was on individual citizens; FOIA changed that by making the government prove that there is a need for secrecy.

*

I have not had the opportunity to study Senator Leahy's proposal, but I do in concept support the bill's intent to improve the application of the Freedom of Information Act.

I have not yet decided whether or not I believe FOIA should be expanded. ■

I have not yet decided whether or not I believe FOIA should be expanded.

— Bill Clinton

[SCHEDULED FOR ARGUMENT APRIL 30, 1993]
Nos. 93-5086, 93-5092

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiffs-Appellees/
Cross-Appellants,

v.

HILLARY RODHAM CLINTON, DONNA E. SHALALA, Secretary of Health & 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-Appellants/
Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' REPLY AND CROSS-APPELLEES' BRIEF

STUART E. SCHIFFER
Acting Assistant Attorney General

J. RAMSEY JOHNSON
United States Attorney

ROBERT E. KOPP
(202) 514-3311
MARK B. STERN
(202) 514-5089
PATRICIA A. MILLETT
(202) 514-3688
MALCOLM L. STEWART
(202) 514-1633
Attorneys, Appellate Staff
Civil Division, Room 7124
Department of Justice
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

* Authorities chiefly relied upon are marked with an asterisk.

Constitution:

Statutes:

Regulations:

Rules:

Legislative Materials:

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-5086, 93-5092

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

Plaintiffs-Appellees/
Cross-Appellants,

v.

HILLARY RODHAM CLINTON, DONNA E. SHALALA, Secretary of Health & 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-Appellants/
Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' REPLY AND CROSS-APPELLEES' BRIEF

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs invoke this Court's jurisdiction over their cross-appeal pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a). As we discuss at point III, infra, there is no jurisdiction pursuant to 28 U.S.C. § 1291 over the order partially dismissing plaintiffs' claims. To the extent that plaintiffs' cross-appeal argues that the district court erred in prematurely dismissing some claims without permitting adequate discovery, these issues are not suitable for appellate review at the present time. See pp. 24-25, infra.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW BY PLAINTIFFS' CROSS-APPEAL

1. Whether this Court should exercise its jurisdiction to review plaintiffs' contention that the district court erred in partially dismissing their claims without permitting adequate discovery.

2. Whether the interdepartmental working group, comprised of approximately 340 federal employees, is a "subgroup" of the Health Care Task Force.

SUMMARY OF ARGUMENT

1. The principal issue of statutory construction presented by this appeal is whether a task force composed solely of Cabinet members and senior White House advisors including the First Lady consists "wholly of federal officers and employees" for purposes of the Federal Advisory Committee Act ("FACA"). In our opening brief, we showed that the terms "officer" and "employee" are defined variously throughout the United States Code and are plainly broad enough to encompass the First Lady, who functions as an integral part of the White House in a role statutorily recognized and funded by Congress.

That construction is required to effectuate congressional intent and to avoid serious constitutional problems. Congress enacted the FACA to ensure that the influence of private interest groups did not escape scrutiny and to avoid wasteful expenditures. Neither of these purposes is served by indulging in the fiction that the First Lady, who provides assistance to the President pursuant to statute, does not have a federal role as a key advisor to the President. To the contrary, the interpretation urged by plaintiffs creates an encroachment on Executive Branch powers never intended by Congress.

Plaintiffs' brief fails almost entirely to respond to these points. Instead, plaintiffs reply at considerable length to an argument that the government does not make. Contrary to plaintiffs' assertions, we do not argue that the Court may ignore the plain meaning of the statute in order to avoid absurd results. We urge instead that the statutory language, properly construed, creates no unintended results or constitutional confrontations. Indeed, the district court reached a contrary conclusion only because it erroneously believed that it was bound by the definitions of "officer" and "employee" contained at sections 2104 and 2105 of Title 5, an argument which plaintiffs themselves do not press on appeal.

2. As we have explained, the Court need not and should not reach the significant constitutional questions posed by plaintiffs' suit because the FACA, properly construed, does not apply to the Task Force. In urging a contrary interpretation, plaintiffs ask the Court to turn its back on the express teachings of Public Citizen v. Department of Justice, 491 U.S. 440 (1989), where the Supreme Court stressed that the FACA, which works potentially impermissible intrusions into presidential

power, must be construed to avoid unintended constitutional consequences.

If the Court were nevertheless to reach the constitutional issues, it is plain that plaintiffs offer no solution to the constitutional problems identified by the district court. Plaintiffs' principal line of attack is a misguided suggestion that the government could avoid the constitutional issues presented by their suit by invoking the exceptions to the Sunshine Act that are incorporated by reference into the FACA. See 5 U.S.C. 552b(c) (listing Sunshine Act exemptions). However, plaintiffs never explain how any of the exemptions of the Sunshine Act would cure any of the problems discussed in the government's opening brief or the district court's opinion.

Plaintiffs offer no basis for avoiding the constitutional intrusion created by a reading of the FACA which would bar a group of the President's closest advisors, all of whom are Cabinet secretaries or key White House advisors, from meeting in private to formulate legislative proposals for the President. Nor do they seek to defend the unworkable distinction between "formulating recommendations" and "information-gathering" adopted by the district court.

Instead, plaintiffs cite decisions rejecting various challenges to other disclosure statutes. But their discussion entirely fails to address Public Citizen, where the Supreme Court made clear that the FACA itself, if incapable of a narrowing construction, would effect an unconstitutional intrusion into

Presidential powers. Indeed, the cases under the Freedom of Information Act ("FOIA") and the Sunshine Act on which plaintiffs primarily rely involve intrusions on agencies. In contrast, the functions of the Task Force, which is not an agency, are intimately intertwined with the President's exercise of his own constitutionally assigned functions.

3. In their cross-appeal, plaintiffs urge that the district court prematurely dismissed their claims regarding the interaction of the Task Force with the interdepartmental working group, which consists exclusively of federal employees and has been established to develop options for presentation to the Task Force. This contention does not seek review of a final order or a denial of injunctive relief and is therefore not appealable.

In any event, this claim is without basis. The essence of plaintiffs' argument is that, assuming the Task Force to be an advisory committee, the interdepartmental working group must also be a "subgroup" of the Task Force whenever a Task Force member is briefed.

Here it is plaintiffs who leave the language of the statute in the dust. The working group of over three hundred employees cannot conceivably be termed a "subgroup" of the twelve-member Task Force.

Nor can plaintiffs transform the working group into a subgroup of the Task Force by means of baseless allegations that the Task Force will abdicate its assigned function. If the President had wished to receive legislative proposals from the interdepartmental working group, he could certainly have done so. Instead, the President has assigned responsibility for formulating legislative recommendations to a Task Force consisting of some of the highest-ranking officials of his administration. Plaintiffs argue in this suit that this Task Force is an "advisory committee" within the meaning of the FACA. They are wrong. But, in any event, their argument cannot be used to convert a separate group of federal employees into an advisory committee subgroup.

ARGUMENT

I. THE TASK FORCE IS NOT AN ADVISORY COMMITTEE WITHIN THE MEANING OF THE FACA.

Plaintiffs expend considerable effort to refute an argument the government does not make. Contrary to plaintiffs' assertions, we do not ask the Court to ignore the language of the FACA which excepts committees consisting "wholly" of federal officers or employees. See Pl. Br. 20.

Plaintiffs' extensive reliance on principles of construction discussed in Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982), reflects their failure to come to grips with the point at issue. (Pl. Br. 21-22.) Griffin instructs that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." 458 U.S. at 575 (emphasis added). The point, as discussed below and in our opening brief, is that a construction of the FACA consistent with its language and purpose is readily available.

Moreover, although plaintiffs seek to avoid the Supreme Court's decision in Public Citizen at every turn, the Court has made clear that the particular constitutional concerns posed by the FACA require especially strict adherence to the principle that the statute be interpreted in accordance with congressional intent and to avoid unintended constitutional confrontations. See 491 U.S. at 452 & n.8 (warning of unacceptable consequences of the "unfettered breadth of a dictionary reading of the FACA's definition of 'advisory committee'"). Unless the FACA language is incapable of bearing a saving interpretation, Public Citizen requires that it be construed to avoid serious constitutional problems. As the Court made clear, the Act must be applied so as to deal with the "specific ills" it was designed to cure. Id. at 453. Plaintiffs turn their back on the express directive of Public Citizen when they insist that a task force of Cabinet members and senior White House advisors including the First Lady does not consist "wholly of federal officers and employees" for purposes of the FACA.

A. The FACA Is Properly Construed To Encompass The First Lady As An Officer Or Employee.

1. Plaintiffs concede, as they must, that the FACA does not define the terms "officer" and "employee." (Pl. Br. 23.) And they do not urge that this Court perpetuate the district court's error of assuming that the definitions contained at 5 U.S.C. §§ 2104 & 2105 are binding. (As we discuss below, plaintiffs do erroneously argue that the Court should, as a matter of interpretation, adopt these definitions.) Accordingly, this

Court may properly apply the teachings of Public Citizen, which the district court believed it was precluded from implementing. See App. 62-63. Indeed, this Court has long recognized that "officer" is "a term of variable import, whose connotation changes with the setting in which it is used." Morgenthau v. Barrett, 108 F.2d 481, 483 (D.C. Cir. 1939), cert. denied, 309 U.S. 672 (1940); cf. McCall v. Swain, 510 F.2d 167, 180 (D.C. Cir. 1975).

Plaintiffs fail entirely to explain why the terms "officer" and "employee" as used in the FACA should not, consistent with legal and common usage, be construed to encompass the First Lady. Equally, they fail to show how their preferred construction would in any way advance congressional intent.

Plaintiffs do not come to grips with the fact that in the United States Code and in common usage the terms "officer" and "employee" are given various meanings which easily accommodate the First Lady. Instead, they attack an "extrastatutory attempt by the Appellants to exclude the First Lady" from the scope of the FACA. (Pl. Br. 25.) But it is plaintiffs who turn a blind eye to relevant statutes which recognize both the First Lady's official function of providing assistance to the President and the potentially inclusive scope of the term "officer."

As we discussed in our opening brief, Congress has given statutory imprimatur to the First Lady's role, authorizing the expenditure of federal funds in the performance of her official duties in providing "assistance * * * to the President in the discharge of the President's duties and responsibilities." 3 U.S.C. § 105(e). See also Hearings before the Subcommittee on Employee Ethics and Utilization of the House Committee on Post Office and Civil Service 12, 95th Cong., 1st & 2d Sess. (Feb. 7, 1978) (testimony of Harrison Wellford, Executive Associate Director for Reorganization and Management of the Office of Management and Budget) (3 U.S.C. § 105(e) "continues the historical practice of use of appropriations to assist the spouse of the President in connection with the spouse's assistance to the President in discharge of the President's duties and responsibilities").

Consistent with 3 U.S.C. § 105(e), the Office of the First Lady, established within the Office of the White House, annually receives funds appropriated to the White House by Congress. The Office of the First Lady, headed by the First Lady herself, has a staff including a Chief of Staff, Press Secretary, and various other assistants.

Plaintiffs refuse to acknowledge the First Lady's White House role in assisting the President in the discharge of his duties. Indeed, plaintiffs' brief does not even cite 3 U.S.C. § 105(e). Yet this role easily comports with the sense of officer that includes one who holds an office of trust or authority in the government. See Black's Law Dictionary 977 (1979) ("officer" defined as "[p]erson holding office of trust, command or authority in * * * government"); The American Heritage Dictionary of the English Language 912 (1980) ("officer" defined as "[o]ne who holds an office of authority or trust in * * * government"). Similarly, the first general definition of "officer" provided by the United States Code -- which plaintiffs also fail to cite -- suggests the potentially inclusive scope of the term, defining officer to include "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Thus, as one who occupies a White House office, performs through that office presidentially-assigned duties, and receives statutorily authorized federal funds for the execution of her office, the First Lady comes within an ordinary, common sense construction of the term "officer."

2. Plaintiffs do not show how the statutory context of the FACA in any way supports their circumscribed reading of the term. Through the FACA, Congress sought to curb the secretive influence of private special interests on government. See, e.g., S. Rep. No. 1098, 92d Cong., 2d Sess. 4 (1972) ("decision-makers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings -- and could not get in the door if they did -- may not make tempered judgments") (internal quotation omitted); H.R. Rep. No. 1017, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3496 ("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"). By contrast, Congress disavowed any interest in regulating committees whose membership was drawn entirely from inside the

government. "[I]t was felt that the matter 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. 1098, supra, at 8 (emphasis added).

In 1976, when Congress restricted the grounds for closing meetings of an advisory committee, it reaffirmed its view that the FACA draws a line between committees comprised wholly of governmental personnel and committees which include representatives from outside the government. Prior to 1976, the decision to close an advisory committee had been governed by the exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b), including the deliberative process privilege. In amending the FACA, Congress limited the reasons for closing advisory committee meetings to the narrower exceptions contained in the Government in the Sunshine Act, 5 U.S.C. § 552b. The Conference Report explained that the congressional action reflected the necessary presence on FACA advisory committees of persons from outside the government:

> The chief concern in this regard has been application of exemption 5 [the deliberative process privilege], a provision intended to protect the confidentiality of purely internal governmental deliberations, as a basis for closing discussions with and among outside advisers.

H.R. Conf. Rep. No. 1441, 94th Cong., 2d Sess. 26, reprinted in 1976 U.S.C.C.A.N. 2244, 2262 (original emphasis).

In light of this specific and consistent legislative history, there is no conceivable basis -- and plaintiffs have provided none -- for narrowly construing "officers or employees" so as not to include an integral member of the White House office and a key advisor and assistant to the President, performing federal duties recognized, authorized and funded by Congress.

B. Plaintiffs Err In Arguing That The Court Should Be Guided By The Definitions Contained At 5 U.S.C. §§ 2104, 2105.

Plaintiffs place chief reliance on the definitions of officer and employee contained at 5 U.S.C. §§ 2104, 2105. As we explained in our opening brief, the Senate version of the FACA expressly incorporated these definitions, see S. 3529 § 3; S. Rep. No. 1098, supra, at 8, but that provision was deleted in the Conference Committee. H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3508, 3509. This Court should not impose a definitional limitation that Congress itself "expressly declined to enact." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974); see also Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) ("few principles of statutory construction are more compelling than the proposition that Congress does not intent sub silentio to enact statutory language that it has earlier discarded * * *").

Plaintiffs respond to this canon of construction by urging that inclusion of the definitions on which they rely would have been "both unnecessary and redundant." (Pl. Br. 26.) However, plaintiffs offer no basis whatsoever for assuming that Congress intended to assign controlling force to the Title 5 definitions. On the contrary, when Congress wanted to import Title 5 definitions and concepts into the FACA, it did so explicitly. See, e.g., 5 U.S.C. App. 2 §§ 3(3), 7(d)(1)(C), 8(b)(3), 10(b), 11(b), 13.

Plaintiffs suggest that the definitions of "officer" and "employee" found at 5 U.S.C. §§ 2104 & 2105 are sufficiently "long-standing and consistent" that a Court should presume their implicit incorporation into the FACA. (Pl. Br. 26.) In fact, these definitions were enacted in 1966, only six years prior to the FACA itself, as part of a civil service reform statute. See Pub. L. No. 89-554, Subpart A, 80 Stat. 378, 408-09. In contrast, the definition contained in 1 U.S.C. § 1 dates to 1948. See 62 Stat. 859. Moreover, even within Title 5, "officer" and "employee" are given varying definitions. See, e.g., 5 U.S.C. §§ 902(3), 2104, 2105, 7103(a)(2), 7342(a)(1), 7511(a)(1).

Ultimately, plaintiffs' argument on this score rests once more on their inability to perceive the point at issue. The issue is not whether the government can "clearly demonstrate [that] the plain language of the FACA is not controlling." (Pl. Br. 26.) The point is simply that the plain language of the FACA does not include the definitions on which plaintiffs rely -- definitions which were, in fact, removed from the statute by Congress. In the absence of any definition to the contrary, this Court should follow the dictates of Public Citizen and interpret the statutory language so as to effectuate congressional intent and avoid unnecessary constitutional confrontations.

C. Inclusion Of The First Lady As An Officer For Purposes of the FACA Creates No Inconsistencies Or Anomalies.

Plaintiffs argue that if the First Lady is an "officer" or "employee" for purposes of the FACA, she must be subject to the restrictions placed on certain officers and employees by other statutes. Thus, plaintiffs erroneously insist that if the First Lady were an officer or employee for purposes of the FACA, her status would contravene the Anti-Nepotism Act, 5 U.S.C. § 3110(b). Similarly, they argue that partisan political activities by the First Lady would be barred by the Hatch Act, 5 U.S.C. § 7324.

In the first place, as we have already discussed, the terms "officer" and "employee" have varying meanings in different statutes. That the First Lady is an officer for the purposes of the FACA does not suggest that she is an officer for purposes of all statutes. In any event, the statutes cited by plaintiffs are by their own terms inapplicable to the First Lady.

The Anti-Nepotism Act, 5 U.S.C. § 3110(b), applies only to appointments to an "agency," and the Hatch Act's plain language similarly regulates only employees in an "agency." 5 U.S.C. § 7324(a). Plaintiffs ignore the holdings of this Court and the Supreme Court that committees within the Executive Office of the President whose sole function is to advise the President are not Executive branch agencies. <u>See</u>, <u>e.g.</u>, <u>Kissinger</u> v. <u>Reporters</u>

Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980); Meyer v. Bush, 981 F.2d 1288, 1298 (D.C. Cir. 1993); Rushforth v. Council of Economic Advisers, 762 F.2d 1038, 1043-44 (D.C. Cir. 1985); cf. Franklin v. Massachusetts, 112 S. Ct. 2767, 2775-76 (1992) (the President is not an "agency"). Thus, plaintiffs' paradox is illusory. On the contrary, a number of White House personnel are federal "officers" or "employees" for a variety of purposes (including the definitions at 5 U.S.C. §§ 2104 & 2105), without being subject to the restrictions of the Anti-Nepotism Act or the Hatch Act. See, e.g., 5 U.S.C. § 7324(d)(1) (providing that Hatch Act restrictions on political campaigning do not apply to "an employee paid from the appropriation for the office of the President").

The contention of amicus Pacific Legal Foundation that categorizing the First Lady as an officer or employee for purposes of the FACA would run afoul of the Anti-Deficiency Act, 31 U.S.C. § 1342, is similarly flawed. The Anti-Deficiency Act prohibits an "officer or employee of the United States Government" from accepting "voluntary services * * * exceeding that authorized by law." Of course, the First Lady's services in assisting the President are authorized by law. 3 U.S.C. § 105(e).

In a similar vein, plaintiffs suggest that the First Lady cannot be a federal "officer" or "employee" because she is not accountable to anyone. But the First Lady, just like every other White House advisor, answers to the President, who is accountable for the actions of all his advisors. It is the President who designates when, in what manner, and under what terms the First Lady may assist him in the performance of his duties. The President, if so inclined, could limit or prohibit the First Lady from serving as his assistant and similarly restrict expenditures for her Office. Moreover, Congress could independently modify or repeal 3 U.S.C. § 105(e).

II. APPLICATION OF THE FACA TO THE TASK FORCE WOULD BE AN UNCONSTITUTIONAL INTRUSION INTO THE PRESIDENT'S AUTHORITY TO PROPOSE LEGISLATION.

