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## **Comments**

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### The First Lady as Formal Advisor to the President

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# The First Lady as Formal Advisor to the President: When East (Wing) Meets West (Wing)

MaryAnne Borrelli, Connecticut College

**ABSTRACT.** Drawing on archival research, this article examines how the position of the first lady has been formally defined, and how that definition has affected presidential advising by first ladies. Three first ladies—Eleanor Roosevelt, Rosalynn Carter, and Hillary Rodham Clinton—have served in a formal capacity within the executive branch. In each instance, the first lady’s appointment, and subsequent exercise of formal and informal power, carried significant implications for our understanding of this position, the presidency, and the political system. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <getinfo@haworthpressinc.com> Website: <http://www.HaworthPress.com> © 2002 by The Haworth Press, Inc. All rights reserved.]*

Political scientists and historians have long acknowledged the evolutionary character of the first lady’s position. Rather than being created—or even established—by a single actor or process, the post of the first lady is a cultural tradition. It has evolved over time, reflecting the values of the polity, the presidency, and the presidential family. But only studying the evolutionary aspect of the office of first lady neglects an important aspect of her position. In addition to her informal role, the first lady is a formal member of the White House Office. Particularly during the latter part of the twentieth century, there has been a legislative and judicial concern to define this post and also this office. What has been the effect of statutory and case law on the first ladies’ actions, as formal and informal presidential advisors, been affected?

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In one administration after another, first ladies have made significant political contributions. Surveying administrations from that of George Washington to Bill Clinton, O'Connor, Nye, and van Assendelft (1996) found that at least 31 first ladies discussed politics with the president, 26 were confidantes or advisors ("screening correspondence, highlighting news articles, and editing speeches"), and 14 "influenced" the appointment process (846). Similarly, Barbara Burrell (1997a, 1997b) found that first ladies have often been members of the presidents' inner circles. Given these roles, perhaps it is not surprising that there has also been an ongoing concern about the accountability of these presidential advisors. Though public opinion has historically checked first ladies, law has recently become another means by which their actions have been reviewed and their discretion has been limited.

Imposing legal constraints on a presidential advisor, however, is no simple matter. Legislative involvement in White House consultations and staffing raises questions about the proper separation of powers. Too much legislative involvement may inhibit the president's proper exercise of Article II powers. Further, the fact that the first lady and president are married raises privacy concerns. Yet first ladies have served as policy advocates, spokespersons, campaign surrogates, and presidential partners. Consultations between first ladies and presidents are not merely private—they are also politically substantive and, therefore, public. Some have suggested that the first lady's marital relationship with the president gives her undue influence; this informal power leads some commentators to conclude that the president's wife should not engage in presidential politics. As even this brief overview indicates, the formal definition of the first lady's position—the explicit grant of formal power and the equally explicit statement of constraints on the exercise of that power—involves the negotiation of competing visions of legislative-executive relations and gender relations.

This article studies how these negotiations have proceeded. It documents first the emergent formal definition of the position and office of the first lady. The associated legal developments have at once constrained the first lady's informal power and invested her with formal power. The analysis then proceeds to consider how these laws have affected the first lady's performance of formal presidential advising. On the one hand, it seems that the first lady's post is so rooted in historical practices and personal relationships that it defies legal definition. Given the informal power that is gained through their access to the chief executive, first ladies could circumvent legal constraints on their political activism. On the other hand, law sets a standard for claims to authority and for the exercise

of power in the United States. Federal officials are both constrained and protected by the law, and there are few reasons why the first lady should be a singular exception to this otherwise routine practice.

***DESCRIBING THE FIRST LADYSHIP:  
DEFINING THE POSITION  
AND OFFICE OF THE FIRST LADY***

To date, the dominant approaches taken in studying the first ladies have been historical and biographical. Anthony (1991) and Caroli (1995) are exemplars of this method of study. They address each first lady in a distinct chapter, with the first ladies' life stories framing the analysis. Though themes run through the chapters and give coherence to the volumes, the women are treated more as individuals than as successive occupants of a White House position (see also Truman 1995).

This attentiveness to the first ladies as singular persons is evident even in works that analyze the first lady's more institutional roles. Gutin (1989), for example, has conducted an excellent study of the rhetorical style and content of the first ladies' remarks and speeches. Even so, each of her chapters focuses on a single first lady and begins with a biographical overview. Similarly, Troy (2000) profiles each first lady before examining her role in presidential image-making. That these authors presented the first lady this way suggests the strength of the biographical framework as an organizing principal. Although these authors carefully compare and contrast the first ladies—and thus look across presidential administrations—their unit of analysis remains the individual woman rather than the position or office.

