FOSTER BACKGROUND - IRA MAGAZINE

(1)

Foster ⇒ Dra Magazines

Randy Eliason conversation 8/11/17

- WST not accurate
- written by Newmith — Foster's role supervisory
- present during a couple ab meetings Mag, Neu, Foster
- SN drafts it ⇒ VWF goes over draft
- legal Q at that time was whether HRC's presence on committee made it subject to FACA
- 12-member task force
- people have confused working group (600) + task force (12)
- Magazines only overlap
- key legal meeting ⇒ Foster was not there

[redacted]

- remanded ⇒ attempting to respond to discovery + go back to working groups

U.S. Department of Justice

United States Attorney

District of Columbia

Judiciary Center
555 Fourth St. N.W.
Washington, DC 20001

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U.S. Department of Justice

United States Attorney

District of Columbia

Judiciary Center
555 Fourth St. N.W.
Washington, D.C. 20001

August 3, 1995

The Honorable Royce C. Lamberth
United States District Judge
for the District of Columbia
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Lamberth:

On December 21, 1994, this Court asked the United States Attorney's Office to investigate whether Ira C. Magaziner, a senior advisor to President Clinton, committed perjury or contempt of court in connection with a sworn declaration filed in the civil case of Association of American Physicians and Surgeons, et al. v. Hillary Rodham Clinton, et al., 93-399, (hereinafter referred to as the "AAPS" case.) As the Court is well aware, this case involved a challenge to the Clinton administration's health care reform effort, and Mr. Magaziner was a named defendant in the lawsuit. After an extensive and thorough review of this matter, we have concluded that there is no legal basis for prosecuting Mr. Magaziner for either perjury or contempt of court. Because of the unique status of this case, to include the fact that it was referred by a member of the judiciary and involves allegations in an ongoing and high-profile case, we have determined that it is appropriate to provide to you the following detailed analysis of this matter.

OVERVIEW

On March 3, 1993, Ira Magaziner signed, under penalty of perjury, a declaration to be filed in the AAPS case. In the declaration he stated, among other things, that only federal government employees served as members of the working group that was considering health care reform. The plaintiffs in the case later alleged that this declaration was false and sought to have Mr. Magaziner held in contempt of court. When the civil case became moot while the allegations concerning the declaration were still unresolved, this Court referred the allegations to our Office.

The results of our investigation demonstrate that there is no basis to conclude that Mr. Magaziner committed a criminal offense in this matter. There is no significant evidence that his declaration was factually false, much less that it was willfully and intentionally so. The problems that arose concerning the declaration stem from three main factors:

First, some of the declaration's terms are subject to conflicting interpretations and were inartfully used, thus leaving the declarant open to charges that portions were inaccurate. These problems with the language of the declaration were further compounded by certain tactical judgments and missteps made by government counsel in the course of the civil litigation.

Second, several of the key allegations made against the declaration are themselves factually inaccurate. They rest upon mischaracterizations of the AAPS record or of the language of the declaration itself.

Third, the declaration was signed on March 3, 1993, about five weeks into the four-month working group process. A great many things within the working group changed after that date, some of which arguably affected the accuracy of certain statements previously made in the declaration. There has been a tendency, however, to evaluate the truthfulness of the declaration through hindsight as a description of the entire working group process, rather than evaluating its truthfulness as of the day it was filed.

It is fair to say that portions of the declaration are confusing, and that some terms in the document were used imprecisely. The statements that have been challenged, however, cannot be proven true or false. This is not a case in which an individual says, for example, "I was in Cleveland at the time of the murder," and one can obtain eyewitnesses, hotel records, or other evidence that this statement is untrue. The challenged statements in the declaration depend upon characterizations and matters of opinion, both legal and factual. People may legitimately disagree with those characterizations, as the AAPS plaintiffs have, but one cannot prove that they are "false" as is required under law in a prosecution for perjury. Furthermore, although the declaration can be misleading if relied upon as a historical description of the entire working group process, there is no evidence that Mr. Magaziner intended to mislead the court. Therefore, there is no basis for prosecution in this matter.

FACTUAL BACKGROUND: HEALTH CARE REFORM AND THE AAPS LITIGATION

I. The President's Health Care Task Force and Working Group

On January 25, 1993, President Clinton announced the formation of the President's Task Force on National Health Reform to assist

him in developing proposed legislation to reform the health care system. He announced that the Task Force would be chaired by the First Lady, Hillary Rodham Clinton. The other members of the 12-person Task Force included cabinet-level officials and senior advisors to the President. One of the members was Ira Magaziner, Senior Advisor to the President for Policy Development.[1]

Mr. Magaziner was also charged with forming and leading an "interdepartmental working group" to aid the Task Force. The working group was to gather information and brainstorm about all aspects of health care reform, and to prepare options to present to the Task Force. The working group ultimately comprised 12 different "cluster groups," made up of some 38 different sub-groups, each assigned to study a different aspect of health care reform. The working group began meeting in early February and worked at a feverish pitch until the end of May. Although Mr. Magaziner initially envisioned staffing the working group with fewer than 100 people, the process ballooned until, in the end, more than 600 people had been involved.

