THE WHITE HOUSE
WASHINGTON

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TO: JBR

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

FOR YOUR INFORMATION: briefing book file

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN F. BANZHAF, III, et al.,

Plaintiffs,

v.

WILLIAM F. SMITH, et al.,

Defendants.

Civil Action No. 83-3161

OPINION

This is an action under the Ethics in Government Act (Ethics Act), 28 U.S.C. §§ 591 et seq., to require the Attorney General to appoint an Independent Counsel[1] to investigate whether criminal offenses were committed by high-level officials in the course of an alleged transmittal of certain briefing materials from the Carter White House to the headquarters of the then candidate for President Ronald Reagan. Presently before the Court is defendants' motion to dismiss,[2] in which it is claimed that

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1/ Under prior law, that official was known as a Special Prosecutor.

2/ The motion was filed on January 3, 1984; plaintiffs filed their opposition on January 26, 1984; a reply was received February 15, 1984; and a hearing was held on the motion February 22, 1984.

plaintiffs lack standing to bring the action[3/] and that they have failed to submit information that is sufficiently specific and credible to cause an investigation to be conducted under the statute. For a better comprehension of the issues and the underlying facts, it is convenient to discuss these defenses in inverse order.

I

The Ethics Act was enacted in the aftermath of Watergate to establish procedures for the avoidance of the actual or perceived conflicts of interest which may arise when the Attorney General investigates alleged criminal wrongdoing by other high government officials. The Congress believed that an independent prosecutor, who would be free from the divided loyalties which may afflict officials of the Justice Department in these circumstances, would be more likely to be guided by politically neutral principles of fairness and justice.[4/]

3/ A related claim is that Congress did not intend to create a private judicial remedy for the Attorney General's failure to comply with the Act.

4/ S. Rep. No. 170, 95th Cong., 1st Sess. 5-6 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 4216, 4221-22 (hereinafter S. Rep. 170).

To these ends, the statute provides in section 592(a) that if the Attorney General receives specific and credible evidence[5] that a high-level federal official[6] has committed a federal criminal offense, he "shall" conduct a preliminary investigation. In addition to its mandatory nature, the investigation required by the Act differs from an investigation conducted by the Department of Justice under normal circumstances in the following principal respects.

First, an Ethics Act investigation, which may last not more than ninety days,[7] is "preliminary," that is, it is not and it may not become a full-fledged criminal investigation. Its purposes are only to weed out frivolous or groundless allegations and to determine whether the case warrants further investigation.[8] Consequently, as soon as the Attorney General determines

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5/ Although the statute provides that it is the responsibility of the Attorney General to determine whether grounds to investigate exist, it specifies that, in making this decision, he "shall" consider the decree of specificity of the information received, and the credibility of the source of the information. Section 592(a)(1). The court in Dellums v. Smith, 573 F. Supp. 1489, 1499 (N.D. Cal. 1983), concluded that in view of these provisions, the Attorney General's task is ministerial.

6/ That category includes the President, Vice President, members of the Cabinet, high-level Justice Department officials, the Director and the Deputy Director of the Central Intelligence Agency, the Commissioner of Internal Revenue, and various national and Presidential campaign officials. Section 591(b).

7/ Section 592(b)(2). Under section 593(f), "[u]pon a showing of good cause by the Attorney General," the special division of the Court of Appeals (see infra) may "grant a single extension . . . for a period not to exceed sixty days."

8/ S. Rep. 170 at 54, 1978 U.S. Code Cong. & Ad. News at 4270.

that the allegations are serious or have a potential chance of substantiation, his role is over: the case must be referred to a special judicial body (see infra) for the appointment of an Independent Counsel.[9/]

Second, to ensure that the Attorney General does not conduct a full criminal investigation and thereby usurp the authority of the Independent Counsel, the Act prohibits the Attorney General from convening grand juries, plea bargaining, granting immunity, and issuing subpoenas.[10/]

Third, if at the conclusion of an Ethics Act investigation, the Attorney General determines that further investigation or prosecution is not warranted, he must submit a memorandum containing both a summary of the information received and a summary of the results of the investigation to a special division of the U.S. Court of Appeals[11/] which has the authority to appoint an Independent Counsel to take over any further investigation and

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9/ S. Rep. 170, 1978 U.S. Code Cong. & Ad. News at 4270-71. See also, section 597 ("whenever a matter is in the prosecutorial jurisdiction of a [sic] independent counsel . . . the Department of Justice . . . shall suspend all investigations and proceedings. . .").

