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Firing the First Lady: The Role and Accountability of the Presidential Spouse

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NOTE

Firing the First Lady: The Role and Accountability of the Presidential Spouse

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I. INTRODUCTION

The First Lady is asked by her husband to head a task force to assist him in developing health care policy. The fear of outside influence sparks the task force to meet in secrecy. The Federal Advisory Committee Act, however, forbids closed meetings of this type unless all members of the committee are officers or employees of the federal government. May the meetings be kept secret despite the First Lady's presence?

Immediately after leaving the White House, the First Lady is hired to lobby for Columbia/HCA, a major health care corporation. Illegal?

The chairman of a large corporation meets with the First Lady. In the course of their discussions, he hands her a briefcase stacked with cash, winks, and asks for her commitment to reducing corporate taxes. Does federal law prohibit this?

The First Lady decides not to give up her successful career as head of a large oil company. May she continue to involve herself with White House policies?

The President, angry over public criticism by his wife, decides to "fire" her from her position as First Lady. May he name someone else for the job?¹

The answers to these questions depend on a clear definition of the role of the First Lady in government. Such a definition is, however, lacking in federal law. The First Lady's authority and accountability have yet to be seriously analyzed. Undoubtedly, the president's wife exerts, at the very least, a behind-the-scenes influence over her husband outside the practical operation of law. History is replete with examples of powerful wives who have wielded an influ-

1. This actually happened in Peru. Recently, President Alberto Fujimori "went on national television to announce that he was relieving his wife of her duties as First Lady. In an angry address, Mr. Fujimori said that his wife was 'unstable' and that her behavior was motivated by 'unscrupulous' advisers, whom he did not name." Calvin Sims, *With Face-Off at a Fete, Peru's Election Race Begins*, N.Y. Times A3 (Aug. 29, 1994). Two weeks earlier, his wife, Ms. Susana Higuchi, angered by the President's surveillance of her, had moved out of the presidential palace for ten days. *Id.* She announced on August 24, however, that she would not leave the presidential palace. *In a Dispute, Peru's Leader Bars His Wife From Official Duties*, N.Y. Times A8 (Aug. 25, 1994).

More recently, South Africa President Nelson Mandela expelled his estranged wife, Winnie, from his government for insubordination. Bill Keller, *Nelson Mandela Moves to Expel Winnie from Cabinet*, N.Y. Times A1, A1 (March 28, 1995). Mrs. Mandela has repeatedly "railed against Mr. Mandela's government," and has promised to "fight from within." *Id.* at A1, A5. Mr. Mandela had been reluctant to oppose his wife, South Africa's Deputy Minister of Arts, Culture, Science and Technology, it was reported, because of loyalty, guilt, and warnings by his closest advisers that she was "too popular to antagonize." *Id.* at A5.

ence that only one spouse can have over another.² Although the First Lady's role has been the subject of dinner-table conversation for over 200 years, the actions of the Clinton Administration and the role of Hillary Clinton have brought this debate to the fore.

The difficult task of defining the role of the First Lady in legal, rather than historical or political terms, requires an immersion into the murky waters of congressional intent and statutory interpretation. This Note posits that although a First Lady inherits a deep-rooted tradition of influence in politics, she cannot be considered a federal officer or employee for purposes of the Federal Advisory Committee Act ("FACA") or anti-nepotism laws, but may be a "public official" for purposes of conflict-of-interest laws. Part II of this Note discusses Hillary Clinton's deep involvement in her husband's Administration and her appointment to head the President's Task Force on Health Care Reform. This appointment has sparked a judicial attempt to define, for the first time in our nation's history, the role of the First Lady in government. *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton*,³ in which the Court of Appeals for the District of Columbia Circuit held that the First Lady is a de facto officer or employee of the federal government, lays the groundwork for this discussion. Hillary Clinton's open and active role in the Clinton Administration has raised novel questions about the role of presidential spouses.⁴ Part III addresses the

2. Perhaps this all began when Eve gave some bad advice to her husband. Or perhaps it began when Sarah demanded that her husband Abraham oust a member of their personal staff and God instructed Abraham: "Whatever Sarah tells you, heed her voice. . . ." Genesis 21:12.

A particularly insightful editorial has described the controversy over Hillary Clinton's role in the current administration as a fear of the "wicked consort." *East Wing, West Wing*, N.J. L. J. 16 (May 3, 1993). Noting that powerful women who rule outright, such as Margaret Thatcher, also face prejudices, the authors suggest: "What distinguishes the hostility to the wicked consort [from the hostility to a woman who rules in her own right] is envy of her intimate relationship with the ruler; she is feared and envied for having a hidden, irrational influence that no political rival can monitor or match, and that no merely political criticism can end." *Id.*

President Clinton's decision to appoint his wife to head his Task Force on Health Care reform can be viewed in two ways. Either he appointed a qualified, trusted confidant to oversee an area of critical importance to him, or his wife used her undue influence over her husband to "emotionally blackmail" herself into a position of power. Either view compels an examination of the First Lady's legal role in government. People may criticize Warren Christopher's handling of foreign policy, for example, but they do not question his authority to conduct it, as he has been appointed under law and is invested with the legal power to conduct it. The same certainty does not exist with the First Lady.

3. 997 F.2d 898 (D.C. Cir. 1993).

4. For the purposes of this Note, the term "First Lady" denotes the spouse of the President. At trial, both the plaintiffs and defendants in *American Physicians* used the term "First Lady" rather than the term "spouse of the President," which Congress utilized in 3 U.S.C. Section 105(e) (1988). *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham*

historical importance of the First Lady, crucial to understanding the vastness of her influence, and then analyzes the statutes and cases focusing on whether the First Lady is, or is not, a government officer or employee. Part IV discusses the ramifications of the First Lady's legal role, specifically concentrating on federal conflict-of-interest laws. The Conclusion emphasizes the need for Congressional action to resolve the issues raised in this Note.

II. THE CLINTON ADMINISTRATION AND THE HEALTH CARE TASK FORCE

People can gradually be brought to understand that an individual, even if she is a President's wife, may have independent views and must be allowed the expression of an opinion. But actual participation in the work of the government we are not yet able to accept.

—Eleanor Roosevelt⁵

A. *Mrs. Clinton's Role in the Administration*

When Governor Bill Clinton began his presidential campaign, a national debate ensued over what roles his wife Hillary might serve in his Administration.⁶ The Clinton campaign and the Clintons themselves oscillated in their portrayals of Mrs. Clinton. While they portrayed Mrs. Clinton as a potential full partner with her husband in governing the country, they also attempted to assure voters that Mrs. Clinton would maintain a "traditional role" as First Lady.⁷ Mrs.

Clinton, 813 F. Supp. 82, 84 n.1 (D. D.C. 1993). There was some debate in the early days of the Republic over the proper title for Martha Washington. Vice President John Adams referred to her as "presidentress;" the Gazette of the United States suggested "Marquise;" but eventually "Lady Washington" was settled upon. Carl Sferrazza Anthony, *First Ladies: The Saga of the President's Wives and Their Power, 1789-1961* 46 (William Morrow and Co., 1990). "Lady" appears to have found favor as the First Lady's formal title. *Id.* at 46-48.

5. Rochelle Chadakoff, ed., *Eleanor Roosevelt's My Day: Her Acclaimed Columns, 1936-1945* 241 (Pharos Books, 1989).

6. See *All Things Considered* (NPR radio broadcast, July 13, 1992) (interviewing Mrs. Clinton concerning her potential role in a Clinton administration); *Hillary Clinton says she will be Activist First Lady*, Atlanta Journal and Constitution A6 (Sept. 4, 1992) (quoting Mrs. Clinton as planning to take a "more comprehensive approach" to the role of First Lady than Barbara Bush). See generally Jennifer Stevenson and Barbara Hijek, *Running Mate*, St. Petersburg Times 1F (March 8, 1992) (describing Mrs. Clinton's strengths and the possibility of an active role as First Lady).

7. Sally Quinn, *Look Out, It's Superwoman!*, Newsweek 24 (Feb. 15, 1993) (discussing a New York Times page 1 photo opportunity of Mrs. Clinton selecting dinnerware for a state function planned because "Hillary Clinton needed, or felt she needed, or her staff felt she

Clinton, a successful Little Rock attorney, stated, however, that she would take an active role in the administration, especially in the matter of national health care policy—an area of special interest to her and a key element of her husband's election campaign.⁸

After Bill Clinton's election, Mrs. Clinton took a visible role in numerous policy areas. It was leaked that she spent more time interviewing Judge Kimba Wood, an Attorney General nominee, than the President did.⁹ More controversially, however, President Clinton quickly appointed his wife to head the President's Task Force on National Health Care Reform ("Health Care Task Force"), a body formed to prepare health care reform legislation to be submitted to Congress within the first 100 days of the Clinton Administration.¹⁰ Health care reform, a cornerstone of the Clinton bid to win the presidency, was now squarely in the hands of Mrs. Clinton. Her appointment raised more than a few eyebrows.¹¹ The role of the First Lady became no longer just a matter of casual discussion, but a matter

needed, to make a statement about the fact that although she is in charge of health care, she is not eschewing her duties as First Lady"). The author suggests that a picture of either Barbara Bush or Nancy Reagan inspecting China would not have made page one of the New York Times. Id.

More recently, after the defeat of the Clinton health care package, the media focused on a changing image of Mrs. Clinton. See, for example, Marianne Means, *Hillary: No Longer Working Women's Idol*, Phoenix Gazette B5 (March 13, 1995). The author states:

I miss Hillary Clinton. The original one, I mean. The one who was my favorite role model. The first lady currently on display is a pale shadow of the energetic political pioneer who arrived here two years ago.

Gone is the most inspiring, politically powerful woman to occupy the White House since Eleanor Roosevelt. In her place is a more traditional president's spouse, promoting noncontroversial worthy causes; stressing such womanly interests as decorating, fashions and children's well-being. . . .

[W]hen her health care reforms died and the Democrats lost control of Congress, the first lady lost her public cachet and her private courage. And working women everywhere lost, too. . . .

Oh, please. Bring back the old Hillary.

Id.

8. See note 6.

9. Howard Fineman and Mark Miller, *Hillary's Role*, Newsweek 18, 18 (Feb. 15, 1993) (noting that "Mrs. Clinton, eager to see a woman chosen as attorney general, was impressed").

10. 29 Weekly Comp. Pres. Doc. 96 (Feb. 1, 1993) (announcing the formation of the Health Care Task Force).

11. The appointment to the Health Care Task Force sparked journalists to remark, "Hillary Clinton is virtually a co-president with her own style and influence." Matthew Cooper, et al., *Co-President Clinton?*, U.S. News and World Report 30, 30 (Feb. 8, 1993). The authors quote an unnamed White House official as quipping "Of course she's in the loop. . . . She is the loop" Id. at 32. Following the election, Republicans circulated a bumper sticker that read: "Inpoach Clinton—And Her Husband, Too!"

hotly—and daily—debated in the nation's news media, which recognized the serious import of the issue.¹²

Mrs. Clinton was said to resent the critique of her role, noting that no one raised questions over the advice President Bush took from his male advisors—citing President Bush's close personal relationship with Secretary of State James Baker.¹³ Unlike a cabinet-level official, who is appointed by the President with the advice and consent of the Senate and limited in her ability to conduct private business while in office, the First Lady has no defined role, nor is it certain whether she is subject to the same legal limitations of a cabinet official. This issue was partially addressed in the *American Physicians* case.

B. Mrs. Clinton's Role on the Health Care Task Force and the American Physicians Suit

When the Health Care Task Force began meeting, the gatherings were held in private to avoid pressure from outside lobbying groups. The secrecy of the Task Force drew fire from conservative critics who recommended "Kremlinology" as a method of determining who was "in" with the task force.¹⁴

12. Weeks after the election, one journalist wrote: "Forget all the talk about Hillary becoming White House chief of staff." Janice Castro, *Grapevine*, Time 15 (Nov. 23, 1992). She stated that according to an anti-nepotism law, it would be illegal for the President to appoint his wife to a position over which he exercises jurisdiction, and instead predicted that the First Lady would get an unpaid position as a leader of a task force. *Id.* As another columnist wrote:

[W]hile we are all arguing about whether Hillary Clinton should take a job inside or outside the administration and which meetings, if any, she should sit in on, she already has one job waiting for her. It is the job . . . of First Lady. . . . [T]here is argument over the merit, the worthiness of the functions she will be expected to perform in the White House: chooser of visitors, provider of hospitality, emissary to and contact with worthy enterprises, setter of tone, selector of projects and so forth. . . .

Meg Greenfield, *First Ladyhood*, Newsweek 66 (Jan. 18, 1993). After Mrs. Clinton's appointment as head of the Health Care Task Force, Democratic polltaker Geoffrey Garin warned: "If it's just some politician heading a task force, you get rid of him and repudiate his report. . . . But if you don't like your wife's work, it's kind of hard to distance yourself from it." Fineman and Miller, *Newsweek* at 22 (cited in note 9). Fineman and Miller noted that Mrs. Clinton has more senior-grade aides assigned to her than the Vice President. *Id.* at 18. Writer Garry Wills commented, however, that "[s]ince the president's spouse has no constitutional office, title, or salary, some people resent a spouse's influence on policy or politics." Garry Wills, *A Doll's House?*, N.Y. Times Review of Books 6, 6 (Oct. 22, 1992).

13. Mrs. Clinton stated: "[I]f you look at George Bush, he's advised by a coterie of men. . . . No one gives George Bush a hard time when he gets advice from James Baker." Mickey Kaus, *Thinking of Hillary*, New Republic 6 (Feb. 15, 1993) (ellipses in original). Malcolm S. Forbes, Jr., in a commentary entitled "Give Her A Real Job," suggested that Mrs. Clinton be given a statutory post, which "would allow Mrs. Clinton's abilities and policies to be judged in public like other government officials." Malcolm S. Forbes, Jr., *Fact and Comment*, Forbes 25 (Feb. 15, 1993).

14. *Kremlinology*, Wall St. J. A14 (March 24, 1993). When the White House issued a list of Task Force members, the Journal sarcastically remarked, "Toto ran up to the large curtain

The Association of American Physicians and Surgeons, a healthcare lobbying group, subsequently sued Mrs. Clinton, claiming that the Health Care Task Force must hold public meetings as required by the 1972 Federal Advisory Committee Act.¹⁵ FACA subjects advisory committees¹⁶ to various "sunshine" provisions that require public meetings and records.¹⁷ Congress enacted FACA in response to fears over the use of advisory committees as devices to further private interests.¹⁸ Therefore, the statute exempts from its public disclosure requirements advisory committees that are composed wholly of full-time officers or employees of the federal government.¹⁹ The American Physicians group argued that Mrs. Clinton was not a federal employee or officer under FACA and that the task force meetings would, thus, need to be open to the public.

