The Washington Post, Tues., June 26, 1984 - p. A1

Appeals Court Rejects Ruling In Debate Case

By Al Kamen
Washington Post Staff Writer

The U.S. Court of Appeals, acting unanimously and with unusual speed, ruled yesterday that Attorney General William French Smith is not required to appoint an independent counsel to investigate how Ronald Reagan's 1980 campaign obtained briefing papers from the Carter White House.

The seven-page decision came five days after the court heard oral argument in the case and reversed U.S. District Court Judge Harold H. Greene's decision last month giving Smith seven days to seek appointment of an independent counsel, formerly called a special prosecutor.

The appeals court said that the 1978 Ethics in Government Act does not give judges power to hear lawsuits brought by private citizens and that Greene had no authority to order the attorney general to seek appointment of an independent counsel.

The act, passed as a post-Watergate reform measure, provides that such a counsel be named when top executive branch officials are accused of wrongdoing.

"In reaching this decision," the court said, "we express no opinion whatever as to whether the factual information" Smith had was enough under the act to require him to investigate the allegations. Three members of the 11-member court did not participate in the case.

"I'm disappointed with the decision because it means we may never learn the truth about 'Debategate,'" said George Washington law professor John F. Banzhaf III, one of two

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Appeals Court Rejects Ruling On Debate Case Special Counsel

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local attorneys who sued Smith last year under the act.

The disputed documents included a briefing book used by Carter to prepare for a televised debate with Reagan.

Banzhaf said he might appeal the decision to the Supreme Court, "if only to get a definitive ruling" so he can argue to Congress that the law should be amended.

Justice Department spokesman Thomas P. DeCair said Smith was "pleased by the . . . unanimous decision . . . fully sustaining our position" that the attorney general, not the courts, has the responsibility to determine whether to seek appointment of an independent counsel. Last February, the department ended an eight-month investigation of the briefing papers matter with a three-page report finding no evidence of criminal wrongdoing by Reagan campaign officials.

On May 15, Greene ordered Smith to ask a special three-judge panel to appoint an independent counsel. Greene said Banzhaf and attorney Peter H. Meyers had presented "unrebutted evidence" that campaign documents may have been stolen from the Carter White House and that senior Reagan campaign officials now in the goverment came into possession of those documents.

Greene said some of those officials, including White House chief of staff James A. Baker III and CIA Director William J. Casey, made "contradictory statements" on the matter.

But the appeals court said yesterday that the ethics act "makes no provision for members of the public to petition the attorney general to act, its terms provide for no review of refusals to act."

The ruling was the second in two months by the U.S. Court of Appeals for the District of Columbia Circuit in cases involving the ethics act.

Three weeks ago, a three-judge panel overturned U.S. District Court Judge Gerhard A. Gesell's order that Smith conduct a preliminary investigation into allegations that government officials may have permitted Ku Klux Klan members to assault Communist Party demonstrators in Greensboro, N.C., in 1979.

In that case, the panel agreed only that the specific allegations were insufficient to trigger such an investigation under the act.

A federal judge in California last year ordered Smith to investigate allegations that government officials violated the law by supporting paramilitary operations in Nicaragua.

That case is pending before a federal appeals court in California.

The Washington Post, Thurs., June 28, 1984 - p. A12

Briefing Papers: Loose Ends

HAVE WE heard the last of the Carter briefing papers case? That's the conclusion many will draw from the reversal, by an 8-0 margin, of Judge Harold Greene's order that an independent counsel be appointed to investigate this case. The appeals court ruled that an attorney general's decision not to appoint such a counsel is not reviewable by any court. That's what the letter of the law says. If it said otherwise, any member of the public could go into court with some newspaper clippings and, on a good day, set into motion a procedure that amounts to the most serious—and personally draining—sanction short of actual prosecution that can be visited on a public official. That was certainly not what Congress had in mind when it revised the law so that special prosecutors wouldn't automatically have to be appointed.