What we gain from the biographical approach is an appreciation for the informal power of the first lady. Robert Watson (2000) carries this insight to its logical conclusion, classifying first ladies according to their performance of “eleven fundamental duties”: wife and mother; public figure and celebrity; nation's social hostess; symbol of the American woman; White House manager and preservationist; campaigner; social advocate and champion of social causes; presidential spokesperson; presidential and political party booster; diplomat; political and presidential partner (72). Though each of these has political content, few are readily susceptible to legal codification. And, in actuality, Watson concludes that “vague legal parameters” have been an important factor in the position's evolution (47). The first lady's post is thus presented as almost exclusively informal in nature.

Yet, it would be more accurate to state that scholars have most often examined the cultural institution of the “first ladyship” rather than the formal position of the first lady. This latter analysis gained momentum in 1993, however, when three interest groups brought suit against First Lady Hillary Rodham Clinton as chair of the President’s Task Force on Health Care Reform. With an array of cabinet members and senior White House staff members on the task force, and an interdepartmental working group of more than 300 members, the task force conducted closed door meetings to facilitate discussion and decision-making. Objecting to this practice were the Association of American Physicians and Surgeons, Inc. (AAPS), representing medical doctors engaged in legal, sociological, and public relations aspects of medicine; the American Council for Health Care Reform, advocating on behalf of free market approaches to medical care reform; and the National Legal and Policy Center. Seeking access to the task force deliberations, these organizations filed for a temporary injunction and restraining order. They argued that the Federal Advisory Committee Act (FACA; PL 92-463) stipulated that meetings must be open, with minutes provided to the public, when the membership of an executive advisory body included other than full-time federal employees or officials. The task force member who failed to satisfy this criterion was its chair, the first lady. Suddenly the legal status of the first lady—and thus the formal definition of this position—was a matter of immediate concern.

### *The Statutory Law*

Three laws—the Postal Revenue and Federal Salary Act of 1967 (PL 90-206), the Anti-Deficiency Act of 1884 (31 USC 1342), and the White House Personnel Authorization Act of 1978 (PL 95-570)—are relevant to the first lady’s position (see Appendix A). At once complementary and contradictory, these statutes provide only limited guidance in formally defining, let alone constraining, the first lady as a member of the White House Office.

Section 221 of the Postal Revenue and Federal Salary Act of 1967 prohibited nepotism in executive branch employment, appointments, and promotions. In hearings, senators warned that this law would close all executive branch positions, including those in the military, to members of the president’s family (*Congressional Record* 1967). Still, no exemptions were suggested or adopted. So long as this law was in effect, a president’s wife could not be appointed to or employed in an executive branch position. Her actions would be limited to the informal duties and powers of the first ladyship.

Reinforcing this statute were laws governing the payment of federal employees and officials. Violators of the anti-nepotism law were not entitled to payment for their services (5 USC 3110(c)). Yet, the Anti-Deficiency Act banned all voluntary governmental service, unless given to save a life under emergency conditions (31 USC 1342). Thus, a first lady could not be paid to work in the executive branch without violating two strictures of the anti-nepotism act, and she could not volunteer without violating one stricture in the anti-nepotism law and also the Anti-Deficiency Act (see also Krausert 1998). Under these circumstances, the sanctions against the first ladies' service in the executive branch seemed complete and unequivocal. Not only was the first lady denied a formal post, but the acceptability of her performing even the responsibilities associated with the first ladyship was called into question.

The Office of Legal Counsel (OLC) in the Department of Justice, however, uncovered possibilities where none were thought to exist. The OLC concluded that there were "two conditions under which uncompensated services may be accepted by the government even when no explicit statutory authority exists [for their acceptance]: (1) when rendered 'in an official capacity under regular appointment to office'; and (2) when otherwise permitted by law to be nonsalaried because there is no minimum required salary" (Nolan 1992, 126). The first lady arguably was a legal volunteer within the executive branch. Though she was not paid for doing so, she performed a variety of duties on behalf of the president. For example, she traveled throughout the world as a presidential representative, she delivered speeches and made public announcements, and she hosted organizations at the White House and conducted substantive policy meetings. Proposals to salary the first lady having been soundly rejected by the public, it seemed that the voluntary character of her political contributions was accepted as the norm. Thus, the catch-22 of the anti-nepotism law (relatives cannot be paid for their government service) and the anti-deficiency law (volunteers cannot perform government service) had been eliminated. The first step had been taken in protecting the informal power of the first lady.

