



Office of the Attorney General  
Washington, D. C. 20530

September 2, 1988

Honorable George Bush  
President of the Senate  
Washington, D.C. 20510

Re: Washington Legal Foundation and Public  
Citizen v. United States Department of  
Justice, No. 86-2883 (D.D.C. Aug. 4, 1988)

Dear Mr. President:

I am writing to notify you pursuant to Section 21 of Pub. L. No. 96-132, 93 Stat. 1049-50 and 2 U.S.C. 288k(b) that the Department of Justice will not be filing a notice of appeal in the above-referenced case in which the district court held that the Federal Advisory Committee Act (5 U.S.C.A. App. 2) cannot constitutionally be applied to the American Bar Association Standing Committee on Federal Judiciary insofar as that body provides confidential assistance to the Executive Branch in selecting nominees for federal judgeships.

Since 1948, the ABA Committee has provided evaluations of the qualifications of candidates for federal judgeships which have been used by Presidents in the exercise of their constitutional nomination and appointment powers. On October 21, 1986, a suit was filed alleging that this longstanding practice violates the Federal Advisory Committee Act ("FACA"), 5 U.S.C.A. App. 2. Washington Legal Foundation v. United States Department of Justice, No. 86-2883.

Generally speaking, the FACA defines an "advisory committee" as any committee or similar group which is established by statute or reorganization plan, or established or utilized by the President or Executive Branch agencies "in the interest of obtaining advice or recommendations for the President or one or more

agencies or officers of the Federal Government." 5 U.S.C.A. App. 2 Section 3. The Act contains certain procedural and substantive requirements on entities meeting this definition, including: (1) that, absent applicability of statutory exceptions, advisory committee meetings and records be open to the public; and (2) that advisory committee membership be "fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C.A. App. 2 Sections 5, 10.

Plaintiff alleged, inter alia, violations of these provisions, and sought a declaratory judgment that the ABA Committee is being illegally utilized as an advisory committee, and an injunction prohibiting use of the ABA Committee for advice and recommendations on judicial candidates' qualifications until all FACA requirements are met. Plaintiff also sought court ordered access to records and documents of the ABA Committee which relate to their evaluation of potential nominees. Public Citizen Litigation Group intervened and basically supported the Washington Legal Foundation. We notified you by letter dated December 22, 1986 from Assistant Attorney General Richard Willard when this action was filed and what positions we would take in the litigation.

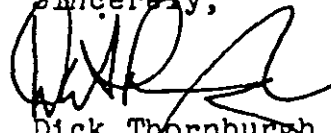
In the district court, we argued that application of the requirements of the FACA to the participation of the ABA Committee in the judicial nomination process raises serious constitutional separation of powers issues, and that consistent with the Constitution, the legislative history of the FACA, and general principles of statutory construction, the FACA should not be construed as applying to entities like the ABA Committee which provide advice to the President and his advisors on matters that are exclusively entrusted to the President by the Constitution. If, however, the Court found that the Act could not be so interpreted, it was our alternative position that the application of the FACA to individuals or groups who advise the President or his immediate designees in matters involving the President's constitutionally assigned functions, including the President's Article II executive and appointment powers, exceeds constitutional limitations upon Congress and impermissibly restricts the President's exercise of his constitutionally assigned powers.

On August 4, 1988, the district court rejected our first argument and held that the FACA does cover the ABA Committee. It then held the FACA unconstitutional insofar as it interferes with the Executive's nomination power.

Under 28 U.S.C. 1252, any party may appeal to the Supreme Court when an Act of Congress has been held unconstitutional.\* On August 26, 1988, Washington Legal Foundation appealed this matter to the Supreme Court. The time for the Department of Justice to appeal on its own expires on September 3, 1988. However, under Supreme Court Rules 11.5 and 12.4, a cross-appeal may be filed within 30 days of the date on which the original appellant docketed his appeal by filing a jurisdictional statement.

We have determined not to file an appeal. Although we are presently considering what position to take in the Supreme Court in this litigation, it is possible that we may defend the judgment of the district court on the ground that application of FACA in the present circumstances would be unconstitutional. Accordingly, we are hereby providing formal notice to Congress required by the provisions of Section 21 of Pub. L. No. 96-132, 93 Stat. 1049-50, as continued by various subsequent acts. Under that section, the Attorney General is directed to "transmit a report to each House of the Congress" in any case in which the Attorney General determines that the Department of Justice "will refrain from defending \* \* \* any provision of law enacted by the Congress, in any proceeding before any court of the United States \* \* \* because of the position of the Department of Justice that such provision of law is not constitutional." Alternatively, we may defend the judgment solely on statutory construction grounds, in which case Section 288k(b) seems to apply here, because we are not appealing a "court decision affecting the constitutionality of an Act \* \* \* of Congress."

Sincerely,



Dick Thornburgh  
Attorney General

cc: Mr. Michael Davidson  
Senate Legal Counsel  
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\* Section 1252 has been repealed, but the repeal is not effective as to judgments entered before September 25, 1988.