In our opening brief, we showed that application of the FACA to this Task Force -- which consists of high-ranking Executive Branch advisors, and is charged with developing legislative proposals of the highest priority -- would impermissibly intrude on the President's constitutionally committed power to recommend legislation. Art. II., § 3. The district court's order properly recognized the constitutional problems created by the court's statutory ruling. However, its order created an unworkable and constitutionally flawed distinction between "information-gathering" and "policy formulation."

Plaintiffs and their amici do not attempt to defend that distinction. Instead, they argue that an order subjecting the Task Force to the provisions of the FACA poses no constitutional problems at all.

1. Plaintiffs urge that the district court misperceived the constitutional intrusions posed by application of the FACA, suggesting that "[t]he appellants have artfully attempted to

misapply rules of statutory construction to ignore the exemptions of Section 10 of the FACA in order to create an illusory constitutional question * * *." (Pl. Br. 42.) Indeed, plaintiffs go so far as to contend (Pl. Br. 41-42) that the district court, having determined that the Task Force was subject to the FACA, should nevertheless have declined to address the constitutional issues presented by this case.

Plaintiffs apparently mean that the President's prerogatives are fully protected by the exemptions in the Sunshine Act, which are incorporated by reference in § 10(d) of the FACA. These exemptions permit public exclusion from meetings only for specific and narrow reasons. See 5 U.S.C. § 552b(c). These exceptions would not, for example, permit closure of a meeting on deliberative process grounds.

Plaintiffs never explain which of the Sunshine Act exemptions would address the obvious constitutional concerns posed by application of the statute here. Nor do plaintiffs explain how the FACA could constitutionally be applied here to require, among other things, "balanced membership," to regulate the President's exercise of "influence[]" over the "advice and recommendations" provided by the Task Force, or to require a public report explaining the President's reasons for rejecting any advisory committee recommendations that he chooses not to adopt. See 5 U.S.C. App. 2 §§ 5(b)(2), 5(b)(3), 5(c), 6(b). Similarly, plaintiffs do not explain how the statute's notice requirements strictly applied would not improperly encumber the expedited process ordered by the President.

It is not surprising that the Sunshine Act exemptions fail adequately to protect presidential prerogatives in this context. Because the Sunshine Act is inapplicable to bodies whose sole function is to advise the President, see S. Rep. No. 354, 94th Cong., 1st Sess. 15 (1975), its exemptions were not designed to protect the integrity of the advisory function. There is consequently no basis for plaintiffs' suggestion that this Court may subject the Task Force to the requirements of the FACA without addressing the constitutional objections to that course of action. Such abdication of the judicial role is inconsistent both with basic principles of adjudication and with the Supreme Court's disposition of Public Citizen, in which the Court expressly considered the FACA's constitutional ramifications in an analogous context. In light of the pendency of the Task Force's deliberations, Pacific Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1265 (D.C. Cir. 1980) (see Pl. Br. 41) -- which involved a challenge to agency regulations at a time when meetings appear to have been neither scheduled nor imminent -- is easily distinguishable.

2. Plaintiffs' constitutional discussion omits all reference to Public Citizen, where a majority of the Justices concluded that the constitutional questions posed by the FACA were "serious" and "undeniable," 491 U.S. at 466-67, and the remaining Justices would have held the statute unconstitutional

as applied. Rather, resolutely ignoring the precedent most directly on point, plaintiffs and their amici rely principally on cases decided under <u>other</u> public disclosure statutes -- the Freedom of Information Act ("FOIA") and the Sunshine Act. These cases establish the undisputed proposition that not <u>all</u> information within the possession of the Executive Branch is constitutionally immune from public scrutiny. None of the cases cited by plaintiffs, however, remotely suggests that Congress could prevent high-level Executive Branch advisors charged with developing legislative proposals for the President from conducting their business confidentially. Indeed, the FOIA and the Sunshine Act, which apply only to agencies, have no application at all to bodies whose sole function is to advise the President. <u>See</u> <u>Meyer</u> v. <u>Bush</u>, 981 F.2d 1288, 1291-94 & n.1 (D.C. Cir. 1993); <u>Pacific Legal Found.</u>, 636 F.2d at 1263.

Imposition of open-meeting requirements on the Task Force raises substantially different constitutional issues than those presented by application of the FOIA and the Sunshine Act to agencies. Because the functions of the Task Force are so intimately tied to the President's performance of his own constitutional duties, the level of intrusion is substantially higher. Conversely, the need for public oversight is significantly less compelling. Unlike an agency which can itself promulgate regulations having the force of law, the Task Force's recommendations assume significance only insofar as the President himself chooses to include them among his own proposals for legislation. At this point they will of course be the subject of extensive debate within the Congress and the electorate. See generally Meyer. The intrusion here thus reaches far more directly to the President's own exercise of his constitutionally committed functions than do the requirements of the FOIA or the Sunshine Act. At the same time, because the Task Force recommendations affect the public only insofar as the President incorporates the recommendations into legislative proposals, the opportunity for public scrutiny and comment is assured.

Indeed, the constitutional concerns raised by this lawsuit would be even more apparent if plaintiffs had named the appropriate defendant. The proper defendant in a FACA suit is the governmental entity that has established or utilized the committee, not the committee or its members. Washington Legal Found. v. American Bar Ass'n, 648 F. Supp. 1353, 1359-61 (D.D.C. 1986); cf. Center for Auto Safety v. Cox, 580 F.2d 689, 693 (D.C. Cir. 1978). This is not a technical point of pleading. Rather, it reflects the fact that the FACA "regulates the government's use of the advisory committee and not the committee itself * * *." Washington Legal Found., 648 F. Supp. at 1359 (emphasis in original). Thus, as we have explained, the gravamen of this suit is an effort to enjoin the President from utilizing the Task Force as he sees fit to develop legislative proposals.

The Supreme Court's decision in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), underscores the markedly different constitutional considerations raised by such relief than are raised by similar relief against agencies. In that case, the Court "[o]ut of respect for the separation of powers and the unique constitutional position of the President," refused to interpret the Administrative Procedure Act to apply to the President and accordingly declined to review the statutory claims presented. Id. at 2775. Although the Court concluded that review would be available for constitutional claims, it strongly questioned whether injunctive relief against the President would be available, distinguishing the availability of similar injunctive relief against the Secretary of Commerce. Id. at 2776. The Court observed that "injunctive relief against the President himself is extraordinary," and admonished the court below for entering an injunctive order without appropriate evaluation. Id. at 2776. See also id. at 2788-90 (Scalia, J., concurring in part and concurring in the judgment); Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991). In short, plaintiffs' failure to perceive the different level of intrusion involved in an order that intrudes on the President himself rather than on an agency ignores established law.[1]

---

[1] The importance of naming the proper FACA defendant is ordinarily reduced when the advisory committee is established, appointed, and financed by the government; in that event, the suit will be one against "the government" no matter which entity is named as the defendant. Washington Legal Foundation, 648 F.

(continued...)

Amicus J. Gregory Sidak argues that the President, by his appointment of the Task Force, has "delegate[d]" his duty under Art. II, § 3 to recommend legislation. Amicus Br. at 8. This contention is bizarre: the Task Force reports to the President, who alone retains authority to propose legislation to Congress. Mr. Sidak has things precisely backwards. This is not a case about an injunction against an unconstitutionally empowered Task Force. Rather, it is a case about an injunction against a President seeking recommendations from top-level Executive Branch advisors in the performance of his own duties.

3. Cases decided under the FOIA are distinguishable in another respect as well. As we noted in our opening brief (Gov't Br. 39-41), application of the FOIA often requires the segregation of exempt material in an otherwise disclosable document. That task is not always feasible even when an agency reviews existing records with the benefit of hindsight. But it would be infeasible for the Task Force to predict in advance which portions of a particular meeting will and will not be deliberative, or to enforce the FACA's open-meeting requirements with regard to some portions of an individual session.

The Supreme Court's decision in Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977), is inapposite for essentially

---

[1](...continued)
Supp. at 1361. The need for precision reappears, however, when (as here) a suit against the governmental actor that has utilized the committee raises distinct constitutional concerns.

the same reason. In that case the Court emphasized that the Administrator of General Services -- an official within the Executive Branch -- retained the power to review the pertinent tapes and documents in order to prevent public dissemination of any privileged segments within them. 433 U.S. at 444. In the present case, by contrast, Task Force members are placed in the untenable position of being forced to make an analogous determination <u>in advance of</u> a scheduled meeting.

4. Amici Reporters Committee for Freedom of the Press, et al., suggest that the President's constitutional interest in receiving candid and thorough advice protects the confidentiality only of meetings that actually include the President. <u>See</u> Amicus Br. at 2, 11. Of course, application of the FACA would bar confidentiality even in these meetings. In any event, the distinction proposed by amicus is flatly refuted by <u>Public Citizen</u>. The meetings of the ABA Committee at issue in that case included neither the President himself nor any other government official. <u>See</u> 491 U.S. at 447. Yet five Justices concluded that the Act, if construed to cover this committee, would raise sufficiently serious constitutional concerns so as to warrant a "saving" construction; and three Justices would have held that the Act, so construed, effected an unconstitutional intrusion into presidential prerogatives. It is therefore quite clear that public scrutiny of presidential advisors may unconstitutionally impair the President's ability ultimately to obtain adequate

counsel, even if the meetings that include the President himself remain confidential.[2]

III. PLAINTIFFS' CLAIMS WITH REGARD TO INTER- ACTIONS BETWEEN THE TASK FORCE AND THE WORKING GROUP ARE NOT PROPERLY BEFORE THE COURT AND ARE, IN ANY EVENT, MERITLESS.

In their cross-appeal plaintiffs argue that claims regarding the interaction of the Task Force with the interdepartmental working group consisting of approximately 340 federal employees were prematurely dismissed and that they should have been permitted additional discovery on this point.

1. Plaintiffs' complaint contains no claims regarding the working group as such, see App. 4. However, they argued below that because (in their view) the Task Force was an advisory committee, meetings between Task Force members and the working group should also be subject to the FACA. When the government filed its motion for dismissal or summary judgment, the district court concluded that plaintiffs had failed to demonstrate entitlement to discovery on interactions between the Task Force and the working group and dismissed these claims.

Neither the district court's denial of the discovery request nor its partial dismissal of plaintiffs' suit pursuant to Fed. R.

---

[2] We have informed both Houses of Congress of our position regarding the constitutionality of the FACA as applied in this case, and Congress is aware of this litigation. See, e.g., 139 Cong. Rec. S4448 (daily ed. Apr. 2, 1993) (Statement of Sen. Glenn).

Civ. P. 12(b)(6) is a final judgment. Nor are these orders otherwise immediately appealable. Of course, if plaintiffs had contested the district court's denial of preliminary injunctive relief on these claims, the district court's ruling would be appealable under 28 U.S.C. § 1292(a). In that case, the Court would be asked to consider whether the district court erred in denying preliminary relief on the basis of the existing record.

In fact, however, plaintiffs' argument with regard to the working group is simply that dismissal of their claims under 12(b)(6) was premature and that they are entitled to discovery. See Br. at 35 n.5, 38-39. These issues are not properly raised in the guise of an appeal from the denial of a preliminary injunction. The district court's dismissal of these claims is therefore appealable, if at all, only under a theory of "pendent appellate jurisdiction." Although this Court has discretion to proceed upon this theory, "[p]endent appellate jurisdiction is a procedural device that rarely should be used." Akerman v. Oryx Communications, Inc., 810 F.2d 336, 339 (2d Cir. 1987); see also Wagner v. Taylor, 836 F.2d 578, 586 (D.C. Cir. 1987) (court may review otherwise nonappealable decision that is "inextricably bound up with the remedial decision -- the ruling on preliminary injunctive relief -- which is properly before [it] under Section 1292(a)(1)") (footnote and internal quotations omitted). Cf. Gross v. Winter, 876 F.2d 165, 168 & n.3 (D.C. Cir. 1989) (noting, but not resolving, the question whether the court possessed "pendent appellate jurisdiction" over otherwise nonappealable issues in appeal brought under collateral order doctrine).

2. Assuming that the Court were to reach these arguments, they must be rejected. First, these arguments depend on holdings that the FACA applies to the Task Force and that this application is constitutional. As we have discussed, these positions should be rejected.

Second, a separate group composed of over three hundred federal employees cannot conceivably be a "subgroup" of a twelve-person task force. Even if plaintiffs could prevail on their claim that the Task Force is an advisory committee, they cannot by sleight-of-hand make the working group into its subgroup.

Plaintiffs offer a welter of unsupported and irrelevant assertions in support of their argument, darkly hinting that the Task Force is a "political facade to mask the real meetings with selected private interests which are being conducted by the "'interdepartmental working group.'" (Pl. Br. 38.) The government has no need for a "facade" for the wholly proper activities of the working group. Contrary to plaintiffs' evident assumption, the President could have asked the working group to develop consensus advice and report to him directly. Similarly, the President could have asked any government Department or Departments to undertake the same activity. Any of these Departments could, with full propriety, develop legislative proposals, meet with private persons, or hire private consultants. Had the President asked any Department, Departments or the inter-departmental working group to proceed in this fashion and formulate legislative proposals without participation of the Task Force, the purported basis for plaintiffs' suit would have been removed entirely.

However, the President has charged a group of his key advisors to consider options presented by the working group as well as input from other sources, and plaintiffs have chosen to challenge that Task Force as an advisory committee. Even if they were correct in that characterization, which they are not, this claim could not be used to make other, distinct groups comprised wholly of federal employees into a "subgroup."

Plaintiffs' reliance on National Anti-Hunger Coalition v. Executive Committee, 711 F.2d 1071 (D.C. Cir. 1983), is altogether misplaced. Indeed, National Anti-Hunger Coalition refutes, rather than supports, plaintiffs' assertion that the attendance of a Task Force member at a meeting of the working group automatically converts the working group as a whole, or one of its "cluster groups," into a "subgroup" or "subcommittee" of the twelve-person Task Force. In National Anti-Hunger Coalition, "task forces" of an advisory committee and sub-committee, both subject to the FACA, were chaired by advisory committee members and staffed by others. National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524, 526 (D.D.C. 1983). Neither the presence of FACA committee members on these "task forces" nor even their intimate involvement "in the gathering of information about federal programs and the formulation of possible recommendations for the Committee," was enough to subject the task forces to the FACA. Id. at 529. That holding was affirmed by this Court. 711 F.2d at 1075. Like the task forces at issue in National Anti-Hunger Coalition, the working group here is appropriately characterized as the "staff" of the committee that advises the President, and its meetings -- even those which include Task Force members -- therefore are not subject to the Act. See 557 F. Supp. at 529; 711 F.2d at 1075.

Because, in contrast to the present case, none of the groups involved in National Anti-Hunger Coalition fell within the FACA exceptions for committees of federal employees, the Court in that case considered whether the staff committees, each of which included at least two members of the Advisory Committee, were themselves directly advising the President. 711 F.2d at 1075-76. This consideration may be pertinent when a Court is asked to determine which group of private citizens is functioning as an advisory committee. That inquiry has no relevance here.

While the point is not material to disposition of this suit, we stress that plaintiffs' suggestion that the Task Force will abdicate its assigned function is utterly without foundation and entitles them to no relief. The declaration of Ira Magaziner explains clearly the respective functions of the working group and the Task Force, and explains that the President himself has charged the Task Force (and not the working group) with recommending legislative proposals. Plaintiffs, who testified during the 12-hour open Task Force meeting on March 29 -- a meeting to which plaintiffs were invited before this litigation commenced -- should be well aware that the high-ranking officials on the Task Force are personally immersed in the work they have been assigned. Indeed, as has been reported, the Task Force may need to extend the time for considering material from the working group and other sources; it is the Task Force itself that bears responsibility for formulating the recommendations requested by the President. (The Task Force still plans to make its recommendations to the President in May.)[3]

Finally, plaintiffs' reliance on 41 C.F.R. § 101-6.1004 typifies the multiple errors of their analysis. This regulation states that federal officials may meet with and obtain the advice of private individuals or groups, so long as the officials are not "utilizing the group to obtain consensus advice or recommendations." However, the group would become subject to the provisions of the FACA if it became a "source of consensus advice or recommendations." The regulation thus describes the circumstances under which private individuals who advise federal officials become an advisory committee.

---

[3] Contrary to plaintiffs' assumption, even when relevant to claims at issue, unsubstantiated allegations of governmental bad faith do not provide general entitlement to discovery. See generally United States v. Morgan, 313 U.S. 409, 422 (1941); National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1144-45 (2d Cir.), cert. denied, 419 U.S. 874 (1974).

In the first place, the regulation must be read in light of Public Citizen; as the Supreme Court made clear, not every group of private individuals which offers consensus advice to government officials has been "utilized" by the government within the meaning of the FACA. Second, the working group and the Task Force are both obtaining the views of hundreds of persons and groups, including plaintiffs themselves. The notion that these persons and groups -- and not the Task Force itself -- will be the source of the consensus advice stretches plaintiffs' argument considerably past the breaking point. It is thus clear that private individuals and groups who provide information or advice to the Task Force or the working group are not themselves part of an advisory committee. And the regulation does not remotely suggest that members of the working group are transformed into a FACA advisory committee simply by virtue of their contact with private parties.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the injunction of the district court should be vacated.

Respectfully submitted,

STUART E. SCHIFFER
Acting Assistant Attorney General

J. RAMSEY JOHNSON
United States Attorney

ROBERT E. KOPP
(202) 514-3311
MARK B. STERN
(202) 514-5089
PATRICIA A. MILLETT
(202) 514-3688
MALCOLM L. STEWART
(202) 514-1633
Attorneys, Appellate Staff
Civil Division, Room 7124
Department of Justice
Washington, D.C. 20530-0001

APRIL 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 1993, I am causing a copy of the foregoing Reply Brief to be served by messenger on:

Frank M. Northam
Webster, Chamberlain & Bean
1747 Pennsylvania Ave., N.W.
Suite 1000
Washington, D.C. 20006
Phone: (202) 785-9500 Fax: (202) 835-0243

I am also causing a copy of the brief to be served by facsimile and overnight mail on:

Kent Masterson Brown
Brown & Brown
1114 First National Building
167 West Main Street
Lexington, KY 40507
Phone: (606) 233-7879 Fax: (606) 252-6791

I am also causing one copy of the brief to be served by first class United States mail, postage prepaid, upon the following named counsel for amici curiae:

Jane E. Kirtley
Rebecca Daugherty
Mark R. Bollinger
The Reporters Committee for
Freedom of the Press
Suite 504
1735 Eye Street, N.W.
Washington, D.C. 20006

J. Laurent Scharff
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

James E. Grossberg
Ross, Dixon & Masback
601 Pennsylvania Ave., N.W.
North Building
Washington, D.C. 20004-1109

Richard M. Schmidt, Jr.
Allan Adler
Cohn & Marks
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Bruce Sanford
Henry S. Hoberman
Robert D. Lystad
Baker & Hostetler
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Whitney Adams
Richard N. Winfield
Rogers & Wells
607 14th Street, N.W.
Washington, D.C. 20005-2011

J. Gregory Sidak
1150 Seventeenth Street, N.W.
11th Floor
Washington, D.C. 20036

Ronald A. Zumbrun
Anthony T. Caso
Robin L. Rivett
Alan W. Foutz
Pacific Legal Foundation
2700 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833

Samuel B. Wallace IV
1221 M Street, N.W., # 416
Washington, D.C. 20005

Mark Stern

MARK B. STERN

FRAN —
MAKE AN
FOIA
FILE
FOR
ME

THE WHITE HOUSE

WASHINGTON

93 MAR 4 P7:08

March 4, 1993

MEMORANDUM

TO: Frank Sobol
Special Counsel to the President

FROM: Vincent W. Foster VF
Deputy Counsel to the President

SUBJECT: Proposed Application of FOIA to the White House

Note the attached memo from Ricki Seidman and the attached letter to John Podesta regarding whether FOIA should apply to the White House. I am aware that generally the White House and agencies whose sole purpose is to advise and assist the President are exempt from FOIA. Would you please review the legislative history of that exemption to pull together any discussions? I presume it is based upon policy and Executive privilege. Would you also draft a brief statement the Communications Office could use should there be an inquiry regarding the justification of the exemption?

