



United States General Accounting Office

GAO

Report to the Chairman, Committee on
Governmental Affairs, U.S. Senate

October 1988

FEDERAL ADVISORY COMMITTEE ACT

Presidential Commission on AIDS: Compliance With the Act

114973
216411



U.S. Department of Justice
National Institute of Justice

114973

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by
Public Domain/U.S. General
Accounting Office

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.



United States
General Accounting Office
Washington, D.C. 20548

114973

General Government Division

NCJRS

B-231314

JAN 15 Rec'd

October 19, 1988

The Honorable John Glenn
Chairman, Committee on Governmental
Affairs
United States Senate

ACQUISITIONS

Dear Mr. Chairman:

This report responds to the Committee's request that we review the compliance by the Presidential Commission on the Human Immunodeficiency Virus Epidemic—commonly known as the AIDS¹ Commission—with selected provisions of the Federal Advisory Committee Act (FACA) and the process the White House used to identify and resolve any potential or actual conflicts of interest of Commissioners. This report supplements our December 3, 1987, testimony before your Committee on the Commission's formation and initial operations.²

The President, in Executive Order 12601, dated June 24, 1987, established the Commission to advise him on the public health dangers associated with AIDS, including the medical, legal, ethical, social, and economic impact of the epidemic. The Commission had 13 members, with 1 member serving as Chairman, that were sworn in on September 9, 1987. On October 7, 1987, the Commission Chairman and one other Commissioner resigned. On November 10, 1987, the President announced his intention to appoint two individuals to replace the Commissioners who resigned. The Commission held 20 announced meetings; issued a final report on June 24, 1988; and terminated on July 24, 1988.

Our Approach

To evaluate the Commission's compliance with FACA, we compared the Commission's actions with the act's requirements and the General Services Administration's implementing regulations governing the establishment and operating procedures of advisory committees. We did not review the Commission's compliance with the FACA requirement that advisory committee membership be balanced, nor did we review the Commission's financial records to determine if its expenditures were proper.

¹This is the acronym for Acquired Immune Deficiency Syndrome.

²The President's Commission on AIDS, statement of Rosslyn S. Kleeman, Senior Associate Director, General Government Division, before the Committee on Governmental Affairs, United States Senate (GAO/T-GGD-88-6).

To evaluate the process the White House used to identify and resolve any actual or potential conflicts of interest on the part of Commissioners, we researched conflict of interest laws, executive orders, and regulations; interviewed White House officials and four Commissioners; and analyzed information provided by the Counsel to the President and documents provided by the Commission and Department of Health and Human Services (HHS), which was responsible for providing the Commission with administrative and other support. While the White House staff told us that the Commissioners had submitted information on their employment and other financial interests, and the four Commissioners we interviewed confirmed that they submitted the information to the White House, the White House would not provide this information to us for our review. Also, the White House would not provide us an explanation of specific actions taken to review the financial information reported by Commissioners for potential conflicts of interest. Accordingly, we were unable to thoroughly examine the White House's conflict of interest review process.

Our review's objectives, scope, and methodology are discussed in greater detail in appendix I. The details of our findings are included in appendix II. A schedule of the Commission's announced meetings is included in appendix III.

Results in Brief

The Commission complied with the principal requirements of FACA that we reviewed. Specifically, the Commission

- was properly established and chartered,
- provided advance notice of all of its 20 meetings in the Federal Register,
- prepared minutes of its meetings,
- made records available to the public, and
- provided the public the opportunity to participate in advisory committee meetings and comment on matters discussed when it held meetings prior to the issuance of reports to the President.

However, we did find instances of noncompliance. For example, the Commission's advance notices of meetings were not always in the form required, and the Commission did not provide the notices within the required 15 days before six of the meetings. Also, the minutes of the meetings did not include all information required by FACA. None of the meeting minutes included (1) estimates of the number of members of the

public who were at the meetings but did not appear before the Commission and (2) copies of reports reviewed and/or approved by the Commission. Also, in 2 instances the minutes did not include both the times the meetings started and adjourned and in 11 instances did not include the places where the meetings took place.

The White House has a process to identify and resolve conflicts of interest on the part of individuals to be appointed to serve on presidential advisory committees. However, the White House did not grant the original Commissioners waivers from application of the conflict of interest provisions of 18 U.S.C. 208³ before their appointments on September 9, 1987. The need to grant waivers was identified by HHS after the members' appointments as a result of a meeting on October 15, 1987, at which the Commissioners were briefed by HHS on federal ethics requirements and other matters. On October 30, 1987, the White House granted the original Commissioners limited waivers from application of 18 U.S.C. 208 after HHS brought the need for waivers to the White House's attention.

The Department of Justice's Office of Legal Counsel has broadly interpreted 18 U.S.C. 208 as barring advisory committee members from participating in deliberations and making recommendations that would have a direct and predictable effect on a whole industry that includes a committee member's organization.⁴ Several of the Commissioners were affiliated with health care providers, medical research institutions, and other entities that could have had financial interests in matters before the Commission. Allowing the members to serve on the Commission until they were granted limited waivers from application of 18 U.S.C. 208 exposed them to the risk of possible criminal violations.