This decision makes it clear that an independent counsel won't be appointed. But it leaves two questions open. The first is whether anyone lied or misled Rep. Donald Albosta's subcommittee during its investigation of the case. Mr. Albosta's report said that some witnesses "have not been entirely candid," and that the failures of recollection of others "were not credible." The subcommittee has not yet referred anything to the Justice Department, and the Justice Department is not investigating whether a crime was committed. It should.

The second question must be asked of President Reagan. At a recent press conference, Mr. Reagan pronounced himself satisfied that the apparently inconsistent testimony of two of his top appointees, James Baker and William Casey, was only the result of different recollections. He left it at that. But if the president really wanted to get to the bottom of this affair, if he made it abundantly clear that he *wanted* to know who got the briefing papers and how, who doubts that he would get the answers? If Mr. Reagan's appointees are not held legally accountable to an independent counsel, he himself can and should be held politically accountable for improprieties committed in his behalf. As a candidate, he has a responsibility to see that his campaigns are conducted fairly. With the legal questions out of the way, there is no reason left for the president to evade that responsibility.

Washington Post, Fri., June 15, 1984 - p. A17

Reagan Says 'No One' Saw '80 Briefing Book

By David Hoffman
Washington Post Staff Writer

President Reagan, contradicting the findings of majority Democrats on a congressional subcommittee, last night said that "no one" in his 1980 presidential campaign saw or obtained a briefing book prepared for then-President Carter before the Oct. 28 preelection debate with Reagan that year.

"I think there is one thing that ought to be cleared up about this whole case," Reagan told a nationally televised news conference. ". . . We still keep calling it the briefing book. Now, it was established quite a while ago that the so-called [Carter] 'debate briefing book' . . . never has been in our possession.

"All that was uncovered were some position papers, the type of things that were issues during the campaign," he added. "And all of it had been out in the open and made public as the campaign went on, before the debate. But the briefing book, if you will remember, the briefing book, it was pointed out, finally someone located on the other side and there it was and no one on this side ever saw it, nor was it ever in our hands."

Democrats in the majority on a House subcommittee chaired by Rep. Donald J. Albosta (D-Mich.) reported that the panel had found evidence to the contrary in its investigation of how Carter material got into the Reagan campaign.

The subcommittee reported:

"Before the Oct. 28, 1980, debate between President Carter and Governor Reagan, the Reagan-Bush campaign obtained foreign policy and national defense briefing papers prepared to assist President Carter in that debate, and also acquired briefing papers on those subjects prepared for Vice President Mondale.

"The Carter debate briefing papers were used by persons connected with the Reagan-Bush campaign to enhance Governor Reagan's performance in the debate. The persons using these papers were aware that they were using Carter debate briefing materials."

The panel noted that last summer, former Reagan campaign aides David R. Gergen and Frank Hodsoll "each produced from their files copies of the Carter foreign policy 'big book' . . ," and that other campaign aides remember seeing a more condensed briefing book on foreign policy prepared only a week before the Cleveland debate.

The report also concluded that it "appears" that the Reagan campaign "had some version" of Carter's domestic-issues briefing book, "perhaps not the final effort, but at least an earlier draft."

The Albosta panel said that some of the Carter material that Reagan aides gathered in 1980 was publicly available. But the subcommittee also reported that the foreign policy briefing materials were "most likely" taken from the Carter National Security Council front office or the White House Situation Room, both "secured areas with limited access."

Reagan also was asked about the apparent contradiction between White House chief of staff James A. Baker III and CIA Director William J. Casey over how the material was obtained. Baker has said he received it from Casey. Casey has said he does not remember giving it to Baker. Both officials held key positions in the 1980 Reagan campaign.

Reagan said he had asked Casey and Baker about their differing recollections and added, "I think they're easily understandable. One has no recollection, and I can understand that, from a campaign . . . something that might have come through his office and been passed on . . . ."

Questioned as to whether an independent counsel should look into the matter, Reagan said "that matter is in court now," but if one is required, he will order officials to cooperate. "Frankly, based on that Democratic committee report, it didn't make any sense at all. This has been investigated thoroughly."

On other matters, Reagan said that his tax cuts had been "more beneficial" to the poor "than to anyone else." He said "the figures belie" the charge from critics that "our tax program has benefited the rich."