Attachment

cc: Bernie Nussbaum
John Podesta
Ricki Seidman

March 3, 1993

MEMORANDUM FOR THE WHITE HOUSE COUNSEL

From: Ricki Seidman

Subject: Information Policy: Application of FOIA to the White House

cc: Vince Foster, George Stephanopoulos

Bernie and Vince, during the campaign, we dodged the issue of whether FOIA should apply to the White House and William Safire hit us on it. So, the good news is: there's no promise we're in a position to break. But as the attached letter indicates, we can anticipate that he (or the Congress) is likely to raise this issue again.

I assume that this is probably part of a larger group of information and records issues about which someone on your staff is becoming an expert. Are you planning to make a proposal to the President anytime soon? Please let me know what your plans are and keep me posed.

Many thanks....

93 MAR 3 P3:04

ONE HUNDRED THIRD CONGRESS

Congress of the United States

House of Representatives

Information, Justice, Transportation, and Agriculture
Subcommittee
of the
Committee on Government Operations
B-349-C Rayburn House Office Building
Washington, DC 20515
(202) 225-3741

February 25, 1993

Mr. John Podesta
Staff Secretary
The White House
Washington, DC 20500

Dear John:

I wanted to offer you a warning about an FOIA issue that might arise in the near future. William Safire of the New York Times recently called Rep. Glenn English about his bill from the last Congress to apply the FOIA to the White House, the Congress, and the judiciary. Glenn's bill was his response to the political pressure to apply the FOIA to the Congress. He was responding in kind to the political nature of the issue. He has not reintroduced the bill and is not likely to do so.

Safire was initially interested in the Congress angle, but he seems to be more interested in the White House. I had a brief conversation with him, and he said that he wanted to talk more about it later. His last question to me was: "Why shouldn't the law apply to the White House?"

I am not sure that there is a need to do anything at this time. But if Safire writes a column, the White House will certainly be asked for comment. You or the Counsel's Office may want to be prepared. The Republicans here resisted Glenn's proposal because they wanted to protect Bush. They may not be so protective of the White House today.

We have no plans to do anything in this area right now. If there is something we can do to help with this now or in the future, please let me know.

Sincerely,

Bob

Robert Gellman
Chief Counsel

THE WHITE HOUSE

WASHINGTON

March 7, 1993

MEMORANDUM TO VINCE FOSTER
FRANK SOBOL
RICKI SEIDMAN

FROM: JOHN PODESTA

SUBJECT: APPLICATION OF FOIA TO THE WHITE HOUSE

Attached is material which I think you will find helpful in your review of the legislative history of the application of FOIA to the White House.

In light of the expected legislative action, I believe we need to approach this issue from the perspective of a policy review, rather than merely a communications problem.

I think Counsel's office should take the lead on such a review, but given my long history with FOIA issues and FOIA legislation, I would like to stay involved.

cc: Bernie Nussbaum

ONE HUNDRED THIRD CONGRESS

Congress of the United States

House of Representatives

93 MAR 1 A10 : 29

Information, Justice, Transportation, and Agriculture
Subcommittee
of the
Committee on Government Operations
B-349-C Rayburn House Office Building
Washington, DC 20515
(202) 225-3741

93 MAR 1

February 25, 1993

Mr. John Podesta
Staff Secretary
The White House
Washington, DC 20500

Dear John:

Enclosed are a few items on the FOIA/Congress/White House issue. I've included a copy of some of the bills on the subject from the last Congress, including the English bill. We haven't had any bills referred to the Subcommittee yet this year so I don't have the current crop. I have not heard of any White House FOIA bills. I believe that all of the focus is on the Congress. Also enclosed is a copy of Bob Wise's statement from 1991. It reflects my own views.

The Meyer decision provides a lot of the legislative and case law background of the issue. The legislative history is relatively clear, but the cases go all over the map. Both Silberman and Wald try to make sense of the cases, but neither side is convincing. The cases cannot be reconciled. *

I don't see an easy way out of any of this. It may be worth remembering that the FOIA does not apply to federal contractors or grantees. If it becomes necessary to expand the scope of the law, it may be possible to find lots of other people who would not like to be covered.

Let me raise another issue as long as I am writing. In the past, the Subcommittee has written to new Presidents asking for a clarification of their policy on executive privilege. A copy of the letter to Bush (that went unanswered) is enclosed. I have been considering preparing a similar letter to Clinton. If you have strong feelings about this, please let me know.

Yell if I can help.

Sincerely,

Bob

Robert Gellman
Chief Counsel

ROBERT E. WISE, JR., WEST VIRGINIA, CHAIRMAN
GLENN ENGLISH, OKLAHOMA
EDOLPHUS TOWNS, NEW YORK
JOHN M. SPRATT, JR., SOUTH CAROLINA

AL McCANDLESS, CALIFORNIA
STEVEN SCHIFF, NEW MEXICO
CRAIG THOMAS, WYOMING

(202) 225-3741

FAX (202) 225-2445

ONE HUNDRED FIRST CONGRESS

Congress of the United States
House of Representatives

GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE
SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
B-349-C RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

July 26, 1989

The Honorable George Bush
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

This Subcommittee has traditionally written to a newly elected President to request a statement of the administration's policy regarding the use of the claim of "executive privilege" to withhold information from the Congress.

President Kennedy stated that executive privilege could only be invoked by the President and would not be used without specific presidential approval. This policy was reaffirmed by Presidents Johnson and Nixon. Similar policies were adopted or utilized by Presidents Ford, Carter, and Reagan.

It is in the best interests of both the executive and congressional branches to avoid contention or even the appearance of controversy regarding the use of the claim of executive privilege.

The Subcommittee would be pleased to work with you in the formulation of a policy on this important matter.

Very truly yours,

Bob Wise
Bob Wise
Chairman

Al McCandless
Al McCandless
Ranking Minority Member

ROBERT E. WISE, JR., WEST VIRGINIA, CHAIRMAN
GARY A. CONDIT, CALIFORNIA
EDOLPHUS TOWNS, NEW YORK
• PATSY T. MINK, HAWAII
COLLIN C. PETERSON, MINNESOTA
JOHN W. COX, JR., ILLINOIS

AL McCANDLESS, CALIFORNIA
RANKING MINORITY MEMBER
STEVEN SCHIFF, NEW MEXICO
ILEANA ROS-LEHTINEN, FLORIDA

BERNARD SANDERS, VERMONT
INDEPENDENT

(202) 225-3741

FAX (202) 225-2445

ONE HUNDRED SECOND CONGRESS

Congress of the United States
House of Representatives

GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE
SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
B-349-C RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6147

December 10, 1991

Mr. C. Boyden Gray
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Gray:

In the first session of the 102nd Congress, the issue of the scope of the Freedom of Information Act and the Privacy Act of 1974 was raised, and several bills on the subject were introduced and have been referred to this Subcommittee.

One of those bills, H.R. 3877, would make the President, the Vice President, and their immediate staff subject to both the Freedom of Information Act and the Privacy Act of 1974. Since there is a likelihood that amendments to the Freedom of Information Act may be considered in the next session, I seek your comments on this legislation.

Your response by the beginning of the second session on January 23, 1992, would be greatly appreciated.

Very truly yours,

Bob Wise

Bob Wise
Chairman

Enclosure

Note: We never received a response.

THE FREEDOM OF INFORMATION ACT, THE CONGRESS, AND THE WHITE HOUSE

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from West Virginia [Mr. WISE] is recognized for 5 minutes.

Mr. WISE. Mr. Speaker, in recent weeks, others have raised the issue of the applicability of the Freedom of Information Act to the Congress, and several Members have introduced bills that would make Congress subject to the FOIA. This is a proposal that has been raised from time to time in the past.

It is not my purpose today to take a position on the basic issue. Rather, I would like to broaden the discussion about the scope of the FOIA to include some other relevant points. In general, I believe that there are three fundamental misconceptions about the FOIA and the Congress that have not been fully recognized in the debate.

The first misconception is that the FOIA covers the entire Federal Government except for the Congress. The truth is that the FOIA does not apply to parts of the executive, judicial, and legislative branches of Government. Congress did not exempt only itself from the FOIA.

Perhaps the most significant part of the executive branch that is not covered by the FOIA is the Office of the President and the Vice President. These two elected officials and their immediate staffs are not required to accept or respond to FOIA requests. Similarly, elected Members of Congress and their staffs are not covered by the FOIA. In addition, the FOIA does not cover any part of the judicial branch of the Federal Government.

The scope of the FOIA was carefully defined by the Congress to apply to those parts of the Federal Government where it was needed. Extensive hearings held in the 1960's and 1970's demonstrated that executive branch agencies were unwilling to make routine information about their activities available to the public. The FOIA was passed in response to a documented, long-term problem of excessive secrecy in the executive branch. No one has made a similar case for the Congress.

The President and Members of Congress were not made subject to the FOIA. This decision was made in part because of a recognition that elected officials are directly accountable to the public in a way that bureaucrats are not. The judicial branch was not covered either, partly out of recognition of its separate role and need for independence.

Portions of the Executive Office of the President are covered by the FOIA. The Executive Office of the President includes agencies such as the Office of Management and Budget, the Office of the U.S. Trade Representative, and the drug czar, and these agencies are subject to the FOIA. Other offices in the Executive Office of the President whose sole function is to provide advice to the President—or Vice President—were expressly exempted from the FOIA in the 1974 amendments. At the insistence of the President, Congress in 1974 preserved the exemption for the immediate staff and Office of the President and Vice President.

A second misconception is that applying the FOIA to the Congress would actually make more records publicly available. The truth is that applying the FOIA to the Congress would permit both the Congress and the executive branch to withhold from the public some information that is now routinely disclosed. Let me explain this unexpected result.

Standard FOIA principles permit the withholding of predecisional documents for the purpose of protecting advice, recommendation, and opinions which are part of the deliberative, consultative, decisionmaking processes of Government. The fifth exemption of the FOIA covers these types of documents.

Consider how these rules might apply to legislation. A bill as introduced is just a draft which fuels the deliberative, consultative, decisionmaking process of the Congress. Until a bill is voted upon and approved by a committee, by the House, or perhaps even by both Houses of Congress, the bill remains a draft document subject to change. One could argue that bill and amendments are predecisional documents subject to withholding.

I am not suggesting that the Congress would withhold bills in process, just that the authority to do so might exist if the FOIA applied to the Congress. For anyone who wants to test this theory, I suggest that you make a FOIA request at any executive branch agency for a copy of any legislative recommendations that have not yet been approved by the agency head or by OMB. In general, you are likely to find that such a request will be denied on the grounds that the draft bill is a predecisional document.

Applying the FOIA to the Congress could have the perverse effect of permitting the executive branch greater authority to withhold documents. Under exemption 5 in current law, interagency documents can be withheld from the public under certain circumstances. Documents sent by the executive branch to the Congress generally do not qualify as interagency documents because Congress is not an agency under the law. If Congress were defined to be an agency under the FOIA, then a broader range of executive branch documents could fall within the fifth exemption. The net result could be that information that is available today would no longer have to be released.

The third misconception is that the Congress operates in excessive secrecy. The truth is that the Congress is the most open of the three branches of Government. All debate on the floor of both Houses is open to the public. The proceedings of both Houses are televised, and a complete transcript is published immediately upon the conclusion of each day's business. Copies of the CONGRESSIONAL RECORD are widely distributed throughout the country. Even the most sensitive business of congressional committees—the markup of legislation—is usually conducted in open session.

The vast majority of congressional hearings are open to the public and the press. Many are televised. Transcripts of hearings are routinely published and provided to Federal depository libraries and others at no charge. Copies of all bills, resolutions, committee reports, and other House and Senate documents are routinely available upon request.

It is difficult to identify any category of current congressional records that would be more available under the FOIA. What about the much disputed records of the House bank? Those records would be exempt from disclosure under the FOIA's existing exemption covering invasion of personal privacy. Anyone who doubts this conclusion should ask any executive branch agency for any personal financial information of a comparable nature regarding any Federal employee. The request will properly be denied. As a Federal banking agency for a list of delinquent borrowers or check bouncers from banks operated by the Federal Government. That request will also be denied.

Further, may of the congressional records that are available to the public are now provided in response to requests made by telephone. The House Document Room, for example, provides copies of House bills and reports in response to requests made in person, on the telephone, in writing, and by fax.

If FOIA procedures were applied to the distribution of these documents, all requesters could be obliged to make written requests. The Document Room would be entitled to wait 10 days before providing the requested material. In addition, a charge could be imposed on requesters. Today, House materials are distributed at no charge to the public. I know of no Federal agency—including the Office of the President—that provides so many different documents to so many different people in such a convenient manner.

It is useful to contrast the openness of the Congress with the disclosure practices of the Office of the President and the Office of the Vice President. A recent FOIA decision by a Federal district judge offers some insight into the availability of Presidential and Vice Presidential records. The case is Meyer versus Bush, and it was decided about a month ago.

The requester in the case sought access to records created by the Task Force on Regulatory Relief which was chaired during the Reagan administration by Vice President George Bush. The request was denied on the ground that the Vice President's task force was not an agency under the FOIA. The Government would not even search the Vice President's Office for any records responsive to the request.

What is interesting about this case is the argument made on behalf of Vice President George Bush and not the outcome. For 3 years, the Government has been resisting the FOIA request for these records on the grounds that the FOIA did not apply. Whether that legal position is correct is a separate issue. There is, however, no legal principle that prevented the Vice President from releasing those records regardless of the applicability of the FOIA. The records could have been released if President Bush were willing to do so. He was not.

The judge did not accept the Government's legal arguments. The judge found that Vice President's Bush's task force was an agency subject to the FOIA because it had functions beyond providing assistance and advice to the Vice President. This is not a final judgment, and I am sure that the Government will appeal this ruling to the Supreme Court if necessary.

(More on back)

The Council on Competitiveness, chaired by Vice President QUAYLE, also contends that it too is not subject to the FOIA, and its records are not available to the public. The Council on Competitiveness, the successor to the Task Force on Regulatory Relief, is heavily involved in overseeing the Federal Government's regulatory activities. The Council has been criticized for conducting these activities in secret.

The question about the applicability of the FOIA to the Congress cannot and should not be considered in a vacuum. If we should make the Congress comply with the FOIA, I believe that we must make the President and Vice President subject as well. If we are to alter the FOIA's exemption for elected officials, let us treat all elected officials equally.

We may also need to reconsider the exemption for the judicial branch. A recent article in the Washington Post discussed the effect of a new law that required Federal judges to report on motions and trials that have remained undecided for more than 6 months. The resulting information provided an interesting new window on the activities and performance of judges. I also suspect that some of the judges were embarrassed. My guess is that the effect of this limited amount of sunshine on the courts will be to spur delinquent judges to do a better job. That has certainly been one of the major benefits from more FOIA disclosures by the executive branch.

Let me turn briefly to another related issue. A few weeks ago, the President offered the observation that the Congress was not subject to the Privacy Act of 1974. This is certainly true, although the President failed to mention that he, the Vice President, their immediate staffs, and the judiciary are not subject to the Privacy Act either. In fact, the FOIA and the Privacy Acts are identical in scope.

The President raised the Privacy Act in the context of using the act to punish leakers. I am not sure, however, that the Privacy Act is an effective deterrent to leaks in the executive branch. First, the criminal penalties under the Privacy Act are misdemeanors with a maximum fine of $5,000. No one who violates the Privacy Act can be sent to jail.

Second, the criminal penalties of the Privacy Act have only been used a few times. I do not know the exact number of people who have been prosecuted in the more than 15 years that the law has been on the books, but it is no more than a handful. How many leaks of personal information came from the executive branch during that time? Of course, any leaks that might have come from the immediate staff of the President would not be subject to criminal sanctions under the Privacy Act because the act does not apply to the office of the President. And apparently, the President has not proposed extending the Privacy Act to his own office.

Third, it is not even clear that a release by the FBI of sensitive personal information from its investigative files would be a violation of the Privacy Act. The FBI has reserved to itself the ability to disclose publicly any information about the subject of an investigation—including appointees to federal office—without violating the Privacy Act.

Under the Privacy Act, each agency can define permissible disclosures of information—called routine uses—through notices in the Federal Register. If a particular disclosure has been authorized by a routine use, then it is legal under the Privacy Act. The routine uses for any system of records are defined by the agencies. There is no general legal requirement for establishing any particular routine use. It is up to each agency.

The FBI's main investigatory records are maintained in a system called the central records system. This system of records contains information on subjects of investigations, applicants for sensitive positions in the U.S. Government informants, and others.

Given the sensitivity of the records in this system, I was shocked to learn that a routine use has been established reserving to the FBI the ability to disclose any of the information to the news media and general public where there exists a legitimate public interest. This is as broad and vague a standard for the disclosure of personal information as exists anywhere. It could be used to justify virtually any release of data. If any personal information from the central records system were released by the FBI to the news media, I suspect that the first defense would be that the release did not violate the Privacy Act because FBI had reserved the right to disclose the information.

I am at a loss to explain why the FBI maintains the right to release to the news media all sensitive personal information that it maintains. I wonder if confidential FBI informants would sleep confortably if they were aware that the FBI could disclose their identities without even violating the Privacy Act.

This is certainly a convenient provision just in case anyone at the FBI is ever caught disclosing confidential personal information. If the President is concerned about punishing leakers under the Privacy Act, he should immediately direct the FBI to revise its rules to eliminate the ability of its agents to release to the press sensitive personal information. This change could be implemented through administrative action. No change in the law is needed to accomplish this purpose.

What this illustrates is that the Privacy Act provides little protection against leaks or invasions of privacy. Extending the act to the Congress would not solve the existing problem or provide any additional protection. I have introduced legislation to amend the Privacy Act to make it more effective. I would be happy to work with the President to strengthen privacy laws and to consider extending those laws to the President as well as the Congress.

1ST CASE of Level 1 printed in FULL format.