As requested by the Committee, we did not obtain official agency comments on this report. We did discuss its contents with the Commission's Chairman, who generally agreed with the facts presented.

As arranged with the Committee, we plan no further distribution of this report for 30 days from the date of this letter unless you publicly

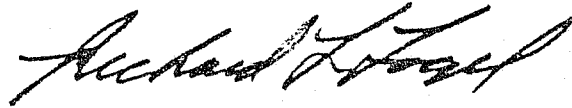
³This section of the conflict of interest laws prohibits an individual from participating personally and substantially in a particular matter where the outcome may have a direct and predictable effect on an individual's financial interests, including interests of organizations with which the individual is affiliated.

⁴2 Op. Off. Legal Counsel 151, 155 (1978).

announce its contents earlier. At that time we will send copies to the President; the Counsel to the President; the Chairman, Presidential Commission on the Human Immunodeficiency Virus Epidemic; the Secretary of Health and Human Services; and the Director, Committee Management Secretariat, Office of Management Services, General Services Administration. We will make copies available to others on request.

This report was prepared under the direction of Rosslyn S. Kleeman, Senior Associate Director. Other major contributors are listed in appendix IV.

Sincerely yours,



Richard L. Fogel
Assistant Comptroller General

Contents

Letter		1
Appendix I Objectives, Scope, and Methodology		8
Appendix II Information on the Creation and Operation of the AIDS Commission	The AIDS Commission's Creation and Initial Operations The AIDS Commission's Compliance With the Federal Advisory Committee Act (FACA) The Conflict of Interest Review Process	10 10 14 21
Appendix III The AIDS Commission's Public Meeting Schedule		25
Appendix IV Major Contributors to the Report	General Government Division, Washington, D.C. Office of General Counsel, Washington, D.C.	26 26 26

Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
FACA	Federal Advisory Committee Act
GSA	General Services Administration
HHS	Department of Health and Human Services
HIV	Human Immunodeficiency Virus

Objectives, Scope, and Methodology

The objectives of this review were to evaluate (1) the compliance by the Commission with selected provisions of the Federal Advisory Committee Act (FACA) and (2) the process followed by the White House in identifying and resolving potential or actual conflicts of interest on the part of Commission members.

To evaluate the Commission's compliance with FACA, we compared the Commission's actions with the act's requirements and the General Services Administration's (GSA) implementing regulations. We also reviewed Commission records, visited the Commission's records inspection area, and interviewed the Commission's Executive Director and Administrative Officer. We reviewed the Commission's compliance with the FACA provisions dealing with the establishment and operating procedures of advisory committees. We did not review the Commission's compliance with the FACA requirement that the membership of advisory committees be balanced, since at the time of our review the issue was the subject of litigation before the United States District Court for the District of Columbia.¹ We also did not review the Commission's financial records.

To evaluate the process the White House used to identify and resolve any actual or potential conflicts of interest on the part of Commissioners, we researched conflict of interest statutes, executive orders, governmentwide regulations, and Executive Office of the President standards of conduct regulations. We obtained information from White House officials concerning the conflict of interest review process. We also interviewed four Commissioners to verify the White House's description of the process followed.

The White House advised us that, pursuant to its policies and procedures, the Commissioners submitted information on their employment and other financial interests to the Counsel to the President, and this information formed the basis for the White House's conflict of interest reviews. Our interviews with four Commissioners confirmed that they submitted the information. The White House would not grant us access to this information, however, and also would not provide an explanation of specific actions taken to review the information reported by the Commissioners for potential conflicts of interest. We therefore were unable to thoroughly examine the White House review process.

¹National Association of People with AIDS v. Reagan, No. 87-2777 (D.D.C. filed Oct. 14, 1987). This litigation has since been resolved, since the plaintiffs in the case stipulated to a dismissal of the action. The Stipulation and Order of Dismissal were entered on July 13, 1988.

Appendix I
Objectives, Scope, and Methodology

Our audit work was done between February and June 1988, in accordance with generally accepted government auditing standards.

Information on the Creation and Operation of the AIDS Commission

The AIDS Commission's Creation and Initial Operations

On June 24, 1987, the President signed Executive Order 12601 which established the Presidential Commission on the Human Immunodeficiency Virus Epidemic. The order specified that the Commission should

- have 11¹ members—distinguished by their experience in medicine, epidemiology, virology, law, insurance, education, and public health—appointed or designated by the President, with 1 serving as chairperson;
- advise the President, the Secretary of Health and Human Services, and other relevant Cabinet heads on the public health dangers, including the medical, legal, ethical, social, and economic impacts from the virus and resulting illnesses;
- recommend measures that federal, state, and local officials could take to (1) protect the public from acquiring the virus, (2) assist in finding a cure for AIDS, and (3) care for those who have the disease;
- (1) evaluate efforts by educational institutions and other public and private entities to provide education and information on AIDS; (2) analyze efforts underway by federal, state, and local authorities to combat AIDS; (3) examine the long-term impact of AIDS treatment needs on health care delivery systems, including the effect on non-AIDS patients in need of medical care; (4) review how the United States has dealt with communicable disease epidemics; (5) evaluate research on AIDS prevention and treatment; (6) identify future research to address AIDS; (7) examine policies for developing and releasing drugs and vaccines to combat AIDS; (8) assess the progression of AIDS among the general population and specific risk groups; (9) study legal and ethical issues on AIDS; and (10) review the United States' role in dealing with AIDS in the international setting;
- issue a preliminary report to the President not later than 90 days after the Commissioners were first appointed or designated, and submit its final report no later than 1 year from the date of the order;
- terminate, unless extended, 30 days after submitting its final report to the President.

