UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S RESPONSE AND POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR EXPEDITED RULING ON THE PLAINTIFF'S MOTION FOR CONTEMPT AND RULE 11 AND OTHER APPLICABLE SANCTIONS AGAINST HON. IRA MAGAZINER

Defendants have essentially again moved for a Summary Judgment (without complying with either the federal or local rules) [15] on the issues relating to Ira Magaziner. This motion also seeks, in the alternative, an expedited evidentiary hearing "uncoupled" from, and in advance of, a trial on the remaining issues in the case. [16]

Plaintiffs contend that their motions for sanctions and contempt are not a dispute over the law of "membership," or an exercise in revisionist history, but a juridical spotlight on the unfortunate factual issues concerning whether a highly placed and respected official intentionally misled the federal courts in a material way at a crucial time in this case in bad faith. See Rule 11, Rule 56(g), Federal Rules of Civil Procedure. See Barticheck v. Fidelity Union Bank of New Jersey/First Nat. State, 680 F. Supp. 144 (D.N.J. 1988); Aerotube, Inv. v. J.K. Financial Group, Inc., 653 F.Supp. 470, 478 (N.D. Ga. 1987), Avirgan v. Hull, 705 F.Supp.

[15] See Local Rule 108(h).

[16] This is also essentially a motion for reconsideration on this issue of the Cross Motion for Summary Judgment denied on July 25, 1994. In fact, apparently this is really what Defendants want. Compare the title on the Certificate of Service to the title of the Motion. For this reason, Plaintiffs invite the Court to review the Memoranda, Exhibits and Submissions previously submitted and well argued by both parties on July 25, 1994. The Record is replete with factual issues. See also pages 45-57, transcript ("transcript" refers to transcript of July 25, 1994 proceedings).

1544 (S.D. Fla. 1989), 932 F.2d 1572 (11th Cir. 1991), Cert. Den. 112 S.Ct. 913 (1992).

1. Revisionist History or Semantical Spin.

Defendants agree that sanctions and contempt must always be viewed through a highly cautious lens. Intentional, wilful bad faith conduct is and should be the test for contempt. Obstreperous, grossly negligent conduct should be the test for sanctions.[17] Especially in these cynical times, this Court should be loathe (but not reticent) to find a high government official untruthful, lacking candor, or engaging in bad faith conduct. But serious and material factual issues cannot be resolved on paper arguments. Fitzpatrick v. City of Atlanta, 2 F. 3d 1112, 1115 (11th Cir. 1993). Resolution of the truth must often be based on the ancient tests used by triers of fact and searchers for truth to determine who and what is to be believed.[18] The facts and questions should

[17]Compare sanctions under Rule 56(g) Barticheck v. Fidelity Union Bank of New Jersey/First Nat. State, 680 F.Supp. 144 (D.N.J. 1988) with Rule 11 Sanctions United States v. Excellair, Inc., 637 F.Supp. 1377 (D. Colo. 1986).

[18]As the government has often argued successfully, if a defendant does not admit to his knowledge of the falsity of a statement, the only way it can be proved is by circumstantial evidence U.S. v. Sweig, 441 F.2d 114, 117 (2nd Cir. 1971), Cert. den. 91 S.Ct. 2256 (1971).

be required to weigh in heavy against Mr. Magaziner. Unfortunately, at this point, they do.

At the time (March 3, 1993) that Mr. Magaziner represented to the Court [19] the facts concerning the structure of his creation - The Task Force, Clusters, and Working Groups, Subgroups and Toll Gates, all were meeting at a fevered pitch. He and Mrs. Clinton were the architects of the process. They defined the issues and developed a highly structured work plan and operating rules. It was an ambitious, if unwieldy organizational structure designed to cover an enormous field at a rapid pace. The purpose was to develop strategies and options and to finally give advice to President Clinton. [20] Mr. Magaziner, more than anyone else (except perhaps Mrs. Clinton) was in a position to know the facts. Neither the Plaintiffs (because of the secrecy surrounding the process) nor the Court (due to the lack of develop ment of a factual record) nor the general public, had possession of the true facts. Indeed, initially this Court described the case as not "fact intensive."