But what about the injunction imposed by the anti-nepotism law? The 1978 White House Personnel Authorization Act seemed to exempt the first lady from this prohibition, as well. Section 105(e) of this act, titled "Assistance and Services for the President," related to the first lady.

(e) Assistance and services authorized pursuant to this section to the President are authorized to be provided to the spouse of the President in connection with assistance provided by such spouse to the



President in the discharge of the President's duties and responsibilities. If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President's family whom the President designates. (PL 95-570, 105(e))

Arguably, 105(e) formally identified the first lady as an assistant to the president, as a senior member of the White House staff who presided over other presidential aides. In support of this contention, there was the subsection's acknowledgement that the spouse offered "assistance . . . in the discharge of the President's duties and responsibilities." Additionally, the first lady was being legislatively identified as an executive within a White House unit. To this way of thinking, Section 105(e) established an office of the first lady that was similar to the office of the vice president. Because she already held a formal office, the first lady could undertake other responsibilities throughout the administration and the executive branch, including those that involved receiving a presidential appointment (see *AAPS et al. v. Clinton* Brief for the Appellants 1993; *AAPS et al. v. Clinton* Brief for Plaintiff-Appellees and Cross-Appellants 1993; *AAPS et al. v. Clinton* Reply Brief for Plaintiff-Appellees and Cross Appellants 1993).

Alternatively, it was possible to argue that 105(e) did not even address the formal position of the first lady. This law still defined the first lady in terms of her spousal relationship to the president. Moreover, first ladies were "designated" rather than appointed, a significant distinction since the prohibitions of the anti-nepotism law related to federal officers and employees who were appointed to or employed in their posts. These considerations suggested that 105(e) circumvented, rather than overturned, the anti-nepotism law. A 1977 OLC opinion stated that "Mrs. Carter would not be regarded as a special Government employee solely on the ground that she may discuss governmental matters with the President on a daily basis" (Harmon 1977, 22). Nothing in 105(e), according to those who favored this second interpretation, gave cause to revise this conclusion (see Wasserman 1995). The first lady could apparently exercise informal power through the first ladyship, but she was prohibited from exercising formal power as a federal employee or officer in the executive branch.

These debates about the first lady's formal status and power did not discourage modern presidents' wives from becoming more deeply involved in presidential policy-making processes. Their engagement did, however, raise questions about the accountability and responsiveness of

the first lady as a presidential advisor. This was the matter addressed by the federal courts when ruling on the *AAPS et al. v. Clinton* (1993).

### ***The Case Law***

The Association of American Physicians and Surgeons, Inc. (AAPS), the American Council for Health Care Reform, and the National Legal and Policy Center argued that the first lady's status as a federal officer had to be determined by reference to legal standards, not tradition. And they maintained that law precluded the first lady from being a full-time federal official. The United States Code (USC) stipulated that a federal official had to be appointed to office, yet the first lady could claim no such authorization under Section 105(e) and was prohibited from doing so by the anti-nepotism law. Thus, she was a private citizen and the task force meetings had to be open to the public (*AAPS et al. v. Clinton* Plaintiff's Memorandum 1993; *AAPS et al. v. Clinton* Brief for Plaintiff-Appellees and Cross-Appellants 1993; *AAPS et al. v. Clinton* Reply Brief for Plaintiff-Appellees and Cross-Appellants 1993).

The government, however, claimed that the first lady was the "functional equivalent" of a full-time federal officer, citing congressional authorizations of funding and staff for the president's spouse to assist the president. In the words of the government's memorandum to the District Court, "History, legislative enactments, and practical realities place this First Lady and all First Ladies among the President's closest advisors and government 'insiders'" (14-15). Section 105(e), therefore, buttressed arguments for, as well as against, the first lady's claim to be a federal official (*AAPS et al. v. Clinton* Brief for the Appellants 1993; *AAPS et al. v. Clinton* Brief for Plaintiff-Appellees and Cross-Appellants 1993; *AAPS et al. v. Clinton* Reply Brief for Plaintiff-Appellees and Cross-Appellants 1993).

The D.C. District Court concluded that the first lady failed to conform to the legal definition of a federal official (*AAPS et al. v. Clinton* 1993a). On appeal, however, the D.C. Circuit Court reversed that judgment (*AAPS et al. v. Clinton* 1993b). The majority opinion identified the first lady as a *de facto* federal official for the purposes of FACA, though it refused to rule on the first lady's status in relation to other statutes (*AAPS et al. v. Clinton* 1993b).