This appears to be a shift from Reagan's earlier statements that his across-the-board tax cut was even-handed.

On other topics, Reagan:

- Said he would "look forward to" a debate with his Democratic presidential opponent.
- Said he does not view as the "death knell" of affirmative action this week's Supreme Court decision that courts may not interfere with seniority systems to protect jobs of newly hired blacks when layoffs are necessary.

Washington Post, Thurs., June 14, 1984

Wick Repaying Government for Personal Calls

By Howard Kurtz
Washington Post Staff Writer

U.S. Information Agency Director Charles Z. Wick had two private telephones installed in his home at government expense in 1981 and recently repaid $4,436 for personal calls and service charges after federal auditors ruled his use of the phones illegal.

USIA spokesman James Bryant confirmed yesterday that Wick reimbursed the government after the General Accounting Office discovered the phone charges. Bryant said that Wick has retained the phones in his northwest Washington home but now pays for the service himself.

It is a violation of federal law to spend government money for telephone service in an official's home. A federal statute says "appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences."

The statute, which makes an exception for government officials abroad, allows officials to be reimbursed for long-distance business calls made from home.

GAO attorney Barry Bedrick said that the statute does not carry any penalties but that GAO generally requires an agency found violating the law to return to the Treasury funds spent on home phones. The agency must seek reimbursement from the employe involved, he said.

Bedrick said that the congression-

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Wick Reimbursing U.S. for Personal Calls

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al auditing agency, which oversees the law, has granted occasional exceptions for military reasons or for officials who live on government bases or other federal properties.

USIA's Bryant said Wick has identified all calls that appeared unrelated to agency business. "If there was any question about whether [a call] might be personal as opposed to official, the director repaid it," he said.

Bryant said that Wick's November phone bill is missing and that further reimbursement will be made after it is found.

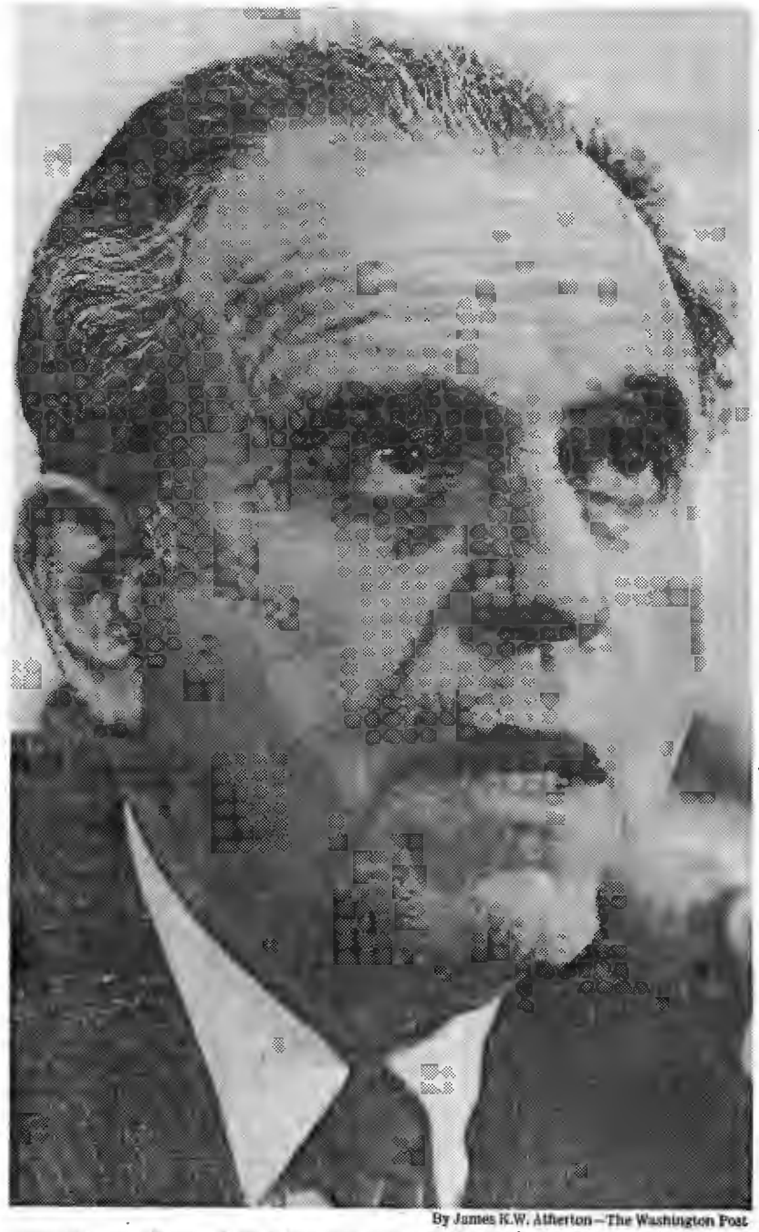
Byrant said the $4,436 repayment covers installation and service charges, as well as personal calls charged by Wick to a government credit card. Wick began the repayment in late May and wrote the final check Tuesday, Bryant said.