Federal District Judge Royce Lamberth held that Mrs. Clinton was not a federal employee or official—a holding that would require

that separated the Task Force from the people and pulled it down." *The Wizards of Oz*, Wall St. J. A12 (March 29, 1993).

15. *American Physicians*, 813 F. Supp. at 84.

16. 5 U.S.C. app. §§ 1-15 (1988). As defined in FACA, an advisory committee is: [Any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is -

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

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

5 U.S.C. app. § 3 (1988) (emphasis added).

17. FACA requires that each advisory committee meeting be open to the public. 5 U.S.C. app. § 10(a)(1) (1988). Advisory committees must file and publish timely notice of meetings in the Federal Register, and all interested persons may attend. *Id.* at § 10(a)(2)-(3) (1988). Furthermore, the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents are to be made available for public inspection. *Id.* at § 10(b). Because the Health Care Task Force meetings had already concluded by the time the Court of Appeals heard the case, the court battle was over disclosure of the working papers and the viability of the legislative products of the task force meetings. For a discussion of FACA's history and its relationship to the First Lady, see generally Anessa Abrams, *The First Lady: Federal Employee or Citizen Representative under FACA?*, 62 Geo. Wash. L. Rev. 855 (1994) (noting that the result in *American Physicians* will limit public participation in public policy initiatives).

18. See Federal Advisory Committee Act, P.L. 92-463, Legislative History, at 3492, 3496, 3500, and generally. "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." *Id.* at 3496.

19. 5 U.S.C. app. § 3(2)(C)(iii) (1988).

the task force to hold its meetings in public.²⁰ Therefore, until the task force actually formulated its recommendations to the President,²¹ it was required to open its meetings.²² The district court enjoined the task force from any further meetings until it complied with FACA.²³ The task force filed for a charter, announced its meetings in the Federal Register, and offered one public meeting. Otherwise, its gatherings remained closed.²⁴

On appeal, the D.C. Circuit reversed and remanded Judge Lamberth's ruling.²⁵ With Judge Silberman writing for the majority, the court found Mrs. Clinton to be, at least for purposes of FACA, a full-time officer or employee of the government.²⁶ Rather than addressing the constitutionality of FACA, the court redefined the statutory meaning of "officer" so as to construe FACA as not applying to the Health Care Task Force.²⁷ Judge Lamberth had written that task

20. *American Physicians*, 813 F. Supp. at 90.

21. *Id.* at 93. Judge Lamberth held that FACA "impermissibly imposes upon the President's enumerated power . . . to recommend to Congress such measures as he deems necessary and expedient, but only as to those meetings of the Task Force at which the Task Force formulates its recommendations or presents these recommendations to the President." *Id.*

22. Judge Lamberth ordered that (a) a charter be filed for the Task Force, (b) that it announce all meetings, (c) that all meetings for the purpose of "information gathering" and "information reporting," as opposed to meetings for the purpose of recommendation formulation, be held open to the public. *Id.* at 91-93.

23. *Id.* at 95. Under FACA, an advisory committee must have a charter, containing, among other things, a description of the duties for which the committee is responsible, the committee's official designation, the committee's objectives and the scope of its activity, the period of time necessary for the committee to carry out its purposes. 5 U.S.C. app. § 9(c)(2)(A)-(J) (1988).

24. After Judge Lamberth's order, the Administration posted notices of its closed meetings in the Federal Register as required by FACA. These notices, signed by Deputy Counsel to the President Vincent W. Foster, explicitly cited the district court opinion in *American Physicians* for authority to hold closed meetings. See, for example, 58 Fed. Reg. 21,330 (1993); 58 Fed. Reg. 28,655 (1993); 58 Fed. Reg. 29,854 (1993). The one open meeting took place on March 29, 1993, and solicited testimony from "consumer groups, insurers, health care providers, small and large business interests, labor, and other interested parties." 58 Fed. Reg. 16,264 (1993).

25. *American Physicians*, 997 F.2d at 916.

26. *Id.* at 911. As discussed below, the notion that Mrs. Clinton could be a federal official or employee under FACA, but not under other federal statutes, is disingenuous. See Part IV.

27. *American Physicians*, 997 F.2d at 910-11. The court stated that "[p]rudent use of the maxim of statutory construction allows us to avoid the difficult constitutional issue posed by this case. The question whether the President's spouse is a full-time officer or employee of the government is close enough for us to construe FACA not to apply to the Task Force merely because Mrs. Clinton is a member." *Id.*

This case bears a similarity to *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989). In *Public Citizen*, the Supreme Court was faced with the dilemma of applying FACA to the American Bar Association's Standing Committee on the Judiciary. If FACA applied, consultations between the Justice Department and the ABA committee would be open to the public. The ABA had refused to hand over to various public interest groups a list of potential judicial nominees it was considering. *Id.* at 447. The Washington Legal Foundation argued that because the Justice Department "utilized" the ABA committee, 5 U.S.C. app. § 3(c), FACA

force compliance with FACA was the inevitable result of the First Lady's private status.²⁸ The circuit court took the exact opposite view. By finding the First Lady to be a federal officer, the court avoided applying FACA. The Task Force could continue its closed meetings, and there would be no unconstitutional restriction on the President's ability to seek and accept advice.²⁹

required that the committee file a charter, give notice of meetings, open its meetings to the public, and make its minutes, records, and reports available to the general public. *Public Citizen*, 491 U.S. at 447. The Court held that the Justice Department did not "utilize" the ABA committee, and thus, FACA did not apply. *Id.* at 452, 465-67.

In making its determination that the committee was not utilized, the Court dispensed with the plain meaning of the word "utilize" to avoid the heavy constitutional implications of a finding that FACA would apply to the ABA committee. The district court (as in *American Physicians*) had reached the conclusion that FACA applied, but if applied, would violate both the President's Article II power to nominate judges and the separation of powers doctrine. *Id.* at 466. The Court responded that the word "utilize" is a "wooly verb, its contours left undefined by the statute itself." *Id.* at 452. But see *American Physicians*, 997 F.2d at 923 (Buckley, J., concurring) (criticizing the *Public Citizen* Court's reasoning).

The *Public Citizen* Court declared that "[w]e cannot press statutory construction 'to the point of disingenuous evasion.'" *Public Citizen*, 491 U.S. at 467 (quoting *United States v. Locke*, 471 U.S. 84, 96 (1985)). Finding that a new definition of "utilize" would probably effectuate the intent of Congress rather than elude it, the Court decided that statutory interpretation, if "fairly possible," should be used to avoid the "dangerous constitutional thicket" it might have otherwise had to enter. *Id.* at 465-67.

The *American Physicians* majority believed it followed this advice. See *American Physicians*, 997 F.2d at 906 (discussing the *Public Citizen* rationale). Judge Buckley believed the court did not. *Id.* at 921-23 (Buckley, J., concurring). *American Physicians*, now coupled with its predecessor *Public Citizen*, should not come to stand for the proposition that courts may wring out badly reasoned statutory interpretations to save statutes. As Judge Buckley pointed out, his colleagues in the majority implicitly, and erroneously, interpreted *Public Citizen* as requiring strained interpretations of statutes in cases involving serious constitutional questions. *Id.* at 923 (Buckley, J., concurring).

Compare *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring) (discussing the Court's rules for avoiding constitutional questions, that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter") with *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 518 (1979) (Brennan, J., dissenting) (stating: "it is irresponsible to avoid [a constitutional question] by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent").

28. *American Physicians*, 813 F. Supp. at 90. Judge Lamberth ominously noted: "The court today is faced with two difficult tasks: declaring an act of Congress unconstitutional; and declaring that the actions of a new President violate the law. . . . It is not a power to be taken lightly, but it is a power that must be taken." *Id.* at 95.

29. Representative William F. Clinger, Jr., the ranking Republican on the House Government Operations Committee, took note of the appeals court holding, and entered the following New York Times editorial into the Congressional Record:

A federal court in Washington has given legal meaning to the Clinton campaign slogan, "Buy one, get one free." The court found that Hillary Rodham Clinton, unpaid but hard-working is "the functional equivalent of an "assistant to the President" and not, under certain laws, a private citizen. . . .

Mrs. Clinton was the only person not on the public payroll of the large, Cabinet-level task force on health reform that she headed. But the U.S. Court of Appeals,

The circuit court remanded the case with instructions that the district court examine FACA's application to the task force in light of its finding that Mrs. Clinton was a federal official under FACA.³⁰ In a concurring opinion, Judge Buckley rejected the majority's view of the First Lady's role, and instead supported the district court's previous conclusion that the First Lady is neither a federal official nor employee, thus subjecting the Task Force to FACA's disclosure provisions. Judge Buckley went further, however, arguing that FACA is unconstitutional as applied to presidential policymaking.³¹

It is not only FACA and the Health Care Task Force's viability that hinge on the role of the First Lady. Her status implicates the efficacy of several conflict-of-interest laws as well. The ability of a career-oriented First Lady to maintain her outside work while serving in the White House is at issue. Implicated as well are federal laws that seek to limit the "revolving door," the ability of outgoing federal employees and officers to leave government service only to use their influence to lobby their former co-workers and employees.³² It is not too far-fetched to expect that a First Lady, after spending years in the most powerful residence in the world, might desire to capitalize on her position by accepting employment as a lobbyist following her tenure as First Lady.³³ Other issues exist. For example, do federal

relying heavily on Congress's appropriations for the First Lady's staff, found her a public servant for purposes of the law.

The White House was lucky in its appeal to draw a panel of judges appointed by Ronald Reagan. Judges Laurence Silberman, Stephen Williams and James Buckley are like many Reagan appointees: they believe in exalted Presidential power. They saw the law [FACA] as a potential incursion on executive privilege, depriving the President of the confidential advice he needs to do his job.

By contorting the law to find Mrs. Clinton a public employee, and therefore rule that her task force was not covered by the law, Judges Silberman and Williams said they were avoiding a decision on whether to strike the law down as unconstitutional. Judge Buckley, unable to view Mrs. Clinton as a public employee, concurred in the result but said he would have struck down the law. . . .

139 Cong. Rec. E1685 (daily ed. June 30, 1993) (quoting *A Very Private Public Servant*, N.Y. Times A14 (June 29, 1993)).

30. The statement that the First Lady is an officer under FACA is most unusual because, as discussed below, the court's reasoning would make the First Lady an officer in all cases. See notes 78-81 and accompanying text.

31. *American Physicians*, 997 F.2d at 924-25. In Judge Buckley's words: "Because I can find no credible argument to the contrary, and because I cannot bring myself to strain the meaning of 'officer' or 'employee' to produce one, I would hold that the Task Force was not exempt from the public disclosure requirements of FACA. . . ." *Id.* at 924.

32. See generally 18 U.S.C. § 207 (1988 and Supp. 1993).

33. Former First Lady Barbara Bush is reported to command between \$40,000 and \$60,000 for a speech. See Ruth Marcus, *Bush to Get \$100,000 for Amway Convention Speech*, Wash. Post A5 (Sept. 4, 1993) (citing speaking fees for several former federal officials). Though not illegal, this income demonstrates the ability of a First Lady to capitalize on her former position.

bribery laws apply to the First Lady? If the First Lady accepted bribes, her actions might bring down a government. But they may not be illegal under federal law. The anti-bribery laws, as well as other conflict-of-interest laws, apply to those considered "public officials," a standard different from the officer-employee standard used in FACA.³⁴ Is the First Lady, then, a public official? These questions are significant and require answers.

Hillary Rodham Clinton offers an excellent model for studying the legal limits on the First Lady, for she has moved the debate over the First Lady's role from the White House to the courthouse. But Mrs. Clinton is not the first presidential spouse to cause us to think about the role of the First Lady, nor will she be the last—unless Congress acts to clarify just what her role is.

III. THE ROLE OF THE FIRST LADY

A. *The First Lady in History and Tradition*

In *American Physicians*, the government contended that the tradition of public service by First Ladies lent support to the conclusion that the First Lady is a de facto officer or employee of the federal government.³⁵ The lives of First Ladies are well documented, and many of these women did, indeed, occupy important places in the White House.³⁶ If we are to grasp the nature of the legal problems created by a First Lady with an undefined role, it is important to understand the extent of responsibility First Ladies have frequently assumed.

34. See Part IV.C.

35. *American Physicians*, 997 F.2d at 904. The government argued that First Ladies act as "advisers and personal representatives of their husbands," indicative of their official role in government. *Id.*

36. Historian Betty Boyd Caroli notes the general fascination Americans have always had for the First Lady:

The absence of any clearly defined role for presidential wives, the possibility that they exercised some private influence on their husbands, and their place as symbols of how women ought to behave made them the object of the same kind of media attention that surrounded actresses, sports figures, and society women.

Daniel C. Diller and Stephen L. Robertson, *The Presidents, First Ladies, and Vice Presidents, White House Biographies 1789-1989* 9 (Cong. Quarterly, 1989).

The primary responsibility of the First Lady has always been to act as hostess or organizer of White House social events.³⁷ Of course, not all First Ladies have cherished this role. Some, like Letitia Tyler, Margaret Taylor, and Abigail Filmore avoided social appearances, while others, like Eleanor Roosevelt and Helen Taft, were political actors and viewed their social duties merely as formalities.³⁸ Nevertheless, our nation's history is replete with examples of First Ladies whose activities far exceeded conducting state dinners.

The first First Lady, Martha Washington, sought to win respect for the new nation in the courts of Europe by bringing dignity to the office of the Presidency.³⁹ She did not involve herself with political matters, and, instead, confined herself to dinners, receptions, and parties.⁴⁰ Mrs. Washington did not seek wide authority for her post, and, noting the inherent limitations placed upon her activities, she referred to herself as a state prisoner.⁴¹

37. *Id.* at 7. "Custom demands that the president's wife organize and preside at social events. The first lady is supposed to arrange any teas, receptions, banquets, coffees, and state dinners that the president may have. And although she has both a personal and the White House domestic staff to assist her, the basic responsibility is still hers, even on those occasions when she does not have to act as hostess." *Id.* at 8.