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[19] "Only federal government employees serve as members of the Interdepartmental Working Group." First Magaziner Declaration, paragraph 11.

[20] Indeed, the President attended some meetings with working group members. Which meet ings, and who attended, and whether private sector members briefed him is still unclear and needs to be further developed. Compare Third Magaziner Declaration, paragraph 27 to Transcript at 75.

See 813 F.Supp. 82 at 84, F.N. 11. Mr. Magaziner's representations concern ing the facts (then unrefuted) were pivotal both to an understanding of the case and to the legal structure of the defendants' motions for a quick exit. [21]

Mr. Magaziner knew that "membership" was not a loose semantical concept, but the very bedrock of an important legal analysis. How people interrelated with each other, who were fixed "members", what were their functions, responsibility, roles and activities - he knew to be key to the Court's understanding of this organization. Mr. Magaziner was the only person at that time upon whom this Court and the Circuit Court of Appeals could (and did) rely. That was the very material purpose of his Declaration. [22]

One can fairly argue on this Record that Mr. Magaziner "spun" the facts in his Declaration to point this Court away from the non-governmen tal participants and un truthfully color them as "out reach" or "intermittent" consultants. As we now know, the spin was

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[21] See for example Footnotes 10, 11 to this Court's opinion. 813 F.Supp. 82 at 89. See also, 997 F.2d at 921 (concurring opinion).

[22] Even under criminal statutes, a false statement is "material" if it has a natural tendency to influence or is capable of influencing decisions required to be made. U.S. v. Allen, 892 F.2d 66 (10th Cir. 1989). Stated otherwise, the test under perjury statutes, is whether a truthful statement might have assisted or influenced a tribunal in its inquiry. 18 U.S.C.A. §1623, U.S. v. Adams, 870 F.2d 1140 (6th Cir. 1989).

completely wrong. It was not, as defendants now suggest, an error in semantics or in retrospective legal analysis. [23] At this point at least, until we develop more facts, it clearly appears to have been a deliberate attempt to cause this Court to believe that the active, material, "fixed" participants were all in one way or another, federal employees. The question is, did Mr. Magaziner really believe it?

2. Where is the Membership Handbook?

Mr. Magaziner's excellent counsel now assist him by declaring that he assumed and believed that only federal employees were "members" and "participants" were otherwise. They say that he simply made a perfectly understandable ex post facto legal mistake. [24] Perhaps. But if that is so, Plaintiffs must ask, where in this enormous record is the paper dated on or before March 3, 1993 which defines "member ship"? Where is there any paper after

[23] Even in cases of semantical adventure, the government has successfully imprisoned persons attempting to "spin" words at the expense of plain meaning. See for example, U.S. v. Tobias, 863 F.2d 685 (9th Cir. 1988) [Defendant denied "knowing" individual with whom he spoke 74 times]. See also, United States v. Petzold, 788 F.2d 1478 (11th Cir. 1986).

[24] Indeed, Defendants have recognized that the "federal employee exemption" will not help them. To save this Court time, they have elected not to assert the exemption. See Defendants' Memorandum in Opposition, filed May 4, 1994 at pages 2 and 6.

that date which confirms it? Could it possibly be that this activity which was so finely structured and carefully planned was without any definition of who were "members" and who were just "partici pants"?

If that is so, and there is no membership criteria written anywhere in the Record or in the long-awaited Task Force papers, what do we have to assist an examination of Mr. Magaziner's belief and good faith? Apparently (at least at this point) there is nothing else.

Since there is nothing in writing at this point to sustain Mr. Magaziner's representation of "membership," [25] in order to support the credibility and good faith of his March 3, 1993 assertion, the Court should (to be fair to him and the system) indulge in a functional analysis of the facts as of March 3, 1993. [26] Perhaps the facts or common belief of others will support him.

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[25] There is no question but that the facts, looking backward, do not literally support Mr. Magaziner's Declaration. See Transcript at 54. While Plaintiffs agree that we must initially test the truth as of March 3, 1993, Mr. Magaziner had a continuing duty to correct facts he later knew to be untrue. See Business Guides v. Chromatic Communications Ent., 111 S.Ct. 922 (1991).