10/ Section 592(a)(2).

11/ Section 592(b)(2).

prosecution.[12] The summary of information must be sufficiently detailed to apprise the special judicial division of the essence of the allegations and the information received by the Department of Justice; the summary of the results must be sufficiently comprehensive to enable the special judicial division to determine what efforts the Department made to determine the truth of the allegations and what, if anything, it did to uncover additional evidence.[13] When conducting investigations not covered by the Ethics Act, the Attorney General is, of course, free to pursue his own course and reach his own conclusions without accounting to anyone.

The complaint in this case alleges, inter alia, that, according to information available on the public record, hundreds of pages of documents from the White House and the Executive Offices were removed or copied and then turned over to the 1980 Reagan campaign organization; that four of President Reagan's present or former aides[14] have admitted to possessing or seeing

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12/ If, upon completion of the preliminary investigation, the Attorney General finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, he must so notify a special division of the Court of Appeals; if he finds that the matter warrants further investigation or prosecution (or if he fails to act within ninety days) he must apply to that division for the appointment of an Independent Counsel. Section 592(b)(1), (c)(1).

13/ S. Rep. 170 at 56, 1978 U.S. Code Cong. & Ad. News at 4272.

14/ James A. Baker, III, White House chief of staff; David Stockman, Director of the Office of Management and Budget; David Gergen, White House Communications Director; and Richard Allen, former National Security Advisor.

such materials; that at least some of these aides[15/] knew that the documents had been taken from the Carter White House; that an operation existed to collect inside information on the Carter campaign through means of a "mole" and otherwise; and that several high Administration officials[16/] appear to have made contradictory statements concerning these papers. Plaintiffs claim that the individuals involved in these activities may have violated one or more federal criminal laws.[17/]

The government argues that this information is not specific or credible, and that plaintiffs have for that reason failed to state a claim upon which relief may be granted. Indeed, the government goes so far as to assert, more pointedly, that the term "mole" has no "criminal overtones"; that there are likewise no such "overtones" to an information gathering apparatus employed by a Presidential campaign which uses former agents of the FBI and the CIA; and that the statement of Budget Director Stockman -- that briefing books were "filched" -- may have had a

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15/ E.g., Baker and Stockman.

16/ Plaintiffs allege that the following persons made such contradictory statements: Baker and William Casey, Director of the Central Intelligence Agency; Allen and Jerry D. Jennings, Director of the White House Office of Science and Technology; and Baker and Gergen.

17/ Among the laws mentioned in the complaint are those dealing with conspiracy (section 371 of title 18); interference with nomination or election of candidate for office of President (section 595); theft of records of the United States (section 641, 654, 661, 2112); disclosure of classified or confidential information (sections 798, 1905); and removal of records (section 2071).

connotation other than theft. Memorandum of Points and Authorities at 19-21.

These contentions entirely lack merit. To be sure, none of the information summarized above is sufficient, without more, to prove the guilt of any particular individual beyond a reasonable doubt; it may not even be sufficient to support the indictment of any particular individual by a grand jury. But that is not the standard that Congress had in mind when it directed that an Ethics Act investigation be conducted whenever information of high-level involvement in criminal conduct is received. In fact, the intention of the Congress is the precise opposite. The Senate Report states that

> as soon as there is <u>any indication whatsoever</u> that the allegations involving a high level official may be serious or have <u>any potential chance of substantiation</u>, a special prosecutor should be appointed to take over the investigation.

(emphasis added). S. Rep. 170 at 54, 1978 U.S. Code Cong. & Ad. News at 4270.

There can be no question that the admissions, contradictions, and other information suggestive of criminal activity would normally generate at least a preliminary investigation to determine whether those who were seemingly implicated did, in

fact, violate the law.[18] If any proof of that proposition were needed, it is supplied by the Department of Justice itself. By the government's own admission, the Department has conducted "a thorough and searching investigation of the transmittal of the briefing papers" in the course of which "over 200 interviews have been conducted and numerous criminal statutes have been considered, including those cited by plaintiffs." Memorandum of Points and Authorities at 21-22.[19]

It is difficult to understand on what basis the government can conduct that kind of an investigation and yet assert at the same time that when plaintiffs furnished evidence similar to that which generated the Department's inquiry, they failed to provide information that is sufficiently specific and credible to cause

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18/ It strains credulity that a prosecutor who, under any other circumstances, received information that a highly-placed public official had admitted that classified or other significant documents had been "filched" from the White House, would simply sit back on the assumption that this filching had a "connotation other than theft." Any prosecutor, careful or careless, eager or lethargic, would on the receipt of such information conduct at least a preliminary investigation. The Attorney General's authority under the Ethics Act may be broad; it is not unlimited. See 5 U.S.C. § 706(2)(A).