Margaret Williams, Mrs. Clinton's chief of staff, apparently played a role in the White House investigation of Deputy Counsel Vincent Foster's death. Representative Dan Burton of Indiana, on the floor of the House, gave an admittedly partisan account of what took place the night of Mr. Foster's suicide:

The three officials who went into his [Mr. Foster's] office in violation of the [sic] what the chief of staff, Mr. [Thomas] McLarty, said was going to be done, were Bernie Nussbaum, the President's counsel; Hillary Clinton's chief of staff, I don't know what she is doing in there, Margaret Williams; and special assistant to the President, Patsy Thomasson.

It was later revealed at last August's congressional hearings before the Committee on Banking, Finance, and Urban Affairs that Bernie Nussbaum gave one of the files concerning Whitewater to Margaret Williams, Hillary Clinton's chief of staff. After checking with Hillary Clinton, Ms. Williams locked the file away upstairs in Hillary Clinton's personal residence, and several days later it was given to the President's personal lawyer. When the President's First Lady was asked about this, she said it was locked away in a file and we didn't look at it.

The Economics of Spending Cuts—and Whitewater, 141 Cong. Rec. H207, H208 (daily ed. Jan. 11, 1995).

The allegations concerning this incident were serious enough that 43 United States Senators issued a letter to Senate Majority Leader George Mitchell in March 1994, informing him that they would delay President Clinton's nomination of a new Chairman of the FDIC until the Senate Banking Committee could conclude various investigations in this matter. Specifically mentioned as a Senate concern was the role Mrs. Williams played in the incident. 140 Cong. Rec. S13975 (daily ed. Oct. 14, 1994).

38. Diller and Rebertson, *Presidents, First Ladies, and Vice Presidents* at 7, 101-02, 105-06 (discussing attitudes of various First Ladies toward their roles).

39. See Paul F. Boller, Jr., *Presidential Wives* 6 (Oxford U., 1988) (discussing Martha Washington's early duties).

40. *Id.* Boller reports that Alexander Hamilton criticized Mrs. Washington for attempting an awkward imitation of royalty. *Id.*

41. "I live a very dull life here, and know nothing that passes in town. I never go to any public place—indeed, I am more like a State prisoner than anything else. There are certain

Abigail Adams, her successor, was determined to expand the role of the First Lady.⁴² Indeed, she was quite conscious of her role in advising her husband and expressing her opinion on important political questions. However, when she learned she had been quoted by a merchant who publicly articulated a position of hers, she expressed surprise that anyone would have taken note of her thoughts.⁴³ John Adams' opponents referred to Mrs. Adams as "her majesty," and one senator stated that President Adams would not make a nomination without her approval.⁴⁴

Dolley Madison took an immediate interest in politics, serving as official hostess for Thomas Jefferson.⁴⁵ When James Madison captured his party's nomination for president, his opponent, Charles Pinckney, remarked he was beaten by *both* Mr. and Mrs. Madison.⁴⁶ In her role as hostess, Mrs. Madison dealt with delicate matters of where to seat ambassadors and whom to welcome officially. She was

bounds set for me which I must not depart from, and as I cannot do as I like, I am obstinate and stay home a great deal." *Id.* It is unclear what the "bounds" for her role were.

42. See generally *id.* at 13-30 (outlining the life of Abigail Adams). Even before assuming the role of First Lady, Mrs. Adams was determined to be politically active. When her husband was elected a member of the Continental Congress, Mrs. Adams began calling herself "Mrs. Delegate." *Id.* at 16. In 1784, when John Adams was Minister to England, she tried to pressure him to ask the Dutch for a badly needed loan for the United States. He refused. Mrs. Adams then urged Thomas Jefferson, then Minister to France, to pressure her husband to seek the loan. Jefferson did, Adams got the loan, and then gave the credit to his wife. "It is all your intrigue which has forced me to this loan. . . . I suppose you will boast of it as a great public service." *Id.* at 28.

43. Anthony, *First Ladies* at 63 (cited in note 4). "The man must have lost his senses. I cannot say that I did not utter the expression . . . but little did I think of having my name quoted. . . . It will . . . serve as a lesson to me to be upon my guard." *Id.*

44. *Id.* Though Mrs. Adams wholeheartedly supported her husband, she differed with him on the question of whether the United States should war with France—she favored military action. Boller, *Presidential Wives* at 19 (cited in note 39). Boller notes that when President Adams appointed William Vans Murray to lead a peace delegation to France, he incurred the fury of the Federalists who pushed for war. "Oh how they lament Mrs. Adams' absence!" President Adams remarked. "She is a good Counsellor! If she had been here Murray would never have been named, nor his mission instituted." *Id.* Mrs. Adams was cognizant of this and stated that the Federalists "wisht the old Woman had been there; they did not believe it [Murray's appointment] would have taken place." *Id.*

45. See *id.* at 36 (noting that Mrs. Madison served part-time for eight years as hostess). By serving as official hostess to Thomas Jefferson, Dolley Madison arguably assumed the role of First Lady. However, she was not, in fact, married to him. There is no requirement that the President be married while in office or that he take a family member to assist him with state functions.

46. Anthony, *First Ladies* at 80-81 (cited in note 4). Pinckney quipped that while he was beaten by them as a team, "I might have had a better chance had I faced Mr. Madison alone." *Id.*

outgoing and visited card games and racetracks.⁴⁷ Her best known act, however, was in eluding British Admiral Cockburn, who planned to take Mrs. Madison hostage and parade her through the streets of London.⁴⁸ When the British sacked Washington in 1814 and burned down the White House, Mrs. Madison narrowly escaped, bringing with her the famous Gilbert Stuart painting of George Washington crossing the Delaware.⁴⁹

Perhaps the most famous example of the power wielded by a First Lady is that of Edith Wilson, who served as the only conduit between President Woodrow Wilson, crippled by a stroke, and the rest of the country.⁵⁰ Mrs. Wilson herself suggested that President Wilson resign and allow the Vice President to act, but on advice from one of President Wilson's doctors, she agreed to act as a "steward."⁵¹ Another account suggests that she demanded her husband remain President so that the incapacitated President would rely on her to carry out his duties.⁵² Claiming to be nothing more than the President's emissary, Mrs. Wilson met with cabinet members, though some suspected that she was something more than a mere conveyer of information. In fact, Mrs. Wilson did not hide the fact that she did not tell the President everything other government officials told her.⁵³ Mrs. Wilson's apparent control over the government was so great that famed League of Nations opponent, Republican Senator Albert Fall, pounded his fist at a meeting of the Senate Foreign Relations Committee declaring, "We have petticoat Government! Mrs. Wilson is President!"⁵⁴

First Ladies have had varying degrees of success in influencing their husbands. President Jimmy Carter included his wife Rosalynn

47. *Id.* at 83. Dolley (Dorothea Payne Todd Madison) was such a popular hostess even before she became First Lady that Thomas Jefferson, whose own wife, Martha, died many years before his election, recruited Mrs. Madison to serve as official hostess beginning in 1801, a full eight years before her own husband became President. Carole Chandler Waldrup, *Presidents' Wives, The Lives of American Women of Strength* 30 (McFarland & Co., 1989).

48. Anthony, *First Ladies* at 90 (cited in note 4).

49. *Id.* at 91.

50. See generally *id.* at 371-84 (giving a detailed account of Mrs. Wilson's use of executive authority).

51. *Id.* at 372 (citing Mrs. Wilson's own account of the situation, as contained in her pencil-draft memoirs).

52. Waldrup writes that Mrs. Wilson "fiercely resisted any effort to have Vice President Thomas Marshall assume the office of President. Instead she elected to make decisions and help Woodrow sign documents based on what she thought he would have done." Waldrup, *Presidents' Wives* at 248 (cited in note 47).

53. Anthony, *First Ladies* at 375-76 (cited in note 4).

54. *Id.* at 375.

in cabinet meetings,⁵⁵ and she frequently pressured him to act contrary to his own opinions. But as she remarked in her autobiography, she seldom swayed him.⁵⁶ Mrs. Carter believed in an expansive role for the First Lady, noting that although traditionally First Ladies were expected to manage the public and social aspects of the White House, neither she nor the public expected a narrow role any longer.⁵⁷

Thus, Mrs. Clinton is not the first First Lady to take an active political role—or to face criticism for doing so. Nor is she the first First Lady to be accused of financial impropriety.⁵⁸ Julia Grant, wife of Ulysses S. Grant, had prominent associations with the “robber barons” of the day, most significantly Jay Gould and Jim Fisk.⁵⁹ When the scandal was uncovered that Fisk and Gould had tried to corner the gold market with the help of important Government officials, the two directly implicated Mrs. Grant and accused her of making enormous profit from the activities. Her role in the crisis was never fully determined.⁶⁰

55. Arguably, this practice creates a FACA problem. See *American Physicians*, 997 F.2d at 905 (stating that if the President's spouse routinely participated in cabinet meetings, but were not considered a de facto officer, “he or she would convert an all-government group, established or used by the President, into a FACA advisory committee”).

56. Rosalynn Carter, *First Lady from Plains* 164 (Houghton Mifflin, 1984). Mrs. Carter recounts her differences with the President on the death penalty, abortion, and the Panama Canal Treaty. “I was never able to budge him on these issues—but neither did he budge me.” *Id.* at 164.

57. *Id.* at 292-93. She writes:

The political victories for women were important ones, and being a woman who mattered pleased me very much during my time as First Lady. But I never forgot that I was there because my husband held his high office, not because I had been elected. I had helped him get there, and I liked to think he couldn't have done it without me. . . . First Ladies throughout our history have been expected to be adoring wives and perfect mothers, to manage the public and social aspects of the White House to the satisfaction of all critics, and to participate in ‘appropriate public service.’ The role of the First Lady is a difficult—and sometimes nearly impossible—one to fill, and each one of us has dealt with this challenge in her own way.

The role has changed dramatically along with the expanded opportunities of other women in America. . . . Until quite recently, First Ladies were expected to limit themselves to the duties of official hostess and private helpmate, and most of them never varied from this narrowly restricted role.

Id. at 292.

58. In the wake of the Whitewater scandal, Attorney General Janet Reno appointed an independent counsel to investigate “whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with: (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services.” 28 C.F.R. § 603.1 (1994).

59. Anthony, *First Ladies* at 211 (cited in note 4).

60. *Id.*

Seen in this context, the debate over whether or not the First Lady should have political power is largely irrelevant. She does. But the mere fact of exerting political power does not transform her, or any other private citizen, into a government officer or employee. That is a question of the First Lady's *legal* role.

B. The First Lady in the Law

As explained in Part II, the constitutionality of federal statutes, such as FACA, the efficacy of conflict-of-interest laws and, in the case of controversial outside employment or bribery, the political legitimacy of a White House, may all be dependent on the answer to a single question: Is the First Lady an officer or employee of the government?

1. The Government Organizations and Employees Act: Defining an Officer

The Government Organization and Employees Act defines an employee as "an officer and an individual" who (1) is appointed in the civil service, (2) performs a federal function under authority of law or an Executive act, and (3) is supervised by the President, Congress, or another federal officer.⁶¹ All three tests must be met to qualify as an employee for the purposes of federal law.⁶²

The words "employee" and "officer" often work in tandem. Whether one is a government "employee" or government "officer"

61. Government Organization and Employees Act, 5 U.S.C. § 2105 (1988). The Act states:

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section

709(c) of title 32,

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

Id.

62. *Baker v. United States*, 614 F.2d 263, 266 (Ct. Cl. 1980).

depends on how Congress created the position.⁶³ The inquiry into the status of the First Lady necessarily begins with this question: Has Congress provided for her position, and if so, how? This critical inquiry, however, poses great difficulty. Indeed, in *American Physicians*, the D.C. Circuit noted that statutes proffered by the government to authorize a position for the First Lady were so ambiguous that the Government was forced to take the position that the First Lady was assuredly an officer or employee of the federal government—but it could not decide which one.⁶⁴ Nevertheless, while the Constitution speaks only of the appointment of officers and inferior officers,⁶⁵ rather than employees, courts consider these terms synonymous.⁶⁶

The *American Physicians* court examined the First Lady's employee or officer status in light of Title 5 of the United States Code, Section 2105, and concluded that Mrs. Clinton had not been appointed to the civil service and was, thus, not an employee within the meaning

63. *Burnap v. United States*, 252 U.S. 512, 516 (1920). It is "the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto" that controls whether a person is considered an officer or employee of the federal government. *Id.*

64. *American Physicians*, 997 F.2d at 905. "[T]he government is uncomfortable at having to choose whether Mrs. Clinton should be thought of as an officer or employee. The government's discomfort is quite understandable." *Id.* The court, noting that the First Lady is not actually appointed or elected, found it difficult to classify her position. *Id.*

65. U.S. Const., Art. II, § 2, cl. 2. (providing the President with the authority to appoint "Officers of the United States" and "inferior Officers").

66. *Baker*, 614 F.2d at 267. 5 U.S.C. § 2104 defines "officer" separately from the Section 2105 definition of "employee," which seems to include within it the definition of an officer, but is somewhat broader. Section 2104 states:

§ 2104. Officer

(a) For the purpose of this title, "officer", except as otherwise provided by this section or when specifically modified, means a justice or a judge of the United States and an individual who is—

(1) required by law to be appointed in the civil service by one of the following acting in an official capacity—

- (A) the President;
- (B) a court of the United States;
- (C) the head of an Executive agency; or
- (D) the Secretary of a military department;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.

5 U.S.C. § 2104 (1988). Judge Buckley believed that the First Lady could not be viewed as an employee at all because employees are paid and the First Lady is not. *American Physicians*, 997 F.2d at 919 (Buckley, J., concurring).

of Section 2105.⁶⁷ The majority noted the possibility, as the Government had argued, that Congress did not intend for FACA to be bound by the Section 2104 and 2105 definitions.⁶⁸ If FACA relied on a definition of officer or employee different from sections 2104 and 2105, the court could have limited the scope of its ruling to the proposition that the First Lady is an officer or employee for FACA purposes only. But the *American Physicians* court did not find this argument compelling.⁶⁹ As stated in the district court's opinion, FACA itself provides no express definition of "employee."⁷⁰ The reason for this "glaring omission" is that Congress had already provided comprehensive definitions of "employee" and "officer" in Title 5 of the U.S. Code⁷¹

In Section 2105, for example, Congress codified the definition of "employee" to avoid the necessity of defining the term in every statute codified in Title 5.⁷² Most, if not all, legislation concerning the conduct, payment, and responsibilities of government employees relies on Section 2105 to define the term's statutory scope.⁷³ If not confined to the definition in Section 2105, the term "employee" would be subject to varying judicial constructions for every different statute codified in Title 5. It is implausible that the very provision through which Congress explicitly intended to increase convenience and simplicity would be now interpreted merely as loose guidelines begging litigation.⁷⁴ Similarly, Section 2104 states that its definition of "officer" may be superseded if specifically modified,⁷⁵ suggesting that the definition given in Section 2104 controls unless Congress expressly provides otherwise. Hence, if Congress did intend for sections 2104 and 2105 to control, then the analysis of whether the First Lady is a federal officer or employee should go no further than

67. *Id.* at 903. The court stated that it would, for purposes of FACA, consider Mrs. Clinton an employee anyway so as to avoid the "serious constitutional problems" that could result should FACA's sunshine provisions apply to the task force. *Id.* at 903-06.