A concurring opinion by Circuit Court Judge James L. Buckley signaled that debates about the first lady's legal status were far from over. After carefully examining the law, Buckley concluded that the first lady was neither a federal official nor a federal employee. Further, he wrote,

the anti-nepotism law did apply to the president's wife and 105(e) did not establish an office of the first lady (*AAPS et al. v. Clinton* 1993b). If the majority opinion offered a cautious endorsement of the first lady as a formal member of the executive branch, Buckley's opinion questioned whether she could even be an informal participant in its workings.

This analysis of the statutory and case law related to the first lady begins to suggest the problematic nature of this actor's status within the executive branch generally, and the presidency specifically. Still, the political and policy implications of the law have yet to be considered. For this, we turn to case studies of those instances in which first ladies have served as formal advisors to the president. It is on these occasions that the law has been most closely scrutinized. Likewise, it is in fulfilling this role that the first lady has been subjected to the most searching review.

### ***THE FIRST LADY IN THE EXECUTIVE BRANCH: FORMAL AND INFORMAL POWER IN PRACTICE***

Statutory and case law have each made their contributions to the institutional development of this position and office within the White House. Law has constrained the first lady's ability to serve as a presidential advisor, as seen in the anti-nepotism and anti-deficiency statutes. Law has also enhanced the first lady's capacity to contribute to presidential decision-making, as seen in the White House personnel authorization and the *AAPS et al.* appellate ruling. Having acquired an appreciation for the workings and complexities of formal power in this position and office, we can begin to determine how formal and informal power have each been exercised by the presidents' wives.

Though a first lady arguably exercises formal and informal power whenever she performs a political act, she does so most obviously when serving as a presidential appointee. As an officeholder within an established hierarchy, the president's wife acquires a formal identity. Her supervisors are formally established, as are the standards for her performance. At the same time, informally, the first lady retains access to the chief executive, endures intense scrutiny, and confronts conflicting standards for her behavior.

These tensions could be resolved by applying the anti-nepotism and anti-deficiency statutes. The first lady could simply be prohibited from formal executive branch service, even to the point of limiting the duties that are presently and informally attributed to the first ladyship. The first lady would become the president's dependent, even his satellite; she

would be denied any professional benefits from her husband's election to presidential office. Such an outcome, however, would ignore her contributions to his political success. According to Georgia Duerst-Lahti (1997), the husband's career accomplishments would be his alone; they would not become the communal property of the marriage.

Alternatively, the first lady's opportunities for service could be protected by relying on an expansive reading of the appellate ruling in *AAPS et al. v. Clinton*. As an executive branch appointee, a first lady's formal service could be viewed as an extension of duties historically performed by her predecessors. In the appellate opinion, a majority of justices dismissed distinctions between the office of the first lady and the first ladyship. If this could be extended to other legal contexts, it would be an extraordinary grant of formal authority.

Political practice has fallen between these extremes. Just as first ladies have been limited and empowered by the law, they have had lesser and greater amounts of formal power. They have also been more and less able to utilize their informal power. The following brief case studies examine this dynamic of formal and informal power in each instance of a first lady's appointment to an executive branch position. The first ladies and their appointments are Eleanor Roosevelt, Assistant Director of the Office of Civilian Defense (OCD); Rosalynn Carter, Honorary Chairman [*sic*] of the President's Commission on Mental Health; and Hillary Rodham Clinton, Chair of the President's Task Force on National Health Reform.

The first ladies and their appointments span approximately fifty years in the institutional development of the first lady's position. As first lady, Eleanor Roosevelt encountered no legal constraints on her appointment to a position in the executive branch. Her experiences, therefore, provide an indication of what might be required to formally ensure the first lady's accountability and responsiveness, given the extent of her informal power. The Rosalynn Carter case strongly contrasts with that of Eleanor Roosevelt, as the anti-nepotism act was narrowly interpreted when First Lady Carter sought an appointment to her husband's mental health commission. A study of Carter's political activism as a formal advisor, therefore, begins to indicate the extent to which a first lady's discretion may be formally constrained. In contrast to Roosevelt and Carter, Hillary Rodham Clinton held office at a time when the position of the first lady seemed to receive its most notable grant of formal power. Thus, these cases cumulatively reveal the intermixing of formal power and constraint with informal power and constraint, when first ladies are appointed to serve as presidential advisors.

***Eleanor Roosevelt, Assistant Director of the Office of Civilian Defense (September 1941-February 1942)***

President Roosevelt established the Office of Civilian Defense (OCD) in May 1941, the same month in which he declared an unlimited national emergency. The agency was directed to recruit civilian defense volunteers, signaling the imminence of war to a still-isolationist population. The agency's part-time director was Fiorello La Guardia, then mayor of New York City.