19/ The media reported several days after the hearing on the motion to dismiss that the Department had concluded its eight-month investigation and had issued a three-page report stating that no evidence had been found of any plan or conspiracy by Reagan officials to obtain Carter briefing materials or any other confidential, internal Carter documents. See Washington Post, February 24, 1984, p. 1, col. 6; The New York Times, February 24, 1984, p. 1, col. 1.

an Ethics Act investigation to be conducted.[20] The two types of investigations would obviously be triggered by evidence of the same or similar character.[21] The difference between them lies not in the quantity or quality of the evidence required for their initiation but in the fact that at the conclusion of one the Attorney General makes his own decision as to whether or not he should prosecute, while at the conclusion of the other he must account to the special division of the Court of Appeals.

For the reasons stated, the Court finds on the basis of the present record[22] that plaintiffs have submitted information of sufficient specificity and credibility to require the Attorney

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20/ Neither the credibility nor the specificity of the information supplied by plaintiffs is diminished by the fact that plaintiffs did not discover it through their own confidential or other "live" sources but compiled it from published newspaper and magazine reports. While publication in the media does not necessarily endow information with special attributes of credibility, it is not deprived of those attributes merely because there has been such publication. The Watergate episode teaches that the media sometimes have the independence and resources necessary for the preliminary collection of facts which may later be used in a more structured form by legislative, judicial, or executive officials.

21/ An Ethics Act investigation would be more limited in two respects. First, it is concerned only with wrongdoing by a special class -- high-ranking executive officials. In view of the array of officials named in the complaint in this case, it could not seriously be maintained that, while evidence of wrongdoing sufficient to cause a criminal investigation is present, it is not sufficient to cause an investigation of an individual subject to the Ethics Act. Second, the Ethics Act investigation is limited solely to the question whether the submitted information is sufficient to constitute grounds to investigate that a covered official committed a violation of any Federal criminal law. Section 592(a)(1).

22/ It may be that the defendants' answer to the complaint will contradict plaintiffs' factual allegations.

General to conduct a preliminary investigation provided for under the Ethics Act.[23] Accordingly, defendants' contention that the complaint fails to state a claim upon which relief may be granted is rejected.

II

The government argues that Congress did not intend to confer any private rights when it enacted the Ethics Act and that plaintiffs therefore lack standing to maintain this lawsuit.

Plaintiffs advance two theories in support of their claimed standing: (1) that they have standing as citizens,[24] as attorneys and officers of the court,[25] and as public interest lawyers

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23/ The Justice Department's own investigation clearly does not comply with the requirements of the Act, if for no other reason than that the Attorney General failed to file a report with the special division of the Court of Appeals. Moreover, as indicated supra, the Attorney General only has authority to investigate the allegations of criminal wrongdoing with a view toward making a report to that division concerning the appointment of an independent prosecutor. Accordingly, the purportedly definitive conclusions drawn by the Department of Justice on the basis of its own investigation, lack validity under the statute. Of course, in the event that an Independent Counsel is ultimately appointed, that official would decide on the extent to which he wished to rely on the facts addressed in the Department of Justice investigation, what additional facts should be developed, and what conclusions should be drawn from all the evidence.

24/ On a related basis, plaintiffs also claim standing as voters, taxpayers, and campaign contributors.

25/ It is plaintiffs' theory that as attorneys they have a special interest in the impartial administration of justice.

whose prior legal actions helped to establish the Ethics Act,[26] and (2) that they have standing because they presented sufficiently specific and credible information to the Attorney General to trigger the procedural mechanism leading to the appointment of an independent counsel under the Act. It is not necessary to explore the first theory because plaintiffs have standing under the second.