II. The Lawsuit: AAPS et al. v. Hillary Clinton et al.

The administration had announced that it intended to keep the proceedings of the Task Force and working group closed to the public. On February 24, 1993, three organizations -- the Association of American Physicians and Surgeons, Inc.; the American Council for Health Care Reform; and the National Legal & Policy Center -- sued the Task Force and its members to force the meetings to be open. The government was represented by attorneys from the Department of Justice Civil Division, Federal Programs Branch. From the outset of the litigation, attorneys from the Office of Counsel to the President also were actively involved in the case.[2]

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[1] In addition to the First Lady and Magaziner, the members of the Task Force were: Treasury Secretary Lloyd Bentsen, Defense Secretary Les Aspin, Commerce Secretary Ron Brown, Labor Secretary Robert Reich, Health and Human Services Secretary Donna Shalala, Veteran Affairs Secretary Jesse Brown, OMB Director Leon Panetta, Assistant to the President for Domestic Policy Carol Rasco, Assistant to the President for Economic Policy Robert Rubin, and Council of Economic Advisors Chair Laura Tyson.

[2] The name of the United States Attorney for the District of Columbia is typed on all pleadings filed in the case. As the Court is aware, this is due to a local practice that requires the name of the United States Attorney to appear on pleadings in cases in which the United States or United States officials are defendants. This Office actually played no role in defending the case and was not involved at any stage of the litigation.

The complaint sought an injunction and a declaratory judgment that meetings of the Task Force were required to be public pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15. FACA requires that presidential "advisory committees" follow certain procedural requirements, including opening their meetings to the public. Exempt from the definition of an "advisory committee," however, are all committees made up solely of full-time federal officers or employees. This exception (the "all-employee exception") was a critical issue in the AAPS case.

The plaintiffs argued that the Task Force was a FACA committee and that the all-employee exception did not apply because the First Lady, who chaired the Task Force, was not a federal "officer or employee" within the meaning of FACA. Although the working group was not directly named in the complaint, the plaintiffs argued in their motion papers that the working group should likewise be enjoined as a "subcommittee or subgroup" of the Task Force.

The defendants moved to dismiss or for summary judgment, arguing that the Task Force was not a FACA committee because it fell within the all-employee exception. They argued that even if the First Lady did not technically fit within the statutory definitions of a federal "officer or employee," she was the "functional equivalent" of a federal employee. They also argued that a contrary holding would violate the constitutional separation of powers.

As to the interdepartmental working group, the defendants relied primarily upon a case called National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524 (D.D.C.), aff'd, 711 F.2d 1071 (D.C. Cir. 1983). Anti-Hunger essentially held that a group performing "staff" functions such as research for an advisory committee was not itself subject to FACA because it was not being directly "utilized" by the President.

In support of their arguments, the defendants filed a 13-page sworn declaration of Ira Magaziner, dated March 3, 1993. The declaration was drafted by attorneys in the Office of Counsel to the President. In the declaration, Mr. Magaziner stated that "[o]nly federal government employees serve as members of the interdepartmental working group." (para. 11). He said those federal employees fell into two categories: regular, full-time government employees who work for the executive branch or for Congress, and "special government employees" ("SGEs") who were employed, with or without compensation, for less than 130 days. (paras. 11-12). He had arranged for all of these working group members to be informed that they were subject to various ethical restrictions imposed upon executive branch employees. (Id.)

The declaration continued: "The working group has also retained a wide range of consultants, who attend working group meetings on an intermittent basis, either with or without

compensation." (para. 13.) Mr. Magaziner noted that the consultants "have not had any supervisory role or decision-making authority" in the working group, and that he had arranged for consultants to be informed that they too were subject to certain ethical proscriptions. (Id.)

III. Court Proceedings After the Declaration Was Filed

A. District Court's Decision

On March 10, 1993, this Court decided the motions for a temporary restraining order and injunction, and the defendants' motion to dismiss.[3] The Court ruled that: 1) the First Lady was not an "officer or employee" of the federal government for the purposes of FACA; 2) FACA therefore applied to the Task Force; 3) FACA was unconstitutional as applied to certain meetings of the Task Force; and 4) the interdepartmental working group was not a FACA committee.

This Court dismissed the claims against the working group based upon the Anti-Hunger decision, citing the fact that because the working group was only gathering information and serving as "staff" for the Task Force, it was not being directly utilized by the President. Notably, the Court did not hold that the working group was exempt from FACA because it fell within the all-employee exception. The portion of Mr. Magaziner's declaration stating that all working group members were federal employees played no role in the Court's written decision.