The order allowed Commissioners to be compensated for their work at the daily rate of GS-18, and for travel expenses, including per diem. It also directed the Office of the Secretary of Health and Human Services (HHS) to provide administrative support services, staff, facilities, and funds as needed for the Commission to do its functions. Heads of executive departments and agencies, to the extent permitted by law, were

¹Executive Order 12603, signed by the President on July 16, 1987, amended Executive Order 12601 to increase the number of Commissioners from 11 to 13.

Appendix II
Information on the Creation and Operation of
the AIDS Commission

required to cooperate by providing needed information and administrative support.

On June 25, 1987, the President announced his intention to appoint W. Eugene Mayberry, M.D., Chief Executive Officer, Mayo Foundation, and Chairman of the Board, Mayo Clinic, as a member and Chairman of the Commission.

On July 23, 1987, the Secretary of HHS signed the Commission's charter. On the same day, the President publicly announced the Commission had been formed and named the 12 other members he intended to appoint in a statement issued by his Assistant for Press Relations. The Commissioners chosen by the President met that day with the President, the Secretary of HHS, the Director of the National Institutes of Health, the Director of the National Institute of Allergy and Infectious Diseases, and other leaders in the health community. Also, on July 23, 1987, the Chairman appointed an Acting Executive Director.

The Commissioners were sworn in as special government employees² on September 9, 1987. They were: Admiral James D. Watkins (Retired), U.S. Navy; Colleen Conway-Welch, Ph.D., Dean of Nursing, Vanderbilt University; John J. Creedon, President and Chief Executive Officer, Metropolitan Life Insurance Company; Theresa L. Crenshaw, M.D., Director, The Crenshaw Clinic; Richard M. DeVos, President, Amway Corporation; Burton James Lee III, M.D., Physician, Memorial Sloan-Kettering Cancer Center; Frank Lilly, Ph.D., Chairman, Genetics Department, Albert Einstein College of Medicine; Woodrow A. Myers, Jr., M.D., Health Commissioner, State of Indiana; John Cardinal O'Connor, Archdiocese of New York; Representative Penny Pullen, House Minority Leader, Illinois State House of Representatives; Cory SerVaas, Editor and Publisher, The Saturday Evening Post; and William B. Walsh, M.D., President and Chief Executive Officer, Project HOPE. The Chairman designated Dr. Myers to be Vice Chairman.

After the gathering on July 23, 1987, the Chairman and Acting Executive Director began to establish the Commission's Washington office and plan the Commission's future activities. From late July until early September 1987, numerous actions were initiated to get the Commission under way, including (1) obtaining needed facilities, office equipment,

²Special government employees are officers and employees of an agency who are retained, designated, appointed, or employed to do, with or without compensation, for not more than 130 days during any period of 365 consecutive days, temporary duties on a full-time or intermittent basis.

Appendix II
Information on the Creation and Operation of
the AIDS Commission

furniture, and supplies; (2) contracting with a private firm for logistical support of the Commission's meetings; (3) hiring the Acting Executive Director as permanent Executive Director on August 26, 1987; (4) hiring two professional and two administrative staff members on August 31, 1987; (5) planning visits to New York City and San Francisco—two areas affected by AIDS—so that Commissioners could gain further information on AIDS issues; (6) planning and arranging the agenda for Commission meetings; and (7) preparing a questionnaire for obtaining Commissioners' views on the issues they believed should be addressed by the Commission.

During the first few days of September 1987, before the Commissioners were officially sworn in, some member-designees visited New York City and San Francisco. The itinerary for the New York City visit included attending a presentation by the Memorial Sloan-Kettering Cancer Center's Department of Infectious Diseases and visiting people with AIDS and institutions providing care for people with AIDS. The itinerary for the San Francisco visit included stops at the San Francisco Health Department, the San Francisco AIDS Foundation, the Coming Home Hospice, and the San Francisco General Hospital.

On the evening of September 8, 1987, the day before the Commissioners were officially sworn in, they attended a gathering in Washington, D.C. This gathering was described by several members as a social event, not an official Commission meeting. According to some Commissioners who were present, several Commissioners conversing at the gathering expressed the view that the Commission was not moving fast enough and needed to develop an action plan for accomplishing its assigned functions.

On September 9 and 10, 1987, the Commission held its first public meeting, which was devoted to obtaining (1) information on the government's role in combating the human immunodeficiency virus epidemic and (2) selected interest groups' views on epidemic issues. The Chairman distributed a questionnaire to Commissioners soliciting their views on the issues before the Commission. According to Commission files, six Commissioners completed the questionnaire.