68. *Id.* at 904. The court indicated that Congress had deleted sections of FACA that provided definitions of officer and employee paralleling sections 2104 and 2105 of Title 5. Instead of the Title 5 definitions, the court stated that Title 1 of the U.S. Code provides another definition of federal officer—as including "any person authorized by law to perform the duties of the office." *Id.* (citing 1 U.S.C. § 1 (1988)).

69. *Id.*

70. *American Physicians*, 813 F. Supp. at 86.

71. *Id.*

72. 5 U.S.C. § 2105 (1994) (History; Ancillary Laws and Directives).

73. See, for example, 5 U.S.C. § 3101 (1988) (providing general authority for the federal government to hire employees); 5 U.S.C. § 3332 (1988) (requiring an officer to submit an affidavit that he has not paid consideration for his appointment); 5 U.S.C. § 3532 (1988) (delineating the rights of transferring employees); 5 U.S.C. § 6303 (1988 & Supp. 1993) (determining how much leave an employee is entitled to).

74. See note 72 and accompanying text.

75. 5 U.S.C. § 2104(a) (1988).

the point at which it can be determined whether she fits within the confines of these congressionally mandated definitions.

It is difficult to see how the First Lady, as First Lady, has been appointed to the civil service, or somehow competes for her position.⁷⁶ This seems to lead to the inevitable conclusion, as both Judge Lamberth and Judge Buckley concluded in their opinions, that the First Lady is not a federal officer or employee, but simply a private citizen, married to the President.⁷⁷

2. Title 3 of the United States Code, Sections 105, 106: Creating the Office, Deconstructing It

In *American Physicians*, the government argued that the First Lady, indeed, *has* a statutory position in the civil service: She is an "assistant to the President."⁷⁸ Under the White House Personnel Authorization Act of 1978, Congress authorized the President to hire and set the salaries of White House Office employees.⁷⁹ In addition to creating the one hundred personal advisers to assist the President, Congress authorized these assistants to provide services to the

76. Because the presidential spouse is not specifically mentioned as either an officer or an employee in any statute, the only way she could become one is to be "appointed to the civil service" by either the President or the Congress. *American Physicians*, 997 F.2d at 903. 5 U.S.C. Section 2101 defines the "civil service" as "all appointive positions in the executive, judicial, and legislative branches" with the exception of the uniformed services. 5 U.S.C. § 2101 (1988). 5 U.S.C. § 2102(a) provides:

The "competitive service" (those positions for which people compete) consists of-

- (1) all civil service positions in the executive branch, except-
 - (A) positions which are specifically excepted from the competitive service by or under statute;
 - (B) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs; and
 - (C) positions in the Senior Executive Service.

5 U.S.C. § 2101(a) (1988).

It is clear that the First Lady does not compete for her position as one would compete for a regular government job. There are no applications for the position. Furthermore, the First Lady is neither nominated nor confirmed by the Senate. First Ladies have not followed, nor have they been asked to follow, any of the procedures required of federal officers. *American Physicians*, 997 F.2d at 920 (Buckley, J., concurring) (noting that Mrs. Clinton "has neither been appointed to nor confirmed in the position of 'First Lady,' she has taken no oath of office, and she neither holds a statutory office nor performs statutory duties").

77. See *American Physicians*, 997 F.2d at 920 (Buckley, J., concurring) (concluding that efforts to characterize the First Lady as an employee "lack an argument in support of the proposition" and that there is "no such argument" that the First Lady is an officer); *American Physicians*, 813 F. Supp. at 90 (finding that the First Lady is not an officer or employee of the federal government).

78. *American Physicians*, 997 F.2d at 904.

79. 3 U.S.C. § 105(a)(1) (1988).

President's spouse "in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities."⁸⁰ The government argued that Congress, through this authorization provision, understood that the First Lady assists the President in discharging his duties and thus serves as an "officer" of the federal government. The *American Physicians* court was persuaded by this argument and read Section 105(e) as creating a de facto official position for the Presidential spouse.⁸¹

This reading of the statute is inaccurate. Although Congress may have assumed that the First Lady is a de facto "assistant," this assumption does not necessarily imply that she holds an office. Furthermore, the plain language of Section 105(e) suggests simply that when the First Lady is helping the President discharge his duties, the President's assistants may assist the First Lady. That is, the statute does not authorize a position entitled "First Lady;" rather, it provides merely that as part of their duties, White House employees created by the statute may assist the First Lady when she is helping the President in his official duties. So, for example, if the First Lady were planning a state dinner, the White House staff could help her.⁸²

80. *Id.* at § 105(e) (emphasis added).

81. *American Physicians*, 997 F.2d at 904-05. "It is reasonable, therefore, to construe section 105(e) as treating the presidential spouse as a de facto officer or employee." *Id.*

82. This statute may merely have codified a practice common prior to the adoption of Section 105(e) in 1978. Eleanor Roosevelt borrowed from her husband's staff to answer the hundreds of thousands of letters that poured into the White House, and Letitia Baldrige, President Kennedy's social secretary, claimed to have forty people working under the First Lady—including helpers borrowed from the President. Diller and Robertson, *Presidents, First Ladies, and Vice Presidents* at 13 (cited in note 36). Even though the First Lady was given a staff of her own, her staff often was too small to handle the work. *Id.*

Rosalynn Carter recounted that the "most painful disagreements" she had with the President were over her staff. Carter, *First Lady from Plains* at 168 (cited in note 56). She writes:

Jimmy's efforts to conserve and save the taxpayers' money affected just about every part of our lives in the White House. The most painful disagreements we had were about staff. . . . At the White House, I thought, I would have all the staff I needed. I was wrong. Jimmy planned to cut, not add to, the number of people working in the White House, and all my pleas fell on deaf ears. "Everybody always wants more staff, and that's why the federal government gets so overloaded," he would say to me time and again. "Anybody you talk to in government will say, 'I need at least one more worker.'" "But I'm not anybody you talk to in government. I'm your wife!" I insisted, not always quietly.

According to the White House personnel records, I had little reason for complaint. They showed that every First Lady in recent history had drawn from staffs of similar size. . . .

What I soon realized was that the staffs change with each administration, depending on the needs of the First Lady. In the past, if a First Lady was very active she always needed more staff and drew from other sources: Some administrations used volunteers and part-time workers; some borrowed from other agencies. . . . I tried . . . borrowing a staff person from Health, Education and Welfare (HEW) who helped with

The legislative history behind Section 105(e) summarizes the provision as merely “[a]uthoriz[ing] assistance and services to the spouses of the President and Vice-President,” without mentioning anything associated with the services those *spouses* might provide.⁸³ As Judge Buckley observed, this provision is carefully worded so that it does not name a position or prescribe duties for the First Lady.⁸⁴ This authorization provision simply acknowledges the reality that First Ladies often help their husbands.⁸⁵ Thus, to read Section 105(e) as creating or recognizing a position of the First Lady as an “assistant to the President” clearly strays from an accurate reading of both the language and the intent of the authorization statute.⁸⁶

Section 105(e), then, provides two competing frameworks: the government’s position in *American Physicians*, that Section 105(e) establishes the First Lady as a federal official; and, alternatively, the position that Section 105(e) creates no federal authority for the First Lady, leaving her a private citizen. The ramifications of either option are substantial; yet remarkably, these consequences rarely have been discussed. If Congress has, in effect, created an official post for the

my volunteer program for three months, but Jimmy discouraged that too, and with a good argument. If HEW could spare someone, then they had too much staff. He never did give in to my pleas, and though my staff was not paid overtime, the lights burned in my offices until late every evening.

Id. at 168-69.

83. White House Personnel Authorization, S. Rep. No. 95-868, 95th Cong., 2nd Sess. 4 (1978) (reporting legislative history of Public Law Number 95-579, now codified as section 105(e)). This interpretation, that Section 105(e) exists only to allow the First Lady to make use of presidential assistants herself, makes even more sense in light of the fear of “detailing,” a White House practice of removing executive employees from the posts to which they were hired and placing them in the White House Office. This practice caused the number of Presidential assistants to mushroom. Section 105 limits the number of assistants the President may hire, but alleviates the limitation somewhat by authorizing the First Lady to detail when she requires the assistance of the President’s staff. Without Section 105(e), the First Lady might engage in unauthorized “detailing” when she required the assistance of the president’s staff. Section 105(e) solves this problem by specifically authorizing the First Lady to engage in this practice. The President retains authority to detail employees “from time to time.” 5 U.S.C. § 112 (1988).

84. *American Physicians*, 997 F.2d at 920.

85. Id. Arguably, Section 105(e) ensures that the executive mansion will be run as an efficient household. The President’s spouse cannot be expected to tackle such a daunting task alone, so Congress provided the spouse with assistance. Just as a husband or wife would ask his or her spouse for permission to hire a housekeeper to maintain the home, Section 105(e) provides Congress’s approval for the presidential spouse to use presidential assistants in the maintenance of the presidential household.

86. This observation was not lost on the majority in *American Physicians*. As noted above, Judge Silberman compared this case to *Public Citizen*, in which the Supreme Court adopted, according to Judge Silberman, “an extremely strained construction of the word ‘utilized’ in order to avoid the constitutional question.” *American Physicians*, 997 F.2d at 906.

President's spouse, then as a federal officer the First Lady should be subject to all federal laws restricting the financial dealings of those who work for the Government, and she must limit her activities accordingly.⁸⁷ On the other hand, if Congress has authorized no such post for the First Lady, one must question how much authority she may legally exert in matters of national policy.

An examination of the legislative history of Section 105(e) indicates that Congress did not consider the First Lady a presidential adviser at all, let alone create a position for her. Congress adopted Section 105(e) in the wake of Watergate as part of a White House authorization bill.⁸⁸ Over the years, Congress watched as President Nixon hired six hundred assistants and President Carter five hundred, even though Congress had authorized only fourteen.⁸⁹ Thus, from 1975 to 1978, Congress engaged in a concerted effort to create accountability within the executive branch for these personal advisers.⁹⁰

Congress intended this bill to clarify the role of the President's staff, limiting its numbers, and controlling its pay.⁹¹ When this authorization bill came before the House, the provision that became Section 105(e) was added by amendment.⁹² This anomalous amendment does not alter the general purpose of the bill.⁹³ It seems

87. See part IV.

88. See S. Rep. No. 95-868 at 3 (cited in note 83).

89. White House Personnel Authorization, Hearings on H.R. 11003 before the Senate Subcommittee on Civil Service and General Services of the Committee on Governmental Affairs, 95th Cong., 2d Sess. 4 (1978) (statement of Cong. Herbert E. Harris, II).

90. Authorization for the White House Staff, Part II, Hearings on H.R. 6326 and H.R. 10657 before the House Subcommittee on Employee Ethics and Utilization of the Committee on Post Office and Civil Service, 95th Cong., 1st and 2d Sess. 9-10 (1978) (prepared statement of Cong. Herbert E. Harris, II).

91. Virginia Congressman Herbert Harris, II, who sponsored the bill (the culmination of a three year effort by him, Congresswoman Patricia Schroeder of Colorado, and Congressman Morris Udall of Arizona) stated that the impetus for this action was to prevent a "palace guard" from developing within the White House by subjecting the hiring and pay of presidential advisers to Congressional authorization. Authorization for the White House Staff, Hearings on H.R. 6326 before the House Subcommittee on Employee Ethics and Utilization of the Committee on Post Office and Civil Service, 95th Cong., 1st Sess. 2 (1977). Representative Harris remarked: "I think, over the past several years, we have suffered as our Government has more and more tended toward a palace-guard type of operation. I think Congress has a responsibility it can't duck, and that's the responsibility to designate what staff the President can have. It should be reasonable, but it should be clear. It should be open. It should be authorized." *Id.*

92. H.R. 6326, introduced on April 19, 1977, did not contain the provision providing assistance to the First Lady. H.R. 6326, 95th Cong., 1st Sess (April 26, 1977). However, H.R. 10657, introduced the following year, did contain authorization of assistance to the President's spouse. H.R. 10657, 95th Cong., 2d Sess. (Jan. 31, 1978). This provision became the present version of Section 105(e).

93. Mr. Harris reminded the House of his fears:

counterintuitive that a bill which had the very purpose to increase accountability of executive assistants would then transform the First Lady into a federal officer with no defined role, responsibility, or accountability.⁹⁴

Furthermore, Section 105(e) is the only provision of Section 105 that makes use of the word "designate" as opposed to "appoint." Section 105(a)(1) of the authorization provision allows the President to "appoint" advisers to perform duties as the President may prescribe.⁹⁵ The use of the word "appoint" appears with respect to all

I, for example, have felt very strongly that many of the people that were in actuality running the Government were never elected and, in effect, were not even known by the people that they were governing. It seems to me that authorizing legislation is absolutely necessary for this very important, very vital, part of our Government, so that Congress does set down at least parameters for how it should function.

Hearings on H.R. 6326 and H.R. 10657 at 8 (cited in note 90).

94. Harrison Wellford, then Executive Director for Reorganization and Management of the Office of Management and Budget, briefly noted during hearings on Section 105(e) that its addition merely continued what he believed was an historical practice of providing the First Lady with staff support when she assisted the President with his duties. "[The section] 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." *Id.* at 12. No one on the House Subcommittee asked a single question about this provision. In fact, the only question on this section of the bill arose in Senate subcommittee hearings when Senator Jim Sasser of Tennessee asked Wellford point blank what provision 105(e) did. This time, Wellford's description was more elaborate, but equally cryptic:

This provision makes explicit in the statutory authorization the historical practice of providing assistance and services for the spouses of the President and Vice President. The provision is not a grant of additional authority to each spouse but simply allows the spouse to share the authority granted to the President and Vice President. All staff and funds would come from those authorized to the President and Vice President. Such funds could only be used by the spouse for assistance rendered to the President or Vice President in discharge of their duties and responsibilities.

Hearings on H.R. 11003 at 38 (cited in note 89).