To establish standing, plaintiffs must show that they suffered "injury-in-fact," that is, that they sustained some actual or threatened injury as a result of the allegedly illegal conduct of the defendants (see, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Gladstone Realtors v. Village of Bellwood, 441 U.S. 1, 99 (1979); and Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)) and that the interest they seek to protect is arguably with the zone of interests to be protected or regulated by the statute. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

The government acknowledges that, as a general rule, the deprivation of procedural rights granted by a statute constitutes sufficient injury to confer standing. Reply Brief at 3. See also; Schlesinger v. Reservists to Stop the War, 418 U.S. 208,

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26/ Plaintiff John Banzhaf asserts that, as a public interest lawyer and law professor, he was perhaps the first person to raise the issue of the need for an impartial outside prosecutor to investigate the allegations against then Vice President Agnew and then President Nixon, and that these efforts and the events that followed led to the enactment of the Ethics Act.

224 n.14 (1974). Accordingly, if Congress created a legal right to a preliminary investigation for persons who supply the required information, then the requisite interest for standing is found in the invasion of that right; i.e., the Attorney General's refusal to conduct that investigation as required by the Act. Thus, plaintiffs have standing[27/] if the Ethics Act confers rights to persons who present to the Attorney General specific and credible information of high-level law violations.

That issue was considered and answered in the affirmative in the only two cases which have thus far arisen under the Act -- Nathan v. Attorney General, 557 F. Supp. 1186 (D.D.C. 1983) (Gesell, J.)[28/] and Dellums v. Smith, 573 F. Supp. 1489 (N.D. Cal. 1983) (Weigel, J.). Nathan involved a request by the victims of a terrorist attack in Greensboro, North Carolina for an investigation of charges that high officials of the government had authorized or negligently permitted various violations of civil rights and that they had conspired to conceal their involvement. In Dellums, plaintiffs charged that, by supporting paramilitary operations against Nicaragua, high federal officials

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27/ Because the right to a preliminary investigation is a protected procedural right, the zone of interests prong of standing is supported here by considerations similar to those involved in the injury prong.

28/ See also, Nathan v. United States, 563 F. Supp. 815 (D.D.C. 1983). An appeal is pending, and the Court is advised that briefs have been filed and that the Court of Appeals has scheduled oral argument.

violated the Neutrality Act (18 U.S.C. § 960) and related statutes.

In response to arguments similar to those made in this case, Judge Gesell found the statute's limited restriction on court review[29/] to be suggestive of an intent by the Congress not to foreclose such review in other appropriate circumstances, i.e., where the Attorney General refuses to conduct the preliminary investigation mandated by the statute. He further found that, if the Act is to be enforceable at all, it must be through those who supply specific information, and that the plaintiffs, as victims of the alleged crime, had, for standing purposes, far more than a generalized grievance. See 557 F. Supp. at 1188-89. Based upon these conclusions, the court held that the plaintiffs had standing, and it denied the government's motion to dismiss.

Similarly, in Dellums, Judge Weigel concluded that Congress gave those persons who supplied the required information a procedural right to a preliminary investigation, and that the scheme of the Act -- to remove certain actions and determinations from the political process into the public realm -- supported a decision in favor of standing by the plaintiffs. That court, too, denied a government motion to dismiss.[30/]

29/ The only express limitation on judicial review is contained in section 592(f). That section provides that the Attorney General's application to the special judicial division for the application of an Independent Counsel "shall not be reviewable in any court."

30/ The court has also denied a motion for reconsideration.

This Court is in agreement with the Nathan and Dellums conclusions. Where Congress has provided that, upon request of a citizen, the government has a duty to act and the government then fails to act, the person making the request has standing to enforce his right to government action[31] by a lawsuit in federal court. This principle has been applied in such diverse areas as the Freedom of Information Act, the National Environmental Policy Act, and the False Claims Act. See, e.g., City of Davis v. Coleman, 521 F.2d 661, 672 (9th Cir. 1975); Nixon v. Sampson, 389 F. Supp. 107, 121-22 (D.D.C. 1975); see also, 31 U.S.C. § 231-35. As the court in Dellums correctly noted,

> [t]he Ethics in Government Act . . . envisions that information supplied by persons pursuant to its provisions will be forwarded and considered by appropriate decisionmakers named in the statute . . . [and] that plaintiffs have standing because Congress conferred upon them a right to a judicial determination.