Some of the questionnaire responses criticized the Chairman's management style. One Commissioner said that the Commission was being run like a corporation with all decisions being made at the top and filtering down; he believed that all Commission matters of importance should

have been discussed and voted on by the full Commission. Another Commissioner commented that better communication between the Chairman, Vice Chairman, and other Commissioners was needed and that the most significant issue facing the Commission was the selection of another Executive Director and a Public Affairs Officer. (The Executive Director resigned on September 11, 1987.) This Commissioner also suggested that members should be more involved in planning and agenda development to better assist the Chairman in fulfilling the Commission's mission.

On September 30, 1987, the Commission held its second public meeting in Washington, D.C., to obtain the views of Members of Congress on AIDS issues. The week after the second meeting, on October 7, 1987, the Chairman and Vice Chairman resigned. Because the former Chairman declined to be interviewed, we were unable to obtain a firsthand account of the events that led to his resignation. According to an associate who worked with him on Commission matters, the former Chairman grew frustrated with some members' persistent criticism of Commission operations. The Vice Chairman said he resigned as a result of the Chairman's resignation and a feeling that he could no longer serve the Commission.

A new Chairman, Commissioner Watkins, was appointed on October 7, 1987, and a new Executive Director was appointed on October 15, 1987. On November 10, 1987, the President announced his intention to appoint Kristine M. Gebbie, R.N., M.N., Oregon Health Division, and Chairperson, AIDS Committee, Association of State and Territorial Health Officials, and Beny J. Primm, M.D., Executive Director, Addiction Research and Treatment Corporation, to replace the Commissioners who resigned.

The Commission subsequently issued three reports to the President: Preliminary Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (December 2, 1987); Interim Report, Presidential Commission on the Human Immunodeficiency Virus Epidemic (March 15, 1988); and Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (June 24, 1988).

The AIDS Commission's Compliance With the Federal Advisory Committee Act (FACA)

Charter Requirements

FACA requires that a charter be prepared for each presidential advisory committee and be filed with the Administrator of GSA.³ The AIDS Commission's charter contained all but one of the elements required by FACA. The charter did not contain an estimate of the number of meetings the Commission expected to hold. The charter included (1) the Commission's official designation, (2) the Commission's objectives and scope of activity, (3) the period of time necessary to carry out the Commission's purpose, (4) the official to whom the Commission was to report, (5) the agency (HHS) responsible for providing necessary administrative and other support, (6) a description of the duties for which the Commission was responsible, (7) the Commission's estimated annual operating costs and staff-years, (8) the frequency of meetings, (9) the Commission's termination date, and (10) the date the charter was filed.

Public Notice and Closed-Meeting Requirements

Except when the President cites reasons of national security, FACA requires that timely notice of advisory committee meetings be published in the Federal Register. GSA regulations require each meeting notice to be published at least 15 days before the meeting and include the name of the committee; the time, date, place, and purpose for the meeting; a summary of the agenda; and a statement of whether the meeting is open or closed to the public and, if closed, the specific reason(s) why. The reasons for closing meetings must be consistent with the Government in the Sunshine Act, 5 U.S.C. 552b, exemptions. In exceptional circumstances, fewer than 15 days' notice of a committee meeting may be given, as long as the notice includes the reasons for the abbreviated notice period.

³Under Reorganization Plan No. 1 of 1977, all functions of the Director, Office of Management and Budget, related to the Committee Management Secretariat provided for by FACA, were transferred to the Administrator of General Services. Under FACA, the Secretariat is responsible for all matters related to advisory committees.

The Commission provided advance notice, but not always in the form required, of each of its 20 announced meetings. Fourteen of the 20 meetings were announced in the Federal Register at least 15 days before the Commission met, and 6 were not. For five of the six latter meetings, the notices preceded the meetings dates by 13 or 14 days and did not include explanations for the abbreviated notice periods. The notice for the sixth meeting preceded the meeting date by 8 days and stated that the short notice was necessary because of the need to obtain the views of Members of Congress as soon as possible and the deadlines for the reports required of the Commission.

All meeting notices did not specifically identify the purposes and agendas for the meetings as required, but all notices did describe the nature of the meetings.

In order to close a meeting to the public, an advisory committee must submit a request to the agency head in sufficient time before publishing the meeting notice to allow a full review, including review by legal counsel, of the justification for the closure. If the agency head approves the request, he or she must issue a determination that all or part of the meeting may be closed and cite the specific reasons for such closing. Nineteen of the Commission's 20 announced meetings were open to the public. The Commission followed the required procedures to close one day of its October 15-16, 1987, meeting to the public, and the Secretary of HHS approved its request on the basis that the Commission would be discussing internal personnel rules and practices and matters that, if disclosed, would constitute an invasion of personal privacy.

Requirement to Prepare and Certify Minutes of Meetings

FACA requires that detailed minutes be prepared for each advisory committee meeting and that the chairperson certify their accuracy. The act specifies that the minutes must include (1) a record of the people present; (2) a complete and accurate description of the matters discussed and conclusions reached; and (3) copies of all reports received, issued, or approved by the committee. Additionally, GSA regulations provide that meeting minutes must include (1) time, date, and place; and (2) a list of persons present, including committee members, staff, agency employees, and persons who presented statements, and an estimate of the number of other members of the public present.