The agency said in a two-paragraph statement that senior aides advised Wick in 1981 "that it was appropriate to install USIA telephone facilities at his residence." Bryant said Wick learned of the statute after the GAO review.

Wick, a longtime friend of President Reagan, last summer agreed to reimburse the USIA $22,053 of the $32,000 he charged the government for an elaborate security system installed at his two-acre home.

Wick made the repayment after White House counsel Fred F. Fielding told him that the security system raised "very serious questions of propriety and appearance" and could cause "considerable embarrassment to you and the president."

In January, Wick publicly apologized after disclosures that he frequently recorded telephone calls without informing the other party.



By James K.W. Atherton—The Washington Post

USIA Director Charles Z. Wick had phones installed in home at government expense.

Wick, who began the taping in 1981 despite several senior aides' objections, said the practice violated a General Services Administration rule carrying no penalty.

Congress is considering legislation to make it illegal for federal officials to tape phone calls secretly, except for law-enforcement purposes.

The USIA statement said Wick has "spent well in excess of $25,000 of his own money for entertainment and other activities directly related to USIA business."

"While he, of course, makes no claim that this is a technical offset to the telephone charges, it does provide a context in which to appraise the significance of these relatively small disbursements, all of which were promptly reimbursed to the government when the GAO made its findings known."

Administration Terms Bill On Secret Taping Unnecessary

United Press International

Administration officials yesterday attacked as confusing and unnecessary a bill to make it a crime for government employes to tape telephone conversations secretly.

The legislation was prompted by revelations in December that U.S. Information Agency Director Charles Z. Wick routinely recorded telephone conversations without informing the other parties.

A 1981 federal regulation says government workers must have consent for such recordings.

The bill would prohibit most secret taping by federal officials acting in an official capacity and punish violators with up to $1,000 fines and/or as much as six months in prison.

THE WASHINGTON POST, Saturday, June 2, 1984

Detectives' Files Cite Donovan Probe Contact

By George Lardner Jr.
Washington Post Staff Writer

Private investigators for Labor Secretary Raymond J. Donovan's construction company claimed to have a contact in the special prosecutor's office during the 1982 investigations of alleged ties between Donovan and organized crime, according to documents turned over recently to the FBI.

The investigators also claimed to have sources in the FBI, the documents show.

Indications of contact with an investigator on the staff of independent counsel Leon Silverman, whose official title then was special prosecutor, are contained in records kept by Robert L. Shortley.

An ex-FBI agent, Shortley was one of the detectives who worked for Donovan's firm, the Schiavone Construction Co., in an effort to determine who was making allegations in the case and who was leaking them to the press.

The papers were obtained by Frank J. Smist, a University of Oklahoma graduate student who came here to work on a doctoral thesis and who says he became interested in the Donovan case last year. He says he got the records with company President Ronald A. Schiavone's permission last fall, and decided after reading some that government authorities should review them.

Smist gave the records to the FBI last week in connection with a recently launched inquiry into the activities of the Schiavone detectives. Government prosecutors have been attempting to find out whether there was any obstruction of justice or disclosure of grand jury secrets during Silverman's New York-based probe. Two witnesses, Fred Furino and Nat Masselli, were murdered during the investigation.