B. Proceedings in the D.C. Circuit

Both sides sought an expedited appeal of the ruling. On appeal, the principal arguments again centered on the Task Force and whether the First Lady should be considered the functional equivalent of a federal employee. Arguments about the working group concerned whether the issues were properly appealable and whether the district court's Anti-Hunger analysis was correct.

The D.C. Circuit issued its opinion on June 22, 1993.[4] The Court reversed and held that the First Lady was the functional equivalent of a federal employee for purposes of FACA. The Task Force, accordingly, fell within the all-employee FACA exception. This decision ended the litigation as to the Task Force. As to the working group, the Court remanded for discovery and further proceedings concerning whether it was a FACA committee.

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[3] The decision is reported at 813 F.Supp. 82 (D.D.C. 1993).

[4] The decision is reported at 997 F.2d 898 (D.C. Cir. 1993).

In remanding the case, the D.C. Circuit made two observations that became the focal points of all of the later proceedings. First, when describing the nature of a FACA committee, the Court stated that such a group must have "an organized structure, a fixed membership, and a specific purpose." 997 F.2d at 914. In this regard, they observed that the "working groups, as a whole, seem more like a horde than a committee." Id.

Second, the Court stated that "[f]inally, the government claims that all of the members of the working groups are full-time officers or employees of the government and, for that reason alone, the working groups are not a FACA advisory committee." Id. (emphasis added). The government did not really advance that argument in written submissions to the Court of Appeals. During oral argument, however, the judges had asked a number of questions concerning this issue and whether or not Mr. Magaziner's declaration was designed to bolster the all-employee argument for the working group. When pressed, government counsel did not argue for the all-employee exception, but instead continued to rely on Anti-Hunger. In their opinion, however, the Circuit Judges said that the government had made the argument, and then proceeded to critique it. They held that an SGE was not necessarily a "full-time employee" for FACA purposes, noting that "FACA would be rather easy to avoid if an agency could simply appoint 10 private citizens as special government employees for two days, and then have the committee receive" the all-employee exception. 997 F.2d at 915. Finally, the Court noted that designating someone as a "consultant" cannot necessarily mean they are not a "member" of the working group: a consultant would still be a "member" if his role was functionally indistinguishable from that of other members. Id.

C. Further Proceedings Before The District Court

The case returned to this Court in June of 1993, and until March of 1994 the parties engaged in discovery concerning the working group. Discovery was difficult, drawn-out, and contentious. In September of 1993, the plaintiffs filed a motion to compel discovery, in which they claimed that the government's responses had been completely inadequate. On November 9, 1993, this Court agreed. The Court sharply criticized the government's tactics, stating that certain discovery responses were "preposterous," "incomplete," and "inadequate," and that the defendant's objections were "meritless." Finding that the defendants had "improperly thwarted plaintiffs' legitimate discovery requests," this Court granted the motion to compel and ordered the government to pay the plaintiffs' costs and attorney's fees for the motion. See 837 F.Supp. 454 (D.D.C. 1993). Following this Order, the government produced a great deal of information it had previously withheld.

Once discovery was completed, the plaintiffs filed a massive summary judgment motion on March 23, 1994. They argued that the

defendants had sought to keep the health care reform meetings closed in order to conceal the fact that various organizations that promoted a "managed care" model of reform were controlling the process. The plaintiffs also listed several hundred individuals, whose names they had gleaned from various documents in discovery, whom they claimed were members of the working group and were not government employees. Accordingly, they argued, the all-employee exception did not apply, the working group was subject to FACA, and all working group records must be made public.

On May 4, 1994 the government filed its opposition to the plaintiffs' motion and its own cross-motion for summary judgment. In a footnote, the government said, for the first time since the remand, that it was not relying upon the all-employee exception to FACA. The defense argued that a person by person analysis of each working group participant, based upon the criteria announced by the D.C. Circuit, would be too burdensome and time consuming and, in any event, was unnecessary. The government instead relied upon what became known as the "horde" theory: the working group was so massive, fluid, and disorganized, that it lacked the structure, organization, and fixed membership the D.C. Circuit had identified as essential to a FACA committee.

The decision not to pursue the all-employee exception was a tactical litigation judgment by the government. The plaintiffs, however, were apparently furious that they had devoted months of work to proving a point the government now said it was not going to contest, and clearly felt they had been "sandbagged." Two weeks later, on May 16, 1994, the plaintiffs filed a "Motion for Sanctions and for a Rule for Contempt to Issue Against the Defendant, Ira Magaziner." The primary basis for the motion was the plaintiffs' claim that the defendants had, since the beginning of the litigation, misled everyone into believing that only full-time government employees were members of the working group:

> Beginning on March 3, 1993 when the Defendant, IRA MAGAZINER, filed his Declaration under penalty of perjury, MR. MAGAZINER and the Defendants set upon a course of presenting to this Court and the Plaintiffs that only full-time employees of the federal government, as defined in the Federal Advisory Committee Act, 5 U.S.C. App. § 3, were participants on the Task Force Working Groups. Such was argued before this Court repeatedly, and such was argued before the United States Court of Appeals.
>
> After fifteen (15) months of litigation, and the expenditure of thousands of dollars, the Defendants now concede that such was not the case. . . .