Throughout the war years, Eleanor Roosevelt upheld social reform ideals that she considered the core of the New Deal programs. In 1941, she believed that the OCD could give programmatic expression to those values, preventing the war from eclipsing the New Deal's advances. Instead, La Guardia focused on military preparedness, inventorying municipal resources and enlisting air raid wardens and aircraft spotters. Frustrated, Eleanor criticized the mayor, first in conversations with the president and then in a press conference. Shortly thereafter, La Guardia offered her the OCD assistant directorship (Beasley 1983, 247; Goodwin 1994, 280-281, 324-325; Gutin 1989, 90-91; Lash 1982, 355, 374; Roosevelt 1958, 230; Roosevelt to Kerr 1942).

The appointment was discussed at one of the first lady's press conferences.

Question: How did you happen to take a public job?

Eleanor 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 and the President and me, both. The President has to approve anyone who is going to be in a position.

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

ER: Just as he would ask about anyone he was bringing in as an 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. (Beasley 1983, 224)

Refusing to comment on her husband's "personal" views, Eleanor Roosevelt framed her OCD appointment as a personnel decision based on political and policy considerations. Doing so reflected the fact that the first lady faced no distinctive legal constraints in being appointed to her husband's administration.

True to his invitation, La Guardia gave Eleanor the opportunity to act on her ideas, so much so that she felt he abdicated his own responsibilities as director (Roosevelt 1958, 225). To condense history, continuing conflicts between Eleanor and the mayor eventually led to his being replaced by Harvard Law School Dean James Landis (Goodwin 1994, 324-325). Meanwhile, the attack on Pearl Harbor shifted White House priorities in favor of military preparedness (Roosevelt 1958, 230). An OCD authorization provided congressional critics with an opportunity to disparage the first lady's personnel choices and programs (*Congressional Record* 1942; Lash 1982, 368-375). Initially determined to outlast the criticism, Eleanor Roosevelt resigned as assistant director when she concluded that her presence "would bring more harm than good to the program" (Roosevelt to Kerr 1942).

This first case study demonstrates the complications that may result from a first lady's appointment to a position in her husband's administration. A first lady's access to the president is a formidable grant of informal power, enabling her to evade established bureaucratic hierarchies and to pursue her own policy priorities. As much was seen in Eleanor's success in displacing OCD Director La Guardia. Yet, there are also powerful informal checks on the first lady. As assistant director, Roosevelt's statements and actions were closely scrutinized. Congressional debate about the OCD authorization, for example, veered into protracted tangential discussions about Assistant Director/First Lady Roosevelt's programmatic and personnel decisions.

By any standard, Eleanor Roosevelt's tenure as the OCD assistant director was a failure. Few of her programs were implemented and even those were discontinued shortly after she left office. However insightful her proposals, Roosevelt's ability and willingness to end-run established processes caused her to be viewed as more threatening than creative. Though the federal anti-nepotism law is typically attributed to concerns about Robert Kennedy's service as attorney general, similar attitudes were generated by Eleanor Roosevelt's actions as OCD assistant director. Rather than legitimizing presidential appointments for first ladies, she raised serious questions about their wisdom and efficacy. It did not seem that first ladies would be granted formal power so much as they would find their informal power increasingly scrutinized.

***Rosalynn Carter, Honorary Chairman of the President's Commission on Mental Health (February 1977-April 1978)***

Reflecting on the 1976 presidential campaign, Rosalynn Carter concluded that she had made one promise in her own name, which was to conduct a study of the nation's mental health needs. The stigma associated with mental illness, coupled with funding cuts, had resulted in a fragmented and limited set of services. When the Carters entered the White House in 1977, the last systematic assessment of national mental health needs had been prepared in the Kennedy administration, over 15 years earlier (Foley and Sharfstein 1983).

Rosalynn Carter described her learning about mental health as personal and political. As a child, she remembered, she was fearful of a distant cousin who was periodically treated at a state hospital, even though he "probably wanted nothing more than friendship and recognition" (Carter 1984). Then, throughout the Carter gubernatorial campaign, she learned that many families were concerned about caring for their mentally ill. As first lady of Georgia, she was the principal force behind the establishment of a gubernatorial commission, and she subsequently participated in its meetings and field research. Her commitment was rewarded when many of the commission's recommendations were implemented (Carter 1984, 73, 94-95; Gutin 1989, 149).

In 1976, therefore, Rosalynn Carter spoke with a record of accomplishment in this policy area. But could she step from membership in a governor's commission to leadership of a presidential commission? To ensure her success, Carter advisors throughout the presidential transition briefed the first lady-elect on prospective administrative and political problems. The appointment itself was seemingly a foregone conclusion (Bourne to Carter 1976; Bryant to Huron 1977; Foley and Sharfstein 1983, 113). On the day the president issued the executive order establishing the commission, however, the Office of Legal Counsel (OLC) concluded that the federal anti-nepotism law prohibited the first lady from formally participating on the commission (Kneedler to Harmon 1977, 1).