[26] "Member" is commonly defined as "one of the individuals composing a group" Webster's Ninth New Collegiate Dictionary. In other contexts, "member" has been defined by an examination of status and function. See Easley v. Southern Shipbuilding Corp., 936 F.2d 839 (5th Cir. 1991) [nature of work and duties defines status of "member" of crew].

3. Factual Issues Abound.

Plaintiffs submit that to test Mr. Magaziner's statements, the Court might explore at an evidentiary hearing a number of questions (there are many more) of the factual record, as of March 3, 1993 and thereafter:

a. Had Mr. Magaziner or Mrs. Clinton fixed in writing membership criteria? If so, where? If not, why not?

b. What were the functional differences between and among "members" and "participants"?

c. If Mr. Magaziner mentally and privately considered only federal employees to be "members" did he communicate that to anyone (other than the Court). If so, how, where and when? If not, why not?

d. How did others on the task force working groups, tollgates, subgroups, clusters and staff view and define "members"?

e. Do the totality of the facts and circumstances as of March 3, 1993 reasonably support Mr. Magaziner's privately held views?

f. Did Mr. Magaziner have a bad faith motive [27] to unjustifiably define "membership" for the Courts?

[27]Certainly Mr. Magaziner had a political motive to avoid F.A.C.A. At least he was clear about that:

g. What was the process and circumstances under which the Declaration of March 3, 1993 was crafted?

h. Why did it take Mr. Magaziner so long to correct the facts?

Perhaps everyone commonly knew or believed that only federal employees were "members" and that members had special duties and functions. However, at this point there is more than enough evidence in the record to raise a legitimate factual issue as to whether Mr. Magaziner was untruthful in his apparently privately self-defined criteria for membership.

Three cluster groups were composed entirely of private persons. Important working groups and subgroups were dominated by private persons, who regularly, not intermittently, attended. Private persons already identified in the record regularly

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

March 3, 1993, First Magaziner Declaration, paragraph 31.

participated in virtually all of the sessions. Some governmental "members" apparently participated irregularly. See Exhibits in Support of Plaintiff's Motion for Summary Judgment, Declarations of Marjorie Tarmey, Declaration of Genevieve Young . See Plaintiffs' Memorandum in Support of Motion for Summary Judgment . Docket Number 107 (numerous exhibits are filed with the Clerk and are in the vault).

Could Mr. Magaziner not have known the facts? Was the pace and size of this alleged galloping horde so great that he simply did not know better? This is possibly a truthful although highly improbable explanation. Perhaps he truly believed in his own mind that only federal employees were to be "members." Perhaps in the rush of things he or his staff neglected to commit this concept to writing. Perhaps the concept of "membership" was not then important. Perhaps he simply made a mistake under the pressure of his enormous project and incredible responsibility. People make mistakes. Mistakes are not sanction able if not made in bad faith.

On the other hand, there is enough in the record to suggest that perhaps he carefully portrayed a picture of "member ship" for the Court in order to both strategically define and conclusive ly capture an undeserved F.A.C.A. exemption. [28] Perhaps the "member-

[28] Interestingly, after the Circuit decision, on August 11, 1993, in their Responses and Objections to Plaintiffs' First Set of Interrogatories and Second Set of Requests for Production of Documents, Defendants said:

ship" distinction came to him when the Complaint was filed and the lawyers were scrambling for a defense strategy. [29] And perhaps he was purposefully engaging in semantical spin and really got too "cute". [30] Only Mr. Magaziner apparently knows for certain. But the damage done is too great to be ignored.

Thus, the Court here is faced with a serious dilemma. There is nothing thus far developed by Defendants but Mr. Magaziner's word as to who were commonly thought to be members as of March 3, 1993. Without a factual inquiry, we are left where we began - only with Mr. Magaziner's word and serious question relating to his candor raised by the evidence. The principle sought to be adjudicated here, and the misplaced reliance by this and the Circuit Court on the erroneous Declaration, while unpleasant is

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> "Given the fluid and dynamic process by which the interdepartmental working groups was formed and operated membership was not a significant or operative concept." Pg. 9

[29] On April 30, 1993, the government continued to rely upon the Magaziner Affidavit before the Circuit Court as the Polestar of the Facts. See 997 F.2d at 914:

> "...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 FACT committees."