What did Mr. Wellford mean when he stated that the President's spouse "shares the authority" of the President? If Section 105(e) does "create" an advisory position for the First Lady, as the Government argued and the *American Physicians* court accepted, then the First Lady arguably becomes an officer who shares the President's authority to hire staff. This assertion would make little sense. The President may not designate his powers to just anyone:

The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law. . . .

3 U.S.C. § 301 (1988). The First Lady does not fit any of these categories.

Notably, the historical practice of providing the First Lady with a staff did not begin until 1901 when Edith Roosevelt established an office in the East Wing of the White House (Julia Tyler had hired a press agent years before, however). Diller and Robertson, *Presidents, First Ladies, and Vice Presidents* at 13 (cited in note 36). In fact, even Eleanor Roosevelt, who received 300,000 letters in 1933, had only one assistant. The rest were borrowed from the President. *Id.*

95. 3 U.S.C. § 105 (1988).

advisers in this section, with the notable exception of the provision authorizing advisers to assist the First Lady.⁹⁶ This further illustrates the unofficial status of the presidential spouse, as opposed to an appointed position that would qualify her for "officer" status.

Even more intriguing is that the language of Section 105(e) is repeated in Section 106(c),⁹⁷ only this time, the spouse of the Vice President is authorized assistance and services in connection with assistance provided in the discharge of the Vice President's duties. Although Congress did not express its intentions in enacting Section 106(c), the existence of Section 106(c) does assist an understanding of Section 105(e). Because the language of the two sections is virtually identical, Congress arguably intended the same purpose in both. Thus, we must accept either the premise that Congress created *two* official positions, one for the wife of the President and one for the wife of the Vice President, or that Congress merely allowed presidential (or vice presidential) advisers to assist the First (or Second) Lady from time to time while not creating any official status for the First (or Second) Lady herself.⁹⁸

By accepting the proposition that the First Lady, qua First Lady, is an outright, congressionally created federal officer,⁹⁹ rather than looking at Mrs. Clinton's specific appointment to the Health Care Task Force, the *American Physicians* court may have created a constitutional problem far greater than the one it sought to avoid. One could argue that the First Lady is a private citizen in general, but that Mrs. Clinton became a federal officer when the President appointed her to head the task force.¹⁰⁰ It is understandable, however, why the court, and Mrs. Clinton, chose to avoid this reasoning.¹⁰¹

96. *Id.* Section 105(a)(1) states that "the President is authorized to *appoint* and fix the pay of employees in the White House Office. . . ." *Id.* (emphasis added). Section 105(e), however, states: "If the President does not have a spouse, such assistance and services may be provided for such purposes to a family member of the President's family whom the President *designates*" (emphasis added). One is "appointed" to the post of Assistant to the President, but "designated" to fill the 105(e) position.

97. Section 106(c) states:

Assistance and services authorized pursuant to this section to the Vice President are authorized to be provided to the spouse of the Vice President in connection with assistance provided by such spouse to the Vice President in the discharge of the Vice President's executive duties and responsibilities. If the Vice President does not have a spouse, such assistance and services may be provided for such purposes to a member of the Vice President's family whom the Vice President designates.

98. Compare 3 U.S.C. §§ 105(e), 106(c) (1988).

99. See note 81 and accompanying text.

100. See note 101 (suggesting that while the First Lady as such is not a federal officer or employee, she could become one depending on the role she is given).

101. A similar situation came before John M. Harmon in 1977, while he was Acting Assistant Attorney General. In an Office of Legal Counsel ("OLC") opinion letter, he addressed

a. *Problems, Relatively Speaking: The Anti-Nepotism Provision of Title 5*

In the wake of President John F. Kennedy's appointment of his brother to the post of Attorney General, Congress enacted the Postal

the employment statutes of informal presidential advisers for conflict-of-interest purposes. See 1 Op. Off. Legal Counsel 20 (1977). An informal adviser was defined as one who "advises the President almost daily, principally on an informal basis." *Id.* Harmon's analysis, much like the *American Physicians* court, centered on 5 U.S.C. sections 2104 and 2105. He concluded that "an identifiable act of appointment may not be absolutely essential for an individual to be regarded as an officer or employee in a particular case where the parties omitted it for the purpose of avoiding conflict-of-interest laws or where there was a firm mutual understanding that a relatively formal relationship existed." *Id.* at 21. Thus, there must be official retention, designation, appointment or employment of this informal adviser or there must be a basis to infer a formal relationship. *Id.*

Though the OLC opinion dealt with applicability of conflict-of-interest statutes, it used the same officer-employee framework later used to analyze applicability of FACA.

Harmon concluded that informal advice is not a federal function (the second prong of the *Baker* test, see notes 61-62 and accompanying text) and that there is no true supervision by a Federal officer or employee (the third prong of *Baker*) because "the largely personal relationship between the President and Mr. A [the informal adviser] apparently [is] based on mutual respect rather than assignment of duties. . . ." 1 Op. Off. Legal Counsel 21. Harmon noted that "Mr. A" discusses policy issues daily with the President, "[b]ut we do not believe the mere fact that Mr. A speaks with the President on a daily basis in itself alters the fundamentally personal nature of the relationship that is apparently involved here, just as Mrs. Carter would not be regarded as a . . . Government employee solely on the ground that she may discuss governmental matters with the President on a daily basis." *Id.* (emphasis added).

The Harmon opinion seems to conflict with the D.C. Circuit's holding. This OLC opinion was written before Section 105(e) became law, but this fact does not appear to discount Harmon's opinion. In fact, Harmon's letter appears especially poignant in the following passage:

Mr. A, however, seems to have departed from his usual role of an informal adviser to the President in connection with his recent work on a current social issue. Mr. A has called and chaired a number of meetings that were attended by employees of various agencies, in relation to this work, and he has assumed considerable responsibility for coordinating the Administration's activities in that particular area. Mr. A is quite clearly engaging in a governmental function when he performs these duties, and he presumably is working under the direction or supervision of the President. For this reason, Mr. A should be designated as a special Government employee for purposes of this work—assuming that a good faith estimate can be made that he will perform official duties relating to that work for no more than 130 out of the next 365 consecutive days. If he is expected to perform these services for more than 130 days, he should be regarded as a regular employee. In either case, he should be formally appointed and take an oath of office. This formal designation would not necessarily affect the conclusion that Mr. A's other consultations with the President are of a personal rather than official nature. Should Mr. A assume governmental responsibilities in other areas, as he has done with his work on the above project, he should be regarded as a Government employee for these other purposes as well.

Id.

Seen in this light, the OLC opinion suggests that: (a) the First Lady as First Lady is simply an informal adviser and not an employee; and (b) if the First Lady is selected by the President to take on unique responsibilities, she may become a federal employee, subject to the strictures placed upon such employees.

Rates and Federal Salaries Act in 1967. This statute contains anti-nepotism provisions that forbid a public official from appointing or employing a relative in an agency in which he serves or over which he exercises control.¹⁰² The statute explicitly defines the President as a "public official."¹⁰³ It also explicitly includes a spouse in the definition of "relative."¹⁰⁴ President Clinton arguably violated this law when he appointed his wife to head the health care advisory committee.

In *American Physicians*, however, the D.C. Circuit rejected this analysis. It stated that while the President is a public official and a wife is a relative, the President is not an "agency" bound by the anti-nepotism act.¹⁰⁵ In fact, the court opined that while the statute bars a President from appointing his brother Attorney General, it may not prohibit the President from hiring him as a White House special assistant.¹⁰⁶ Judge Buckley found it inconceivable that Mrs. Clinton would be barred from appointment to the post of Attorney General, but not, for example, from appointment to the post of National Security Adviser.¹⁰⁷

The *American Physicians* majority held that Section 105(e), as an implicit recognition by Congress of the First Lady's authority, undermined the claim that Mrs. Clinton's appointment to the task force violated federal anti-nepotism laws.¹⁰⁸ The court reasoned that holding otherwise would bring the anti-nepotism laws into conflict with Congress' intent to allow the presidential spouse to assist the President.¹⁰⁹ Judge Buckley took the opposite view, that it is unreasonable to hold that the First Lady is an officer of the Government when the holding would conflict with Congress's intent to prohibit

102. 5 U.S.C. § 3110(b) (1988). Specifically, the law states that a "public official may not appoint, employ, promote, advance . . . in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official." *Id.*

103. 5 U.S.C. § 3110(a)(2) (1988).

104. *Id.*

105. *American Physicians*, 997 F.2d at 905. The court stated that though the anti-nepotism provision in 5 U.S.C. Section 3110(a)(1)(A) defines a covered "agency" as an "executive agency," "we doubt that Congress intended to include the White House or the Executive Office of the President." *Id.*

106. *Id.*

107. *Id.* at 921 (Buckley, J., concurring). "Viewed purely as a matter of congressional intent, the argument that the Anti-nepotism Act applies only to the Departments and not to the White House . . . is a weak one." *Id.*

108. *Id.* at 905.

109. *Id.*

nepotism.¹¹⁰ The legislative history behind the federal anti-nepotism statute strongly supports Judge Buckley's view.¹¹¹

Whether the anti-nepotism provisions of Title 5 apply at all the advisers created under Section 105 requires more analysis, however. According to Section 105(a)(1), the President is authorized to appoint and fix the pay of employees in the White House Office without regard

110. *Id.* at 920. Judge Buckley stated: "[A]ny gravitational pull exerted in the direction of congressional acceptance of a President's spouse as a 'de facto' officer attributable to Section 105(e) is overwhelmed by the opposite force exerted by the Anti-Nepotism Act." *Id.*

111. See Federal Pay Legislation, Hearings on S. 1489 and H.R. 7977 before the Senate Committee on Post Office and Civil Service, 90th Cong., 1st Sess. 357-72 (1967).

The committee, after hearing testimony from John W. Macy, Jr., the Chairman of the United States Civil Service Commission, recommended that the President and the Vice President be excluded from coverage of the Act, as well as heads of executive agencies with respect to appointment of their immediate assistants who are exempt from the competitive service. *Id.* at 357.

Mr. Macy repeatedly indicated his belief that, as written, the Act would apply to the President and his advisers. *Id.* at 361, 363, 364-72. However, he did not support applying the act to the President, and stated, "I am really not in a position to comment on why the House applied this [provision] as broadly as it did." *Id.* at 367. Nevertheless, the Act passed and included the blanket provision.

The hearings not only indicate *that* the provision applies to the President, but also demonstrates *how far* it applies. An exchange between Senator Hiram Fong of Hawaii and Mr. Macy is illustrative:

Senator Fong. So the President of the United States couldn't have anybody in this category [relatives] work for the Government?

Mr. Macy. This would appear to be the case.

Senator Fong. While he is the headman?

Mr. Macy. Yes. Well, I would modify that. The Constitution actually provides that the appointing authority is vested in the heads of departments for lesser officials. The President's appointment authority is circumscribed to a certain identified position or positions that the Congress may designate subject to his appointment, but I would feel that regardless of that constitutional technicality the conclusion that you reach would be the proper one under the law.

...

Senator Fong. That means then if one of the President's relatives wants a job anywhere in the government he would never be able to get a job?

Mr. Macy. That would be my interpretation.

Senator Fong. So it means that you would be taking it out on this man and just because he is a relative. He had nothing to do with it.

Mr. Macy. That is right.

Id. at 363.

It is also apparent from the hearings that both appointive positions and competitive positions fall under the nepotism law. See *id.* at 359-63 (discussing the "blanket" prohibition on appointing and promoting relatives).

The restrictions on the President appeared overbroad to the Committee, especially to Senator Robert Yarberough of Texas, who remarked: "If they haven't got judgment enough to know whether to appoint kinsfolk or not they haven't the judgment enough to be President or Vice President of this country. . . . That is my opinion, and I think certainly it should not apply to the President and Vice President in my opinion." *Id.* at 369.

Nevertheless, when the act was passed, the President and Vice President were covered. 5 U.S.C. § 3110(a)(2) (1988).

to any other provision of law regulating the employment or compensation of persons in the government service.¹¹² Under this reading, the anti-nepotism provisions, which regulate employment of persons in the government service, are inoperative on White House advisers. Thus, this reading of Section 105 supports the Government's position that the First Lady may be considered an "officer" under the President.

It appears, however, that Congress understood, when it approved this legislation, that federal conflict-of-interest, nepotism, and ethics laws would apply to the President and his advisers under Section 105.¹¹³ Otherwise, a President could hire his parents, children, siblings, and first cousins to staff the Executive Office of the President. A reasoned understanding of the anti-nepotism act coupled with congressional intent leads to the opposite conclusion: that he could hire none of them.¹¹⁴

112. 3 U.S.C. 105(a)(1) (1988).

113. This precise issue arose during hearings on the White House Personnel Authorization Act. See Hearings on H.R. 6326 and H.R. 10657 at 20-21 (cited in note 90) (discussing applicability of laws to Section 105 employees). During the hearings, Representative Schroeder asked F.T. Davis, General Counsel to the Reorganization at the White House, whether a string of federal laws would apply to Section 105 employees. *Id.*

Mr. Davis responded:

It's our view of the bill that it exempts from those laws dealing with employment and compensation and not those dealing with conduct by public officials once they are appointed. For instance, it would exempt from the Classification Act, laws relating to the competitive service, and the Veterans Preference Act. *However, I might add, it would not exempt from the restrictions under the nepotism statute because of the specific provisions of that act which apply to the President.*

On the other hand, it would not exempt persons from laws dealing with bribery or conduct in office which clearly apply to all persons holding office in the Federal Government.

Id. (emphasis added).

114. 5 U.S.C. § 3110(a)(3) (1988). In the days before the nepotism ban, First Lady Eleanor Roosevelt was actually hired for an official New Deal post—assistant director of the Office of Civilian Defense ("OCD"). She was selected by New York Mayor Fiorello LaGuardia, whom President Roosevelt had appointed as director of the OCD. Mrs. Roosevelt's position was voluntary. See Chadakoff, ed., *Eleanor Roosevelt's My Day* at 215-16, 218 (cited in note 5).

In a press conference given soon after her appointment, a reporter asked Mrs. Roosevelt how she decided to take a public job. The question prompted the following dialogue:

Mrs. Roosevelt: "Well, the mayor had asked the President and seemed to feel that the time had come when everybody who could do any work as a volunteer should do it. Therefore, I decided that as I could do it as a volunteer, I had better do it. The mayor asked the President and me, both. The President has to approve anyone who is going to be in a position."

Question: "He asked the President not for permission to ask you but for permission?"

Mrs. Roosevelt: "Just as he would ask about anyone he was bringing in as assistant director. Whether I would be useful, I suppose. He may have asked him also from the point of view of having any personal objections. I don't know about that."