KATHERINE ANNE MEYER v. GEORGE BUSH, CHAIRMAN, TASK FORCE ON REGULATORY RELIEF, ET AL., APPELLANTS

No. 92-5029

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

1993 U.S. App. LEXIS 228

September 18, 1992, Argued
January 8, 1993, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Columbia. 88cv03112

DISPOSITION: Accordingly, for the reasons stated, we conclude that the Task Force was not an agency under FOIA. Having decided the issue certified to us, we remand the case to the district court.

COUNSEL: Douglas Letter, Attorney, Department of Justice, with whom Stuart M. Gerson, Assistant Attorney General, Jay B. Stephens, United States Attorney, and Matthew M. Collette, Attorney, Department of Justice, were on the brief, for appellants.

Theresa A. Amato, with whom Alan B. Morrison and David C. Vladeck were on the brief, for appellee.

JUDGES: Before: WALD, SILBERMAN, and SENTELLE, Circuit Judges. Opinion for the Court filed by Circuit Judge SILBERMAN. Dissenting opinion filed by Circuit Judge WALD.

OPINIONBY: SILBERMAN

OPINION: SILBERMAN, Circuit Judge: The district court, at the behest of the government, certified to us on interlocutory appeal the question whether President Reagan's Task Force on Regulatory Relief, headed by then-Vice President Bush and composed of certain cabinet members, is an "agency" for purposes of the Freedom of Information Act, 5 U.S.C. § 552. Appellee seeks certain Task Force documents under [*2] the Act. We reverse the district court's determination and hold that the Task Force was not an "agency."

I.

Soon after his inauguration in 1981, President Reagan embarked on an effort to reduce regulatory burdens on the economy. As part of that program, the President established a cabinet-level Task Force on Regulatory Relief which included the Vice President, the Attorney General, the Secretaries of the Treasury, Commerce and Labor Departments, the Director of the Office of Management and Budget (OMB), the Chairman of the Council of Economic Advisers, and the President's Assistant for Policy Planning. President Reagan directed the Task Force to "review pending regulations, study past regulations with an eye towards revising them and recommend appropriate legislative remedies." As head of the Task Force, Vice President Bush named the Administrator for OMB's

Office of Information and Regulatory Affairs (OIRA) as the Executive Director of the Task Force and a Special Assistant to the President as the Associate Director. Using staff from OMB, the Task Force operated from the Office of the Vice President.

President Reagan followed up the creation of the Task Force with Executive [*3] Order 12,291, which details the procedures for developing regulations and requires agencies to use cost/benefit analysis when making decisions. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). Agencies must issue a Regulatory Impact Analysis (RIA) for any regulations that have a significant effect on the economy--defined as "major rules" in the Executive Order. Subject to the direction of the Task Force, the OMB Director has the authority to review RIAs and to issue guidelines both for filing the RIAs and for identifying major rules. The Order also gives the OMB Director--subject to the Task Force's guidance--the authority, among other things: (1) to designate regulations as major rules; (2) to require agencies to seek additional information in connection with a regulation; (3) to require interagency consultation designed to reduce conflicting regulations; (4) to develop procedures for estimating the annual social costs and benefits of regulations; and (5) to prepare recommendations to the President for changes in agency statutes. Exec. Order No. 12,291, § 6. If any disagreements arise between an agency and OMB, the Task Force "shall resolve any [*4] issues raised under this Order or ensure that they are presented to the President." Id. § 3(e)(1).

Thus, the Order authorized OMB, under Task Force guidance, to provide policy advice, to require agencies to seek interagency coordination, and even to delay regulatory proposals. But it did not confer any power to prevent an agency from carrying out its legal duty. The Order cautioned that the agencies must follow its provisions only "to the extent permitted by law." Id. § 2. And § 8 exempts "any regulation for which consideration or reconsideration . . . would conflict with deadlines imposed by statute or by judicial order." Moreover, in § 9, the President directed that the Order "is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States."

The Task Force was in operation for two periods during the Reagan Administration. From 1981 to its initial termination in 1983, the Task Force reviewed and assessed regulations. In its "final report," the Task Force stated that it had "designated a total of 119 of the most questionable [*5] [existing] rules and regulatory programs for high-priority agency reconsideration," 76 of which the Administration took final action "to revise or eliminate," and 27 of which received "partial action or formal proposals for change." Under the Executive Order, OMB had reviewed 6,701 proposed and final regulations, including 89 final, and 53 proposed, "major" regulations. After a hiatus of three years, President Reagan reactivated the Task Force on December 15, 1986, and gave it much the same mission it had before. The Task Force was phased out after the transition to the Bush Administration.

On June 29, 1988, appellee submitted her FOIA request for documents held by "the Task Force on Regulatory Relief, Vice President George Bush, who Chairs the Task Force, or any other member of the Task Force." Appellee sought three types of documents: "(1) all reports, which have been issued since February, 1981, concerning the accomplishments of the Task Force; (2) all reports, which have been issued since February, 1981, which list or identify the regulations that the Task Force has reviewed; and (3) all reports, memoranda, correspondence, or other written documents transmitted to or from the [*6] Task Force or any of its members since January 1, 1985, concerning the Task Force's review of or involvement in regulations that were or still are under consideration by the Environmental Protection Agency, the Food and Drug Administration, or the Occupational Safety and Health Administration." After denying appellee's request, attorneys of the Vice President's office referred her to the OIRA Administrator, who also served as Executive Director of the Task Force.

Upon receiving appellee's renewed request, OMB officials conducted a search of publicly available reports and press releases, copies of Task Force documents located at OMB, and OMB's own files for records related to the Task Force. OMB did not conduct a search of the Vice President's files, which the government claimed were exempt from FOIA. In response to appellee's first two requests, OMB released only publicly available documents in its files. OMB identified eight "documents" covered by appellee's third request, but declined to provide them to appellee. The first seven documents are pages from briefing books prepared for the Vice President and other members of the Task Force (in 1987-88) for use during Task Force deliberations. [*7] They discuss agency regulations, the Task Force's staff analysis of those regulations, and policy recommendations to the Task Force. Copies of the briefing books were kept in "Task Force files" in the office of the OIRA Administrator, who, as it will be recalled, was also Executive Director of the Task Force. Although located at OMB, the files were segregated from OMB files. The government declined to produce these documents on the grounds that neither the Vice President nor the Task Force are "agencies" under FOIA.

The eighth document, a letter sent by the OIRA Administrator to Health and Human Services Secretary Bowen, contains "recommendations and guidance to be incorporated in future administrative and legislative proposals to improve the [FDA's investigational new drug] approval process," according to OMB officials. OMB withheld the letter under exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), as a pre-decisional memorandum. The government concedes that the letter is an OMB--not a Task Force--document and that OMB is an agency within the meaning of FOIA. Thus, the eighth document is not subject to this interlocutory appeal.

Appellee brought suit in the [*8] district court challenging the adequacy of the document search, the government's specific refusal to search the Vice President's files, and the withholding of the eight documents. On a motion for summary judgment, the government claimed that the first seven documents were not "agency" documents, that the eighth was exempt, and that the search was adequate. Denying the motion, the district court held that the documents were Task Force documents, not the Vice President's, and that the Task Force was an agency under FOIA. See Meyer v. Bush, 1991 U.S. Dist. LEXIS 13626 (D.D.C. 1991). According to the court, "the Task Force was not formed simply to advise and assist the President," but rather "had substantial, independent, directorial authority." Id. The court did not decide whether the government was obliged to search the Vice President's files, and, upon the government's motion, certified as appropriate for an interlocutory appeal the question whether the Task Force is an agency under FOIA.

II.

The district court applied the correct governing law in determining whether a body within the Executive Office of the President is a FOIA "agency." As amended in 1974, [*9] the Act defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(e) (emphasis added).

As clearly shown by the legislative history, however, Congress intended to codify our earlier decision (interpreting more general predecessor language) in Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067 (D.C. Cir. 1971). n1 In that case, we held that the Office of Science and Technology (OST), a distinct entity within the Executive Office of the President, was a FOIA "agency." Although we acknowledged that OST advised and assisted the President, we emphasized that OST also had inherited from the National Science Foundation "substantial independent authority," such as evaluating federal programs, initiating and supporting research, and awarding scholarships. Id. at 1073-75 (emphasis added); see also Rushforth v. Council of Economic Advisers, 246 U.S. App. D.C. 59, 762 F.2d 1038, 1041 (D.C. Cir. 1985). [*10] OST was a FOIA agency precisely because it could act directly and independently beyond advising and assisting the President. "By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act." Soucie, 448 F.2d at 1075. In Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1980), the Supreme Court followed the legislative history and held that the Act did not cover "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.'" Id. at 156 (quoting H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. 14 (1974)) (emphasis added).

- -Footnotes- - - - - - - - - - - - - - - - - - - -

n1 "With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in Soucie v. David. The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. REP. NO. 1380, 93d Cong., 2d Sess. 14 (1974) (citation omitted).

Before the 1974 Amendments, FOIA simply had adopted the APA's definition of agency: "each authority of the Government of the United States, whether for not it is within or subject to review by another agency." 5 U.S.C. § 551(1).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*11]

Shortly after Kissinger, in Pacific Legal Found. v. Council on Envtl. Quality, 205 U.S. App. D.C. 131, 636 F.2d 1259 (D.C. Cir. 1980), we decided that the Council on Environmental Quality (CEQ), an entity within the Executive Office of the President, was a FOIA agency. But subsequently in Rushforth v. Council of Economic Advisers, 246 U.S. App. D.C. 59, 762 F.2d 1038 (D.C. Cir. 1985), we distinguished the Council of Economic Advisers (CEA) from the CEQ and exempted it from FOIA. We did so even though the House Report (on which the dissent relies, dissent at 2) explicitly listed the CEA as an agency under FOIA. We concluded that the subsequent Conference Report's adoption of the Soucie test directly had undercut the House Report. We conceded that "the statutes organizing CEA and CEQ are, for all practical purposes, identical." Id. at

1041. Both organizations, moreover, performed duties, enumerated by statute, directed at providing advice and assistance to the President. CEQ differed, however, because several executive orders had given it the power to coordinate federal environmental programs and to issue guidelines to federal agencies [*12] for preparing environmental impact statements. Id. CEQ also had the authority to promulgate regulations--legally binding on the agencies--implementing the procedural provisions of the National Environmental Policy Act, 83 Stat. 852 (1970). n2 See also Energy Research Found. v. Defense Nuclear Facilities Safety Bd., 286 U.S. App. D.C. 359, 917 F.2d 581, 584-85 (D.C. Cir. 1990). CEA had no similar power to issue formal, legally authoritative commands to entities or persons within or outside the executive branch. As we observed: "CEA is directed to appraise federal programs relative to a particular statutory policy and make recommendations to the President in that regard." Rushforth, 762 F.2d at 1043. But the "CEA has no regulatory power under [its] statute. It cannot fund projects based on [its] appraisal, as OST might, nor can it issue regulations for procedures based on the appraisals, as CEQ might." Id.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n2 CEQ also admitted in litigation that it was an "agency," but not when it acted in its capacity of advising and assisting the President. Pacific Legal Foundation, 636 F.2d at 1263. We rejected this on-again, off-again approach to FOIA in Ryan v. Department of Justice, 199 U.S. App. D.C. 199, 617 F.2d 781, 788-89 (D.C. Cir. 1980).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*13]

Appellee argues that the Task Force bore a closer resemblance to the CEQ than the CEA because it evaluated agency regulatory efforts and had authority to provide some direction over agency rulemaking. In other words, appellee focuses not on the Task Force's advice or recommendation responsibilities to the President, but rather on its interaction with the agencies. The government responds that the directions given to the agencies merely "assisted" the President because the President himself cannot issue every specific order to the departments and agencies. According to the government, appellee's argument would read "assist" out of Soucie and Kissinger's "advise and assist" test, and would limit its exemption to bodies that only advise the President. The government also contends that the Task Force did not exercise sufficient independent authority--independent from the President--to qualify as an "agency" under the Act. It was no different than several presidential assistants acting together or than the President's cabinet. And the government emphasizes that the Vice President--a separate constitutional officer who could not be thought of as an "agency"--headed the Task Force. [*14] Finally, the government distinguishes our prior cases because, unlike the OST, the CEQ, or even the CEA, the Task Force never received any delegated authority from Congress.

The core of the dispute between the parties, then, turns on the degree of independence from the President the Task Force exercised in its relations with the rest of the executive branch. Was the Task Force, in Soucie's words, "substantially independent," or was its function "solely to advise and assist" the President? The latter phrase is not easy to apply literally. Every action taken by any executive branch official can be described as "assisting" the President. On the other hand, the line cannot be drawn to include all those who direct others in the executive branch because, contrary to the legislative history and Kissinger, under that approach the White House staff would be an agency. We can assume, however, that Congress intended the phrase "solely to advise and assist" the President to refer to entities whose characteristics and functions were similar to those of the President's immediate personal staff.

Thus, when we apply Soucie to those who help the President supervise others in the [*15] executive branch, we think it is necessary to focus on three interrelated factors. We must ask how close operationally the group is to the President, what the nature of its delegation from the President is, and whether it has a self-contained structure. Proximity to the President, in the sense of continuing interaction, is surely in part what Congress had in mind when it exempted the President's "immediate personal staff" without requiring a careful examination of its function. n3 See H.R. REP. NO. 1380, 93d Cong., 2d Sess. 14 (1974). Therefore, the other units in the Executive Office, which are exempted because they "advise and assist the President," would be those whose characteristics are similar to the White House staff--one of which is proximity to the President. n4

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n3 The President's immediate personal staff, we assume, would encompass at least those approximately 400 individuals employed in the White House Office. See Reorganization Plan No. 1 of 1977, 5 U.S.C. App. 1, § 2. But as we recognized in Rushforth, the sole function test must be applied to other units in the Executive Office of the President. [*16]

n4 "If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." Soucie, 448 F.2d at 1075.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Closely related to the proximity factor is the nature of the delegation. The greater the scope of the delegation--which also usually implies less continuing interaction with the President--the more independence an entity will exercise. Thus, Rushforth held that the CEA was not an agency because, unlike CEQ, CEA did not possess any delegated regulatory authority to supervise agencies. Similarly, we recently determined that the White House Counsel's Office is not a FOIA agency. National Sec. Archive v. Archivist of the United States, 285 U.S. App. D.C. 302, 909 F.2d 541, 545 (D.C. Cir. 1990). Unquestionably, the Chairman and members of the CEA and the White House counsel, like other senior White House officials close to the President, often give ad hoc directions to executive branch personnel. But when it occurs, it is assumed that they merely are [*17] passing on the President's wishes.

In this case, appellee contends that the Task Force exercised regulatory authority over executive branch agencies. But that is not accurate. Executive Order 12,291 did not authorize either the Vice President or the Task Force, qua Task Force, to give directions to the executive branch. Instead, the OMB Director took up that responsibility under the Executive Order. For example, the Order says the Director of OMB shall have the authority to designate major rules "subject to the direction of the Task Force." Exec. Order No. 12,291, § 3(b). The Director's other powers of review are only "subject to the direction of the Task Force." Id. § 3(e)(1), § (3)(i), § 5(b), § 6(a), § 6(b). The Associate

Director of OMB for OIRA also served as Executive Director of the Task Force, but the government does not even claim that his (or the Director's), written policy instructions to the agencies were "Task Force" documents. As the government concedes, those documents, like document eight, are OMB records subject to FOIA. Insofar [*18] as appellee is correct in arguing that the body which provided direction to the executive branch is an agency under FOIA, that body is OMB, not the Task Force.

A careful reading of the Executive Order--which, of course, is the most important indication of the Task Force's role--reveals that whatever significant authority the President delegated he gave to the Director of OMB. Although the appellee and the dissent blend together the responsibilities of both OMB and the Task Force, they are analytically quite distinct. The dissent's list of the "Task Force's" responsibilities, dissent at 14, is, therefore--like Homer's catalogue of ships--exhaustive but quite beside the point. Also irrelevant, at least to this case, is the dissent's concern that OMB's directives implementing the Executive Order should be exposed, see dissent at 32 n.26. Despite OMB's closeness to the President, it is a permanent agency with a significant staff and broadly delegated powers, and so it unquestionably falls under FOIA.

It remains to be determined, however, whether the Task Force's role, vis-a-vis the OMB Director and cabinet or agency heads, made the Task Force a FOIA agency. The Executive Order did [*19] give the Task Force the responsibility for providing "guidance" and "direction" to the OMB Director, and the authority to resolve disputes between agencies and OMB "or [to] ensure that they are presented to the President." Exec. Order No. 12,291, § 3(e)(1). In that respect, however, the Task Force theoretically was positioned between the OMB Director and the President, placing the Task Force only a hair's breadth from the President. After all, the OMB Director, whose duties include aiding the President in managing the entire executive branch, is (as the dissent recognizes at 19) the cabinet officer functionally, if not actually, closest to the President. The cabinet members serving on the Task Force, therefore, were acting not so much as the heads of their departments, but rather as the functional equivalents of assistants to the President ("immediate personal staff" are, it will be recalled, exempt from FOIA coverage). Furthermore, notwithstanding appellee's proffer of press releases--which is not reliable evidence--we see no indication that the Task Force, qua Task Force, directed anyone, including OMB, to do anything. n5 Indeed, when the Task Force wished directions given to [*20] the executive branch, it found it necessary to advise the President to put such instructions in another Executive Order. (See Executive Order No. 12,498 § 1(d)). Indeed, if the Task Force exercised all the powers which the dissent attributes to it, we would expect the Task Force to have generated more than only the seven documents that fell within appellee's FOIA request.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n5 It is interesting to note that in the beginning of the dissent OMB and the Task Force are mentioned together, but gradually OMB fades behind the "curtain" (see dissent at 23 n.18), and by the end of the opinion the Task Force emerges alone.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Nor does the dispute resolution mechanism of the Executive Order indicate that the Task Force, in dealing with the OMB Director (or the agency heads), acted with substantial independence. Despite the option granted to the Task Force to resolve disputes or bring them to the President, it is rather hard to imagine that the OMB Director, or any other head of a department or agency who reports directly [*21] to the President, would acquiesce in a Task Force decision that was thought not to represent directly and precisely the President's opinion. It seems implicit that the Vice President and the other members of the Task Force were not expected to resolve disputes themselves, without presenting those disputes to the President, unless they already knew the President's views on the exact issue. This, of course, means the Task Force was not expected to act with significant independence. Not surprisingly, there is no documented example of an agency appealing an OMB decision to the Task Force. n6

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n6 The dissent cites an article in an obscure law review (not in the record) as evidence that the Task Force actually exercised the power to resolve a dispute between OMB and OSHA. Dissent at 22 n.17. The law review article claims that the Task Force's dispute resolution authority was rarely invoked and that the OSHA example was the only publicly known example of its exercise. Olson, The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291, 4 VA. J. NATURAL RESOURCES L. 1, 44 & n.210 (1984). But close examination of the law review article's sources shows that it is unlikely any such incident took place. At hearings on OMB's authority under Exec. Order 12,291, the representative of the AFL-CIO claimed that the Task Force had intervened in an OMB-OSHA dispute to uphold OSHA's position. Nonetheless, the representative then conceded that "none of the intergovernmental exchanges . . . are documented." Hearings on OMB Control of OSHA Rulemaking: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 97th Cong., 2d Sess. 22 (1982). In discussing the OMB-OSHA conflict, the head of OMB at the time merely noted that the Task Force had reviewed the matter but made no mention of an alleged appeal or a resolution of a dispute. Id. at 318.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*22]

Appellee suggests, however, that the Vice President's chairmanship of the Task Force gave the Task Force added clout and independent authority. The government responds that the Vice President's role made the Task Force even less plausible an agency under FOIA. Because of his constitutional position, according to the government, we must treat the Vice President and his staff in the same manner as the President and his staff. Indeed, appellee conceded at oral argument that if the Vice President alone held the exact duties of the Task Force, the Vice President would not be an agency for purposes of FOIA. See Armstrong v. Bush, 288 U.S. App. D.C. 38, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (President and Vice President subject only to Presidential Records Act, not Federal Records Act). n7

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n7 We do not have to decide whether the Vice President could ever be the head of a FOIA agency.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In any event, despite the Vice President's rank, we do not believe his status as Chairman lent the Task Force any authority independent [*23] of the President. The Vice President is the only senior official in the executive branch totally protected from the President's removal power. See Bowsher v. Synar, 478 U.S. 714, 721-27, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) (presidential power to remove executive branch officials crucial to presidential control). Presidents are, for that reason, reluctant to delegate real supervisory authority over the executive branch to the Vice President. As Professor Rossiter has observed, it is dangerous for the President to give the Vice President administrative responsibilities "because the Vice President is not subject to removal" and so could become "a dagger aimed constantly at the precious unity of the executive power." C. ROSSITER, THE AMERICAN PRESIDENCY 140 (2d ed. 1960); see also Report of the Task Force in A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY 64-66 (1988). No matter how close the personal and functional relationship between a Vice President and President, the former, mindful of traditional presidential concerns, presumably will not express direction to others in the executive branch unless his view is shared by the President. [*24] The Vice President's chairmanship, thus, cuts against appellee's argument.