[30] Word games have resulted in sanctions against the government before. See United States v. Excellair, Inc. , 637 F.Supp. 1377 (D. Colo. 1986).

much too serious a matter to be so prematurely resolved or peremptorily excused. [31] The parties, the judiciary, and the people deserve a full explanation of the facts. It is Plaintiffs' burden to further develop them and Mr. Magaziner 's duty to explain them in open Court.

4. Words or Meaning.

Defense counsel argue that Mr. Magaziner was "characteristically truthful" in disclosing on March 3, 1993 the participation of outside groups in the working group process. If it is not clear already, Plaintiffs do not dispute the integrity of Mr. Magaziner as a characteristic. His record of public service is salutary and remarkable. That we disagree with his health care philosophy is not here an issue or our principle operandi. We would have made our views known on that subject if able to participate meaningfully. What is in dispute is a clearly apparent, however uncharacter-

[31]The government has been vigilant in prosecuting when falsehoods and "stonewalling" block or obstruct the truth and the people's right to know. United States v. Clarridge , 811 F.Supp. 697 (D.D.C. 1992), United States v. George , 786 F.Supp. 11 (D.D.C. 1992), United States v. Poindexter , 727 F.Supp. 1470 (D.D.C. 1989), United States v. Secord , 776 F.Supp. 845 (D.D.C. 1989). The government has even successfully based criminal perjury charges on false civil depositions U.S. v. Markiewicz , 978 F.2d 786 (2d Cir. 1992). Certainly, the strict standard of accountability must be recognized by the Department of Justice to cut both ways.

istic, lapse in candor to the federal courts he allowed to be uncorrected for over a year.

Mr. Magaziner represented to the Courts by carefully selected words a meaning [32] that the working groups and "outside parties" were two signifi cantly different things. See First Magaziner Declara tion, paragraph 10. He opined that the "consultants" were "retained" by the working groups and attended on an "intermittent" basis. First Magaziner Declaration, paragraph 13. He said he attended large meetings of outside organizations in the "outreach"

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[32]Words and meaning have frequently been at war with each other. Consider the dispute, relevant here, between Alice and Humpty Dumpty:

> "`I don't know what you mean by "glory,"' Alice said.
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> Humpty Dumpty smiled contemptuously. `Of course you don't - till I tell you. I meant "there's a nice knock-down argument for you!"'
>
> `But "glory" doesn't mean "a nice knock-down argument,"' Alice objected.
>
> **`When I use a word,' Humpty Dumpty said in rather a scornful tone, `it means just what I choose it to mean - neither more nor less.'**
>
> `The question is,' said Alice, `whether you can make words mean so many different things.'
>
> `The question is,' said Humpty Dumpty, `which is to be master - that's all.'"

Lewis Carroll. Through the Looking Glass Puffin Books 1948 at page 100.

program. First Magaziner Declara tion, paragraph 24. He said that the working groups sponsored selective large group meetings. First Magaziner Declaration, paragraph 25.

Indeed, Mr. Magaziner told the Court a lot about the process. But what he did not tell was significantly misleading by omission; whether this omission was related to his insistence that the process be "non public" is a legitimate trial issue. Clearly it can be shown that he had a political motive to mislead.

He did not tell the Court about the over 350 private persons attending and participating in a regular way. Mrs. Clinton knew that they were an integral part of the process. President Clinton knew it too. When the President and Mrs. Clinton thanked the over 1000 persons "participating in a regular way" on April 29, 1993, Mr. Magaziner was there and was recognized! [33] The next day, however, (April 30, 1993) his lawyers were arguing that the working group consisted of only 340 "virtually anonymous" persons (as members). 997 F.2d 898 at 914. And his lawyers argued that all of them were federal employees. 997 F.2d 898 at 914. They argued that there were an "unknown" number of intermittent consultants. Mr. Magaziner knew the truth.

[33]See Speech of April 29, 1993 of President and Mrs. Clinton on the South lawn of the White House attached hereto.