573 F. Supp. at 1095-96.

This conclusion is particularly compelling in the context of this statute when the alternative is considered,[32] for if the

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31/ The underlying interest or injury need not be an economic one. Data Processing Service v. Camp, 397 U.S. 150,154 (1970); Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

32/ To be sure, the Court could not find that a particular plaintiff has standing merely because otherwise no one would have standing (Schlesinger v. Reservists, supra, 418 U.S. at 227) since some matters may have deliberately been left by the Congress to the political process. But that reasoning can hardly be applied to a statute, such as this one, which was intended to remove certain decisions from that process.

government is right, no one has standing to enforce the Ethics Act.[33]

This contention is supported neither by the statutory language[34] nor by the legislative purpose. The Ethics Act was enacted to prevent a recurrence of the Watergate abuses perpetrated by, among other individuals, the then Attorney General. It accomplishes that objective by requiring the Attorney General, upon the receipt of information that certain high officials violated criminal laws, promptly to undertake an investigation and to report thereon to a special judicial body. The obvious purpose of this procedure is to provide some check on the Attorney General who is a political appointee of the President and who, as a member of an elected Administration, is placed in a difficult situation when called upon to investigate allegations against Administration officials.[35]

33/ See, e.g., Memorandum of Points and Authorities at 15-17. Upon inquiry, counsel informed the Court that in the government's view, even former President Carter, the owner or custodian of the allegedly stolen documents, would not have standing to sue.

34/ The decision on the conduct of a preliminary investigation is not discretionary under the statute. Rather, the Ethics Act requires the Attorney General to conduct such an investigation whenever he is presented with specific and credible information that a covered official may have committed a crime. See note 5 supra.

35/ Not only is there a potential for favoritism but there is also a danger that, to avoid the risk of a loss of public confidence, the Attorney General may bend over backwards to make harsh and unfair prosecutorial decisions against other public officials. S. Rep. No. 496, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Ad. News at 3540-41.

Yet if the government's argument is correct, that entire process can be short-circuited by the simple devise of a refusal of the Attorney General (either on his own volition or on instructions from White House officials who may be the targets the investigation) to initiate the required investigation. For if no one has standing to sue, there will be no accountability: no one could require the Attorney General to conduct a preliminary investigation in accordance with the Act, to report to the special judicial division, or to apply in appropriate cases for the appointment of Independent Counsel.36/

Stripped of an enforcement mechanism, the statute would be nothing more than a hortatory statement from the Congress to the

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36/ Congressional oversight cannot accomplish these objectives. Section 595(e) provides that the members of the Judiciary Committees of the House and the Senate may request that the Attorney General apply for the appointment of an Independent Counsel. However, if the government is correct in is arguments in this case, the Committees would have no greater standing than the plaintiffs here. Indeed, it is doubtful that the Congress would be able even to enforce the statutory requirement that the Attorney General supply it with a written notification of actions taken pursuant to the congressional request and an explanation in the event no action is taken. See Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983).

The general power of congressional committees to investigate -- such as that of a subcommittee of the House Committee on Post Office and Civil Service which is presently conducting an investigation into the subject of the removal of the Carter papers -- is not likely to be more effective. Legislative committees have no power to prosecute, and it is problematical, in any event, whether they will receive the requisite cooperation from the Executive Branch.

As the for the special division of the Court of Appeals, it has ruled that it lacks jurisdiction at the present stage of the proceedings. Order 82-3, U.S. Court of Appeals for the District of Columbia, Special Prosecutors Division, September 13, 1982.

Executive Branch.[37] That is not the way in which statutes, unlike resolutions or informal requests, are normally viewed. In any event, absent a direction to that effect in the Act or the legislative history, the Court is not prepared to adopt so defeatist a view of a law which had its origins in the dereliction of duty of the highest officers of the Republic and which was intended to prevent their recurrence.[38]

37/ The government argues that, surely, the Attorney General may be trusted to carry out the law. As a general rule that is undoubtedly true, but as the Congress discovered to its dismay during the Watergate days, not every attorney general can, under all circumstances, be counted upon to investigate vigorously and impartially. Moreover, the Ethics Act was designed to avoid both actual and perceived conflicts of interest. Where a potential conflict of interest or loyalties is present, some accountability is necessary. That the possibility of neglect by the Department of Justice of its statutory duties is not idle and unwarranted speculation appears to be affirmed, on the present record, by the events surrounding this controversy. See note 46 infra.