The Task Force's lack of a separate staff further indicates the absence of independent authority. In Soucie, we implied that structure and function, for purposes of defining agency, are interrelated. "If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." Soucie, 448 F.2d at 1075 (emphasis added). FOIA, by declaring that only "establishments in the executive branch" are covered, 5 U.S.C. § 552(e), requires a definite structure for agency status. And just as the intended exemption for the President's personal staff leads us to believe that proximity to the President is relevant so, too, the exemption suggests the importance of structure. For another characteristic of the President's immediate staff is its lack of a firm structure.

It could be said that, in one sense, the President "established" the Task Force, albeit by informal presidential direction, and then later delegated to it certain functions under Executive Order [*25] 12,291. But the Task Force was simply a partial cabinet group. The President does not create an "establishment" subject to FOIA every time he convenes a group of senior staff or departmental heads to work on a problem. Furthermore, the Task Force operated out of the Vice President's office without a separate staff, borrowing OMB personnel as needed. We doubt that any individual or group, within the Office of the President, without a separate staff, can be regarded as an "establishment" with independent authority. Veterans of bureaucratic wars will insist that the typical officer in the executive branch is virtually powerless without a staff. And it is often said that presidential appointees are captured relatively quickly by their staffs--in other words, they are weaned away from presidential influence and made, in that sense, more independent. Whether these maxims are true or not, the Task Force's lack of a separate staff is a strong indicator that it was neither an "establishment" nor an independent actor in the executive branch.

The dissent at 29 n.24 suggests that the Executive Order might distinguish this case from one in which the President merely instructs several cabinet [*26] officers, or a group of White House assistants (or perhaps the Chief of Staff), to perform the same duties. But that distinction appears inconsistent with the dissent's insistence that the crucial factor is the function performed by the entity in question. As we understand our colleague's reasoning, if the President had set up this exact structure by memorandum, or even by oral direction, the Task Force would still be a FOIA agency. So the Executive Order is, according to the dissent's logic, mere surplusage. See dissent at 11 n.9; see also dissent at 7.

We do not think much should turn on whether the President delegates authority to a White House group by memorandum or by Executive Order. n8 Otherwise, of course, a future President could avoid creating an agency under FOIA by informally delegating authority to an "establishment" in the Executive Office. As we have indicated, however, the structure of the group is important in determining its relative independence from the President. Function is crucial, but, like the architect Louis Sullivan, we believe that form follows function.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n8 The Executive Order carefully stated that its purpose was only for internal management and that it created no private rights. As such, it is doubtful that it had any legal significance. An Executive Order devoted solely to the internal management of the executive branch--and one which does not create any private rights--is not, for instance, subject to judicial review. Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986); Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 235-36 (8th Cir. 1975), cert. denied, 424 U.S. 966, 47 L. Ed. 2d 733, 96 S. Ct. 1461 (1976). The Order seems no different than a presidential memorandum delegating certain tasks to the Vice President and to some cabinet officers or to the President's own staff. If agency heads appealed directly to the President over a disagreement with OMB (or the Task Force) on regulatory matters--without giving the Task Force its opportunity to resolve disputes--it surely would not have been thought "illegal." Certainly, the President, if he wished, could have ignored his own Task Force.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

[*27]

The dissent acknowledges that the President has a constitutional duty to see that the laws are faithfully executed, and, therefore, a duty to oversee the regulatory policies produced by the departments and agencies. See Sierra Club v. Costle, 211 U.S. App. D.C. 336, 657 F.2d 298, 406 (D.C. Cir. 1981); Public Citizen v. Burke, 269 U.S. App. D.C. 145, 843 F.2d 1473, 1477-78 (D.C. Cir. 1988). Nonetheless, the dissent insists that the choice the President makes between various techniques to perform this task can have enormous consequences under FOIA. If he performs this role alone, meeting with his cabinet officers and agency heads "face to face," as our colleague puts it, he may keep the discussion entirely confidential (so long as the agency rule is justified by the record), Sierra Club at 657 F.2d at 407. But should he use a group of cabinet officers and perhaps White House staff in some sort of committee like the Task Force to screen the regulatory issues, he risks creating a FOIA agency. That approach empties the word "assist" in the Soucie test of all meaning.

The dissent does not dispute, however, dissent at 28-29 & n.23, that [*28] if the President used only White House staff in this manner, he would avoid FOIA altogether. In other words, if the President had set up this exact Task Force structure (including OMB's role) in this exact fashion (by Executive Order), but used senior White House staff personnel as his Task Force members, FOIA would not apply. If on the other hand, a President employed his entire cabinet as his Task Force, the dissent insists that FOIA would apply. To be sure, the dissent does doubt that a President would ever delegate true independent authority to his cabinet. n9 In light of that sound observation, however, it is difficult to understand why the dissent strains to construe the Executive Order as granting "substantial independent" authority to a partial cabinet group. And the dissent's position leaves open the obvious question: how would we treat an analogous Task Force composed partially of senior White House staff and cabinet officers?

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n9 The old story about President Lincoln overruling his entire cabinet is instructive. After receiving the unanimous vote of his cabinet against a certain decision, Lincoln announced: "The vote has been taken. Seven noes one aye--the ayes have it." See R. FENNO, THE PRESIDENT'S CABINET 29 (1963).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*29]

The dissent appears to recognize that the structure employed at least bears on the question whether the President has delegated independent authority. Dissent at 27 n.22. It would appear, then, that the line the dissent draws in this case is governed more by fortuitous history than by a logical principle. The dissent asserts over and over that in this case--structure aside--the Task Force was given "substantial independent" authority. But it is unclear just what factors distinguish this case from a multitude of similar arrangements that a President could use to accomplish the exact same ends--arrangements that the dissent is unwilling to categorize as covered by FOIA or not. See dissent at 28 n.23. As for our dissenting colleague's concerns about the President's ability to "shroud [the Task Force's] actions in absolute secrecy," dissent at 32, it is worth noting that when a President openly discloses exactly how he will review regulations--as, for example, by a Task Force mechanism--it might well be thought more forthright than the behind the scenes ad hoc approach sanctioned in Sierra Club.

In sum, the Task Force was not a body with "substantial independent authority" [*30] to direct executive branch officials. The various cabinet members of the Task Force were unquestionably officers who wielded great authority as heads of their departments. But there is no indication that when acting as the Task Force they were to exercise substantial independent authority, nor in fact, did they do so. Put another way, the whole does not appear to equal the sum of its parts. The cabinet officers were acting, in truth, just as would senior White House staffers. We think the dissent's characterization, moreover, of the Task Force as the "people" behind the scenes [or curtain?] "who call the shots" is not supported by the record in this case. The Task Force seems to have been merely a committee which convened periodically both to bring together the views of various cabinet department heads concerning significant proposed regulations, and to shape for the President's decision intra-agency disputes which, in truth, only he can resolve. As such, the Task Force fell within the Soucie test as an entity "whose sole function is to advise and assist" the President.

* * * *

Accordingly, for the reasons stated, we conclude that the Task Force was not an agency under FOIA. [*31] Having decided the issue certified to us, we remand the case to the district court.

It is so ordered.

DISSENTBY: WALD

DISSENT: WALD, Circuit Judge, dissenting: A close examination of the Freedom of Information Act ("FOIA" or "the Act") and its legislative history, the governing FOIA precedent, and the record of the Task Force's creation and functions demonstrates that the Task Force falls within the Act's definition of an "agency." The majority opinion does not give due weight either to the applicable law or to the actual role the Task Force played in the President's regulatory reform program. Accordingly, I dissent.

I. BACKGROUND

A. Legislative History

Congress in 1974 amended the Freedom of Information Act to broaden the definition of "agency" to encompass more entities "which perform governmental functions and control information of interest to the public," H.R. REP. NO. 876, 93d Cong., 2d Sess. 8 (1974), reprinted in FOIA SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, COMMITTEE ON GOVERNMENT OPERATIONS, U.S. HOUSE OF REPRESENTATIVES 121, 128 (1975) [hereinafter FOIA SOURCE BOOK]. These amendments expanded the definition of an "agency" expressly to include an "establishment [*32] . . . in the Executive Office of the President." 5 U.S.C. § 552(e). As the majority points out, the House/Senate conference committee, citing this court's decision in Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067 (D.C. Cir. 1971), clarified that "Executive Office of the President . . . is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. REP. NO. 1380, 93d Cong., 2d Sess. 14 (1974), reprinted in FOIA SOURCE BOOK 219, 233 [hereinafter Conference Report]. What the majority overlooks, however, is the additional and quite specific guidance Congress provided for determining when an establishment in the Executive Office of the President is an "agency" for FOIA purposes.

Most significantly, Congress contemplated that "agency" would encompass entities, like the Task Force, which are created solely by executive order. The statutory language expanding the definition of an agency originated in the House bill, H.R. 12471. In its report accompanying that legislation, the House Committee on Government Operations stated:

> For the [*33] purposes of this section, the definition of "agency" has been expanded to include those entities which may not be considered agencies under [the APA, 5 U.S.C. § 551(1)], but which perform governmental functions and control information of interest to the public. The bill expands the definition of agency for purposes of [FOIA]. . . .
>
> The term "establishment in the Executive Office of the President," as used in the amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property

Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

H.R. REP. NO. 876, 93d Cong., 2d Sess. 8 (1974), reprinted in FOIA SOURCE BOOK 121, 128 (emphases added). n1

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n1 Although this court has subsequently concluded that one of the House's illustrative examples of a "functional entity," the Council of Economic Advisors, falls within the Soucie exception for units whose "sole function" is to advise and assist the President, Rushforth v. Council of Economic Advisers, 246 U.S. App. D.C. 59, 762 F.2d 1038 (D.C. Cir. 1985), this does not undercut the congressional determination that entities created by executive orders can be "agencies" under the FOIA. After expressly providing that its substitute "follow[ed] the House bill"--the bill that defined "agency" to include establishments within the Executive Office of the President--the Conference Report merely imposed the additional requirement that this term be "interpreted" according to the Soucie test. CONF. REP. at 13, 14 (emphasis added).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*34]

Additionally, the legislative history indicates that in focusing on "functional entities" within the Executive Office of the President, Congress intended to exclude from the FOIA the President's own records. An exchange during the floor debate on H.R. 12471 between Representative Moorhead, chair of the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations, and Representative Erlenborn, the ranking minority member of that committee, illustrates this:

Rep. Erlenborn: The question has been asked by Members on this side of the aisle as to the meaning of two definitions of agencies to include the Executive Office of the President.

I want to ask the gentleman if it is not correct, as it states in the report of the committee, that the term "establishment in the Executive Office of the President" as it is contained in this bill means functional entities, such as the Office of Telecommunications Policy, the Office of Manager of [sic] the Budget, the Council of Economic Advisers and so forth; that it does not mean the public has a right to run through the private papers of the President himself?

Rep. Moorhead: No, definitely not. [*35] I think the report is crystal clear on that. I thank the gentleman for bringing it up.

120 CONG. REC. 6806 (1974), reprinted in FOIA SOURCE BOOK at 241 (emphasis added).

From the foregoing, we can surmise congressional intent on the definition of an agency to the following extent: It includes establishments within the Executive Office of the President, excepting only the President's "immediate personal staff" or units whose "sole function" is to advise and assist the President. n2 It encompasses entities created by executive orders, with no requirement that the entity receive direct congressional approval or appropriations. And it shields the President's own records.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n2 It is worth noting that while the Senate bill did not expressly refer to entities within the Executive Office of the President, the Senate Committee on Government Operations contemplated that they would be included as "agencies" under the Soucie test:

Section 3 expands on the definition of agency as provided in section 551(1) of title 5 [the APA]. That section defines "agency" as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia." This definition has been broadly interpreted by the courts as including "any administrative unit with the substantial independent authority in the exercise of specific functions," which in one case was held to include the Office of Science and Technology. Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1073 ([D.C. Cir.] 1971).

S. REP. NO. 854, 93d Cong., 2d Sess. 32 (1974), reprinted in FOIA SOURCE BOOK at 153, 185.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*36]

B. Precedent

In the oft-cited case of Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067 (D.C. Cir. 1971), this court interpreted the APA and the FOIA to confer agency status "on any administrative unit with substantial independent authority in the exercise of specific functions." Id. at 1073 (emphasis added). We determined that the Office of Science and Technology ("OST") satisfied this test "by virtue of its independent function of evaluating federal programs . . . ." Id. at 1075.

This court has applied the Soucie "sole function" test three times to entities within the Executive Office of the President; two of the three entities were found to be "agencies." n3 In its first application of the Soucie test, this court held that the Office of Management and Budget ("OMB"), an entity within the Executive Office of the President, n4 was an "agency" under the Administrative Procedure Act, 5 U.S.C. § 555(1) and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. Sierra Club v. Andrus, 189 U.S. App. D.C. 117, 581 F.2d 895 (D.C. Cir. 1978). [*37] n5 The court held that, although the OMB's primary statutory duty was to prepare the President's budget proposal for submission to Congress, it was an agency under the "sole function" test. Id. at 902. The court noted that the preparation of the budget was "an aid to Congress as well as an instrument of presidential and policymaking control over the executive bureaucracy," and that the OMB had other management, coordination, and administrative functions." Id. The court also found that Congress "signified the importance of OMB's function, over and above its role as presidential advisor," when it provided for Senate confirmation of the OMB's director and deputy director. Id.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n3 We did not apply the Soucie "sole function" test to the White House Counsel, but instead treated it as part of the President's "immediate personal staff." See National Security Archive v. Archivist of the United States, 285 U.S. App. D.C. 302, 909 F.2d 541, 545 (D.C. Cir. 1990).

n4 The OMB itself was a presidential creation. See Reorganization Plan No. 2 of 1970, 35 FED. REG. 7959 (1970), reprinted in 31 U.S.C. § 501 (1988). [*38]

n5 The APA defines agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1). Although the Sierra Club court was determining agency status under the APA, and not under the FOIA, its application of the Soucie test is nonetheless instructive here. Obviously, it applies the appropriate test, and moreover, since the FOIA definition is an expansion of the APA definition, see H.R. REP. NO. 1380, 93d Cong., 2d Sess. 13 (1974), reprinted in FOIA SOURCE BOOK at 219, 231, any entity determined to be an agency under the APA should easily qualify as an agency under the FOIA.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In 1980, this court applied the Soucie test to determine that the Council on Environmental Quality ("CEQ"), a unit within the Executive Office of the President, was an "agency" for purposes of the Government in the Sunshine Act, 5 U.S.C. § 552b(b), which adopted the FOIA definition of an agency. Pacific Legal Foundation v. Council on Environmental Quality, 205 U.S. App. D.C. 131, 636 F.2d 1259 (D.C. Cir. 1980). [*39] The CEQ was created by the NEPA, which authorized it to advise the President in preparing his annual environmental policy report; prepare studies on environmental conditions and trends for the President; review and appraise federal programs that affect the environment and make recommendations to the President about those programs; and recommend national environmental policies to the President. 42 U.S.C. § 4344. The CEQ's mission was later expanded by several executive orders, which made it responsible for overseeing activities of federal agencies; for coordinating federal programs related to environmental quality and for issuing guidelines to federal agencies for preparing Environmental Impact Statements; for issuing regulations to federal agencies for implementing the procedural requirements of the NEPA; and for publishing and revising the national contingency plan for removing oil and hazardous substances from navigable waters. Pacific Legal Foundation, 636 F.2d at 1262. Relying on the Supreme Court's determination in Soucie that the OST's authority to evaluate federal programs was sufficient to qualify it as an agency, [*40] this court looked to the CEQ's executive order authority to evaluate federal programs and likewise found it sufficient to qualify the CEQ as an agency. Id. at 1263.

The only entity within the Executive Office of the President that this court has found not to be an agency under the "sole function" test is the President's Council of Economic Advisers ("CEA"). Rushforth v. Council of Economic Advisors, 246 U.S. App. D.C. 59, 762 F.2d 1038 (D.C. Cir. 1985). The CEA was created by statute, housed in the Executive Office of the President, and authorized to, among other things, advise and assist the President in formulating his economic policies; gather information concerning economic developments and trends; and appraise federal programs and activities in light of the President's economic policies. 15 U.S.C. § 1023. The court noted that the CEA and the CEQ, which the court had earlier determined to be an agency, were created by statutes that were "for all practical purposes, identical." Rushforth, 762 F.2d at 1041.

Nonetheless, Judge Starr, writing for the panel, distinguished the CEA from [*41] the CEQ on the ground that the latter's statutory functions had been expanded under several executive orders. Id. These expanded--and apparently dispositive--functions included coordinating federal regulatory policy, issuing guidelines for agencies to prepare required statements, and promulgating regulations for implementing the procedural provisions of a key environmental law. Id. See also id. at 1042 (the CEQ's "expanded duties . . . took [it] out of the realm of entities the sole function of which is to advise and assist the President"). Judge Starr also distinguished the CEA from the OST, found in Soucie to be an agency, by the OST's ability to "take direct action." Id. at 1041.