Maurine Beasley, ed., *The White House Press Conferences of Eleanor Roosevelt* 224 (Garland, 1983).

Section 105(e) read as a whole further illustrates the inconsistency with federal anti-nepotism laws if it is construed to authorize the First Lady as a government officer. In addition to its authorization of assistance to the First Lady, Section 105(e) states that if the President does not have a spouse, the services and assistance that otherwise would have been provided to her may instead be provided to another family member designated by the President.¹¹⁵ This part of Section 105(e) deals the death blow to the suggestion that the First Lady is a public official.

On the one hand, the ability to designate another family member is arguably proof of Congress's intent to authorize an official position of some kind for the First Lady. If the President has no First Lady, he may fill the position, just as he would fill a vacant office over which he has authority. Recognizing the necessity of intimate advice and assistance only a spouse could provide, Congress, through the language of Section 105(e) simply allowed for the next best alternative. That is, the President may "appoint," as it were, another family member to take that place as an unpaid adviser. This interpretation implicitly assumes that the anti-nepotism law would otherwise bar the President from appointing a relative to any other advisory position. If the President could always appoint a relative to such a position, there would be no need to include the language in Section 105(e) that the President may "designate" (as opposed to "appoint") a member of his family should he have no spouse.¹¹⁶

This interpretation is unsatisfactory for several reasons. First, if the President has no spouse, he may designate someone else to fulfill what would otherwise be his wife's historical duties—but he may select *only* a family member.¹¹⁷ If Section 105(e) had specific du-

As Mrs. Roosevelt writes, however, "I soon discovered that the very thing I had feared was true: that I could not take a government position, even without salary or paid expenses, without giving ample opportunity for faultfinding to some members of the opposition in Congress and even to some of our own party people who disagreed with certain policies." Eleanor Roosevelt, *This I Remember* 231-32 (Harper & Brothers, 1st ed. 1949). Though Mrs. Roosevelt herself received no compensation, she had authority to hire people on her own. To design children's physical fitness programs, Mrs. Roosevelt hired dancer Mayris Chaney for a \$4,000 a year post. This ignited so much criticism that on February 6, 1942, Congress voted to prohibit the use of OCD funds for "instruction in physical fitness by dancers. . . ." Chadakoff, ed., *Eleanor Roosevelt's My Day* at 239. On February 21, 1942, Mrs. Roosevelt resigned her post. *Id.*

115. 3 U.S.C. § 105(e). Specifically, the section provides that if the President has no spouse, assistance "may be provided for such purposes to a member of the President's family whom the President designates." *Id.*

116. *Id.*

117. There have been numerous occasions when a President entered the White House unmarried and used a substitute First Lady to carry out state functions, and on a number of

ties and responsibilities in mind, then *anyone* who is qualified to perform those tasks should be eligible. But, the language allows only for a family member. It is likely that this provision simply recognizes that an unmarried President, as a fact of life, would seek the assistance of a family member, as opposed to an unrelated party, for help when carrying out his personal affairs. Acknowledging this, Congress provides this family member resources when she assists the President. It cannot be logically argued, however, that this provision makes this non-First Lady relative of the President a de facto officer as well.

In addition, as the *American Physicians* majority indicated, if the President does have a spouse, but does not wish to make use of her assistance, then he may not use any other family member as an adviser under this provision¹¹⁸ because Section 105(e) authorizes assistance to another family member only if the President has no spouse.¹¹⁹ If Section 105(e) does create a de facto office for the First Lady, then the First Lady apparently can never be fired other than through divorce or death. Only these two actions would free Section 105(e)'s "office" for someone else. As long as this spouse is alive and remains married to the President, only she is authorized Section 105(e) assistance. It is unlikely that Congress created an office whose duties could be filled by one person alone—the spouse or designated relative of the President.

occasions, the substitute First Lady was not a family member. Diller and Robertson, *Presidents, First Ladies, and Vice Presidents* at 92-93 (cited in note 36), note that Thomas Jefferson used Dolley Madison and a daughter, Martha Jefferson Randolph; Andrew Jackson called upon his niece, Emily Donelson; Martin Van Buren utilized his daughter-in-law, Angelica Singleton Van Buren; and James Buchanan had his niece, Harriet Lane, serve in the First Lady's role. *Id.* at 92. In addition to these instances, the authors discuss "surrogate First Ladies," women who assumed the social role of the President's spouse when she was unable to fulfill it herself. *Id.* at 93. President William Henry Harrison prevailed upon his daughter-in-law Jane Irwin Harrison, while John Tyler asked his daughter-in-law, Priscilla Cooper Tyler to serve after his wife Letitia suffered a stroke. *Id.* Zachary Taylor's youngest daughter Mary Elizabeth Taylor acted as an official hostess, and President Millard Fillmore was assisted by his daughter Mary. *Id.* First Lady Jane Pierce, who mourned her only son's death during her husband Franklin's first two years in the White House, sought out the help of her longtime friend, Abby Kent Means. *Id.* In fact, Ms. Means herself received help—from Varina Davis, wife of Jefferson Davis. *Id.* Andrew Johnson's wife Eliza, sick with tuberculosis, was replaced by her daughter Martha Johnson Patterson; Chester A. Arthur, whose wife had been dead for 18 months when he became President, asked his younger sister Mary Arthur McElroy to arrange social functions. *Id.* Finally, before Grover Cleveland married Frances Folsom, his younger sister Rose served as White House Hostess. *Id.*

118. Again, such a prohibition assumes that the anti-nepotism laws apply to presidential advisers.

119. *American Physicians*, 997 F.2d at 905. The court stated: "We suppose the President could withdraw any or all authority delegated to his spouse, but then he would be left without the official assistance of any family member." *Id.*

b. An Officer Without an Office?

Section 105(e) is nevertheless of great importance in determining whether the First Lady is to be considered a de facto officer or not. As discussed above, Section 105(e) must create an office if the First Lady is to pass even the first test of the Title 5 definition of officer.¹²⁰

In *United States v. Mouat*,¹²¹ the Supreme Court stated that a person must be appointed before she can be considered an officer.¹²² The Court found Mouat's appointment as a United States naval officer invalid because there was no statute authorizing his appointment to a position. Therefore, the Court stated, Mouat was simply not an officer.¹²³ In the end, however, it is the appointment, and authorization for that appointment, which is absolutely crucial to status as an officer.¹²⁴ Neither can be found for the First Lady.

Semantic games will not work to create an office, either. The *Mouat* Court indicated that even when Congress uses the very word "officer," use of that word alone will not qualify one as an officer.¹²⁵ Rather, the definition of the word "officer" may vary from statute to statute when Congress specifically indicates, and a court must ascertain the word's particular meaning in a specific statute in light of Congress's intent.¹²⁶

In *Baker v. United States*,¹²⁷ the court of claims faced the issue of whether Baker, an employee of the New York State Employment Service ("NYSES"), was also a federal employee, a status enabling him to collect retirement benefits on the period of his government service. The court, which relied heavily on *Mouat* and its progeny, found that Baker, by his own admission, had never received a formal federal appointment during his service to the federal government.¹²⁸

120. See note 61 and accompanying text.

121. 124 U.S. 303 (1887).

122. *Id.* at 307. "Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." *Id.*

123. *Id.* at 308.

124. *Id.* at 307.

125. *Id.* at 308. "Undoubtedly congress may have used the word 'officer' in some other connections in a more popular sense . . . in which case it will be the duty of the court in construing such an act of congress to ascertain its true meaning, and be governed accordingly." *Id.*

126. *Id.* "[I]t [is] the duty of the court in construing such an act of Congress to ascertain its true meaning and be governed accordingly." *Id.*

127. 614 F.2d 263 (Ct. Cl. 1980).

128. *Id.* at 268 n.5.

The court thus equated federal appointment with *formal* federal appointment. In fact, the court specifically stated that one cannot hold a government position as either an officer or employee until a person authorized to make the appointment so appoints.¹²⁹ Given that no one has ever appointed the First Lady, formally or otherwise, to her "post," it is impossible that she could be considered an employee or officer.¹³⁰ In fact, much as the government argued in *American Physicians*, Baker argued that his service for the NYSES satisfied the "federal appointment" requirement.¹³¹ In other words, Baker believed he had the status of a federal employee based on the duties he performed, even though he lacked a formal appointment. The *Baker* court rejected this reasoning based on the Supreme Court's strong historical emphasis on the necessity of actual appointment by an authorized party.¹³²

If Section 105(e) provides the true authority for the "employment" of the First Lady, then it does so without definition of any specific role and without the use of the words "appoint," "employ," or "pay."¹³³ Arguably, the President may not have the authority to relieve the First Lady of her "duties" since the power of removal is incident to the power to appoint.¹³⁴ This reading of the President's appointment and removal power in the context of the First Lady would raise a serious separation of powers issue.¹³⁵ The President

129. *Id.* at 268.

130. This discussion is limited to the possibility that Section 105(e) creates an office, de facto or otherwise, for the First Lady. As discussed above, Mrs. Clinton's appointment as head of the Health Care Task Force may be a federal appointment. See notes 100-01 and accompanying text.

131. *Baker*, 614 F.2d at 268 n.5.

132. *Id.* at 269.

133. 3 U.S.C. § 105(e)

134. *Burnap*, 252 U.S. at 518.

135. See *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (stating that Congress cannot limit the President's power to remove an executive branch official to the extent the restriction would "interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws"). If Section 105(e) creates an office without clear removal power by the President, then the President's removal power could be implied as constitutionally mandated.

It is possible, however, for Congress to create "offices" over which only it has removal power. The Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976), indicated that Congress may create "offices" and provide for such method of appointment to those offices as it chooses, through its authority under the Necessary and Proper Clause of the Constitution. U.S. Const., Art. I, § 8, cl. 18 (declaring Congress' power to enact "all Laws which shall be necessary and proper" for executing Congress' authority). However, the Court noted, the method of appointment must comport with Art. II, § 2, cl. 2. Otherwise,

[T]he holders of those offices will not be "Officers of the United States." They may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."

could presumably say that she is not “assisting” him and prohibit White House advisers from assisting her under Section 105(e). But this reading seems strained.

The First Lady keeps an office on the second floor of the West Wing of the White House, one floor above the President.¹³⁶ However, this physical office does not make her an officer; authorization statutes do. The First Lady, unlike all other major employees in her office, lacks a direct presidential appointment.¹³⁷ In fact, it appears that ultimate authority over her staff lies not with her, but with either the President’s Chief of Staff or the President himself.¹³⁸

Any reliance on Section 105(e) as authorization for de facto officer status is, therefore, shaky at best. Discernible congressional intent does not favor such a reading, and the lack of any indication of a formal appointment, a most crucial element of officer status, is nonexistent.

*c. All Work and No Pay Makes the First Lady. . . ?
Implications of the Antideficiency Act*

Even if the First Lady could be appointed to an official position without violating the anti-nepotism laws, it seems at least clear that she could not be paid.¹³⁹ In fact, Mrs. Clinton was not paid for her work on the Health Care Task Force.¹⁴⁰ This provision of voluntary services for the government, however, raises another legal prob-

Id. So even if in Section 105(e) Congress created an office for the First Lady, it is assuredly within the executive branch, hardly removed from the “administration and enforcement of the public law.” Id.

136. *Federal Yellow Book*, § I at I-7, I-13 (Leadership Directories, Winter 1995). She is on the same floor with the President’s Counsel, the President’s Economic Policy Adviser, and the White House Director of Legislative Affairs. Id.

137. Id. at I-13. The First Lady’s Chief of Staff is technically an Assistant to the President, and is appointed by him. Id. The Deputy Chief of Staff to the First Lady is also appointed by the President, and is a deputy assistant to him, as is the First Lady’s Press Secretary. Id. The Director of Scheduling and Social Secretary to the First Lady are both appointed by the President and serve as Special Assistants to him. Id. The First Lady arguably has no legal authority to hire and fire staff because all her staff members are either appointed by the President as personal assistants or they serve one of these assistants.

138. See *United States Government Manual* 92 (1994) (identifying Chief of Staff Leon Panetta as authority over entire White House staff, including Mrs. Clinton’s staff members).

139. The majority in the *American Physicians* case believed that the anti-nepotism provisions of the U.S. Code did not override the position created by 3 U.S.C. § 105, but that the provisions “may well ban appointment only to paid positions.” *American Physicians*, 997 F.2d at 905.

140. Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L. J. 51, 54 (1994).

lem—the Antideficiency Act.¹⁴¹ This Act prohibits federal agencies from accepting voluntary services without express statutory authority.¹⁴² Congress enacted the Antideficiency Act to prevent an individual from providing free services to the government, for which Congress had made no appropriation, and then suing later for compensation.¹⁴³ When this Act is coupled with a statutory ban on the supplementation of salaries of federal officials,¹⁴⁴ the Antideficiency Act stands for the proposition that one may not work for the government for no pay, and one may not be paid for government work by anyone else.¹⁴⁵ Thus, if the First Lady is specifically appointed to a post, not only can it not be a post that pays, because of the anti-nepotism laws, but it cannot be a post that does not pay, because of the Antideficiency Act. In fact, the Antideficiency Act seems quite appropriate when directed at the First Lady; for, as it has been interpreted, the Act refers to voluntary services rendered by private persons without authority of law.¹⁴⁶

The Office of Legal Counsel (“OLC”) recently summarized the conditions under which the government may accept voluntary services without express statutory authority.¹⁴⁷ First, the services must be rendered in an official capacity under regular appointment to an office.¹⁴⁸ Second, the services must otherwise be permitted by law to be nonsalaried because no minimum salary is required.¹⁴⁹ Using this test, the OLC approved Professor Laurence Tribe’s provision of free service to the independent counsel when it conducted investigations on the Iran-Contra Affair under the Reagan administration.¹⁵⁰ Under

141. 31 U.S.C. §§ 1341-1342 (Supp. 1993).

142. 31 U.S.C. § 1342. The statute provides: “An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” *Id.*

143. See generally Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 Nw. U. L. Rev. 57, 123-27 (1992) (discussing various aspects of the Antideficiency Act). The author notes that the Antideficiency Act dates back to 1884. *Id.* at 124.

144. See note 164 (noting various limits on outside compensation for upper-level officers and employees of the government).

145. Nolan, 87 Nw. U. L. Rev. at 124 (cited in note 143) (citing 41 Op. Att’y Gen. 463, 480 (1960)).

146. 30 Op. Att’y Gen. 129, 131 (1913).