To accomplish the required detachment from the Commission's Federal function, Mrs. Carter should at least have no formal authority or duties relating to the Commission's work and avoid being the moving force behind its operations—e.g., in selecting staff, convening meetings, conducting hearings, establishing policy, or formulating recommendations. This would not, however, prohibit Mrs. Carter from attending meetings or hearings (although perhaps she should

not do so on a regular basis), submitting her ideas to the Commission for consideration, or offering her support and soliciting support from others for the Commission's work. It is my understanding that First Ladies have in the past assumed this type of advocate's role in connection with Government programs in which they were especially interested, and it would seem to make no difference here that Mrs. Carter may have an honorary title that really only serves to highlight her interest. (Kneedler to Harmon 1977, 15)

The phrasing of the OLC memorandum is highly significant. It endorses a publicly visible role for the first lady—making specific reference to her historic contributions as an “advocate”—while cautioning against a substantive role as a policy advisor. This is an unworkable distinction, given the importance of public presentation in the modern presidency (see Kernell 1997; Stuckey 1991). If it is ignorant of modern presidential practices, however, the OLC opinion is conversant with the responsibilities traditionally assigned to men and to their wives. It reserved politics and politicking to the president, leaving the helpmate and decorative functions to the first lady. If Rosalynn Carter merely issued moral pronouncements, she would not call into question the prevailing gendered allocation of power. If, however, she made substantive contributions to the policy development process, the OLC concluded, she would be overturning tradition and breaking the law.

At the last minute, Dr. Thomas E. Bryant was appointed commission chair and Rosalynn Carter was named “honorary chairman” (*Public Papers* 1977, 185-189). Though Bryant and the first lady had a constructive and complementary working relationship, Rosalynn objected to her “honorary” status (*Public Papers* 1980, 2100). Even in her memoirs, she wrote, “[b]ecause of federal nepotism laws, I could not be appointed the formal chairperson of the commission but had to *settle* for ‘honorary’ instead” (Carter 1984, 272-279) (emphasis added). Carter perceived the loss of the chairmanship as a loss of formal power for which she had served a rigorous apprenticeship in state and electoral politics.

As honorary chairman, Carter disregarded the OLC guidelines. She and the president selected the commissioners. She attended all but three commission meetings. She convened and presided over all of the public hearings (President's Commission on Mental Health Files). She became the primary advocate for the commission report, lobbying within the White House and throughout the administration, as well as giving numerous speeches and interviews (Onek and Elms to Eizenstat 1978; Gutin 1989, 151). She testified before the Senate Labor and Human Relations



Committee on behalf of the Mental Health Systems Act and was universally recognized as having been “instrumental” to its passage (*Congressional Record* 1979; Torrey 1988, 189-197). Thus, she successfully leveraged her informal power and status against the formal constraints, entering the executive and legislative policy-making processes and becoming a political actor in her own right.

Though Carter’s designation as honorary chairman ensured that she had no “formal authority or duties,” the commission’s own transcripts and documents indicate that she was most definitely “the moving force behind its operations” (President’s Commission on Mental Health Files). It remained to be seen, though, what effect Carter’s accomplishments would have on the position of the first lady. Because she had been obliged to renounce the formal power of a commission chair for the informal power of the first ladyship, her policy contributions could be attributed to her personal ambition. Under these circumstances, Carter’s success could reinforce fears that a politically adroit first lady would choose to be neither accountable nor responsive to the public.

***Hillary Rodham Clinton, Chair of the President’s Task Force on National Health Reform (January 1993-1994)***

President Clinton named First Lady Hillary Rodham Clinton as the unsalaried chair of his Task Force on National Health Care Reform on January 25, 1993 (*Public Papers* 1993, 15). The president described Clinton as qualified for this position because she had chaired education and health reform committees at the state level, and had been a member of the Southern Regional Task Force on Infant Mortality and the Arkansas Children’s Hospital Board (*Public Papers* 1993, 13-16). Like Rosalynn Carter, Hillary Rodham Clinton had credentials as a political and policy advisor, which supported her claim to formal power.