This court most recently applied the Soucie test not to an entity within the Executive Office of the President, but to the Defense Nuclear Facilities Safety Board, an "independent establishment in the executive branch." 42 U.S.C. § 2286(a). In Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 286 U.S. App. D.C. 359, 917 F.2d 581 (D.C. Cir. 1990), we held that the Board was an [*42] agency under the Soucie test, based on four functions demonstrating that the Board did "considerably more than merely offer advice": it conducted investigations; formally evaluated the Energy Department's standards relating to defense nuclear facilities; "force[d] public decisions about health and safety"; and possessed the authority to impose reporting requirements on the Secretary of Energy. Id. at 584-85. The court found that, since "evaluation plus advice was enough to make the Office of Science and Technology an 'agency' in Soucie," and the CEQ an agency in Pacific Legal Foundation, the Board's evaluation and other functions more than fulfilled the Soucie test. Id.

These cases teach us that whether an establishment is an "agency" for FOIA purposes hinges primarily on its functions. See, e.g., Rushforth, 762 F.2d at 1043 n.7 ("it is, at bottom, its function that determines an entity's status for FOIA purposes"); see also Ryan v. Department of Justice, 199 U.S. App. D.C. 199, 617 F.2d 781, 788 (D.C. Cir. 1980) (agency status depends on "general nature and functions" of a particular unit). [*43] Specifically, agency status does not depend on where within the Executive Office of the President (but outside the Office of the President, see infra 24-25, 28 n.3) the establishment is located, see Rushforth, 762 F.2d at 1041 (while the CEA and the OST were "located, hierarchically, in the same position . . ., there [was] no indication that [their] functional roles . . . were the same; and critically, it was the functional role of the agency on which Soucie turned") (emphasis added), nor on congressionally granted authority, see id. at 1041 (CEA and CEQ had virtually identical authorizing statutes). Thus, determining whether the Task Force is an agency requires a careful examination of both its authorized and actual functions.

II. APPLICATION OF THE LAW TO THE TASK FORCE

Turning now to the Task Force, it is obvious that both its structure and its authorized and actual functions satisfy all statutory and case law requirements of an agency under the FOIA.

A. The Task Force as an Establishment

First, the Task Force was an "establishment" within the Executive Office of the President. The legislative history [*44] of the FOIA's expanded definition of "agency" makes clear that entities created by executive order are sufficiently "established" to fall within its ambit. H.R. REP. NO. 876, 93d Cong., 2d Sess. 8 (1974), reprinted in FOIA SOURCE BOOK at 121, 128. The majority, however, in its inquiry into the nature of the delegation of authority to the Task Force, completely overlooks the formality and authority of the delegation provided by Executive Order No. 12,291, saying that the President established the Task Force by "informal presidential direction" and suggesting that it lacked a sufficiently "definite structure" to qualify for agency status. Majority opinion ("Maj. op.") at 14. Although the President announced the formation of the Task Force before he issued Executive Order No. 12,291, it was the Executive Order that spelled out the Task Force's mission, responsibilities and relationship to other entities in the executive branch, including those within the Executive Office of the President. Short of a reorganization plan requiring congressional approval, the executive order offers the most formal means available to the President to create or assign responsibility to an entity within [*45] the Executive Office of the President. n6 Without deciding whether an entity in the Executive Office of the President without executive order authority can ever be an agency, n7 it seems clear that an entity whose role is established by an executive order is a sufficient "establishment" to qualify as an agency, provided it passes Soucie's "sole function" test. n8 The majority is surely correct that the President "does not create an 'establishment' subject to FOIA every time he convenes a group of senior staff or departmental heads to work on a problem." Maj. op. at 14. This is not, however, a question of the President calling in his chief of staff and the Director of OMB, or yet his entire cabinets for a strategy session. Instead, it is a matter of the creation of a separate functional entity to which the President--by an executive order--delegated significant independent authority to act on a continuing basis without his ongoing involvement. See infra at 13-19.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n6 The government acknowledges that an executive order remains in effect until formally rescinded. Letter from Appellant to Clerk of Court, October 2, 1992, at 4. See Feliciano v. United States, 297 F. Supp. 1356, 1358, 1359 (D.P.R. 1969), aff'd, 422 F.2d 943 (1st Cir.), cert. denied, 400 U.S. 823, 27 L. Ed. 2d 51, 91 S. Ct. 44 (1970). An executive order is, for many purposes, a form of presidential "law." See, e.g., Old Dominion Branch No. 46 v. Austin, 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974) (managerial executive order lacking specific statutory authority can be "relevant federal law" for purposes of Supremacy Clause); In re Neagle, 135 U.S. 1, 34 L. Ed. 55, 10 S. Ct. 658 (1890) (executive directive issued by the Attorney General was a "law of the United States" under the habeas corpus statute). See generally John E. Noyes, Executive Orders, Presidential Intent, and Private Rights of Action, 59 Tex. L. Rev. 837, 839 (1981) (executive orders are "the most important type of 'Presidential legislation'").

While an executive order that merely implements a personal policy of the President may not be enforceable in a private civil action, Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 382 U.S. 978 (1976); Manhattan-Bronx Postal Union v. Gronouski, 121 U.S. App. D.C. 321, 350 F.2d 451, 452 (D.C. Cir. 1965), cert. denied, 382 U.S. 978, 15 L. Ed. 2d 469, 86 S. Ct. 548 (1966), at least one commentator has concluded that Executive Order No. 12,291 nonetheless binds the agencies under the doctrine of the unitary executive, which makes the rule of the executive the rule of the agency, and the doctrine that agencies must follow those rules that go beyond mere regulation of internal housekeeping. Peter Raven-Hansen, Making Agencies Follow Orders: Judicial Review of Executive Order 12,291, 1983 Duke L.J. 285. [*46]

n7 At least one entity outside of the Executive Office of the President that was created without statutory or executive order authority has been determined an agency for FOIA purposes. See Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 969 n.2 (7th Cir. 1977) (Watergate Special Prosecution Force, whose authority was delegated by the Attorney General through a formal Department of Justice regulation, was an agency under FOIA because it "exercised the requisite independent authority in exercising specific functions").

n8 To the extent that the majority's assertion that the FOIA requires a "definite structure," Maj. op. at 14, suggests that the statute requires a specific form or structure, I must disagree. The choice of the word "establishment," in lieu of board, division, office or some other term, makes the FOIA applicable to a broad range of structures. See Armstrong v. Bush, 288 U.S. App. D.C. 38, 924 F.2d 282, 289 (D.C. Cir. 1991) (in the APA, "Congress thought it 'necessary to define agency as 'authority' rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or 'divisions' to have final authority'") (quoting Senate Judiciary Committee Print, reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 13 (1946)). Therefore, I believe that while the general structure of an entity is relevant to whether it satisfies the statutory requirement of an "establishment," its specific form or structure is not dispositive of its agency status.

No less novel or puzzling is the majority's requirement that a FOIA agency have a "self-contained structure." Maj. op. at 9. Does this suggest that no interagency task force, even if created by statute, heavily staffed, and armed with significant independent authority, could ever be a FOIA agency? Or is it intended to exclude any entity that relies on another body for staff or other support services? Whatever the majority intends, this requirement appears incompatible both with the legislative intent to expand the definition of agency and with this court's heretofore largely functional inquiry under Soucie.

Perhaps most curious is the majority's analogy to the structure of the White House Office, or the President's "immediate personal staff." The majority first observes that the President's "immediate personal staff," which has been exempt from FOIA, lacks a "definite structure." (I'll assume for purposes of argument that this is true.) It then suggests that, because the White House staff possesses this characteristic, this characteristic is relevant to the FOIA inquiry. Maj. op. at 14. By this same reasoning, the majority could claim that, because the White House Office has upwards of 400 employees, then only entities that have 400 employees can be agencies under FOIA. The majority does not explain how or why such fortuitous characteristics of the President's "immediate personal staff" can or should become relevant to our "sole function" inquiry.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*47]

The potential importance of executive order authority is evident in our opinion in Rushforth. n9 There we determined that the President's delegation of authority, through an executive order, was alone enough to make an entity an "agency";

Appellant mounts a policy argument that the President should not be allowed to take an entity out of, or place an entity in, FOIA agency status by the mere expedient of adding or eliminating duties. This argument is unavailing. Congress' intent would appear to have been to require entities having authority and the ability to act, but not those whose sole function was to render advice and assistance to the President, to be subject to FOIA. If the President adds duties to an entity which bring it outside the sole-function test, Congress would want the entity covered.

Rushforth, 762 F.2d at 1042 n.5. This confirms that the "independent" authority that takes an agency outside the sole function test can be granted by the President, as well as the Congress. See also id. at 1042 (CEA lacked the "independent" authority enjoyed by the CEQ--authority granted by an executive order); id. at 1041-43 [*48] (emphasizing that the inquiry is on an entity's functions, not its genesis). n10

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n9 Of course, how a President delegates to an entity is not as important as what he delegates. Here, he delegated significant authority to act independently. While Rushforth demonstrates that delegation by an executive order can, in some circumstances, be sufficient to establish an agency, we are not called on here to decide if such authority is necessary, and it bears repeating that I have nowhere suggested that it is. Cf. Maj. op. at 15. In this regard, I agree with the majority that a President should not be able to avoid FOIA merely by delegating authority informally. Maj. op. at 16. In this particular case, however, Executive Order No. 12,291 happens to provide relevant evidence for both parts of our inquiry: first, whether the Task Force was an "establishment," and second, how it functioned. In another case, however, an entity without executive order authority might well be deemed a FOIA agency.

n10 In light of the foregoing discussion, I am puzzled by the majority's assertion that I view Executive Order No. 12,291 as mere "surplusage." Maj. op. at 15.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*49]

The majority also expresses its "doubt that any individual or group, within the Office of the President, without a separate staff can be regarded as an 'establishment' with independent authority." Maj. op. at 14-15. This new "requirement" of the majority that an agency have a separate staff is at odds with our precedent focusing on how an entity functions, not where it gets the resources to perform those functions. See Rushforth, 762 F.2d at 1041 ("critically, it was the functional role of the agency on which Soucie turned"); id. at 1043 n.7 (Senate confirmation of CEA members not given great weight, as "the nature of thee appointment" did not "speak[] to the function of the CEA"). Nor does this staff "requirement" appear anywhere in the FOIA's language or legislative history. Indeed, when Congress indicated that an entity created by an executive order could be a FOIA agency, it had to have contemplated that the President might exercise his broad powers to structure the Executive Office of the President to staff the new entity as he saw fit, whether by transferring staff to it or by designating personnel of other Executive [*50] Offices to provide needed support. It is clear that, by permitting FOIA agencies to be formed by executive order, Congress foreswore any requirement that an agency's staff appear on a separate line in an authorization or appropriation bill.

Even in case law under the APA, whose definition of "agency" is less expansive than the FOIA's, there is no such "separate staff" requirement. Instead, the APA inquiry into agency status is much like the FOIA inquiry: focused on the functions of the entity, and flexible enough to encompass the "myriad organizational arrangements for getting the business of government done." Washington Research Proj., Inc. v. HEW, 164 U.S. App. D.C. 169, 504 F.2d 238, 246 (D.C. Cir. 1974) (citations omitted), cert. denied, 421 U.S. 963, 44 L. Ed. 2d 450, 95 S. Ct. 1951 (1975). See also Lee Constr. Co. v. Fed. Reserve Bank of Richmond, 558 F. Supp. 165, 173 (D. Md. 1982) ("'The authority to act with the sanction of government behind it determines whether or not a governmental agency exists.'") (quoting Lassiter v. Guy F. Atkinson Co., 176 F.2d 984, 991 (9th Cir. 1949)).

Staff capabilities may of [*51] course, be relevant indicia of an entity's ability to take substantial independent action, see Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 157 U.S. App. D.C. 121, 482 F.2d 710, 715 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 168, 44 L. Ed. 2d 57, 95 S. Ct. 1491 (1975), but ready access to staff support or, as in the case of the Task Force, direct delegation of authority effectively to direct OMB staff is the functional equivalent of a separate staff, as this case illustrates. In any event, it is clear, the majority's claims aside, that the Task Force was not "virtually powerless" without a separate staff. Maj. op. at 15. Through its authority to direct the OMB Director and through the service of the OIRA Administrator as Executive Director of the Task Force (reinforced by the political suasion of its high-powered membership), the Task Force had the staff of a powerful and effective agency at its disposal. n11

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n11 Moreover, any "veteran of bureaucratic wars," see Maj. op. at 15, is certainly familiar with the common practices of "assigning" and "detailing" top staff members from one agency to another, particularly to the White House, see, e.g., S. REP. NO. 353, 102d Cong., 2d Sess. 52 (1992) (supporting "White House efforts to reduce its reliance on detailees"), and with the existence in the Executive Office of the President of a separate unit, the Office of Administration, which is directed "to provide components of the Executive Office of the President with such administrative services as the President shall from time to time direct." Reorganization Plan No. 1 of 1977, 5 U.S.C. App. 1, § 2. Thus, there is little cause to worry that any high-level establishment within the Executive Office of the President will be a toothless tiger without its own independent staff.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*52]

B. The Task Force's Functions

Turning to the second part of our inquiry, the Task Force clearly had functions beyond "advising and assisting the President," as this term has been construed in our case law. As the majority acknowledges, Executive Order No. 12,291 "is the most important indication of the Task Force's role . . . ." Maj. op. at 11. This Executive Order gave the Task Force "substantial independent authority," Soucie, 448 F.2d at 1073, charging it with the "direction" of a far-reaching regulatory reform program. The Task Force's directions were to be carried out by the Director of the OMB. Exec. Order No. 12,291 §§ 3(b), 3(e)(1), 3(i), 5(b), 6(a), 6(b), 7(c), 7(g) and 8(b). The Task Force was to "direct" the OMB Director in performing the following functions: reviewing preliminary and final Regulatory Impact Analyses ("RIAs"), notices of proposed rulemaking, or final rules based on the requirements of the order, § 3(e)(1); monitoring agency compliance with the order, § 6(a)(8); designating a proposed or currently effective rule as a "major" rule subject to additional review and reporting [*53] requirements, §§ 3(b), 6(a), 7(c)(2); requiring reconsideration of major rules, § 7(c)(1); identifying duplicative, overlapping and conflicting rules and requiring interagency consultation to eliminate such duplication, overlap or conflict, § 6(a)(5); preparing and promulgating uniform standards for the identification of major rules and the development of RIAs, § 6(a)(2); establishing schedules for reviews of RIAs, § 3(i); developing procedures for estimating annual costs and benefits of agency regulations, § 6(a)(6); developing procedures for the performance of his own functions under the order, § 6(b); requiring agencies to provide and evaluate additional information in connection with regulations or with their regulatory agendas, §§ 5(b), 6(a)(3); requiring the publication of regulatory agendas in a prescribed form, § 5(b)(2); waiving the requirements of the order with respect to any existing or proposed major rule, § 6(a)(4); and preparing, in consultation with the agency, recommendations for changes in the agency's statutes, § 6(a)(7). The Task Force was also entrusted with resolving any issues raised under the order or ensuring that they were presented [*54] to the President. See § 3(e)(1). One need not "strain" to construe this Executive Order as granting the Task Force substantial independent authority. See Maj. op. at 17.

Additional evidence in the record reveals that the President intended, and the Task Force provided, an active and independent force for regulatory reform. The President instructed the Chair of the Task Force to "take clear, constructive, and decisive action to restrain Federal regulation and to improve the regulatory process." Memorandum for the Heads of Executive Departments and Agencies, Office of the Vice President, Mar. 25, 1981; Press Release, Office of the Vice President's Press Secretary, Mar. 25, 1981 (Task Force "was instructed by the President to take action, not write reports"). By the Administration's own accounts, the Task Force exercised its powers to the fullest, undertaking the final review of regulations of "truly major consequence," Press Release, Office of the Vice President, Feb. 17, 1981; Press Release, Office of the White House Press Secretary, Feb. 18, 1981; "direct[ing]" federal agencies to propose new rules, Press Release, Office of the Press Secretary to the Vice President, Mar. 10, [*55] 1987; Press Release, Office of the Press Secretary to the Vice President, Jan. 29, 1988; "recommend[ing]" that federal agencies propose certain rules, Press Release, Office of the Vice President, July 14, 1987; "convening working groups representing key agencies to develop appropriate legislative proposals and responses," Press Release, Office of the Vice President, Feb. 17, 1981; Press Release, Office of the Vice President, April 10, 1987; "designating . . . rules and regulatory programs for high-priority agency consideration," PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS, Aug. 11, 1983, at 5; id. at 78; Press Release, Office of the White House Press Secretary, Feb. 4, 1982; and making "decisions" and taking "actions" to address these submissions, Remarks of Vice President George Bush at the Presidential Task Force on Regulatory Relief Briefing, Aug. 12, 1981; and "target[ing]" existing regulations for in-depth agency consideration, id.

The Task Force was directly involved not only with other executive agencies but with Congress and with the public. It "work[ed] actively with those in the Congress to achieve legislative change [*56] in the regulatory area," Press Release, Office of the Vice President's Press Secretary, June 13, 1981. It also "formally request[ed]" private sector comments to itself and to the agencies, Press Release, Office of the Vice President, March 25, 1981, and its counsel advised business leaders: "If you go to the agency first, don't be too pessimistic if they can't solve the problem there. If they don't, that is what the Task Force is for." C. Boyden Gray, Remarks at Transcription of Hall of Flags Regulatory Reform Briefing (Apr. 10, 1981), reprinted in Role of OMB in Regulation: Hearings of the Oversight and Investigations Subcomm. of the House Comm. on Energy & Commerce, 97th Cong., 1st Sess. 92 (1981), cited in Erik D. Olson, The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291, 4 VA. J. NAT. RES. L. 1, 56 n.283 (1984).

These functions equal or surpass those of every entity determined to date to be a FOIA agency and satisfy every judicial articulation of the Soucie "sole function" test. n12 Like the OST in Soucie, 448 F.2d at 1075, the CEQ in Pacific Legal Foundation, 636 F.2d at 1263, [*57] and the Defense Nuclear Facilities Board in Energy Research Foundation, 917 F.2d at 584, the Task Force evaluated federal programs. Instead of evaluating only scientific, technological or environmental programs, however, the Task Force evaluated regulatory programs across the spectrum of executive agencies. See Press Release, Office of the Vice President, Feb. 17, 1981 (Task Force was "in charge of the President's overall regulatory reform program"). Its evaluation functions included: identification of duplicative, overlapping and conflicting rules; the final review of regulations of "truly major consequence"; identifying specific areas where it believed reporting and paperwork requirements could be reduced and, in coordination with the OMB, reviewing these requirements in order to reduce them; reviewing agencies' legislative recommendations; and reassessing federal regulations and paperwork requirements. It is significant that the Task Force's evaluation functions were geared not just toward counseling the President, but toward guiding its own interactions with the OMB and other executive agencies. Although the CEA's functions included evaluation, [*58] see Rushforth, 762 F.2d at 1042 n.6, Judge Randolph later pointed out that all of its duties "simply facilitate[d] providing advice to the President." Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 917 F.2d at 584. By contrast, the Task Force's evaluation function shaped its decisions and actions directed toward executive regulatory agencies.