For the most part, the minutes of all 20 announced meetings met FACA and GSA regulatory requirements. The minutes, however, did not contain all of the required information. None of the meeting minutes included

Appendix II
Information on the Creation and Operation of
the AIDS Commission

(1) estimates of the number of members of the public who were at the meetings but did not appear before the Commission and (2) copies of reports reviewed and/or approved by the Commission. Also, in 2 instances the minutes did not include both the times the meetings started and adjourned and in 11 instances the minutes did not include the places where the meetings took place.

Commission's Records
Availability

FACA provides that advisory committee documents are subject to the Freedom of Information Act, 5 U.S.C. 552, and specifies that records, reports, drafts, and other documents that were made available to or prepared for or by an advisory committee be made available to the public for inspection and copying at a single location in the offices of the advisory committee or the agency to which it reports.

The Freedom of Information Act requires agencies to routinely make information available to the public (1) by publishing certain material in the Federal Register; (2) by making other material, such as final opinions in the adjudication of cases, available for public inspection and copying unless it is published promptly and copies are offered for sale; and (3) by making material available upon receiving a request made in accordance with published rules and that reasonably describes the material. The act permits agencies to withhold material from the public if the material is covered by any of nine specific exemptions in the act. For example, one exemption permits matters to be withheld from the public that are specifically authorized under criteria established by executive order to be kept secret in the interest of national defense or foreign policy and properly classified pursuant to such executive order.

The Commission generally complied with the FACA requirement to make its records available to the public. The Commission (1) published notices in the Federal Register of the location at which its records would be available for public inspection, (2) maintained records for public inspection at that location, and (3) made records available upon receiving written requests from members of the public.

With one exception, each notice published in the Federal Register to inform the public of a Commission meeting included the following or a similar statement: "Records shall be kept of all Commission proceedings and shall be available for public inspection at 655 15th Street, N.W., Suite 901, Washington, D.C. 20005." Only the notice of the Commission's September 9 and 10, 1987, meeting—its first announced meeting—omitted such a statement.

Appendix II
Information on the Creation and Operation of
the AIDS Commission

During December 1987 and January 1988, the Commission established a site at its offices where the public could inspect its records. The Commission Administrative Officer told us that records were previously made available on request. The records inspection area measured about 12 feet by 12 feet and contained a table and three bookcases that were used to store and display the AIDS Commission's records and general information on AIDS. Records on display on June 1, 1988, included meeting agendas of all 20 meetings, prepared statements of witnesses who testified at the meetings, transcripts of the proceedings, and reports. Other records such as correspondence between the Commission and others were not on display, but we were told they would be available if the public requested them.

The Commission also generally made its records available upon receiving written requests from members of the public who may not have visited the Commission's records inspection area. We reviewed the Commission's correspondence log covering the period October 1, 1987, to April 18, 1988. During that period, the Commission received 93 requests for information on AIDS or for Commission documents. In 49 of the cases, the log entries indicated that the material had been provided. Of the 44 cases where the log did not show the disposition of the request, the Administrative Officer told us that in 33 instances the material requested had been sent to the requesters, in 2 instances the material had not been sent yet, and in 9 instances the disposition could not be determined. Of the nine latter requests, five were for general information on AIDS, two were for Commission reports, and two were for hearing materials.

Commission's Three
Reports Issued Within
Requirements

FACA requires that the public be given the opportunity to participate in advisory committee meetings and comment on matters discussed and conclusions reached by attending, appearing before, or filing statements with advisory committees. The AIDS Commission complied with this requirement when it held meetings before issuing reports to the President.

Preliminary Report

During the Commission's November 24, 1987, meeting in Washington, D.C., the Commissioners discussed the preparation of the preliminary report that the President had directed be submitted to him 90 days after the members were appointed, or December 7, 1987. At the meeting, the Chairman said that (1) White House staff had indicated that the preliminary report requirement was included in the Executive Order so that the

Appendix II
Information on the Creation and Operation of
the AIDS Commission

President would quickly know where the Commission stood in its deliberations and where it was headed; (2) the Commission had attempted over the previous few weeks to focus its broad mandate on a finite set of issues that had been raised during its site visits, hearings, and report reviews so that it could develop a "road map" to achieve all tasks by June 1988; and (3) the road map would become the centerpiece of the Commission's preliminary report.

The Chairman also mentioned at the November 24, 1987, meeting, that (1) the staff, working with some of the Commissioners, had begun to draft the preliminary report; (2) small groups of Commissioners would be working with the staff on the drafting effort that evening; and (3) all Commissioners would be contacted to ensure that they felt comfortable with the report before its submission to the President. In response to an inquiry from a Commissioner, the Chairman confirmed that the preliminary report would include no proposals, recommendations, or findings and would be a road map discussing where the Commission had been and the directions it would take in the future. None of the Commissioners present expressed disagreement with that approach.