The first lady would need to draw on that experience and expertise in chairing the task force. Access to health care was an exceptionally complex matter. Although Bill Clinton first commented on the issue during the New Hampshire primary, a coherent proposal had never been developed. Still, polling revealed that a significant percentage of voters had supported Bill Clinton in anticipation of health care reforms; the issue even seemed a possible base for renewing the middle class Democratic coalition. As a difficult policy problem with a high public profile, the health care task force promised to be a significant political challenge. Yet, there were further complications. Task force members included six cabinet secretaries, the Office of Management and Budget director, and

three of the most senior White House aides. An interdepartmental working group had more than 300 federal government employees. With so many individuals of such different ranks, meetings and consultations were cumbersome. Accordingly, closed door meetings were conducted to facilitate discussions. In response, the Association of American Physicians and Surgeons, Inc. (AAPS), the American Council for Health Care Reform, and the National Legal and Policy Center filed suit, requesting that the task force meetings and minutes be opened to the public (Drew 1994).

Litigation relating to the task force extended from 1993 into 1995, as the interest groups challenged the task force's compliance with the Federal Advisory Committee Act. These were not the only legal challenges to confront the first lady as task force chair. When it became known that Clinton held shares in a mutual fund which had profited from judicial trading at the time of her congressional testimony, a group of legislators became convinced that the first lady had violated criminal conflict of interest laws. The Office of Government Ethics (OGE) subsequently vindicated Clinton. Yet, OGE's ruling included the suggestion that the federal conflict of interest laws might not even be applicable to the first lady. Though the statutes obviously applied to *de jure* federal officials, the first lady's exceptional status was in need of further definition (*AAPS et al. v. Clinton* 1993b; Hasson 1993, A4; Krausert 1998; Locy 1994; Wasserman 1995).

The policy process imposed further checks on Clinton. Although the Congress did consider the task force report, with Clinton's testimony in committee hearings being praised for its substantive content, there were no legislative enactments. Nor were there significant budgetary or programmatic reforms. The possibility of a new middle class coalition based on health care reform was never realized. Likewise, the potential for a formally strengthened position for the first lady evaporated. Even though public opinion polls indicated that a majority of the public did not attribute the task force failure to Clinton's leadership, she publicly retreated from her role as a formal presidential advisor (Burrell 1997b; Guy 1995). Not until she declared herself a candidate for the U.S. Senate did Hillary Rodham Clinton again lay claim to formal political power. Instead, she performed duties associated with the first ladyship, her public statements focusing on such "women's issues" as social programs and human rights. Though she was a force within the Clinton White House, Hillary Rodham Clinton, nonetheless, relied on her informal rather than her formal power for most of her husband's eight years in the Oval Office. This first lady's

formal power was checked by both the formal processes of policy making and the informal dictates of public opinion.

### DISCUSSION

An informal institution for much of its history, the first lady's position has recently been defined through statutory and case law. This apparent innovation, however, evidences a striking continuity with past practices: Both the formal descriptions and the informal expectations of the first lady follow from her relationship to the president. Thus, the first lady has found her opportunities for service in the wider executive branch constrained by the federal anti-nepotism statute. And yet, the first lady has been granted resources so that she, as the "president's spouse," could assist the chief executive. Biographical analyses of the first ladies indicate that this assistance has historically been rendered through traditionally feminine roles such as those of wife and mother, and nation's hostess and social advocate (Watson 2000). In the past, first ladies have served as presidential advisors because they were wives, not because they were presidential appointees.

This circumstance clarifies why *AAPS et al. v. Clinton* marks an important stage in the institutional development of the first lady's position and office. In this case, for the first time, the first lady is formally identified as a political actor in her own right. In addition to acknowledging the first lady's historic contributions to the presidency, the majority opinion identified this individual as a *de facto* federal official for the purposes of the Federal Advisory Committee Act. The first lady, then, was a legitimate and formally defined post and office within the White House. No longer can the political activism of the president's wife be dismissed as the expression of one woman's ambition.

Still, this court ruling does not resolve all of the tensions or difficulties associated with the first lady's service as a presidential appointee. Most notably, it does nothing to control or correct the potential for the first lady's abuse of her informal power. Every presidential advisor gains power through her or his relationship with the chief executive. It is on the basis of that relationship, after all, that an advisor's claims to power become credible. Yet, presidential "cronies"—and one must include the president's wife among his friends and intimates—may damage an administration even as they ostensibly work for its success. Their close relationship with the chief executive may allow them to evade established routines for "staffing out" proposals. Time and again, this disregard for process has generated scandals that

have profoundly disrupted presidential administrations. Elements of these practices were seen in the Eleanor Roosevelt case study above. In that instance, an agency director was essentially fired because he did not implement the first lady's priorities, even though his actions were congruent with presidential priorities.