Silverman found there was "insufficient credible evidence" to warrant Donovan's prosecution on any grounds.

The FBI "sources" mentioned in Shortley's papers are not named. The claimed contact in the special prosecutor's office apparently was a former FBI agent named James T. McShane, the only civilian investigator on Silverman's staff.

Silverman said this week that all his investigators were "under strict orders of confidentiality." He said "McShane takes his oath to me that he never disclosed a single solitary thing out of our investigation." As a result, Silverman said, "I have no reason to believe that confidentiality was breached."

Shortley has been quoted as saying he neither sought nor obtained confidential information from either the FBI or the special prosecutor's investigation. Another investigator who worked with Shortley and who figures in the memorandums, Robert A. Bermingham, has been quoted to the same effect.

McShane told a reporter that he had two contacts with Bermingham. McShane said he spoke with Bermingham, an old friend from the FBI's New York office, over the phone in May, 1982, and they had lunch at a Manhattan restaurant Friday, June 18, 1982. But McShane said that he told Bermingham on the phone that he couldn't talk about the Donovan case and that at the June 18 lunch all they talked was shop.

"He [Bermingham] was out out drumming up business," McShane recalled of the luncheon meeting. "I was just finishing up the [Donovan] case and I was looking for business. He was just getting started. I was filling him in, telling him how to handle invoices and things like that . . . . I paid for the lunch."

One paper from Shortley's files is an undated memo in Shortley's handwriting that begins with the heading: "Meeting McShane in New York for lunch on Friday." The memo does not say who was meeting, or had met, McShane. The memo continues:

"He brought up Furino—said he had been before G.J. [grand jury] & taken a polygraph. He (Mc) earlier had advised that nothing had come of all this testimony (general) and therefore assumes that statement included Furino's testimony and lie detector test. Mc believes the accident in New York was probably more related to [union] Activities in New Jersey than to Donovan/SCC [Schiavone Construction Co.] matter."

A former Teamsters Union official and gangland figure, Furino disappeared June 3, 1982. He had failed an FBI polygraph test in late April on a series of questions about whether he knew Donovan. He was found dead in the trunk of his car June 11 with a bullet through his head.

There is no mention of a phone call with McShane in the Shortley papers. But the records do include a typewritten report by Bermingham, dated June 21, 1982, three days after the luncheon meeting. It is deals primarily with Frank Silbey, then the chief investigator for the Senate Labor Committee, whom Schiavone detectives suspected of being the prime source of news leaks about the Donovan investigation.

Regarding Silbey, the report concluded: "A source regarding the operation of the special prosecutor's office indicated it was not in touch with Silbey but speculated that Silbey was the recipient of FBI leaks."

The memo also stated:

"A source in New York reported that Schiavone investigators in the New York area are risking becoming involved in obstruction of justice charges as they are apparently becoming involved in GRAND JURY proceedings. This source said that neither the SPECIAL PROSECUTORS investigation or that of the FBI would result in criminal charges. He reasoned that Schiavone therefore should employ a good PP [perhaps a typographical error for PR] man rather than investigators."

Neither the "source in New York" nor the "source regarding the operation of the special prosecutor's office" was named.

Bermingham refused to comment on the documents except to say, "I don't think I've done anything wrong." He said he adopted the no-comment policy after inquiries from other news organizations.

McShane said Bermingham called him "somewhere in May" and asked about Silbey, but McShane said he didn't even know who Silbey was.

"He [Bermingham] said he was a guy who works with the Labor Committee," McShane recalled. At that point, McShane says, he told Bermingham, "I'm working with Silverman on the Donovan case. This is a grand jury [investigation]. I can't talk with you about it."

McShane said he might have been the "source in New York" in Bermingham's memo who warned of obstruction-of-justice hazards, but if so, he said, Bermingham's typewritten account of it was "very much of an overstatement." He said he had no reason to think any Schiavone investigators had become involved in grand jury proceedings.