147. Nolan, 87 Nw. U. L. Rev. at 126 & n.265 (cited in note 143) (citing Memorandum for Francis A. Keating, II, Acting Associate Attorney General, re Independent Counsel’s Authority to Accept Voluntary Services—Appointment of Laurence H. Tribe, from Michael Carvin, Deputy Assistant Attorney General, Office of Legal Counsel 3-4 (May 19, 1988)).

148. *Id.*

149. *Id.*

150. *Id.* at 126.

this test, an official appointment must first be made, and the pay for the office must be set to zero.

As Professor Nolan recognized, however, this reading transforms the Antideficiency Act into a grant to accept free services, as long as the two conditions are met, rather than a prohibition against their acceptance.¹⁵¹ According to Professor Nolan, the OLC test undermines Congressional control over appropriations and places the shaping of government policy in private hands.¹⁵² Nevertheless, if the First Lady has not been appointed to *her* position, the Act appears to bar her from providing free services to the government, at least beyond those authorized by Section 105(e).¹⁵³ The *American Physicians* court refused to address whether its finding that the First Lady is a federal officer created problems under the Antideficiency Act.¹⁵⁴

C. *The Baker Test*

Federal appointment, performance of a federal function, and federal supervision are all required in the definition of a federal officer or employee, pursuant to statute and the dictates of *Baker v. United States*.¹⁵⁵ This Note has focused primarily on the complex issue of federal appointment in the First Lady context. The two other conditions require decidedly less analysis.

The performance of a federal function is probably the easiest issue to satisfy. Assisting the President in the discharge of his duties and obligations seems to fit this category. Hosting state dinners, the classic example of a First Lady's duties, would appear to be a federal function, as would serving as the head of a Task Force aimed at advising the President on health care reform.¹⁵⁶

The final test of "officer" or "employee" is whether the person is subject to supervision. As regards the First Lady, this issue is far

151. *Id.* at 127.

152. *Id.*

153. This proposition assumes that there is no special statutory authority under which one may work for free for the Government without such appointment.

154. 997 F.2d at 911 n.10.

155. See notes 61-62; 5 U.S.C. §§ 2104(a)(2) and 2105(a)(2) (requiring the performance of a federal function to be considered an officer or employee); §§ 2104(a)(3) and 2105(a)(3) (requiring the individual to be subject to supervision).

156. See note 37. Judge Buckley, on the other hand, noted in his concurring opinion that the First Lady performs no defined statutory duties. He did not elaborate on whether a First Lady's typical activities constitute "federal functions." *American Physicians*, 997 F.2d at 920 (Buckley, J., concurring).

more elusive.¹⁵⁷ Presumably, the First Lady, if an officer, would be accountable to the President.¹⁵⁸ However, the President would not likely ever dismiss the First Lady.¹⁵⁹ If he did "fire" the First Lady, the President might face enormous political consequences.¹⁶⁰ The President may be close to other advisers whom he would have great personal or political difficulty in dismissing, but there seems something different about firing one's own spouse. The suggestion that the First Lady is truly politically accountable to the President is fiction.

IV. CONSEQUENCES

Under Congress' statutory scheme, the First Lady is neither an employee nor an official of the government. The ramifications of this conclusion are profound. Obviously, one could pick through the Code and find every provision which mentions "officer" or "employee" and simply say it does or does not apply. But the consequences of this finding have special significance in our time in defining the role of the First Lady and requiring limits on it.

A. *Outside Employment*

One of the most interesting and relevant¹⁶¹ implications of the First Lady's role in government is the issue of whether the presidential spouse may serve the government in any capacity, official or otherwise, and continue to maintain employment in the private

157. See note 61.

158. Under Section 105(e), the President is the only one to whom she could be accountable because he would be the one who "hires" her.

159. See *American Physicians*, 997 F.2d at 905 (noting that such an option would be a "rather extreme alternative[]").

160. A scandal in Peru in which its President "fired" his wife from the post of First Lady resulted in great political turmoil. See note 1.

161. As the 1996 presidential race gears up, the role of the First Lady is again debated in the national media. Chuck Jones, a political analyst at the Brookings Institution, recently stated: "We're in a period where, in contrast to the Reagans and Bushes, two professionals head up families. It is a fact of life and it's going to be a fact of politics." *Independence Marks Potential First Ladies*, Rochester Democrat and Chronicle 19A (March 19, 1995). Sheila Tate, press secretary for former First Lady Nancy Reagan remarked: "From a career woman's standpoint, there will be a lot of support for a first lady who continues in her career while her husband is president. . . . Sooner or later that's going to happen." *Id.* See *Women's Place*, Atlanta Journal and Constitution 18A (March 25, 1995) (stating that "[n]o matter who's elected in 1996, chances are good the nation has seen the last of first ladies whose roles are restricted to homemaker and volunteer").

sector.¹⁶² It is unclear whether the First Lady should have to sacrifice a successful career in the private sector simply because her husband is elected President.¹⁶³

The Ethics in Government Act of 1978 limits the amount of outside earned income for certain upper-level "officers" or "employers" of the federal government.¹⁶⁴ President Bush, however, issued executive orders prohibiting senior advisers from any outside employment while employed in the White House.¹⁶⁵ If the presidential

162. Eleanor Roosevelt received \$3,000 from Pond's cosmetics firm for each of thirteen broadcasts of a radio program, *My Day*, which she began in 1937. Though she donated most of the money to the American Friends Service Committee, \$500 was used for expenses and her agent's fees. This personal use of fees was not reported to the public. Maurine H. Beasley, *Eleanor Roosevelt and the Media* 113 (U. of Ill., 1987).

163. The law has recognized a need to place restrictions on the employment opportunities of one spouse when the other spouse is engaged in a sensitive occupation. In *Application of Gaulkin*, the Supreme Court of New Jersey addressed the question of whether a wife of a superior court judge could run for public office in contravention of New Jersey law. 69 N.J. 185, 351 A.2d 740 (1976). The purpose of the New Jersey law was to prevent judges' embroilment in politics and to prevent any assumption that the views of the political spouse were the views of the judge. *Id.* at 742. The court determined that the complete ban on political office-seeking was no longer necessary, focusing "upon the trend of modern law which reflects society's realistic appreciation of the independence of both spouses in marriage and more specifically represents modern awareness and sensitivity to individual freedoms, rights, responsibilities and development." *Id.* at 744. Nevertheless, the court maintained a number of restrictions, including banning the judge from accompanying his wife to political gatherings. *Id.* at 747. The fear of tainting the judiciary with the stain of political favoritism required the limitations. Fear of tainting the President with this same appearance of impropriety might well require similar restrictions on the First Lady.

164. Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101-505 (1988 and Supp. 1993). Section 501 of the Act limits the outside earned income of certain upper level officers or employees of the federal government. *Id.* If the First Lady is not an "officer" or "employee," though, then presumably these restrictions do not apply to her. Section 502 of the Act forbids:

- (1) compensation for affiliation with or employment by firms or corporations;
- (2) the officer's or employee's name from being used by that entity;
- (3) compensation for practicing a profession involving a fiduciary relationship;
- (4) serving for compensation as an officer or board member of any association, corporation, or entity;
- (5) compensation for teaching without prior approval, in the case of an executive branch officer or employee of the Office of Government Ethics.

Id. Again, these provisions may be inapplicable to the First Lady if she is not considered an officer or employee.

165. See 3 C.F.R. 301 (1989), as amended, 3 C.F.R. 306 (1990), now codified, as amended, at 5 U.S.C.S. § 7301 (Supp. 1994):

Section 101. Principles of Ethical Conduct. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each Federal employee shall respect and adhere to the fundamental principles of ethical service as implemented in regulations promulgated under sections 201 and 301 of this order. . . .

Sec. 102: Limitations on Outside Earned Income.

(a) No employee who is appointed by the President to a full-time noncareer position in the executive branch (including full-time noncareer employees in the White House Office, the Office of Policy Development, and the Office of Cabinet Affairs), shall

spouse achieves senior adviser status simply by virtue of his or her relationship with the President, then he or she would be foreclosed from any outside career opportunities. Notably, however, the order exempts White House Office employees with salaries below a specified amount from a complete ban on outside income activities.¹⁶⁶ Although this Note argues that the ban on outside employment does not apply to the First Lady because she is not an employee of the government, even if she were an officer or employee, she would be exempted from the ban. Because she earns nothing, she may apparently seek outside compensation. This possibility is troubling for several reasons. The mere proximity of high level officials to the President causes any suspicions cast on their ethical behavior to be transferred to him.¹⁶⁷ The press attention associated with such conduct distracts officials from their duties. Thus, the President has a significant interest in limiting outside conduct.¹⁶⁸

In addition to restricting outside employment, federal law prohibits officers or employees of the executive branch from personally and substantially participating in government decisions that affect their financial interest or the financial interests of their

receive any earned income for any outside employment or activity performed during that Presidential appointment.

5 U.S.C.S. § 7301.

166. *Id.* Specifically, Section 102(b) of the order states:

The prohibition set forth in subsection (a) shall not apply to any full-time noncareer employees employed pursuant to 3 U.S.C. 105 and 3 U.S.C. 107(a) at salaries below the minimum rate of basic pay then paid for GS-9 of the General Schedule. Any outside employment must comply with relevant agency standards of conduct, including any requirements for approval of outside employment.

Id.

167. Nolan, 87 *Nw. U. L. Rev.* at 141-43 (cited in note 143).

Those who are close to the President are likely to be the subjects of ethical inquiries most often. Their closeness to the President alone makes their behavior interesting to the press and to the public. Moreover, their relative power and prestige make them likely subjects of investigations or suspicions. Because such inquiries receive generous press attention, and because the President's own image may be tarnished when those close to the President are the subjects of ethical inquiries, those inquiries inevitably demand immediate and substantial attention, which usually distracts the responders from their official duties.

For these reasons, the President has a significant control interest in minimizing the opportunity for even an inquiry about the conduct of close presidential advisers. Such an interest supports presidential limitation on outside earned income of the President's appointees, even if such income is completely unrelated to official matters or subjects. This interest, however, is the President's alone. . . . Each President should determine how to exercise it and to what extent the interest should be used to limit outside income, and should express the limitations by presidential order. When exercising this power, however, Presidents should restrict the category of covered officials to those who are truly closely identified with the President.

Id. at 142-43 (footnotes omitted).

168. *Id.* at 142.

spouses.¹⁶⁹ This prohibition became a serious issue for Hillary Clinton when eighty-one members of Congress formally asked the Office of Government Ethics (“OGE”) to investigate whether Mrs. Clinton violated the law when she made statements about the health care industry while she held investments in a fund that profited from a decline in value of drug stocks.¹⁷⁰ Republican Congressman Christopher Cox, who initiated the request, cited the *American Physicians* court’s finding that Mrs. Clinton was a de facto officer or employee of the government for FACA purposes. He stated that Mrs. Clinton should be considered the same for purposes of the criminal conflict-of-interest provision of 18 U.S.C. § 208.¹⁷¹

The OGE, in a letter written by its chairman, Stephen Potts, replied that while it may be true that Mrs. Clinton is a de facto officer or employee for FACA purposes, that possibility did not necessarily command the same finding for this criminal statute.¹⁷² The OGE

169. 18 U.S.C. § 208(a) (1988 & Supp. 1993). Note that under 18 U.S.C. § 202(c), the President is exempted from this restriction, so actions affecting his spouse’s financial condition would not be imputed to him under this provision. 18 U.S.C. § 202(c) (1988 & Supp. 1993).

170. See Letter from Stephen D. Potts, Director, Office of Government Ethics, to Congressman Christopher Cox 1, 6 (May 3, 1994) (referring to the initial requests for an investigation) (available on file at OGE) (“Letter from Stephen Potts”). The Wall Street Journal reported that Hillary Clinton and the Health Care Task Force were creating uneasiness in the pharmaceutical markets. See John R. Dorfman, *Cocking the Trigger on Buying Drug Stocks*, Wall St. J. C1 (March 23, 1993) (stating: “Drug stocks have been falling for 15 months. And they’re likely to get roughed up further in April, as people try to guess what therapy Hillary Rodham Clinton’s task force will prescribe for the nation’s health-care system”). When it was discovered that Mrs. Clinton had tens of thousands of dollars invested in Valuepartners, a money management fund, which had been selling short on drug stocks (profiting from a decline in value), members of Congress sought an investigation to determine whether Mrs. Clinton was illegally profiting from her position. See Judi Hasson, *First Lady Invests in Fund with Health Care Ties*, USA Today 4A (May 20, 1993) (noting the White House’s disclosure of Mrs. Clinton’s investment). See also Frank Call, *How Blind is Your Trust?*, Money 5 (July, 1993) (reporting Mrs. Clinton’s investment in Valuepartners at \$97,500).

171. Letter from Stephen Potts at 3. See also 5 U.S.C. § 208(a) (1988 & Supp. 1993) (placing criminal liability on anyone who is “an officer or employee of the executive branch” for participating in government decisions affecting his other financial interests). Since the language “officer or employee” appears, Mr. Cox argued that Mrs. Clinton should be accountable if an “officer or employee” as a result of the *American Physicians* holding. Letter from Stephen Potts at 3.

172. *Id.* Mr. Potts stated: “The interests served by FACA and the purposes of the federal conflicts of interest statutes are not the same. . . . We do not believe that simply because she is the First Lady she has the status of an officer or employee of the executive branch.” Potts observed, though, that:

[T]hat is not to say the spouse of a President could never be an officer or employee of the executive branch; we recognize that Mrs. Clinton has been given a very public role with the Task Force. But it is far from settled that by virtue of that role she is therefore an officer or employee of the executive branch for purposes of the conflicts statutes.

Id.

declined to decide whether the First Lady would be subject to the conflict-of-interest provisions based upon her status because it could dismiss the complaint on other grounds.¹⁷³ The OGE was thus able to stave off the issue of the legal accountability of the First Lady just as the *American Physicians* court had done.