By August 11, 1993, the Defendants were reporting to the Court that "membership was not a significant or operative concept" [34] while at the same time stonewalling the Plaintiffs from discovery. Indeed, until this Court entered a discovery order, on November 9, 1993, Plaintiffs had to resort to finding documents at a library to be able to independently muster the facts.

The Defendants, including Mr. Magaziner, hav e flipped and flopped around the "member ship" issue, in a semantical circus. That process continues today. Compare for example, the following statements, among many which could be culled from the Record:

> "Defendants never suggested, however, that such individu als were somehow `members' of the working group. Plain tiffs contempt allegations totally disregard the express distinctions that Mr. Magaziner drew among categories of working group participants." August 31, 1994. Defen dan ts' Motion for Exp edited Ruling at 14 (referring to consul tants and public outreach).
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> "Given the fluid and dynamic process by which the interdepartmental working group was formed and operated `membership' was not a significant or operative

[34] Defendants Responses and Objections to Plaintiffs First Set of Interrogatories. Court Docket Item 63 at page 9. Mr. Magaziner reviewed and signed these Responses.

concept." August 11, 1993 . Defendants Responses and Objections at 9 (also signed by Mr. Magaziner).

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"Only federal government employees serve as members of the interdepartmental working group." First Magaziner Declaration at 4. March 3, 1993 .

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"People were brought o n to the working group in several different ways and many were able to choose which working group meetings they wished to attend. Membership was very fluid and the meetings were conducted much more informally." Declaration of Bonnie Lefkowitz, May 3, 1994 at 8.

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"In short, the individuals, except Dr. Aaron Shirley, listed in Plaintiff's brief on Pages 77-78 under the caption `met with group 22H and on pages 199-200 under the caption met with subgroup 22A were not "members" of the group." Declaration of Bonnie Lefkowitz, May 3, 1994 at 7.

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"There can be no question that Plaintiffs were wrong to sweep such individuals, whom Mr. Magaziner correctly did not regard as working group `members' into the

membership of the Working Group ... Mr. M agaziner should not now have to continue to defend himself against such frivolous allegations" Defendants Motion for Expedited Hearing, August 31, 1994 at page 19.

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"Participation on the Working Groups was very fluid ... People participated as their time and interests, and the needs of the working groups allowed ... Given our expedited timetable, I did not impose any formal require ments on the conduct of the meetings of the working groups ..." May 4, 1994 , Third Declaration of Magaziner, paragraph 12, 15. [35]

Nowhere in Mr. Magaziner's successive Declarations did he clear up the obvious error. In his Third Declaration, May 4, 1994; for example, he continually referred to Working Groups "members" and "participants" interchangeably:

"I attended all of these Task Force meetings and the President also attended a small number of them. A few

[35]The slipping and sliding is understandable. In order to make the "horde" argument, the process has to appear fluid and unstructured. However, in order to prop up Mr. Magaziner's credibility, the class distinctions must be fixed. Hence, the Defendants made the decision to (1) concede the federal employee membership issue; (2) define the working groups as a "horde" consisting of unstructured "prides" and (3) claim that Mr. Magaziner told the whole truth "characteris tically." This is dizzying strategy indeed.

working group members attended some of these meetings as well, to serve as a resource to answer questions. At the meetings, Task Force members asked me on a number of occasions to obtain additional information for the Task Force's consideration. I, in turn, called on working group participants to obtain the needed information or to examine issues discussed at the Task Force meetings.

Working group members provided the requested information to me and I shared it with the Task Force."

Clearly, people who "participated" were viewed as "members" by Mr. Magaziner in May, 1994. Not so by his counsel. Apparently to counsel, a member was someone who attended regularly and participated in "the decision-making process." See Defendants' Motion for Expedited Ruling at page 18, paragraph 2. Not so according to Mr. Magaziner, who declared 3 1/2 months earlier (May 3, 1994), that participants never made decisions. They simply provided information and briefing books to Mr. Magaziner who in turn provided advice to the President. See Third Declaration of Magaziner at paragraphs 25, 26. As to regularity of attendance at meetings, Mr. Magaziner disagrees with his counsel. See paragraphs 12, 15 of Third Declaration, May 3, 1994. Counsel apparently believes that to be a "member" of a group one had to attend a yet undefined number of meetings of that Group. The Declarations of Mr. Magaziner and others belie that conviction.