Moreover, the *AAPS* majority opinion does impose qualifications in its grant of power to the first lady. It states only that the first lady is a *de facto* federal official for the purposes of FACA. The broader legal implications of her *de facto*, as opposed to *de jure*, status have yet to be determined. The applicability of federal criminal conflict of interest statutes, the extent to which the first lady is protected by executive privilege, even her susceptibility to civil suit as a policy advisor have yet to be established (Broyde and Schapiro 1988, 501-502; Hasson 1993, A4; *In re Grand Jury Subpoena Duces Tecum* 1997; Krausert 1998; Patel 1998; Quinn, Connaughton, and Rozell 1998, 23; Wasserman 1995). During the Clinton administration, as noted in the case study, this ambiguity left the first lady vulnerable to litigation. That, in turn, may have contributed to Clinton's subsequently less public and less formal role as a presidential advisor: Repeated challenges to her formal power led to a reliance on informal power.

The position and office of the first lady, therefore, are best understood as being at an important and difficult stage in their development. The formal authorization of the first lady's political activism can be viewed as empowering an already threatening figure in the White House Office—a view that is held by many executive branch observers. Alternatively, the formal legitimization of the first lady as a presidential advisor may open the president's wife to new charges of malfeasance—a conclusion that could be ascribed to many of the first ladies. Meanwhile, Justice Buckley's concurring opinion adds to the uncertainty, by offering grounds for overturning the appellate ruling.

Under these circumstances, it is important to note that there are stringent checks on the formal and informal power of the first ladies. In each of the case studies above, the first ladies' initiatives encountered significant challenges in Congress. If a first lady's informal power permits her to circumvent process within the White House, it does not seem that the separation of powers allows her to do so in the larger political system. The polity, therefore, may sometimes feel threatened by the first lady, but its governmental institutions are in no danger.

If the polity can withstand the tensions accompanying the institutional development of this position and office, can the first ladies? Perhaps not. The problematic nature of the first lady's formal power may encourage

presidents' wives to be less public—and less formal—in their politicking (Fraser 1983, 1989). Enduring stereotypes of political wives also recommend such a strategy. The presidential mythology still resonates with the values of autonomy and individuality, strength and decisiveness. Suggestions that the chief executive is anything else are resisted and even scorned (Duerst-Lahti 1997; see also Butler 1990). At the same time, the sexual intimacy of marriage generates its own mythology of a woman's ability to seduce and dominate her mate (Jamieson 1995). On the one hand, then, the president is expected to be independent of his advisors; on the other, he is presumed to be susceptible to the first lady's scheming. It is in the national interest, then, to control (and even marginalize) the first lady. In an effort to avoid this outcome, first ladies may resort to being purely informal presidential advisors. If so, they will vindicate the autonomy of the presidents by stripping themselves of their opportunities.

Yet, if they choose this political strategy—and make the associated professional sacrifices—the first ladies will set a destructive example for the public and for other presidential advisors. In ceding their careers to their husbands, they will endorse inequality and encourage political alienation. In avoiding popular scrutiny, they will negate democratic ideals of accountability and responsiveness. Because they hold a position that is cultural and political, informal and formal, the choices of the presidents' wives profoundly affect the legitimacy and the institutional capacity of the presidency. Accordingly, the mixture of formal and informal power in the first lady's position is necessarily a matter for continuing study.

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Public Law 92-463, Federal Advisory Committee Act.  
Public Law 95-570, White House Personnel Authorization–Employment.  
5 United States Code 3110, “Employment of relatives; restrictions.”  
31 United States Code 1342, “Limitation on voluntary services.”

### APPENDIX A. DETERMINING THE LEGAL STATUS OF THE FIRST LADY: APPLICABLE STATUTES

#### ***POSTAL REVENUE AND FEDERAL SALARY ACT (1967)***

Section 221 of this act is the federal anti-nepotism law. It declares that a “public official may not appoint, employ, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position 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.” Individuals appointed in violation of this law are not entitled to payment for their services. This law apparently prohibits the first lady from serving in any executive branch position, given her husband’s supervisory status as chief executive.

#### ***THE ANTI-DEFICIENCY ACT (1884)***

The anti-deficiency act was passed to control agency employment practices and thus to safeguard the congressional power of the purse. The anti-deficiency act was amended on several occasions and ultimately banned all voluntary service to the government, unless given to save a life under emergency conditions.

#### ***WHITE HOUSE PERSONNEL AUTHORIZATION ACT (1978)***

Passed during the Carter presidency, this law authorizes the White House staff. Section 105(e) authorizes the appointment of staff to aid the president’s “spouse” in providing support to the president. An unmarried president may “designate” a family member to serve in this role and thus to receive the resources.