"I was generalizing with him," McShane said. "I said, 'Bob, be very careful—I don't know Shortley—but I said when you take on an investigation like this, the FBI is in on it, everybody's in on it, you've got to watch out for obstruction of justice. I was just warning him as a friend, 'Be very careful.' "

McShane said all this took place over the phone. By the June 18 luncheon, he also observed, "Furino was dead and buried . . . . The biggest thing I could have told him was that Donovan was not going to be indicted."

Shortley said he had no distinct recollection of the details in his records and "no recollection at all" of receiving information about Furino. He said the bulk of his records were "rough notes with initials, short names, not full sentences" dealing sometimes with "things that were about to happen" and sometimes with "things that didn't happen at all." He said he never had lunch with McShane and never even spoke with McShane until a few months ago, over the telephone on another matter.

Efforts to ask Ronald Schiavone about the papers were unsuccessful. He has been quoted in The New York Times as saying that he neither sought nor received confidential information from the special prosecutor's office or the FBI.

The Schiavone company attorney, Theodore Geiser, said in a telephone interview that he was not aware at the time of Bermingham's contacts with McShane, but he indicated that he saw nothing wrong with them.

"To the best of my knowledge," Geiser said, "everything that was done was proper, and if I had to do it again, I would do it again. I honestly think I acted with propriety and did the best I could to protect a client who was under siege."

Shortley's notes also indicate a number of White House contacts in an effort to vindicate Donovan. One undated note mentions what seems to be an upcoming "lunch w/Ed Hickey, assistant to the president . . . to discuss strategy."

A letter dated June 1, 1982, from Shortley to Geiser states that Shortley "met with Hickey on Sunday for several hours" and "one of the things we talked about was your 'if I were president' letter."

Geiser's "if I were president" letter also is in Shortley's files, along with a May 26 cover letter to Shortley from the Schiavone attorney. Geiser suggested in the cover letter that the president might use some of the draft remarks if the subject came up at a press conference. The text included a mention of reported congressional "outrage" over the Schiavone counterinvestigation and suggested a presidential defense of the detectives' work.

"Every citizen is entitled to an accounting and any citizen or group of citizens who with their own resources and acting within the law wishes to audit the stewardship of any official has an absolute right to do so," Geiser wrote for possible use in a White House news conference.

In his June 1 response to Geiser, Shortley said Hickey had suggested that "the most appropriate and effective way to get those thoughts into the system would be for you to write directly to Fred Fielding, counsel to the president. His thinking was that the matter should be handled 'attorney to attorney.' "

Fielding said this week that he did not recall receiving any such communication and a check of his records showed none. Hickey, who is a White House security aide and an old friend of both Shortley and Donovan, said he had had lunch "dozens and dozens of times with Shortley."

As for the suggestion that Geiser contact Fielding, Hickey said: "That's what I would have said. If he [Geiser] is a lawyer, let him talk to a lawyer in the White House."

Wall Street Journal, Tues., June 26, 1984 - p. A6

A BRIEFING-PAPERS RULING requiring an independent counsel was reversed.

A U.S. Appeals Court decided that the attorney general can't be required to seek such a counsel to probe the alleged theft of Carter administration papers by the Reagan-Bush campaign in 1980. The decision is likely to defuse the controversy stemming from the case as a 1984 campaign issue. (Story on Page 6)

Attorney General Can't Be Forced to Seek Counsel in Debate-Papers Case, Court Says

By Robert E. Taylor
Staff Reporter of The Wall Street Journal

WASHINGTON – The attorney general can't be required to seek an independent counsel to probe the alleged theft of Carter administration papers by the 1980 Reagan-Bush campaign, a U.S. Appeals Court ruled.

The unsigned ruling by eight of the court's 11 judges is likely to defuse the controversy over the "debate papers" case as a 1984 campaign issue. The issue stemmed largely from reports that the Reagan campaign surreptitiously obtained Mr. Carter's briefing papers before his 1980 debate with Mr. Reagan.

The appeals court here ruled that Congress specifically precluded courts from requiring the attorney general to seek an independent counsel to probe alleged wrongdoing by high-level officials under the Ethics in Government Act.