The Commission's Executive Director said the staff began work on the preparation of the preliminary report during the week before the November 24, 1987, meeting. She said that during that week the Commission's staff summarized the data the Commission had obtained during its public meetings and research. In addition, Commissioners in Washington, D.C., for the November 24, 1987, meeting, were given the opportunity to provide input in small groups on the content of the draft. She added that on November 23, 1987, Commissioners SerVaas, Pullen, Gebbie, and Crenshaw presented their views on the issues that should be included in the preliminary report; on November 24, 1987, Commissioners Primm, O'Connor, Lilly, and Lee offered their views; and on November 25, 1987, Commissioner Walsh provided his views. According to the Executive Director, Commissioners Conway-Welch and Creedon did not participate in any of the small group sessions, and the staff telephoned them to obtain their input for the draft.

According to the Executive Director, the Chairman approved the preliminary report on November 27 or 28, 1987, and copies were sent to the Commissioners by express mail on November 28, 1987. The Executive Director said that a formal vote of Commissioners was not taken before the issuance of the preliminary report to the President on December 2, 1987.

The Executive Director said that the Commission did not schedule a meeting to deliberate on the preliminary report because of the short time between the Chairman's approval of the report on November 27 or 28, 1987, and the report's deadline of December 7, 1987. If the Commission had met to discuss the preliminary report, the public would have been entitled to attend the meeting and provide comments pursuant to section 10(a) of FACA. However, the Commission was not legally required to hold a meeting on the report. FACA requires only that meetings held by an advisory committee be open to the public unless closed pursuant to exemptions in the Government in Sunshine Act; it does not require an advisory committee to do all of its business through meetings. Also, FACA does not require advisory committees to base their advice and/or recommendations on the collective views of their members.⁴

The preliminary report transmitted to the President on December 2, 1987, discussed what the Commission had learned on AIDS during its public meetings and site visits to three high-impact communities. The report also described the Commission's plan for future work and identified critical areas in which it would immediately begin to gather data so that it could make recommendations in an interim report that could be of benefit to persons with AIDS, health care providers, and fund allocators.

Interim Report

The Commission's Executive Director said work on drafting the interim report began during late January 1988. At a meeting with Commission staff members working on each of the critical areas to be covered in the interim report—new drug development, patient care, and intravenous drug abuse—the Executive Director told the team leaders to begin summarizing the information gathered and developing recommendations.⁵ In summarizing the data and developing recommendations, each team leader worked with the Commissioners assigned by the Chairman to conduct a public meeting on each issue⁶ and coordinate the material to be

⁴If enacted, Senate Bill 2721, introduced August 10, 1988, will amend FACA to require that an advisory committee, before reporting advice or recommendations to any federal official, hold a meeting at which a majority of the members approve the advice or recommendations to be reported.

⁵The Commission had planned to include recommendations relating to the incidence and prevalence of AIDS in the interim report but did not because it believed (1) these issues were found to be an integral part of other issues, such as testing and confidentiality, which were to be covered in future public meetings; and (2) a review of the Nation's public health care system was considered necessary before recommendations on these issues could be made.

⁶Three meetings were chaired by individual Commissioners on the three issues discussed in the interim report.

included in the report. Commissioner Primm coordinated the preparation of the material included in the interim report on intravenous drug abuse and AIDS; Commissioner Conway-Welch coordinated the material on patient care; and Commissioner Lilly coordinated the material on new drug development and research.

The Executive Director also said a draft of the interim report was approved by the Chairman on or about February 22, 1988, and copies of the draft report were sent to the Commissioners on February 23, 1988, for their review prior to the February 29, 1988, meeting at which the draft was to be discussed publicly. The draft interim report was released to the public on February 24, 1988.

At the February 29, 1988, meeting, the Commissioners discussed and reviewed the draft interim report. The Chairman announced that the Commission had received a number of letters and telephone calls from the public containing comments on the draft report and that any additional input from the public should be delivered to the Commission by 2 p.m., March 2, 1988, so that it could be reviewed by the Commissioners later that afternoon. Also, at the meeting, the Commissioners present suggested changes to the draft interim report. On March 3, 1988, the Commission discussed and adopted an amended version of the report. On March 15, 1988, the Commission submitted its report, entitled Interim Report, Presidential Commission on the Human Immunodeficiency Virus Epidemic, to the President.

Final Report

The Commission's Executive Director said work on preparing the final report began in mid-April 1988. In an April 19, 1988, memorandum, the Chairman asked the Commissioners to submit to him in writing by May 6, 1988, any proposed recommendations on issues that had not been addressed by the interim report. The Chairman specified that each recommendation should include a brief statement of the problem being addressed, a statement of who should do what to resolve the problem, and an estimate of the recommendation's potential implementation cost. The Chairman indicated that recommendations on which there was a consensus among the Commissioners would be included in the draft final report. The Chairman received proposals from Commissioners Creedon, Crenshaw, DeVos, Gebbie, O'Connor, Pullen, and SerVaas.

At an early May 1988 meeting, the Executive Director instructed the staff team leaders to begin summarizing the information gathered and developing recommendations for consideration by the Commission.