Plaintiffs' Memorandum of Points and Authorities, filed 5/16/94, at 15-16 (emphasis added). In their reply brief on this issue, the

plaintiffs alleged that, when dismissing the initial complaint against the working group, this Court had relied upon Mr. Magaziner's statement that all members were federal government employees. Plaintiffs' Combined Reply Memorandum, filed 6/3/94, at 5.

These arguments misstate several facts discussed above: 1) the government did not really press the all-employee exception for the working group in the District Court or Court of Appeals, relying instead on the Anti-Hunger analysis;[5] 2) this Court did not, in its written opinion of March 10, 1993, rely at all upon this portion of Mr. Magaziner's declaration; 3) the Magaziner declaration said only that all members (not "participants" as the plaintiffs alleged) were government employees, not that they were all "full-time" government employees; and 4) the government never "conceded" the all-employee argument, they simply said they were not going to rely upon it at that time. Despite these inaccuracies, the plaintiffs' characterization of the government's actions came to be accepted during all of the subsequent arguments.

On July 25, 1994, following a hearing, this Court denied both motions for summary judgment and set the case for trial. The Court also reserved ruling on the motion for contempt, noting that "[t]he allegations are too serious and too troubling for a decision to be made today." (7/25/94 transcript at 91). Following this ruling, the parties began intensive settlement negotiations. After a proposed settlement fell through, the government decided to moot the case out by voluntarily releasing to the public all of the working group documents.

This Court declared the case moot on December 21, 1994. In that Order, the Court noted that the mootness of the case also mooted out the question of civil contempt of Ira Magaziner. The Court stated, however, that there was a remaining question: "Did Mr. Magaziner commit the criminal offense of contempt of court -- as well as possible perjury and/or making a false statement -- when he signed a sworn declaration filed on March 3, 1993, that led this court to initially dismiss the claim for records of the interdepartmental working group." Order of 12/21/94, at 2. The Court then referred this question to our Office for investigation.

APPLICABLE LEGAL STANDARDS

The filing of a false sworn declaration in a civil proceeding

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[5] The government's papers in the District Court, and its reply brief before the D.C. Circuit, contain a few references to the working group being comprised solely of federal employees. In neither forum, however, did the government expressly argue that the working group, as a body, should be exempt from FACA based solely on the all-employee exception.

potentially could fall within at least two different criminal statutes: criminal contempt (18 U.S.C. § 401) and perjury (18 U.S.C. § 1623).[6] Under either statute, the prosecution would be required to prove beyond a reasonable doubt not only that the statements in the declaration were false and material, but that Mr. Magaziner knew the statements were false at the time and intentionally made them nonetheless. Contempt has the added required element of showing an intent to obstruct the judicial proceeding.[7]

In a perjury case, in order to be false, a statement "must be with respect to a fact or facts" and "must be such that the truth or falsity of it is susceptible of proof." United States v. Endo, 635 F.2d 321, 323 (4th Cir. 1980) (citation and internal quotes omitted). The Fourth Circuit in Endo, interpreting the federal perjury statute, noted that ""[a]t common law and under many state statutes, statements which present legal conclusions are considered opinion, and cannot form the basis of a perjury conviction." 635 F.2d at 323. See United States v. Kimberlin, 805 F.2d 210, 250 (7th Cir. 1986) (when agent testified that no other "law enforcement agents" were present during a search, the fact that an AUSA was present does not make this perjury; whether or not an AUSA would be considered a "law enforcement agent" is ambiguous); United States v. Lattimore, 127 F. Supp. 405 (D.D.C.), aff'd, 232 F.2d 334 (D.C. Cir. 1955).[8]

SCOPE OF THE INVESTIGATION

Our six-month investigation, carried out with the assistance of the FBI, included the following:

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[6] The Order mentions the possibility of a false statements charge. However, in light of the recent Supreme Court decision in Hubbard v. United States, 115 S.Ct. 1754 (1995), it now appears that the false statements statute, 18 U.S.C. §1001, does not apply to statements made to a federal court.

[7] See generally N.L.R.B. v. Blevins Popcorn Co., 659 F.2d 1173, 1183-84 (D.C. Cir. 1981); United States v. Whimpy, 531 F.2d 768 (5th Cir. 1976); In re Brown, 454 F.2d 999, 1007 (D.C. Cir. 1971); United States v. Essex, 407 F.2d 214, 217-18 (6th Cir. 1969).