- -Footnotes- - - - - - - - - - - - - - - - - - -

n12 It is worth noting that the Task Force also possessed certain characteristics that this court has found relevant, if not required, in determining agency status. In Sierra Club v. Andrus, we noted that Congress had signalled the "importance of the OMB's power and function, over and above its role as presidential adviser," when it provided for Senate confirmation of the OMB's director and deputy director. 581 F.2d at 902. Congress has similarly required the Senate's advice and consent in the selection of the head of OIRA, who serves as the Executive Director of the Task Force. 44 U.S.C. § 3503(b) (1988). And to the extent that it is relevant that the OST assumed the functions of an entity that was itself an agency, the National Science Foundation, see Maj. op. at 6, the Task Force assumed many functions previously exercised exclusively by the OMB. Under President Ford, for example, the OMB by itself evaluated agencies' Inflation Impact Statements and set criteria for determining which rules had to be accompanied by these statements. Exec. Order No. 11,821, 3A C.F.R. § 926 (1971-1975 Compilation), modified by Exec. Order No. 11,949, 3 C.F.R. § 161 (1976). Under President Carter, the OMB by itself guided agencies in performing the detailed regulatory analyses required under Executive Order No. 12,044. Exec. Order No. 12,044, 3 C.F.R. § 152 (1978). Executive Order No. 12,291, of course, goes farther than either of its predecessors in asserting central presidential control over the regulatory process. See Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533, 549 (1989) ("The Reagan administration's program for oversight of regulation is the most ambitious to date."); Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Ad. L. Rev. 181, 185 (1986) (Executive Order 12,291 and Executive Order 12,498 represent the "most dramatic steps" in asserting presidential authority over the regulatory process).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*59]

Like the Defense Nuclear Facilities Board, see Energy Research Foundation, 917 F.2d at 585, the Task Force imposed reporting requirements on federal agencies. Under Executive Order No. 12,291 the Task Force could direct the head of the OMB to require agencies to provide additional information in connection with their regulations or regulatory agendas; determine the standards for and the form in which agencies filed their RIAs and agendas; and, by designating rules as major rules, sharply increase the reporting requirements incident to the rules. The Task Force also satisfies Rushforth's requirement of ability to take "direct action." Rushforth, 762 F.2d at 1041. The President instructed the Task Force to "take action," Press Release, Office of the Vice President, Mar. 25, 1981, and the Task Force claimed to have followed those instructions. It announced that, after formally requesting private sector comments about governmental regulation directed to itself and to the agencies, it made "decisions" and took "actions" to address these submissions. For example, the Task Force announced the EPA's "bubble" rule as one of [*60] the "actions taken" by the Task Force. Again like the Defense Nuclear Facilities Board, which "force[d] public decisions about health and safety," Energy Research Foundation, 917 F.2d at 584-85, the Task Force "directed" the Department of Health and Human Services and the Food and Drug Administration to make certain drugs available to AIDS patients, and claimed credit for regulations on the use of alternative fuels, as well as the "bubble" rule.

Finally, the Task Force exercised two of the three functions--coordinating regulatory programs, issuing guidelines and promulgating regulations--by which this court distinguished the CEA, which was not an agency, from the CEQ, which was. Rushforth, 762 F.2d at 1041. While the CEQ coordinated only environmental regulatory policy, the Task Force was "in charge of the President's overall regulatory reform program." The Task Force issued guidelines for all regulatory agencies on the preparation of the mandatory RIAs. And while it may not have published regulations in the Federal Register, its guidelines were, nonetheless, binding on federal regulatory agencies. See Exec. Order [*61] No. 12,498, § 1(d), 3 C.F.R. § 323 (1986), reprinted in 5 U.S.C. § 601 (1988). Moreover, it had far-reaching authority to shape the regulations of all regulatory agencies, through the final review of regulations of major consequence, the direction to federal agencies to propose new rules, the selection of rules for special scrutiny or for reconsideration, and the scheduling of the centralized review of all major regulations. Thus, it is easily distinguished from the CEA, which, as the Rushforth court noted, "had no regulatory power." Rushforth, 762 F.2d at 1043 (emphasis added). To the contrary, the Task Force's functions beyond advising and assisting the President equaled or exceeded those of the CEQ, and clearly sufficed to distinguish it from the CEA and to qualify it as an agency.

In assessing the Task Force's functions, the majority makes three fundamental errors. The first goes to the scope of the delegation of authority to the Task Force. The majority asserts that Executive Order No. 12,291 did not authorize "the Task Force, qua Task Force, to give directions to the executive branch." Maj. op. at 10. [*62] To the contrary, the Executive Order expressly authorized the Task Force to give effective direction to the OMB, n13 and through the OMB, to other executive agencies. In so doing, the Task Force directed what is "often called the most powerful agency in the United States Government." J. PARRIS, CONGRESSIONAL RESEARCH SERVICE, THE OFFICE OF MANAGEMENT AND BUDGET: BACKGROUND, RESPONSIBILITIES, RECENT ISSUES i (1978), cited in, Olson, supra, at 5. The Task Force's authority to direct other executive agencies was only fortified by Executive Order No. 12,498, which made the Task Force's regulatory policy guidelines binding on the agencies. See Exec. Order No. 12,498, § 1(d), reprinted at 5 U.S.C. § 601 note. Curiously, the majority cites this increase in the Task Force's direct authority over the agencies as a sign that the Task Force didn't "direct[] anyone . . . to do anything." Maj. op. at 12. In Executive Order No. 12,498, however, the President didn't just say to the agencies, "do as I say," but instead, "do as the Task Force says." Thus, the President in Executive Order No. 12,498 underscored his delegation to the Task Force of the [*63] authority to direct the agencies through the issuance of binding policy guidelines. n14

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n13 The Executive Order by its own terms recognizes the OMB as an executive agency. Exec. Order No. 12,291, § 1(d).

n14 Of course, even before the issuance of Executive Order No. 12,498, federal agency compliance with other Task Force and OMB directives under Executive Order No. 12,291 was hardly optional. See Exec. Order No. 12,291 § 2 (agencies "shall" adhere to order's cost-benefit requirements; regulatory action "shall not be undertaken" unless costs outweigh benefits); id. § 3(f)(1) (agency "shall" consult with the OMB Director at his request and "shall" refrain from publishing regulatory analyses or notice of rulemaking until his review is complete); id. § 5(b) (OMB Director, subject to the direction of the Task Force, may "require" agencies to provide additional information and "require" publication of regulatory agendas in a particular form).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The majority's description of the scope of the President's delegation [*64] to the Task Force comes not from the terms of the Executive Order itself or the Task Force's own account of the authority it exercised (which the majority rejects as "not reliable evidence," Maj. op. at 12), but instead principally from its own conjecture and surmise. For example, the majority would measure the Task Force's "independent authority" by the extent to which its actions are not dependent on "continuing interaction with the President." Maj. op. at 10. There is no evidence in the record that the Task Force had any continuing interaction with the President, and ample evidence, as discussed above, that it was authorized to act, and indeed acted, on its own. The majority surmises, nonetheless that the Task Force, which was chaired by the Vice President, did not exercise any significant independent authority in part because "Presidents are . . . reluctant to delegate real supervisory authority over the executive branch to the Vice President" who is not subject to the President's removal power. n15 Maj. op. at 13. The majority relies on this general hypothesis about presidential behavior instead of on the Administration's own statements that Executive Order No. 12,291 did [*65] in fact constitute a delegation of the President's supervisory authority. See, e.g., Press Release, Office of the Vice President, Mar. 25, 1981 (Task Force to "take action"); Office of Legal Counsel, Memorandum on Proposed Executive Order Entitled "Federal Regulation" (Jan. 28, 1981), reprinted in 5 OP. OFF. LEGAL COUNSEL 59, 63 (1981) (President through Executive Order No. 12,291 "authorized the Task Force and OMB Director to supervise agency rulemaking"); id. at 64 (Task Force and OMB Director "authorized to require an agency to defer rulemaking"). Only by "screening out" the Executive Order's and the Administration's descriptions of the Task Force's substantial independent authority can the majority conclude that the Task Force was merely "screen[ing] the regulatory issues" for the President's review. Maj. op. at 16. n16

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n15 Ironically, after noting the dangers of a presidential delegation to an independent Vice President, the majority is willing to assume that the Vice President, in the exercise of his Task Force leadership, "presumably will not express direction to others in the executive branch unless his view is shared by the President." Maj. op. at 14. Thus, the majority seems to believe that the court should assume the Vice President's loyalty to the President where it would be "dangerous" for his own President to do so. [*66]

n16 If the Tasks Force were merely reviewing or "screening" issues for the President's consideration and action, without more, it would not differ significantly from the Council of Economic Advisers, which we determined was not an agency. See Rushforth, 762 F.2d at 1043 (CEA's review of federal programs was connected to its function of making recommendations to the President); see also Defense Nuclear Facilities Board, 917 F.2d at 584 (CEA's duties "simply facilitate[d] providing advice to the President"). The evidence indicates, however, that the Task Force had significantly more independence than does the CEA.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

For example, the majority cavalierly dismisses, Maj. op. at 12, the President's explicit delegation to the Task Force of the authority either to resolve disputes arising under the order or to determine when a dispute required the President's personal attention. The President's delegation to the Task Force of the authority to keep an issue from even reaching his desk is a clear indication of the Task Force's significant authority [*67] to deal independently with regulatory issues. The majority's statement that it "seems implicit" that the Task Force would not on its own resolve disputes without presenting them to the President is directly contradicted by the express language of the Executive Order, and by the Vice President's own assertion that the Task Force presented disputes to the President only "if necessary," see Press Release, Office of the Vice President, Feb. 17, 1981 (the "most sensitive questions" arising under Executive Order No. 12,291 "will be brought in timely fashion to the Presidential Task Force (and, if necessary to the President himself)"; "regulations of truly major consequence are brought before the Presidential Task Force (and the President, if necessary) for final review"). n17 The majority further suggests that, should the Task Force itself resolve disputes according to the President's known wishes, it would not be acting "independently." See Maj. op. at 12. By this definition, virtually no loyal government body would be sufficiently "independent" to qualify as an agency. Only renegades or freelancers who ignored or disregarded the President's orders would be seen to "act independently." [*68]

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n17 In determining how an agency functions, we have previously relied on its authorized functions, not merely its exercised functions. See Rushforth, 762 F.2d at 1041 (distinguishing the CEQ from the CEA by the executive order authority that had been delegated to the former). Thus, we have read Soucie to declare that the OST was an agency because "it could take direct action," Rushforth, 762 F.2d at 1041 (emphasis added), not because it did take that action. This is certainly the correct reading of Soucie, in which we inquired into the functions that had been delegated to the OST, rather than those that it had exercised. See Soucie, 448 F.2d at 1075 (examining functions that were "transferred" to or "inherited" by the OST).

Furthermore, it would be unreasonable to require FOIA plaintiffs to "document," see Maj. op. at 12, a putative agency's actual exercise of each of its delegated functions, since the entity's very denial of its agency status under the FOIA deprives the plaintiffs of the necessary documentation. In cases such as this one, where delegated authority may be exercised informally, there will often be no more than second-hand accounts of its exercise. See, e.g., Erik D. Olson, The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291, 4 VA. J. NAT. RES. L. 1, 44 n.210 (1984) (citing Hearings on OMB Control of OSHA Rulemaking: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 97th Cong., 2d Sess. 4-5, 20-26, 55, 316-19 (1982)) (account of the Task Force's actual exercise of its power to resolve a dispute between OMB and OSHA).

In any event, whether or not the Task Force actually exercised its delegated dispute resolution function should not be dispositive of its agency status. The record amply demonstrates that the Task Force both possessed and exercised sufficient other functions to put it within the realm of FOIA agencies. And its authority to resolve disputes--whether or not ever exercised--only enhanced its position in the executive branch and reinforced its other express delegations of authority to direct the regulatory efforts of federal agencies.

Of course, this does not mean that an entity's actual exercise of unauthorized functions could not subject it to agency status under the FOIA. To hold otherwise would be to permit irregular organizations or activities to escape disclosure. Instead, the inquiry should extend to functions that were either authorized or exercised, not just those that were authorized and exercised.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*69]

The majority's resort to a thirty-year-old treatise about the presidency, Maj. op. at 14, "maxims" about staff capture, Maj. op. at 15, and the supposed beliefs of "veterans of bureaucratic wars," Maj. op. at 15, to determine how the Task Force actually functioned, and its dismissal of the Task Force's Executive Order authority as "beside the point," Maj. op. at 11, is troubling, to say the least. n18 It discredits the two best and most reliable indications of the Task Force's role: the authority granted by the express terms of the Executive Order itself, and the Administration's own accounts of how the Task Force operated.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n18 Disregarding the record evidence of the Task Force's active involvement in regulatory reform, the majority paints a picture of a "virtually powerless" group that was not an "independent actor" in the executive branch. Maj. op. at 15. The real power, they suggest, resided not with this Cabinet-level Task Force chaired by the Vice President, but with the OMB. Frankly, this conjures up visions of the OMB as a looming, booming, electronic Wizard of Oz, exhorting us to "pay no attention to that man behind the curtain." Where, as here, the "man behind the curtain" is undertaking functions that are legally significant to our inquiry, we cannot and must not disregard them.

- - - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - - -

[*70]

The majority's second fundamental error is in creating and applying an "operational proximity" test that represents a strained reading of the legislative history and runs directly counter to our precedent. The majority asserts--without citing any support from the legislative history or case law--that operational proximity in the sense of "continuing interaction" is, in part, what Congress contemplated when it exempted the President's "immediate personal staff" from the definition of an "agency." Maj. op. at 9. Even assuming that "operational proximity" was a consideration in exempting the President's "immediate personal staff," n19 it should be confined to this exemption. The majority's error is in confusing the "immediate personal staff" exemption, which is not at issue here, with the "sole function" exemption, which is a separate inquiry.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n19 I see little point in pursuing an inquiry into the scope of or the congressional intent behind the "immediate personal staff" exemption, as this case calls on us to construe only the "sole function" exemption.

- - - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - - -

[*71]

The Conference Report, of course, said that the definition of "agency" to include establishments in the Executive Office of the President was to be interpreted to exclude "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." CONF. REP. at 13 (emphasis added). We and the Supreme Court have interpreted "immediate personal staff" to refer to the staff of the Office of the President, also known as the White House Office, one of the fourteen units within the Executive Office of the President, n20 and accordingly have granted FOIA exemptions to persons or offices within the White House Office without applying the "sole function" test. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1979) ("The FOIA does render the 'Executive Office of the President' an agency subject to the Act. 5 U.S.C. § 552(e). The legislative history is unambiguous, however, in explaining that the 'Executive Office' does not include the Office of the President."); National Security Archive v. Archivist of the United States, 285 U.S. App. D.C. 302, 909 F.2d 541, 545 (D.C. Cir. 1990) [*72] (noting that the Supreme Court "had made clear that the Office of the President is not an 'agency' for purposes of the FOIA" and that the Office of Legal Counsel was part of that Office) (citing Kissinger, supra). The majority correctly "assumes" that the President's "immediate personal staff" encompasses "at least those approximately 400 individuals employed in the White House Office," Maj. op. at 9 n.3 (emphasis added), but then attempts to extend its "operational proximity" concept beyond the confines of the White House Office and to incorporate it into the "sole function" test.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n20 See Reorganization Plan No. 1 of 1977, 5 U.S.C. App. 1. The White House Office, which has roughly 400 employees, "concentrates on close personal support including policy and political advice and administrative and operational services." Id. (Message of the President). Other units within the Executive Office of the President, which has over 1800 employees, include the Office of Management and Budget, the National Security Council, the Council of Economic Advisers, the Office of Policy Development and the Office of the Special Representative for Trade Negotiations. See Charles R. Babcock, Hard to Pin Down What Taxpayers Give at Top Office, WASH. POST, Oct. 19, 1992, at A19; H.R. REP. NO. 618, 102d Cong., 2d Sess. (1992) (accompanying the bill appropriating funds for the Executive Office of the President); H.R. REP. NO. 919, 102 Cong., 2d Sess. (1992) (same).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*73]

This is not only an illogical reading of the two tests established in the legislative history, it is also at odds with our "sole function" precedent. We made clear in Ryan, 617 F.2d at 789, that regardless of an entity's close proximity to or continuing interaction with a President, it is a FOIA agency unless its sole function is to advise and assist the President. Thus, to the extent that we focus on how closely the entity works with the President, the "sole function" test, and not "operational proximity" is the proper inquiry.

Furthermore, by the majority's broad definition of "proximity," virtually every person or entity within the Executive Office of the President would be excluded from the FOIA, contrary to the statute's express inclusion of the Executive Office of the President in its definition of agency. For example, under the majority's "operational proximity" test, the Director of the OMB, determined by the majority to be the cabinet officer "functionally . . . closest to the President," Maj. op. at 11, would, on the basis of that proximity, be a shoo-in for exclusion from the FOIA, but no one disputes that the OMB, along with its director, [*74] is subject to the FOIA.

The OMB's recognized operational proximity to the President, see Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Ad. L. Rev. 181, 185 (1986) (OMB "acts in some respects as the President's personal staff"); Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L. Rev. 1075, 1083 (1986) (OMB's role "is to serve as the eyes and ears of the president and to advance" the President's policies), does not negate the fact that the OMB is an establishment within the Executive Office of the President whose functions go beyond advising and assisting the President. When the statute expressly includes establishments within the Executive Office of the President, while the accompanying report language excludes only "immediate personal staff" and those whose "sole function" is to advise and assist the President, I have to read the report language to qualify, not obliterate, the statutory directive.

Finally, on the question of proximity to the President, it is important to note that the plaintiff does not seek records [*75] of the President, of the Vice President, nor yet of the Office of the Vice President. n21 Instead, she seeks the records of a separate functional entity operating partly out of the Office of the Vice President and partly out of the Office of Management and Budget.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n21 The plaintiff requested not records of the Vice President "in his capacity as adviser to the President," but those "that were received or generated by the Task Force which he chairs." The district court below, having no evidence on whether the Office of the Vice President kept Task Force documents, withheld judgment as to whether the defendants would have to search there, too. Thus, the propriety of searching records of the Office of the Vice President is not before us.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The majority's third fundamental error in assessing the Task Force's agency status is to confuse its composition or its structure with its functions. It finds inordinate significance in the fact that the members of the Task Force also served in other capacities as agency [*76] heads and members of the President's cabinet. That the President selected cabinet members to serve on the Task Force is not dispositive of its agency status n22 for a very simple reason: The relevant inquiry is whether there is a separate establishment within the Executive Office of the President with substantial authority to act independently, and not the status of the individual members who make up the entity. n23

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n22 Nor would the basic inquiry under Soucie be different if the Task Force's members included the entire cabinet. It would be unprecedented for a President to turn his cabinet loose to take substantial independent actions on its own and without his ongoing involvement and direction; I know of no instance of the President's delegating to the cabinet "qua cabinet" substantial independent authority. The President's cabinet traditionally has existed solely to advise and assist the President in the exercise of his own retained authority. The majority's own anecdote, in which President Lincoln participates in and overrules the decision of his cabinet, see Maj. op. at 17 n.9, underscores that the President had not delegated any of his authority to the cabinet. Nonetheless, should a President ever exercise his power to delegate substantial independent authority to the cabinet (or to an entity that included all of the cabinet members), there would be no barrier to our applying the Soucie "sole function" test to determine if the cabinet's (or this entity's) new and enlarged powers qualified it as a FOIA agency.