Issues on the international response to the human immunodeficiency virus epidemic were coordinated with Commissioner Walsh; patient care issues were coordinated with Commissioners Conway-Welch and Lee; public health and prevention issues were coordinated with Commissioner Gebbie; and issues on health care providers and homeless persons infected with the virus were coordinated with Commissioner Lee. The Executive Director told us that the Commission's Physician Review Group⁷ also assisted the staff on patient care issues.

The Executive Director said the draft of the final report was approved by the Chairman on or about May 31, 1988, and copies were sent to the Commissioners on May 31, 1988, for their review prior to the June 7, 1988, meeting at which the draft was to be discussed and reviewed publicly. The draft report was released to the public on June 2, 1988.

At the June 7, 1988, meeting, the Commissioners discussed and reviewed the draft report. At the meeting, the Chairman announced that comments from the public should be delivered to the Commission by 12 p.m., June 13, 1988, so that the comments could be distributed to the Commissioners. Also, the Commissioners present suggested changes to the draft report. On June 16 and 17, 1988, the Commission discussed and adopted an amended version of the report. On June 24, 1988, the Commission submitted its report, entitled Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, to the President.

The Conflict of Interest Review Process

Federal conflict of interest statutes, standards of conduct outlined in Executive Order 11222, as amended, and Executive Office of the President regulations establish standards of ethical conduct applicable to individuals serving as members of presidential advisory committees. Advisory committee members are subject to conflict of interest restrictions and ethical standards if they are appointed as special government employees. Any member of a presidential advisory committee appointed as a special government employee is prohibited by the conflict of interest provisions of 18 U.S.C. 208(a) from participating personally and substantially in a particular matter in which to his or her knowledge he or

⁷The Physician Review Group, composed of clinical and research physicians with expertise related to the virus, was established by the Commission to evaluate data collected for scientific and medical validity and advise the Commission on medical and research issues.

she has a financial interest⁸ unless and until the Counsel to the President determines in writing, pursuant to 18 U.S.C. 208(b), that the interest is not so substantial as to be deemed likely to affect the integrity of the services that the government may expect of him or her.

To aid in the identification of potential, as well as actual, conflicts of interest, advisory committee members, before their appointment, are required by White House policy and procedures to submit to the Counsel to the President information on their employment and other financial interests. The information must identify a variety of interests, including (1) current position and employer; (2) current federal government employment or contractual relationships; (3) the names of all corporations, partnerships, firms, or other business enterprises, and all non-profit organizations, and other institutions with which he or she is or was affiliated as an officer, owner, trustee, partner, director, advisor, attorney, or consultant during the past 3 years; and (4) the names of all corporations, firms, or other business enterprises, partnerships, non-profit organizations, and educational or other institutions in which he or she has a continuing financial interest through ownership of stock, stock options, bonds, or other arrangements, including a trust, pension or retirement plan, stock bonus, or other arrangement as a result of any prior employment or business or professional association.

Pursuant to White House policy and procedures, the information on employment and financial interests is to be reviewed by the Counsel to determine whether a conflict, or the appearance of a conflict, exists between the interests of the advisory committee member and the performance of his or her services for the government. If the Counsel determines that a conflict, actual or apparent, exists, the Counsel may direct the advisory committee member to take remedial action. Remedial action can include divestiture of the interest, recusal from participation in matters involving the interest, or the waiver of an insubstantial interest by the Counsel to the President.

⁸Under 18 U.S.C. 208, a financial interest includes the interest of the employee, his or her spouse, minor child, or partner; of the organization in which he or she is serving as an officer, director, trustee, partner, or employee; or of any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment in a particular matter.

HHS Identified the Need to Grant Waivers to Commissioners to Resolve Potential Conflicts

On the basis of biographical information published in the Federal Register, it appeared that at least 10 of the 13 original Commissioners were affiliated with health care providers, medical research institutions, and other entities that could have financial interests in matters before the Commission. For example, the Commission could have engaged in deliberations or developed recommendations involving the federal government's establishment, continuation, or modification of the funding of programs for the treatment of individuals with AIDS, which potentially could have affected organizations with which the Commissioners were affiliated. These Commissioners therefore would not have been able to participate in any matter, even generally, affecting the interests of their organizations unless the interests were determined to be insubstantial and waivers were granted under 18 U.S.C. 208(b). The Counsel to the President did not grant the original AIDS Commissioners such waivers from the conflict of interest provisions of 18 U.S.C. 208(a) at the time of their appointments on September 9, 1987. The need to grant Commissioners waivers was identified by HHS' Designated Agency Ethics Official as a result of a meeting on October 15, 1987, at which Commissioners were briefed on federal ethics requirements and other matters, such as travel, staffing, and the use of government resources.