[8] This is not to posit a sort of "lawyer's exception" to the law of perjury. One can imagine a case in which a statement, even though arguably involving a legal conclusion, was so clearly and intentionally inaccurate as to constitute contempt or even perjury. Such cases will, however, necessarily be rare; any statement involving matters of opinion or judgment is difficult ground upon which to rest a perjury prosecution.

-- interviews of 35 witnesses, including former Associate Attorney General Webster Hubbell, former White House Counsel Bernard Nussbaum, other current and former attorneys and other personnel from the White House, the Department of Justice, and Health and Human Services, and various leaders and members of the working group.

-- review of thousands of documents from the White House, HHS, DOJ, and the National Archives. The Department of Justice cooperated fully in the investigation and gave us free access to all files. The White House and HHS also cooperated and produced documents for our review in response to our requests.

-- a meeting with plaintiffs' counsel in the AAPS case and review of additional materials they provided.

-- a five-hour interview of Ira Magaziner, conducted on June 16, 1995, and review of a written submission from his private counsel.

ANALYSIS AND CONCLUSIONS

I. Particular Issues Concerning Language in the Declaration

A. Special Government Employees v. Consultants

Most of the controversy concerning Mr. Magaziner's declaration stems from one sentence in paragraph 11: "Only federal government employees serve as members of the working group." The declaration goes on to spell out that the federal "employees" fall into two categories: regular, full-time employees of different agencies or Congress, and special government employees ("SGEs") retained to work on this project. According to Mr. Magaziner's declaration, the third category of participants -- the "consultants" -- were not "members" of the working group and participated only intermittently, without supervisory or decision-making roles.

Many allegations concerning the declaration focus on whether a particular participant in the working group was an SGE or a consultant. The AAPS plaintiffs argued, for example, that certain working group leaders or members who were not full-time government employees were consultants rather than SGEs, or had no status at all, and that the declaration was therefore false. The premise underlying such claims is that it is possible to "prove" as a factual matter that a particular individual was an SGE, a consultant, or something else. That premise is incorrect.

The definition of "special government employee" is found only in a criminal statute, 18 U.S.C. § 202(a):

> . . . the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of

> the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis . . .

Such individuals are subject to a limited version of the conflict of interest statutes that appear in Title 18, § 202 et seq.

Determining whether an individual is an SGE is not a matter of examining typical personnel paperwork; rather, it involves a legal opinion concerning whether a person's activities are sufficiently linked to the government to be bound by criminal conflict of interest laws in Title 18. Classifying a particular individual as an SGE involves a legal judgment and is not the sort of statement that can be proven to be "false" as a factual matter. See Endo, 635 F.2d at 323. The designation "SGE" includes people who are paid or unpaid and who work full-time or intermittently, and also covers many individuals who are not "employees" in the traditional sense.

One could make a convincing legal argument that, under this sweeping definition, every individual who came to Washington to participate on the working group for any length of time, whether paid or unpaid, full-time or intermittent, was an SGE. Our investigation revealed that this in fact was the view of most of the government attorneys involved with the working group. HHS consistently took the position that all people brought on by HHS to work on health care reform were SGEs for ethics purposes. The White House also considered all working group participants who were not full-time government employees to be SGEs, including those who were placed in the category of "consultant" for purposes of the litigation. Consultants were considered a subset of the broader category of SGE.

The declaration as drafted clearly implies that consultants are a category completely distinct from that of SGEs. In reality, however, a consultant was simply an SGE who -- either for reasons of appearance or for practical reasons related to their availability -- the White House and Health and Human Services determined should not be allowed to play an active leadership role in the process. The government considered consultants also to be SGEs, bound by the same ethics requirements. In discovery, the government ultimately conceded that the distinction between SGEs and consultants was only "a practical one, based on degree of participation," and that consultants could also be SGEs.

The purported distinction between SGEs and consultants spelled out in the declaration caused a great deal of confusion. The error lies in the blending of ethics and personnel categorizations. SGE

is an ethics term, defined only for purposes of the criminal conflict of interest laws, although it has been co-opted as a personnel term and is frequently used as such. "Consultant," on the other hand, is a term found in personnel law and used to describe a category of temporary employee. See 5 U.S.C. §3109. A consultant for personnel purposes, however, frequently is simultaneously an SGE for ethics purposes. Mr. Magaziner's declaration attempted to use SGE and consultant to describe two distinct classes of individuals. This blurring of personnel and ethics terms ignored the fact that consultants may also be SGEs, and ultimately generated confusion.