The ruling was a major victory for Attorney General William French Smith, who refused to consider formally the appointment of an independent counsel in the case on the ground that there wasn't any evidence that a crime was committed. He also has been fighting other politically charged court efforts to force him to investigate top Reagan administration officials.

The federal appeals court in San Francisco heard arguments June 11 on one such case. Rep. Ronald Dellums (D., Calif.) and others have asked courts to order Mr. Smith to conduct a preliminary inquiry of whether top administration officials are violating the Neutrality Act by aiding rebels' military attacks on the government of Nicaragua. That case wouldn't be directly affected by yesterday's ruling.

The Ethics Act requires the attorney general to conduct a preliminary investigation if he receives an allegation that a high-level official covered by the act has committed more than a minor criminal violation. Unless the attorney general finds within 90 days that the allegations are meritless or wouldn't normally be prosecuted, the act requires him to seek court appointment of an independent counsel to probe further, and perhaps to prosecute.

Debate-Papers Case

In the debate-papers case, the Justice Department said in February that after an eight-month probe it hadn't found credible evidence of theft, misappropriation of government property, improper disclosure of classified information or obstruction of justice.

Federal Judge Harold Greene disagreed. In response to a lawsuit by two George Washington Law School professors, he ruled that allegations against top officials were sufficiently specific and credible to trigger an Ethics Act inquiry. Rather than allow delay for a review under the act, he ordered Mr. Smith to seek an independent counsel.

Pleased With Ruling

Judge Greene rejected the government's claim that courts can't direct the attorney general to seek an independent counsel under the act. Noting that the provision was enacted to prevent an administration from blocking a broad, impartial probe, he said lack of court review would make such a law "self-defeating."

The appeals court unanimously overruled Judge Greene on this point, saying that the statute's language and legislative history suggest that Congress intended to preclude courts from such orders. The appeals court didn't rule on whether the attorney general should have applied the Ethics Act to the case.

Mr. Smith said through a spokesman that he was pleased with the ruling. And the spokesman, Thomas DeCair, asserted that the attorney general has complied with the letter and purpose of the Ethics Act, and will continue to do so.

John Banzhaf, one of the professors who pressed the debate-papers suit, said he was disappointed with the ruling, "because it may very well mean we'll never get to the bottom of" the debate-paper matter nor resolve contradictory statements from top officials on the subject.

Mr. Banzhaf claimed the appeals court ruling is "another way of saying that (the attorney general) is above the law." He urged Congress to authorize judicial review of the attorney general's compliance with Ethics Act.

He also said he was considering appealing the ruling to the Supreme Court, asking that independent counsel Jacob Stein, who is investigating allegations against White House counselor Edwin Meese, probe the debate-papers case as a matter related to the Meese inquiry.

NY Times, Tues., June 26, 1984 - p. A1

Attorney General's Power to Bar Special Counsel Upheld in Court

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, June 25 — The Federal appeals court here ruled unanimously today that no court had power to order appointment of an independent counsel over the objection of the Attorney General.

Acting with unusual speed, eight appelate judges reversed a May 14 decision by Federal District Judge Harold H. Greene ordering Attorney General William French Smith to have an independent counsel investigate how the 1980 Reagan campaign obtained documents from the Carter White House and campaign.

"We are of the conviction," the appeals court said, "that Congress specifically intended in the Ethics in Government Act to preclude judicial review, at the behest of members of the public, of the Attorney General's decisions not to investigate or seek appointment of an independent counsel with respect to officials covered by the Act."

No Opinion on Evidence

In dismissing the case for lack of jurisdiction, the court expressed no opinion on whether there was enough evidence of crimes by high-level officials to warrant appointment of an independent counsel. Mr. Smith has contended there was not.

The unsigned seven-page opinion by the United States Court of Appeals for the District of Columbia Circuit came just five days after the court heard oral arguments, on an expedited basis, from opposing lawyers in the case.

The use of eight judges to decide the case bypassed the usual approach of having three-judge panels hear cases. Those who joined in the decision were Chief Judge Spottswood W. Robinson 3d and Judges J. Skelly Wright, Abner J. Mikva, Harry T. Edwards, Ruth Bader Ginsburg, Edward A. Tamm, Robert H. Bork and Antonin Scalia. The first five are generally regarded as liberals, the latter three as more conservative.