At the meeting, several Commissioners expressed their concerns about the effect that 18 U.S.C. 208 could have on their ability to contribute to the work of the Commission. In particular, they were concerned with the broad interpretation given to section 208. Under the Department of Justice's Office of Legal Counsel's interpretation of section 208, an advisory committee member is barred from participating in deliberations and recommendations having a direct and predictable effect on a whole industry, which includes a committee member's company even if the member's company would not gain any competitive advantage over others in the industry.⁹

On October 26, 1987, HHS' Designated Agency Ethics Official recommended to the Counsel to the President that Commissioners be granted a waiver. On October 30, 1987, the Counsel to the President granted the original Commissioners a limited waiver from the application of the provisions of 18 U.S.C. 208. According to the Counsel's correspondence with the Commission, the limited waiver was based on a review of the Commissioners' interests reported to his office and was granted because the Counsel determined that the Commissioners' interests were not so substantial as to be deemed likely to affect the integrity of the services

⁹2 Op. Off. Legal Counsel 151, 155 (1978).

Appendix II
Information on the Creation and Operation of
the AIDS Commission

that the government could expect from the Commissioners in a general policy context. The waiver was limited to general policy discussions and recommendations. Commissioners were to avoid any specific matters that involved an entity in which the member, his or her family, or a business associate had a financial interest.

From September 9, 1987, when the original Commissioners were appointed, until they were granted limited waivers by the White House from application of 18 U.S.C. 208 on October 30, 1987, the Commission held three announced public meetings. We did not attempt to determine whether any Commissioner participated in deliberations or recommendations affecting his or her business or industry as a whole during this period. However, allowing the Commissioners to serve during that period without a waiver exposed them to the risk of possible criminal violations. An individual may be fined up to \$10,000 or imprisoned for up to 2 years, or both, for violating 18 U.S.C. 208.

The AIDS Commission's Public Meeting Schedule

Date	Subject	Site
1987		
Sept. 9-10	Federal Overview Hearings	Washington, D.C.
Sept. 30	Congressional Caucus	Washington, D.C.
Oct. 15-16	Personnel Meeting and State Response Hearings	Washington, D.C.
Nov. 10-12	Site Visit and Hearing on the Impact of the Human Immunodeficiency Virus (HIV) Epidemic on the South Florida Community	South Florida
Nov. 24	Institute of Medicine Report and American Medical Association Report	Washington, D.C.
Dec. 10-11	Incidence and Prevalence	Washington, D.C.
Dec. 17-18	Intravenous Drug Abuse and the HIV Infection	Washington, D.C.
1988		
Jan. 13-15	Care: Education of Health Care Workers and Pediatric Care	Washington, D.C.
Feb. 18-20	Research: New Drugs, Vaccines, and Facilities	New York, NY
Feb. 29	Executive Session: Review Draft of Interim Report	Washington, D.C.
Mar. 1-3	Prevention and Education	Washington, D.C.
Mar. 16-18	Discrimination: Workplace, Housing, and Schools Ethics: Denial of Care and Research Testing: Confidentiality and Duty to Warn	Nashville, TN
Mar. 24-25	Western States Response	San Francisco, CA
Apr. 5-6	Societal and Legal Concerns	Washington, D.C.
Apr. 18-20	International	Washington, D.C.
Apr. 26-27	Finance	Washington, D.C.
May 9-11	Safety of the Blood Supply, AIDS in the Workplace, and Health Care Worker Safety	Indianapolis, IN
May 16-18	Sexual Behavior and AIDS in Adults and Teenagers, Homeless People with AIDS, and Food Distribution Systems	Washington, D.C.
June 7	Executive Session: Review Draft of Final Report	Washington, D.C.
June 16-17	Executive Session: Review Amended Draft of Final Report	Washington, D.C.

Major Contributors to the Report

General Government
Division, Washington,
D.C.

Roslyn S. Kleeman, Senior Associate Director, (202) 275-6204
Robert E. Shelton, Deputy Associate Director
James T. Campbell, Group Director
Gregory J. Ziombra, Assignment Manager
Nicholas B. Yurchik, Evaluator-in-Charge
Jacqueline S. Vaughn, Secretary/Typist

Office of General
Counsel, Washington,
D.C.

Lynn H. Gibson, Attorney-Advisor

FOUNDATIONS SUPPORTING THE CITIZENS COMMISSION ON AIDS

(as of September 15, 1988)

Rockefeller Brothers Foundation
The Robert Wood Johnson Foundation
United Hospital Fund
The Aaron Diamond Foundation
Josiah Macy, Jr. Foundation
Mrs. Abby R. Mauze Charitable Trust
The Prudential Foundation
New York Community Trust
Charles H. Revson Foundation
Fund for the City of New York
The Florence & John Schumann Foundation
Health Services Improvement Fund, Inc.
Victoria Foundation
The Fund for New Jersey
Hoffmann-La Roche Inc.
Design Industries Foundation for AIDS
The Hyde and Watson Foundation
New York Life Insurance Company
Howard J. Rubenstein Associates
Pro Bono Public Relations

*The Citizens Commission on AIDS
is administered by the
Fund for the City of New York*

Jane Hughes
Associate Director

Requests for copies of GAO reports should be sent to:

U.S. General Accounting Office
Post Office Box 6015
Gaithersburg, Maryland 20877

Telephone 202-275-6241

The first five copies of each report are free. Additional copies are \$2.00 each.

There is a 25% discount on orders for 100 or more copies mailed to a single address.

Orders must be prepaid by cash or by check or money order made out to the Superintendent of Documents.