The terms used in the declaration were also used loosely and inconsistently among and within the different agencies, and not everyone agreed on their definitions. As a result of this confused use of terminology, there were HHS and White House working group lists, produced during discovery, that classified the same people as "SGEs" on one list, "consultants" on another, and "experts" on yet another. These types of lists led in large part to the plaintiffs' allegations of perjury against Mr. Magaziner. They found a number of individuals who headed up different cluster groups, and who appeared as "consultants" on a list or memo generated at some point. They then argued that this was inconsistent with Mr. Magaziner's statement that consultants did not have leadership roles in the working group. In almost all cases, however, there are other documents that list the same person as an SGE. The different documents referring to the same individual as both a consultant and an SGE are evidence not of the falsity of Mr. Magaziner's declaration but rather of the confusion and inconsistent use that surrounded those terms.

Concerns about this portion of the declaration were also fueled by inconsistencies between HHS and the White House over the paperwork and other formalities that attended the SGEs. For example, at the time the declaration was filed, the SGEs participating in the working group had been hired by HHS. The career staff members at HHS were familiar with hiring SGEs and ensured that it was done properly. All personnel paperwork and appropriate executive branch financial disclosure forms were completed by and for the HHS SGEs. After the date of the declaration, as new people arrived who were not federal employees, they were generally assigned not to HHS but to the White House. They were classified as "White House SGEs" or "White House consultants." However, unlike HHS, the White House did not complete all of the appropriate personnel forms that are the typical indicia of employment. The White House was staffed with new people who were generally unfamiliar with these procedures and requirements, and who were under great time pressures because of the workload facing the new administration and the frantic pace of the working group. The result was that there were members of the working group who were classified as White House SGEs, but there was nothing to reflect their "employee" status other than the White

House labeling them as such.

The clearest example of this practice involved working group 17, which was called Ethical Foundations of the New System. This group got a late start and was only beginning to be formed at the time of Mr. Magaziner's declaration. To staff the group, the administration brought in about 30 experts in medical ethics from universities around the country and called them White House SGEs. Unlike the HHS SGEs, however, not one of these people was paid by the government, and not one filled out an SF-171 application for employment or a financial disclosure form.[9] No payroll forms, personnel action forms (SF-50 or SF-52), or other paperwork reflected their "employment" status. They were, in effect, a group of volunteers working on ethics issues, who were labelled SGEs by the White House.

Despite the absence of paperwork, it appears that the members of working group 17, due to the nature of their activities, fit the legal definition of an unpaid SGE within Title 18. Even if that assertion is not correct, it is certainly a defensible legal proposition. Either way, the bottom line is that there were people from outside the government, doing what appeared to be volunteer work and filling out no employment paperwork, yet being classified as "employees" for purposes of the litigation. Other White House SGEs and consultants participating in the working group similarly had no employment paperwork, consulting agreements, or other documentation reflecting their association with the government. This somewhat free-wheeling use of the term "special government employee" led to later confusion and accusations by the plaintiffs. The plaintiffs repeatedly charged, for example, that working group 17 was staffed entirely by non-government employees: people who were unpaid, filed no financial disclosure forms, and with no paperwork reflecting their status. The government was left to respond that these people were in fact special government employees within the meaning of Title 18 and Mr. Magaziner's declaration. However, they did not much look like "employees" within the common understanding of that term, and they lacked any of the indicia of employment present with the HHS SGEs. The government's position

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[9] Each HHS SGE filled out an executive branch employee financial disclosure form, either an SF-450 or SF-278. The White House SGEs did not. The position that the government ultimately took in the AAPS litigation was that the White House SGEs fell within an exemption to the financial disclosure requirements, contained in 5 C.F.R. 2634.905. That section allows a designated agency ethics official to exempt an employee who would otherwise be required to file a financial disclosure form, if the nature of the project upon which the employee is working is such that any likelihood of a conflict appears remote.

therefore appeared strained; the plaintiffs alleged it was simply untrue.

The confusion generated by the terms used in the declaration was also exacerbated by positions taken by the government during discovery. After the declaration had been filed, a number of things in the working group had changed. It had nearly doubled in size, and many individuals arrived to work on the project who did not necessarily fit neatly into the categories of Mr. Magaziner's previously filed declaration. Attorneys in the White House, however, appear to have been reluctant to file a supplemental declaration or anything else that might suggest that the declaration, although accurate when filed, was no longer a complete description of the working group process. Instead, the defense persisted in an attempt to go back after the fact and make everyone who had been involved in the working group "fit" into the original categories of the declaration. This was possible due to the malleability of the language of the declaration, but it led to additional strained interpretations -- such as classifying contractors as SGEs -- and was ultimately unconvincing.

There is no question that the declaration's use of the terms SGE and consultant is potentially confusing and that subsequent litigation decisions by the government exacerbated those problems. There is no evidence, however, that Mr. Magaziner intended to mislead the court. At the time the declaration was signed, the working group was somewhat more manageable, and the SGEs were generally limited to those brought on properly by HHS. The categories of participants set forth in the declaration were more clearly maintained at that time. The strained interpretations made during discovery took place well after the declaration was signed, and in any event, these subsequent characterizations were made by counsel, not by Mr. Magaziner.