Judges Kenneth Starr and Patricia M. Wald, former Justice Department

Continued on Page A11, Column 1

Judge's Decision in Carter Papers Case Is Reversed

Continued From Page A1

officials who had disqualified themselves, and Malcolm R. Wilkey, who was out of town, did not participate.

Thomas P. DeCair, a Justice Department spokesman, said Mr. Smith was "pleased" that today's ruling had upheld his view that "Congress confided in the Attorney General, and not the courts, the responsibility and authority to determine whether to invoke the provisions of the Ethics in Government Act.

"The Attorney General's exercise of his responsibility under the Act," Mr. DeCair added, "has been, and will continue to be, in full compliance with the letter and purpose of the law."

However, the appellate court noted that "we express no opinion whatever as to whether the factual information in the possession of the Attorney General was sufficiently specific and credible to trigger the Attorney General's statutory duty to investigate."

John F. Banzhaf 3d, one of two Washington law professors who brought the suit, said today that they were disappointed but had not yet decided whether to seek Supreme Court review.

Watergate Events Led to Law

The Ethics in Government Act was passed in response to post-Watergate concerns that the Justice Department, headed by a Presidentially appointed Attorney General, could not be trusted to do an impartial investigation of possible crimes by top Administration officials.

It requires the Attorney General to conduct a special preliminary investigation whenever he receives information that any of certain specified high-ranking officials may have committed a Federal crime, and to seek an independent counsel unless the preliminary investigation establishes in 90 days that no prosecution would be warranted.

The law also provides that a special three-judge court must appoint an independent counsel whenever the Attorney General seeks one, but that it has no power to do so otherwise.

Today's ruling means that the Attorney General's legal duties under the Ethics Act, which are theoretically mandatory, cannot be enforced by the courts.

While noting that the law does not specifically address the issue, the appeals court said that "inferences of intent drawn from the statutory scheme and its legislative history compel us to conclude that Congress did intend to preclude review."

Mr. Banzhaf had argued before the court last Wednesday that the purpose of the 1978 Ethics Act would be frustrated if a recalcitrant Attorney General were able to "stonewall" to prevent appointment of an independent counsel, as he contended Mr. Smith had done.

Mr. Smith had refused to conduct a special investigation under the 1978 law or to seek an independent counsel, asserting that there was no evidence of any crime in the transfer of the Carter briefing papers and other information to officials of the 1980 Reagan campaign.

Judge Greene, and the four Democrats on a Congressional investigating panel, said the known facts of the matter suggested that some crimes, such as theft and illegal receipt of Government documents, may have been committed.

They stressed in particular the contradictory statements of officials, including James A. Baker 3d, the White House chief of staff, and William J. Casey, now the Director of Central Intelligence, who was the Reagan campaign director.

Mr. Banzhaf and Peter H. Meyers petitioned Mr. Smith last July to seek appointment of an independent counsel. When he refused to do so, or even to conduct the kind of preliminary investigation specified in the Ethics Act, they sued him.

Mr. Banzhaf said today: "Obviously we are disappointed because it probably means that we are not going to get to the bottom of 'Debategate,' and we will probably also not learn whether people like C.I.A. Director William Casey lied in connection with their involvement."

Grand Jury Decides Not to Indict Wick

LOS ANGELES, June 25 (UPI) — Charles Z. Wick, Director of the United States Information Agency, will not face criminal charges that he secretly taped telephone calls with Senator Charles H. Percy, Republican of Illinois, and a newspaper reporter, a county grand jury decided today.

"We decided not to indict Mr. Wick because the evidence and testimony before us did not suggest a felonious act," the grand jury's foreman, Bernard Ramos, said.

California has one of the strictest laws in the nation covering the recording of telephone calls. Recording a conversation without the consent of all parties is a violation punishable by a year in prison and a fine of $2,500.

District Attorney Robert Philibosian said in late April he was investigating whether Mr. Wick committed a crime when he secretly recorded a telephone call from his Bel-Air home to a reporter for The Los Angeles Times on July 8, 1981.