I do recognize that, in applying the Soucie test where the delegation of authority is informal, implicit or otherwise ambiguous, the structure employed might provide some indication of whether the President had, in fact, delegated substantial independent authority. See Maj. op. at 17. In this case, however, the Task Force's substantial independent authority is expressly and unambiguously delegated in Executive Order No. 12,291 and amply confirmed through the Administration's own statements. It cannot be negated merely by reference to the Task Force's structure or composition. [*77]

n23 Although this Soucie "sole function" test is the proper test for establishments elsewhere in the Executive Office of the President, we have not applied it to persons or offices within the Office of the President, or White House Office. See Kissinger, 445 U.S. at 156; National Security Archive, 909 F.2d at 545; see also Ryan, 617 F.2d at 789 (members of the presidential staff are exempt from FOIA). I recognize, therefore, that we would face a different question were we to consider the FOIA status of an entity comprised entirely of White House personnel, who have been exempt from FOIA in their traditional roles as the President's personal staff, but who now had stepped outside their traditional staff roles and were acting instead as principals to whom the President had delegated substantial independent authority. Since that question is not before this court, I do not address it. Since I do not address the question, I neither "dispute," see Maj. op. at 16, nor endorse any conclusion as to its answer.

It does bear noting, however, that my recognition that an entity wholly within the White House Office presents a different case than the one before us is not "governed by fortuitous history," as the majority charges, Maj. op. at 17, but by Kissinger and National Security Archive, which in turn were governed by the legislative history of the FOIA. My opinion also leaves open, as the majority correctly notes, Maj. op. at 17, the question of the agency status of a hypothetical entity "composed partially of senior White House staff and cabinet officers." Maj. op. at 17. Since that question, like the one involving White House staff alone, is not before the court, I do not reach it, either.

Finally, in regard to White House staff, I question the majority's characterization of the Task Force as the "functional equivalent[] of assistants to the President," or senior White House staff. Maj. op. at 11. The White House staff presumably advises and assists the President in the conduct of all his responsibilities, and without incurring FOIA responsibilities. There are two key distinctions, however. First, White House staff members presumably assist the President in his review of regulations, while the Task Force independently exercised the President's delegated authority to review those regulations. Second, as discussed above, even if the Task Force were functioning in a manner equivalent to White House staff, the relevant FOIA inquiry differs for White House staff and for other establishments within the Executive Office of the President.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*78]

Although the majority professes to subscribe to the view that "form follows function," Maj. op. at 16, its reasoning is closer to "form dictates function." That is, it is willing to disregard a wealth of record evidence about the Task

Force's actual and authorized independent functions because the structure of the Task Force--as a "partial cabinet group" with the Vice President at the helm--raises questions in the majority's eyes as to the Task Force's "real" independence. Maj. op. at 13. n24

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n24 Even if, as the majority urges an entity's structure were to be given this overwhelming significance, I fail to see how the structure of the Task Force, which was headed by the "only senior official in the executive branch totally protected from the President's removal power," Maj. op. at 13, would belie the executive order's express delegation of substantial independent authority.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The majority's focus on the composition of the Task Force is particularly puzzling in light of the majority's own identification of the three [*79] factors relevant under Soucie to determine whether entities like the Task Force are agencies: operational proximity, a self-contained structure (including an independent staff), and the scope and nature of the delegation from the President. Maj. op. at 9-10, 14. Although I disagree with the majority about the first two--which are entirely creatures of the majority's own making--the scope and nature of the President's delegation of authority is certainly the primary relevant inquiry. The majority, however, departs from its own inquiry into what the President delegated, that is, the degree of independent authority he gave the entity, and asks instead to whom he delegated this authority, that is, what other roles the members of the entity happen to play in the Administration. This inquiry is clearly inconsistent with the functional inquiry this court has applied in FOIA cases for twenty years.

III. CONCLUSION

This case does not question the President's authority to supervise the oversight of federal regulations. The President's authority to "supervise and guide" subordinate executive officers in order to "secure the unitary and uniform execution of the laws" is well-established. [*80] Myers v. United States, 272 U.S. 52, 135, 71 L. Ed. 160, 47 S. Ct. 21 (1926). More specifically, we have acknowledged the President's need and authority to coordinate federal regulatory policy:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House staff advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under the Constitution, after all, is not shared--it rests exclusively with the President.

Sierra Club v. Costle, 211 U.S. App. D.C. 336, 657 F.2d 298, 405 (1981), see also In re Permanent Surface Mining Reg. Litigation, 13 ENV'T REP. CAS. (BNA) 1586, 1597 (D.D.C. 1979) (consultation between the President's advisers and other entities in the executive branch permissible). To exercise that power, the President and his close advisers must be able to communicate freely, and, in some cases, without public scrutiny. See Sierra Club, 657 F.2d at 406 ("Our form of government simply [*81] could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive."). This case, however, unlike Sierra Club, does not involve face-to-face strategy sessions between the President and his policymakers. Rather, it involves a separate functional establishment within the Executive Office of the President to which the President delegated some of his executive powers. We have a clear expression of congressional intent that the records of such establishments are generally subject to the FOIA. Cf. Sierra Club, 657 F.2d at 407 (determining lawfulness of undocketed meeting with the President "in the absence of any further Congressional requirements" on docketing). Because the Presidential Task Force on Regulatory Relief does not fall within the Soucie exception to FOIA coverage, it must, consistent with the directives and exemptions of the FOIA, make its records available to those who request them.

Nor does this case question the President's authority to establish any kind of high-level structure--or no structure--within the Executive Office of the President to direct the regulatory [*82] reform effort. The President can choose to accomplish his regulatory objectives through his own actions, through an establishment created pursuant to his executive order authority, through an entity created through a congressionally-approved reorganization plan, or simply through rump sessions with his cabinet members. But the President must live with the consequences of his choice, one of which may be the requirements of the FOIA. We recognized this indisputable fact in Ryan v. Department of Justice, 199 U.S. App. D.C. 199, 617 F.2d 781, 789 (D.C. Cir. 1980): "In many different areas the President has a choice between using his staff to perform a function and using an agency to perform it. While not always substantively significant, these choices are often unavoidably significant for FOIA purposes, because the Act defines agencies as subject to disclosure and presidential staff as exempt." n25 The majority, nonetheless, chafes at these consequences, see Maj. op. at 16, apparently concerned that the cloak of presidential privilege does not and cannot extend as far as the President's delegated authority. It is one thing, however, to say that the President's conversations [*83] with his closest advisers, here the Task Force members, are confidential. It is quite another to say that when the Task Force goes forth to exercise substantial independent authority, the President's consultative privilege extends not only to the Task Force in its communications to those whose work they direct, such as the Administrator of the OMB's OIRA, who served as the Task Force's Executive Director, but even to communications between the Task Force and representatives of regulated industries. I am perplexed as to how the majority could label such an approach "forthright." Maj. op. at 17. The most the President can be said to have "openly disclose[d]," Maj. op. at 17, is a review mechanism by which the substance of and the outside participants in the review can remain cloaked in secrecy.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n25 My colleagues find it "unclear just what factors" would lead me to distinguish this arrangement from similar arrangements that would not require FOIA disclosure. Maj. op. at 17. I had hoped that my opinion made clear that the factors are, first, those that determine whether the "arrangement" creates an agency under FOIA; and second, if there is an agency, those factors that determine whether any particular communications with the agency can be kept confidential under a FOIA exception.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*84]

Instead of addressing the Task Force's authority to direct the President's regulatory reform efforts, this case questions its authority to shroud its actions in absolute secrecy. n26 Similarly tasked entities within the Executive Office of the President, most notably the OMB, operate without such a cloak. Shortly after the enactment of Executive Order No. 12,291, the Office of Legal Counsel advised the OMB that certain substantive communications from the OMB to rulemaking agencies or from outside parties to the OMB pursuant to the order should be disclosed in the administrative record. (The OLC exempted substantive communications from the OMB that formed part of the agency's deliberative process.) Office of Legal Counsel, Contacts Between the Office of Management and Budget and Executive Branch Agencies Under Executive Order No. 12,291 (Apr. 24, 1981), reprinted in 5 OP. OFF. LEGAL COUNSEL 107, 110-12 (1981). The OMB itself expanded on this disclosure policy in 1986 under a directive issued by Wendy Gramm, then the Administrator of the OMB's Office of Regulatory Affairs. OMB, Memorandum for the Heads of Departments and Agencies Subject to Executive Orders 12,291 and 12,498 (June [*85] 13, 1986), reprinted in OMB, REGULATORY PROGRAMS OF THE UNITED STATES GOVERNMENT, APRIL 1, 1988--MARCH 31, 1989 (1988), app. III, at 529-31. Even supporters of a strong presidential role in supervising the regulatory process stress the importance of public disclosure of most OMB communications under Executive Order Nos. 12,291 and 12,498. See, e.g., Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Ad. L. Rev. 181, 188-90, 192 (1986). In fact, one Administrator of OIRA testified that "the very purpose of . . . Executive Order 12,291 is to make regulatory decisions more transparent and accessible." Statement of Christopher DeMuth, OIRA Administrator, Before the Subcomm. on Administrative Law & Governmental Relations of the House Judiciary Comm. (July 28, 1983), reprinted in Regulatory Reform Act: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 895, 922 (1983).

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n26 Many commentators have decried the impenetrable veil of secrecy surrounding presidential intervention in rulemaking. See, e.g., Kenneth C. Davis, Presidential Control of Rulemaking, 56 Tul. L. Rev. 849, 850-51 (1982) (the "harmful element" of secrecy in White House intervention under Executive Order No. 12,291 results in unfair procedure and impaired accountability); Alan B. Morrison, OMB Interference with Agency Rulemaking: The Wrong Way in Write a Regulation, 99 Harv. L. Rev. 1059, 1064 (1986) ("the entire process [of review under Executive Order No. 12,291] operates in an atmosphere of secrecy and insulation from public debate that makes a mockery of the system of open participation embodied in the Administrative Procedure Act (APA)"); Erik D. Olson, The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291, 4 VA. J. NAT. RES. L. 1, 14 (1984) (OMB's "propensity for secrecy . . . tends to undercut the value of OMB review); Steven T. Kargman, Note, OMB Intervention in Agency Rulemaking: The Case for Broadened Record Review, 95 Yale L.J. 1789, 1793 (1986) (Undisclosed OMB intervention results in "two different 'records': one reflecting what happened during the agency's public rulemaking proceedings, and the other reflecting what happened between the agency and OMB."); Ann Rosenfield, Note, Presidential Policy Management of Agency Rules Under Reagan Order 12,498, 38 Ad. L. Rev. 63, 93 (1986) (because OMB regulatory review takes place "wholly in secret, it is hard to see how review of rulemaking has led to [the promised advantages of] the appearance of open government and increased agency accountability to the public"); Note, Executive Orders 12,291 and

12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?, 54 Geo. Wash. L. Rev. 512, 530 (1986) ("secret presentations" to OMB "allow[] OMB to circumvent two related tenets of the APA: the requirement for giving interested parties the opportunity to submit materials into the rulemaking record, and the ban on ex parte communications") (citations omitted). See also H. REP. NO. 919, 102d Cong., 2d Sess. 49 (1992) (expressing conferees' concerns about the lack of a public record of the regulatory review conducted by the Council of Competitiveness "or such other similar reviewing agency established within the Executive Office of the President").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*86]

Given the Realpolitik of the workings of the Executive Office of the President, it is candidly hard to see how disclosure of the same genre of communications by and to the Task Force, which worked hand-in-glove with the OMB, sharing its staff, records, and responsibilities under Executive Order No. 12,291, would pose any significant potential for disruption of the President's valid oversight functions. In fact, it would seem that the objectives of the OIRA disclosure procedures--and FOIA itself--would be thwarted if comments sent to the OMB or the OIRA are subject to public access, while similar comments on the very same matter directed to the Task Force are never revealed. n27

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n27 The 1986 OIRA disclosure procedures themselves were a response to congressional pressure to open up the OMB's processes, under a threat of defunding the OIRA. See Oversight of the Office of Management and Budget Regulatory Review and Planning Process: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 99th Cong., 2d Sess. 56-58, 97-98 (1986); see also Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533, 582 (1989).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*87]

The majority's approach thus creates two tracks: The Task Force, which is charged with the "overall direction" of the President's regulatory reform program, is shielded from disclosure laws, while the OMB, which operates under the Task Force's direction, is not. This clearly maps out the formula for getting around disclosure laws in the Executive Office of the President: First, put a small unit of decisionmakers atop a larger establishment of persons who carry out those decisions, and insist that because only the implementers have a staff, only they form the "agency." Second, when necessary, maintain that the "significant authority" resides only with the implementers, see Maj. op. at 11, and that the "whole" of the decisionmaking unit is less than the sum of its parts. See Maj. op. at 18. That is, if you sever the "brains" of an organization from the "body," the people who call the shots are never in the public's sights. n28

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n28 The majority thus misapprehends what it terms my concern about exposing OMB directives. See Maj. op. at 11. I understand full well that the OMB is subject to disclosure, but I recognize that such disclosure is indeed a hollow gesture if the key records both influencing and documenting the actions taken by the OMB are funneled only through the Task Force.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*88]

Subjecting the Task Force, as well as the OMB, to the FOIA would not compromise either the President's legitimate oversight authority or his undisputed need for confidential policy deliberations, as the FOIA's exemption 5 expressly provides for a deliberative process privilege. In fact, the Administration invoked this privilege to shield certain documents requested by the plaintiff in this case. To the extent that the President or his close advisers need to protect sensitive policy discussions, they can more appropriately do so through the FOIA exemption, which protects particular records from disclosure, rather than through the FOIA agency determination, which bars all records from disclosure. See Pacific Legal Foundation, 636 F.2d at 1265 (where concern was protecting confidential advice to the President, court was unwilling to close all meetings, rather than those meetings in which such confidential advice was to be deliberated).

It is not enough to say, as the majority does, that the Task Force or its Chair is a "hair's breadth" or a "heartbeat" away from the President. This court has previously declined to exempt the President's closest advisers, [*89] his Cabinet members, from the FOIA: "Many Cabinet officers, like the Attorney General or the Office of Legal Counsel under him, act as advisors to the President for many of their important functions; yet they are not members of the presidential staff or exclusively presidential advisors, and are thus not exempt from FOIA requirements." Ryan v. Department of Justice, 199 U.S. App. D.C. 199, 617 F.2d 781, 789 (D.C. Cir. 1980). See also Soucie, 448 F.2d at 1074 n.22 (director of OST expected to replace the President's Special Assistant for Science and Technology in the capacity of personal adviser to the President on scientific matters). Nor is it enough to say that the Task Force operated at the highest levels of the White House. Soucie itself involved an agency created in the Executive Office of the President to provide "higher level" coordination of the nation's science policies. Soucie, 448 F.2d at 1074. Finally, it is not enough to say that the Task Force created the records at issue in its role of advising the President. The report at issue in Soucie was "requested by the President precisely for advisory [*90] purposes," Ryan, 617 F.2d at 788, as was the information the Attorney General had gathered in Ryan. Id.

Instead, the proper inquiry, as the district court noted, must center on the "functions and responsibilities of the Task Force, not the title of its Chairman or his other office," and on the evidence that the Task Force was not formed simply to advise and assist the President, but rather had "substantial, independent, directorial authority." The majority recognizes, as it must, that the district court "applied the correct governing law. . . ." Maj. op. at 6. As the extensive prior discussion demonstrates, and as the district court found as well, such an inquiry leads ineluctably to a recognition that the Task Force is an "agency" under the FOIA test. Accordingly, I would affirm the district court's judgment, and dissent from my colleagues' contrary conclusion.

Clinton Presidential Records
Digital Records Marker

H.R. 3734

6 pgs

102D CONGRESS
1ST SESSION

H. R. 3734

To make applicable to the Congress certain laws relating to the terms and conditions of employment, the health and safety of employees, and the rights and responsibilities of employers and employees, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 7, 1991

Mr. DANNEMEYER (for himself, Mr. SHAYS, Mr. RAMSTAD, Mr. HAYES of Louisiana, Mr. THOMAS of Wyoming, Mr. BALLENGER, Mr. WALSH, Mr. MILLER of Washington, Mr. COMBEST, Mr. ZIMMER, Mr. SMITH of Texas, Mr. KLUG, Mr. BAKER, Mr. DICKINSON, Mr. SANTORUM, Mr. LIGHTFOOT, Mr. EWING, Mr. WOLF, Mr. ALLARD, Mr. DOOLITTLE, Mr. PORTER, Mr. HUNTER, Mr. PACKARD, Mr. ROHRABACHER, Mr. LIVINGSTON, Mr. HOLLOWAY, Mr. YOUNG of Florida, and Mr. DUNCAN) introduced the following bill; which was referred jointly to the Committees on House Administration, Education and Labor, the Judiciary, Government Operations, Ways and Means, and Rules

---

A BILL

To make applicable to the Congress certain laws relating to the terms and conditions of employment, the health and safety of employees, and the rights and responsibilities of employers and employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a publication.

Publications have not been scanned in their entirety for the purpose of digitization. To see the full publication please search online or visit the Clinton Presidential Library's Research Room.

H.R. 3877

2pgs

I

102D CONGRESS
1ST SESSION

H. R. 3877

To provide equal access to Presidential, congresssional, and judicial records.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 22, 1991

Mr. ENGLISH introduced the following bill; which was referred to the Committee on Government Operations

---

A BILL

To provide equal access to Presidential, congresssional, and judicial records.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Equal Access to Presidential, Congressional, and Judicial Records Act".

SEC. 2. ACCESS TO RECORDS.

Section 552 of title 5, United States Code, is amended to read as follows:

"(f) Notwithstanding section 551 of this title, for purposes of this section the term 'agency' includes—

H. R. 4294

10pgs

102D CONGRESS
2D SESSION

H. R. 4294

To make applicable to the Congress certain laws relating to the terms and conditions of employment, the health and safety of employees, and the rights and responsibilities of employers and employees; and to repeal and prohibit certain privileges and gratuities for Members of the United States House of Representatives and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 25, 1992

Mr. NUSSLE (for himself, Mr. DANNEMEYER, Mr. GOSS, Mr. CUNNINGHAM, Mr. ALLEN, and Mr. COX of California) introduced the following bill; which was referred jointly to the Committees on House Administration, Ways and Means, Education and Labor, the Judiciary, Government Operations, and Post Office and Civil Service

---

A BILL

To make applicable to the Congress certain laws relating to the terms and conditions of employment, the health and safety of employees, and the rights and responsibilities of employers and employees; and to repeal and prohibit certain privileges and gratuities for Members of the United States House of Representatives and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

H.R. 4847 13pgs

102D CONGRESS
2D SESSION

H. R. 4847

To provide greater accountability in government by bringing Congress within the scope of certain laws presently covering the private sector, the executive branch, or both.

IN THE HOUSE OF REPRESENTATIVES

APRIL 9, 1992

Mr. MICHEL (by request) introduced the following bill; which was referred jointly to the Committees on House Administration, Education and Labor, the Judiciary, Post Office and Civil Service, and Government Operations

---

A BILL

To provide greater accountability in government by bringing Congress within the scope of certain laws presently covering the private sector, the executive branch, or both.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Accountability in Government Act of 1992".