B. "Members" v. "Non-Members" or "Participants"

The most controversial sentence of Mr. Magaziner's declaration -- "Only federal government employees serve as members of the interdepartmental working group" -- has two components. The first, whether or not the members were federal employees, has just been discussed. The second, related aspect has to do with the definition of "membership." If it could be demonstrated that there were "members" of the working group who clearly were neither regular employees nor SGEs, then the first prong of a perjury charge -- the statements in the declaration were false -- could potentially be proven. But the issue of "membership" within the working group was a fuzzy one, and no generally agreed upon "membership" criteria were ever written down.

Mr. Magaziner's declaration states that membership depended only upon a person's status as a federal employee or SGE. Consultants, who would participate only intermittently, would not

be "members." The legal notion of "membership" in the working group being limited to full-time employees and SGEs was apparently developed to preserve for the future a possible FACA argument -- an argument that, as it turns out, was never really made. Mr. Magaziner contends that when he read the pertinent statement in the declaration, in consultation with his counsel, it made sense to him and he did not feel it was inaccurate.

The government, and Mr. Magaziner in particular, took somewhat conflicting positions on the question of membership during the course of the litigation. At the time the declaration was filed, it clearly gave the impression that "membership" was a meaningful concept and that one could determine who was and was not a "member" of the working group. Six months later, however, the working group had more than doubled in size and the government was pursuing the "horde" theory to argue, in accordance with the Court of Appeals decision, that the working group was too large, informal, and disorganized to be a FACA committee. In interrogatory responses filed in August of 1993, the government provided lists of individuals who "participated" in the working group process. The responses, which were signed by Mr. Magaziner and others, stated that the lists "should not be considered 'membership' rosters . . . . Given the fluid and dynamic process by which the interdepartmental working group was formed and operated, 'membership' was not a significant or operative concept."

The D.C. Circuit had rejected the idea in the declaration that the government could simply call someone a "consultant" and thereby say they were not a "member." In addition, after the declaration was signed the working group nearly doubled in size and became even less organized and formal. As noted above, in light of these realities the government shifted litigation strategies to pursue the "horde" theory. The fluid and uncertain membership fed into that theory, but government counsel seemingly did not focus on the apparent conflict between that position and the position taken in Mr. Magaziner's previously filed declaration. The other reality is that <u>after</u> Mr. Magaziner's declaration the working group process had grown and changed so much that both statements could easily be true -- Mr. Magaziner's description was correct as of March 3, but by the end of the process "membership" was no longer an operative concept.

The question of "membership," of course, assumed the greatest significance in connection with the potential argument that the working group as a whole fell within the all-employee FACA exception. Although the declaration was drafted with an eye towards possibly making that argument, by August of 1993 when the discovery response was filed, the government had pretty much given up on that possibility (although they did not expressly say so until the following May). The plaintiffs, however, seized upon the membership issue and devoted enormous resources to it. They reviewed all of the documents produced in discovery, essentially

took all of the names they could find, and called those people "members." These included people who were brought in for a single meeting to provide input on a particular issue and who thereafter had no part in the process, and even included some individuals listed as potential participants in a meeting who never actually attended. By including virtually anybody whose name they came across, the plaintiffs came up with a list of more than 1,000 people whom they said were "members" of the working group. Because many of the people on their list were not government employees, they argued that Mr. Magaziner's declaration was false.

The plaintiffs' methodology for determining "membership" appears to have been flawed. This Court recognized as much on December 1, 1994, when it issued an order concerning mootness. The Court accepted the government's database list of 630 "participants" in the working group and rejected the plaintiffs' method that resulted in more than 1000 names, noting, "Defendants have adequately demonstrated the flawed methodology used by plaintiffs in creating their own list of names." (Order dated 12/1/94, at 6).

During the course of the litigation, the plaintiffs' allegations that hundreds of working group "members" were from private industry and other "special interests" were given great currency. Because it could be readily shown that, indeed, some of the people who participated in, or were consulted by, the working group were from outside the government, the public generally was under the impression that Mr. Magaziner's declaration must have been inaccurate. No one ever really raised the question of what constituted a "member" in the context of the working group. And yet, that was actually the fundamental question here. Although the parties have different definitions, and even if it can be shown that one definition has considerably more validity than the other, one cannot prove that either position is true or false. Mr. Magaziner's statements concerning membership can only be proven to be the subject of differences of both legal and factual opinion.