These semantical adventures graphically illustrate the difference in the neat organizational picture framed in clear English on March 3, 1993 from the kaleidoscope projected in August 1994. Which is the truth?

5. This was not a Health Care Woodstock. There was structure and there were rules.

The motive for Mr. Magaziner's lack of good faith candor was apparent from the start and clear on this Record. He wanted the process out of view of the public. This is the classic dilemma of the Executive Branch. This administration barely 2 years old has jousted three times with the Federal Advisory Committee Act. See Alabama-Tombigbee River Coalition v. Dept. of Interior, 26 F.3d 1103 (11th Cir. 1994), Northwest Forest Resource Council v. Espy, 846 F.S. 1009 (D.D.C. 1994). Unless restrained, it will undoubtedly violate it again. [36]

[36]The principle upon which Plaintiffs have proceeded is to have the Courts hold the Executive accountable to the F.A.C.A. rule of law. If not stylish, Plaintiffs contend that Madison was right:

The Federalist No. 51, at 322 (James Madison)(Clinton Rossiter ed. 1961). Madison stated:

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

What Mr. Magaziner designed in his Work Plan was an organized method of covering a wide field in a short time with lots of people privately consulted. Defendants argue that the horde [37] was so great its numbers could never add up to a F.A.C.A. They contend that the model "eight old-men-around-a-mahogany table-chatting-with-the President" is so far removed from the "chinese-food-in-the-hall-Health-Care-Group 22A" that no one could seriously argue that F.A.C.A. applies. Nowhere in the Act, however, is size a determinative limitation. It is the process, its structure, function, and its object which are legally relevant and determinative.[38] If Mr. Magaziner could craft a "horde" exemption, then any administration could mask an illegal F.A.C.A. within a Woodstock-like private process.

[37]Soon after the opinion of the Circuit Court, the "horde" concept became a familiar tune sung in this case. This was certainly not Mr. Magaziner's view in January, 1993 nor President Clinton's in April, 1993. We are certain that the participants would decry such a cynical view of their work.

[38]It is hard to understand the government's position, given the "tollgate" process, the briefing book advice and the interaction among the groups and the President. The purpose of the tollgate was to test the consensus advice before it was dispatched to the Cabinet Room. The problem is, the public paid the "toll" and was shut out. This clearly defines the purpose of F.A.C.A. Alabama-Tombigbee Rivers Coalition v. Dept. of Interior, 26 F.3d 1103 (11th cir. 1994).

This process while flexible had rules. The work plan exemplifies that. The Declarations of the participants shed even more light. The process had a function - to design the Presi dent's health care initiative. Even the President participated with the working group members, as the Court correctly perceived at oral argument. See Transcript of July 25 at pages 74-75. Compare with Third Declaration of Magaziner, paragraph 27.

The cluster groups and "toll gate" process was a formal critical path method leading to a comprehensive plan, options and advice to the President. That Mrs. Clinton was chosen to lead the effort, a brilliant lawyer herself (with substantial governmental experi ence), demonstrated the direct link between the group's work and the President's initiative.

In the end, therefore, the Court is presented with strong allegations supported by the evidence already in the Record:

a. The working group was populated as of March 3, 1993 with far more regular participants that were not federal employees than Mr. Magaziner told the Courts.

b. Mr. Magaziner knew it. [39]

[39]Even if Mr. Magaziner can convince the Court that his misstatement was not intentional, he is still subject to sanctions. A litigant has an affirmative obligation to conduct a reasonable inquiry before submitting his paper to a Court. The "pure heart, empty head" defense is not viable under Rule 11. See Business Guides v. Chromatic Communications Ent. , 111 S.Ct. 922 (1991).

c. Mr. Magaziner wanted the process private in order to expedite it. He had a motive to be untruthful and direct the Courts' attention away from the truth.

d. The Courts had only Mr. Magaziner's Declaration upon which to rely for the facts of the case. Membership was crucial for and material to a legal analysis.

e. By April 29, 1993, Mr. Magaziner knew that there were over 1,000 participants participating in a "regular way." A substantial number were private persons. On April 30, 1993 in oral argument before the Circuit Court, Mr. Magaziner and his lawyer never told the Court the facts.

f. Mr. Magaziner's lawyers vigorously resisted discovery. During this period, no correction of clear error was made.

g. To this date, neither defendants nor Mr. Magaziner have produced any contempo raneous paper or Memorandum defining "members," even though the process was highly structured.

h. Mr. Magaziner never corrected [40] his Declaration and has never explained to the Court, under oath, the circumstances under which he made such a material misrepresentation of the facts.