B. Revolving-Door Restrictions

Federal law permanently restricts any person who is an officer or employee of the executive branch from lobbying the government under various circumstances.¹⁷⁴ Notably, under the Ethics Reform Act of 1990 Technical Amendments, Congress removed language that employed the Title 5 definitions of officer and employee, perhaps suggesting that scope of the Act extends beyond the Title 5 definitions.¹⁷⁵ If the First Lady is a Title 5 officer or employee, then the various restrictions certainly apply to her. In addition, the law may still apply to her even if she is not an officer or employee within the meaning of Title 5. The *American Physicians* court left this issue undecided.¹⁷⁶

Even if the First Lady is not an officer or employee of the federal government under the definition provided in Title 5, there is good reason to apply the conflict-of-interest restrictions to her regardless. In addition to placing general restrictions on officers or employees, the provision places specific restrictions on Section 105 appointees of the President and Vice President.¹⁷⁷ By singling these advisers out for

173. *Id.* at 3-4 (stating that the status of Mrs. Clinton as First Lady or as chair of the Health Care Task Force need not be determined if another element of 18 U.S.C. § 208 could not be established). The OGE stated that since Section 208 requires participation in a "particular matter," the issue of health care reform was too broad, failing the "particular" requirement. *Id.* at 4-5 (calling attempts to characterize health care reform as a particular matter "fatally flawed").

174. See 18 U.S.C. § 207(a)(1) (1988 & Supp. 1993) (prohibiting (1) officers and employees from (2) making, with the intent to influence, (3) any communication to or appearance before any officer or employee of any department or agency (4) in connection with a particular matter in which the United States is a party or has a direct and substantial interest, (5) in which the person participated personally and substantially as such officer or employee, and (6) which involved a specific party at the time).

175. Act of May 4, 1990, P.L. 101-280, 104 Stat. 158.

176. *American Physicians*, 997 F.2d at 911 n.10 ("We do not need to consider whether Mrs. Clinton's presence on the Task Force violates . . . any conflict-of-interest statute).

177. See 18 U.S.C. §207(c) & (d) (1988 and Supp. 1993). Under 18 U.S.C. § 207(a)(2), all officers and employees of the Executive Branch" are restricted from making, with intent to influence, "any communication to or appearance before any officer or employee of any department, agency, court . . . on behalf of any other person . . . in connection with a particular matter . . . (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with

special treatment, Congress recognized the widespread influence such top executive branch officials obtain. The First Lady, a confidant at least as close to the President as these advisers, should be subject to similar regulation.

In 1988, the House Subcommittee on Administrative Law and Government Relations took up hearings on the issue of restricting post-employment activities of federal officers and employees.¹⁷⁸ In testimony before the subcommittee, Archibald Cox, the Chairman of Common Cause, identified four distinct fears about influence peddling in government. He stated that (1) the official, hoping to work as a lobbyist once out of government, will curry favor with prospective employers or clients while still in office; (2) the ex-official will use special access to inside information for the benefit of his private employer or client; (3) the ex-official will be able to maintain authority over people once below her in rank even though she now deals with them as a private citizen; and (4) the ex-official turned lobbyist petitions government as a friend and insider and will receive special treatment as a result.¹⁷⁹ These fears apply equally well to the First Lady as they do to any of the other advisers and officials mentioned under the Act.

If Congress viewed the First Lady to be in a position of authority, as it views other Section 105 officers, then it should have applied the revolving-door provisions to her as well. If the purpose of this ethics law is to prevent the exertion of undue influence by "revolving door" government officials, the First Lady should be included unless, of course, Congress does not view the First Lady as a government official.

If, as the *American Physicians* court held, the First Lady is a de facto officer of the government, the provisions of the Ethics in Government Act should govern her future activity and bar Mrs. Clinton from lobbying the government on various health care matters when she leaves office. As a relatively young and successful attorney,

the United States or the District of Columbia, and (C) which involved a specific party or specific parties at the time it was so pending.

18 U.S.C. § 207(a)(2) (1988 & Supp. 1993).

An additional restriction is placed upon "Very Senior Personnel of the Executive Branch," preventing them from appearing before any officer or employee of the department or agency in which that person served within one year. See 18 U.S.C. §207(c).

178. Restrictions on the Post-Employment Activities of Federal Officers and Employees, Hearing on H.R. 4917 and H.R. 5043 before the Subcommittee on Administrative Law and Government Relations of the Committee on the Judiciary, 100 Cong., 2d Sess. 165 (1988).

179. *Id.*

Mrs. Clinton may not desire such a restriction. Congress, on the other hand, should add the First Lady to the list of those covered by federal ethics laws.

C. Bribery

Title 18 of the United States Code, Section 201, makes it unlawful to bribe a public official.¹⁸⁰ Unlike Title 5, which regulates the conduct of "officers" and "employees," this provision applies to "public officials" and may, thus, be broader in scope.¹⁸¹ The definition of "public official" includes, for example, persons acting for or on behalf of the United States.¹⁸² Would this include the First Lady?

Rather than applying strict definitional standards, the bribery statutes call for a broad construction.¹⁸³ Courts have repeatedly ac-

180. 18 U.S.C. § 201(b) (1988).

Whoever—

1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

A) to influence any official act; or

B) to influence such public official; or

C) to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official or person; . . . shall be fined not more than three times the monetary equivalent of the thing of value or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Id.

181. 18 U.S.C. § 201(a), provides:

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

Id.

182. Id.

183. See generally Carolyn G. O'Brien, *Federal Criminal Conflict of Interest*, 31 Am. Crim. L. Rev. 569 (1994) (outlining basic federal policy on bribery and conflict of interest laws); Susan Daunhauer Phillips, Comment, *The Federal Bribery Statute: An Argument for Cautious Revision*, 68 Ky. L. J. 1026, 1031-32 (1980) (illustrating the breadth and vagueness of present federal bribery law).

cepted this preference for broad interpretation.¹⁸⁴ In *Dixson v. United States*,¹⁸⁵ the Supreme Court defined the meaning of "public official" as including all those who occupy positions of public trust and federal responsibilities.¹⁸⁶ The Court, acknowledging the possibility of overbreadth, required that there be "some degree of official responsibility for carrying out a federal program or policy."¹⁸⁷

Under this analysis, the First Lady may fall under the bribery prohibitions even if she is not a federal officer within the meaning of Title 5. The First Lady resides in the White House, advises the President on a host of issues, and is generally responsible for many state functions.¹⁸⁸

In *United States v. Romano*,¹⁸⁹ the Second Circuit Court of Appeals ruled that even though an EPA employee had been terminated from his official functions, he was still employed and performing an "important service" for the Agency.¹⁹⁰ In *Romano*, the defendant contended he was merely a "civilian, masquerading in 'public official's' clothing."¹⁹¹

Keeping with a tradition of broad interpretation of Section 201 of Title 18, the court rejected the defendant's argument and stated that even without official duties, the concept of "public official" was

184. Phillips, Comment, 68 Ky. L. J. at 1032.

185. 465 U.S. 482 (1984).

186. *Id.* at 496. *Dixson* involved the issue of whether Section 201 should apply to employees of entities receiving federal grants. Justice Marshall, writing for the Court, stated: "[T]he proper inquiry is . . . whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such positions are public officials within the meaning of § 201 and liable for prosecution under the federal bribery statute." *Id.*

187. *Id.* at 499.

188. See *id.* at 499-500 (giving examples of what constitutes official responsibility). The *Dixson* majority pointed out that its decision was fully consistent with *Krichman v. United States*, 256 U.S. 363 (1921), in which a baggage porter for a federal railroad was determined not to be a public official because he had no duties of an official character. *Krichman*, 256 U.S. at 366.

However, *Dixson* was a 5-4 decision. In her dissent, Justice O'Connor stated that the statutory language of Section 201 is unclear as to the situation of federal grantees, as "Congress apparently has never specifically considered the statute's coverage of federal grant recipients. The legislative history is simply silent on the question to be answered in these cases." *Id.* at 502 (O'Connor, J., dissenting). As the language is also unclear as to the First Lady, it is possible that, under the dissent's interpretation of the statute, federal bribery laws would not apply to her.

189. 879 F.2d 1056 (2d Cir. 1989).

190. *Id.* at 1059. *Romano*, who worked in the interior demolition business, paid EPA agent Stecker to keep silent about various EPA violations. Stecker had already been "turned" by the government and was working as an informant when the money was paid. *Romano* was convicted for bribery. On appeal, *Romano* argued that Stecker was not a "public official" within the meaning of 18 U.S.C. § 201(a). *Id.* at 1057-60.

191. *Id.*

satisfied.¹⁹² Furthermore, the court reasoned that if a person acts in an official function, she qualifies as a public official for purposes of the bribery statute even if she is not an officer or employee.¹⁹³

As discussed in Part III of this Note, the First Lady has no "official" duties defined by statute. Arguably, then, federal bribery laws would not apply to her in the conduct of unauthorized duties. In *United States v. Kidd*,¹⁹⁴ however, the Ninth Circuit Court of Appeals rejected a similar argument. In *Kidd*, the defendant argued that although he bribed an Army private to issue him identification cards, the federal bribery statute could not apply because no statute authorized the private to issue such cards at all; and the private was, thus, not engaged in an official duty.¹⁹⁵ According to the defendant, one must be induced to violate one's "lawful duties" for the Act to apply.¹⁹⁶ The *Kidd* court stated that a "lawful duty" need not be one specifically imposed by statute.¹⁹⁷

In *United States v. Birdsall*,¹⁹⁸ the Supreme Court stated that official action need not be required by statute or even prescribed by a written rule or regulation for federal bribery laws to criminalize the activity in question.¹⁹⁹ In fact, the Court said that a department's "settled practice" could establish official duties sufficient for bribery

192. *Id.* The court explained that Stecker was still an "employee" of the EPA and on the federal payroll; even though he had "turned" government informant, his duties were curtailed, and he had agreed to plead guilty to a crime, the court ruled he was still covered by the statute's concept of "public official" *Id.* at 1059. The court admitted that the issue of determining who fell under the definition of public official had not squarely presented itself before the Second Circuit, but the court believed its interpretation was in line with that of other circuits. *Id.*

193. *Id.* (citing *Hurley v. United States*, 192 F.2d 297, 299 (4th Cir. 1951)).

194. 734 F.2d 409 (9th Cir. 1984).

195. *Id.* at 412.

196. See 18 U.S.C. § 201(b)(1)(C) (1988) (requiring violation of lawful duties to invoke the statute).

197. *Kidd*, 734 F.2d at 412.

198. 233 U.S. 223 (1914).

199. *Id.* at 230-31. *Birdsall*, an attorney for persons indicted for unlawfully selling liquor to Indians, was charged with bribing two special officers appointed by the Commissioner of Indian Affairs—the officer's duty was to advise the Commissioner on matters concerning offering clemency in such cases. *Id.* at 227-28. At issue was whether this "advice" constituted "official action." The Court stated:

To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.

Id. (citations omitted).

laws to apply.²⁰⁰ In the case of the First Lady, the assistance she provides the President in the performance of his duties²⁰¹ might constitute an "official act" for the purposes of federal bribery laws. Thus, federal criminal laws might proscribe a First Lady from accepting compensation²⁰² in exchange for her efforts to influence her husband's opinion even though she is not an officer or employee of the government.

V. CONCLUSION

The First Lady is not an employee or officer of the Government, *de facto* or otherwise. The D.C. Circuit erred in *American Physicians* because it wanted to avoid subjecting FACA to constitutional analysis. The court's reasoning has since come under fire, even within the D.C. District Court.²⁰³

Rather than take the hard road and rule directly on FACA's constitutionality, the D.C. Circuit sought to avoid the issue that as it turns out, it should have taken anyway.²⁰⁴ Instead, it chose to create

200. *Id.*

201. See 3 U.S.C. § 105(e) (recognizing the First Lady's assistance to the President in the performance of his duties).

202. The bribery statutes do not require money to change hands, which might sound implausible, but presumably cover a promise of future employment, or even a campaign contribution to another political candidate in return for her support. See 18 U.S.C. § 201(b)(1) (including within the bribery prohibition "anything of value").

203. In *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009 (D. D.C. 1994), a case in which FACA played a central role, Judge Thomas Jackson was less than fond of the word games the court played to reach its conclusion that FACA did not apply to the Health Care Task Force. Judge Jackson wrote that the *American Physicians* court engaged in "adroit semantics and near-clairvoyant discernment of legislative intent" to avoid subjecting the Health Care Task Force to the strictures of FACA. *Id.* at 104. Yet, the court acknowledged the "importance of avoiding the constitutional issue to the last." *Id.*

204. As far as the legitimacy of the Health Care Task Force was concerned, the tortured statutory interpretation engaged in by the *American Physicians* court to prohibit FACA's application was for naught. The case was precipitated by the belief that everyone in an advisory role on the Task Force was a federal official, with the exception of Mrs. Clinton, and the *American Physicians* court, to preserve FACA, ruled her an official. However, it was later discovered that private individuals sat on the committee, some with advisory roles. Toni Locy, *Judge Asks U.S. Attorney to Probe Magaziner Statement*, Wash. Post A9 (Dec. 22, 1994). Judge Lamberth, in a six page opinion, stated: "We now know, from the records produced in this litigation, that numerous individuals who were never federal employees did much more than just attend working group meetings on an intermittent basis, and we now know that some of these individuals even had supervisory or decision-making roles. The extent to which these individuals were subjected to conflict-of-interest scrutiny is also questionable." *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton* 1994 U.S. Dist. LEXIS 19925 *4.

a legal role for the First Lady that does not exist.²⁰⁵ But even adroit semantics cannot help escape the conclusion that the First Lady is not an officer or employee under the Constitution. The discussion of the First Lady's role in government need not stop here, however.

A careful analysis of the role of the First Lady indicates that her status, though largely undefined, is that of a private citizen. Some statutory restrictions limit the First Lady's conduct, as seen in the application of federal bribery laws, which apply to the First Lady regardless of whether she is a congressionally authorized employee or officer of the government. The law is less clear as to the applicability of other federal ethics laws, which apply only to "officers" and "employees" of the federal government. The First Lady's unparalleled access to the world's most powerful man, our fear of influence peddling, and our assumptions about the sway spouses hold over one another call for Congress to take action to shape and define the legal role of the First Lady.²⁰⁶

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205. See Naftali Bendavid, *The First Lady and the Law*, *Legal Times* 1 (March 15, 1993). Bendavid reported that Republican Congressman William Clinger of Pennsylvania, the senior Republican on the House Government Operations Committee, offered in February, 1993 to sponsor a bill specifically allowing the First Lady to serve on a task force while keeping its meetings secret. White House Counsel Bernard Nussbaum rejected the offer, stating that: "[i]t is our opinion that the Federal Advisory Committee Act . . . does not, and was not intended by Congress to, apply to the health care task force." *American Physicians*, 813 F. Supp. at 89-90 n.12.

206. As Judge Lamberth noted, "Passage of legislation is advantageous. . . . [A]ction by Congress, rather than the judicial rewriting of an inconvenient statute . . . is the proper way for laws to be made in this democracy." *American Physicians*, 813 F. Supp. at 89-90 n.12.

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