C. Supervisors or Not Supervisors

A third controversial aspect of Mr. Magaziner's declaration is the statement that those denominated as "consultants" did not have supervisory or decision-making authority. The plaintiffs have identified several individuals they claim were consultants who were also the leaders of different cluster or working groups. In every case, however, this dispute is merely a subset of the SGE vs. consultant issue discussed above. In other words, the cluster leader identified by the plaintiffs who appears on a list generated somewhere as a "consultant" was in fact considered an SGE by others and appears as an SGE on different lists. As discussed above, these disparate positions cannot be factually proven either right or wrong.

II. Mr. Magaziner's State of Mind

As demonstrated above, the statements in question are not of the sort than can be proven to be "false." Even if falsity could be shown, however, in a criminal case the government would have to prove beyond a reasonable doubt that Mr. Magaziner knew the statements were false when he made them and intended to deceive the court. We have found no evidence to suggest any criminal intent on Mr. Magaziner's part. It appears that he relied upon the advice of White House attorneys, who assured him that the classifications within the declaration were legally appropriate and could be applied to the working group to ensure that all ethical requirements were met.

III. Analysis of Particular Allegations

The plaintiffs' allegations concerning the declaration and the questions that have been raised by this Court concern a relatively small number of passages. Several of these allegations stem from simple misstatements of the record of the litigation or mischaracterizations of the declaration. The remainder stem from the different conclusions that the parties have drawn concerning how to categorize the various participants in the health care reform effort, and from the problems detailed above that resulted from the language used in the declaration.

1) The plaintiffs repeatedly alleged that the government had obtained dismissal of the working group claims before this Court by relying upon the all-employee exception. They argued that this was the primary motive for Mr. Magaziner falsely to state in his declaration that only federal employees were members of the working group. Also, in the Order referring the investigation to our Office, this Court stated that it had relied upon that portion of the Magaziner declaration when dismissing the working group claims. (Order of 12/21/94, at 2.) As discussed above, however, this key allegation is factually incorrect: the government did not really rely upon the all-employee argument as to the working group, and this Court's written opinion did not rely upon it when dismissing the complaint.

When the plaintiffs first made this claim, the government attorneys not only failed to point out the plaintiffs' mistake but actually made the same mistake themselves: in its response to the contempt motion, the defense wrongly agreed that it had relied upon the FACA argument a year earlier. In the months that followed, the government failed to correct this error. As a result, the Court was never made aware of this mischaracterization of the record.

2) The plaintiffs have alleged that Mr. Magaziner's declaration specified that all SGEs filed financial disclosure forms, and have argued that the failure of the White House SGEs to file those forms demonstrate the declaration is untruthful. But

the declaration says only that Mr. Magaziner arranged for SGEs and consultants to be informed that they were subject to conflict of interest laws. Our investigation indicates that this is true, and that a number of ethics briefings for working group participants did take place. Whether or not a particular individual actually complied with those laws, or whether compliance was effectively policed by the White House, would not directly affect the veracity of the declaration.

3) As noted above, the plaintiffs alleged that many individuals who were consultants or who had no status at all were members or leaders of the working group. In each case, however, the government classified the same individuals as SGEs. Neither side can be proven "wrong" in these disagreements, many of which stem from the inconsistent and confusing use of the terms SGE and consultant within the White House and HHS.

4) This Court noted at various times on July 25, 1994, during the oral argument on summary judgment, that it believed an SGE was someone who was "on the government payroll." The Department of Justice attorneys at the argument failed on several occasions to point out that an SGE, pursuant to the statutory definition, could be paid or unpaid, and therefore need not necessarily be on the "payroll." As a result, the impression was left standing that every example of an unpaid SGE (including all of the White House SGEs) was an example of the declaration being false.

CONCLUSION

We have found no credible evidence that Mr. Magaziner committed a criminal offense. The challenged statements in the declaration depend upon characterizations and matters of opinion, both legal and factual. They may be the subject of legitimate disagreement, as they were throughout the AAPS case, but they cannot be proven either true or false to the degree required for a criminal prosecution. Furthermore, even if the statements in question could be proven true or false, there is no evidence to show that Mr. Magaziner believed the statements to be false at the time that he made them. Therefore, it is clear that no criminal prosecution is warranted in this matter.

Based on the foregoing, we intend to close our investigation into this matter without taking any further action.

Sincerely,

ERIC H. HOLDER, JR.
United States Attorney

By: H. MARSHALL JARRETT
Chief, Criminal Division

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I have included here my sister's ticket from Muskogeen to O'Hare that she could not utilize but it can be still used any time from a year after August 12 for a $25 change fee. So if you will just tuck it away some where in connection with my next years vacation we may or may not figure out some way to utilize it. (They are in by side desk drawer in a file entitled Michigan Information.)

Whenever we get the confirmation from Loews Inn on the $120 rate you can return the cancellation for this confirmation we previously received.

The Worthington is a super choice on this parents weekend. I am really pleased with that. Help me to remember whether or not to cancel it given that we are still up in the air about my niece's wedding date.

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