6. The Court's decision of July 25, 1994 was correct.

[40]Mr. Magaziner had an affirmative duty to correct his Declaration. Independent Fire Ins. v. LEA , 782 F.Supp. 1144 (E.D. La. 1992).

Nothing has changed.

Defendants have neither argued nor presented anything new. They persist in a position that ignores important issues involving the integrity of the judicial and democratic process. [41] Their view is, of course, entirely different (and correct) when on the other side. See U.S. v. Grable, 622 F.Supp. 454 (W.D. Mich. 1985).

The Court was correct to "couple" these issues with a trial on the merits. Why examine virtually the same facts twice? A trial on the merits will flush out the form and structure of the Working Groups. This will shed a great deal of light on Mr. Magaziner's Declaration. After such a determination, the Court can concentrate on Mr. Magaziner.

It is certainly true that Mr. Magaziner dese rves a speedy hearing. This is apparently a new thought, however. The Plaintiffs Motion for Contempt and Sanctions was filed May 16, 1994. No request for expedition was made then or at the hearing of July 25, 1994. Defendants waited until August 31, 1994 (over 3 1/2 months) to decide that this issue was emergent. This is substantially less time than the Plaintiffs had to wait for discovery, the conces-

[41] The purpose of Rule 56(g) is to deter an effort to mislead the Courts and delay or obstruct proceedings. Aerotube, Inc. v. J.K. Financial Group, Inc., 653 F.Supp. 470, 478 (N.D. Ga. 1987). The purpose of F.A.C.A. is to force advisory committees to open the process to the sunshine and fresh air of public scrutiny - however uncomfortable that may be. Alabama-Tombigbee Rivers Coalition v. Dept. of Interior, 26 F.3d 1103 (11th Cir. 1994).

sion[42] that the federal employee exemption would be abandoned, and the Third Declaration by Mr. Magaziner with some of the true facts (over a year).

The instinct of the Court to defer ruling until after a full factual inquiry was the correct one. See Transcript, pg. 91-92. The remaining issues will also resolve, for the most part, the factual background of the form, structure, and functional analysis of the groups. Otherwise, the Court will in essence try almost the same facts twice.

Nothing in the record has changed - except that certain (hopefully all) Health Care Task Force records are to be disgorged in Maryland.[43] The records will shed more light on what Mr. Magaziner knew and did, said and wrote on or before March 3, 1993.

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[42]The concession is appropriate strategy, given the facts. However, it does not excuse the time and expense to which the Court and the Plaintiffs were put finding the truth. See Johnson International Company v. Jackson Nat. Life Ins. , 812 F.Supp. 966, 988 (D.Neb. 1993).

[43]Defendants may contend that the disgorgement (if complete) will moot the case and excuse Magaziner. On the issue of mootness, the "excuse me - here are the papers but we concede nothing" tactic did not fly in Alabama-Tombigbee Rivers Coalition v. Dept. of Interior , 26 F.3d 1103 (11th Cir. 1994). On the issue of sanctions, it cannot be the Law that the government could lie, stonewall, concede, disgorge, retreat and then escape judgment as "moot."

Respectfully submitted,

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DATE: September 6, 1994

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Plaintiff's Response and Points and Authorities in opposition to Defendants' Motion for Expedited Ruling on the Plaintiff's Motion for Contempt and Rule 11 and other Applicable Sanctions against Hon. Ira Magaziner to be served, by hand delivery, on this 6th day of September, 1994 on:

Frank W. Hunger
Assistant Attorney General
Eric H. Holder, Jr.
United States Attorney
John A. Rogovin
Deputy Assistant Attorney General
David J. A nderson
Elizabeth A. Pugh
Thomas W. Millet
David M Souders
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