38/ Actually, to the extent that the will of the Congress may be discerned from the legislative materials, Congress wanted this law to have actual force and to be more than a "pious statement of pure political import." Nathan v. Attorney General, supra, 557 F. Supp. at 1190. Because attorneys general had been reluctant or unwilling to appoint special prosecutors where this appeared to be appropriate because of inherent conflicts of interest, Congress found it necessary to set forth those circumstances in which the Attorney General must conduct a preliminary investigation, report to the special judicial division, and, if the allegations warranted further investigation, apply for the appointment of an independent counsel. S. Rep. 170, 1978 U.S. Code Cong. & Ad. News at 4227. When Congress amended the Act in 1982, it reconsidered the need for the special prosecutor provisions and reaffirmed its earlier finding that "[i]t was not sufficient to rely on the President or the Attorney General to appoint a temporary special prosecutor." S. Rep. No. 97-496, reprinted in 1982 U.S. Code Cong. & Ad. News at 3540. See also, the general discussions regarding legislative history in Nathan and Dellums, supra.

III

The government finally contends that, even if Nathan and Dellums were correctly decided, and that in these cases the plaintiffs did have standing, the plaintiffs in this case do not. In that view, if plaintiffs, who are no more than citizens and lawyers, have standing, the floodgates would be open.

That argument misconceives what is involved. As indicated above, plaintiffs' standing stems not from their citizenship or their membership in the Bar; it stems from their submission to the Attorney General of information that is plainly adequate under the statute to trigger a preliminary investigation.[39/] The question of any injury to plaintiffs apart from the Attorney General's failure to conduct a preliminary investigation in response to their request is therefore irrelevant.

Insofar as the "floodgates" argument is concerned, the requirement of specificity and credibility establishes an inherent limitation on the use of the statute and the burdens on the Attorney General. It will presumably not be a frequent occurrence that someone could or would submit a petition to the Department of Justice containing information that specifically

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39/ It is not necessary to decide on the proper scope of judicial review if the issue of the specificity and credibility of the information was, unlike here, a close one.

and credibly charged one or more high-level officials with committing a federal criminal offense.[40/] But on those rare occasions when such information is submitted, the Attorney General has the duty under the law to act.

To the extent that a distinction may be made between this case and Nathan and Dellums, the instant case even more clearly justifies a finding that the plaintiffs have standing to enforce the statute. Unlike the issue of American involvement in Nicaragua or the alleged violations of the civil rights laws in an alleged assault by members of the Ku Klux Klan on members of the Communist Party in North Carolina, this case involves the very evil that prompted the adoption of the Ethics Act -- alleged political chicanery at the highest levels of government in the context of a political campaign.[41/] To hold that in that kind of situation, the Attorney General may refuse even to conduct the preliminary investigation required by that statute, either by making the patently erroneous claim that he had received no specific and credible information concerning law violations, or by arguing successfully that no one has standing to challenge his failure to act, would vitiate that which Congress had sought to achieve in the Ethics Act.

40/ Since the Ethics Act was passed in 1978, only three private enforcement actions have been filed in federal court.

41/ The involvement of high-level officials is also more apparent here than in Nathan (compare 557 F. Supp. at 1188) and this case, unlike Dellums, does not involve foreign policy questions (compare 573 F. Supp. at 1502-03).

IV

It may well be that no crime was committed by anyone in connection with the transfer of documents from the White House to the campaign headquarters of the opposing candidate.[42/] After all, not every allegation of wrongdoing or even every proven incident of wrongdoing is another Watergate. Yet there may be here at least one parallel with that unhappy episode.

42/ The Court emphasizes that all that is ultimately involved in this lawsuit is a procedural question: who shall investigate charges and who shall decide whether to prosecute -- the Attorney General or an Independent Counsel? The complaint does not allege, and this Court passes no judgment as to whether anyone is guilty of wrongdoing, nor does it have jurisdiction to decide that question.

The Court's decision is also limited in that there will not be, in any event, an interference with the prosecutorial discretion of the Attorney General. The duty to conduct a preliminary investigation is clearly distinguishable from the government's discretionary power to prosecute. First, Congress imposed a mandatory duty to conduct a preliminary investigation under the circumstances alleged to exist in this case, and to the extent that such an investigation would normally be viewed as an exercise of prosecutorial discretion, Congress intended to depart from the general rule by making it mandatory in certain limited circumstances. Second, the preliminary investigation and the decision to prosecute are two distinct steps in the statutory process. The Ethics Act does not disturb the government's discretion in the latter instance. See Dellums v. Smith, supra, 573 F. Supp. at 1499-1500. Third, there will be no interference by any court with either an investigation or a prosecution once it has begun; the statute mandates merely that these functions be carried out by a prosecutor other than the Attorney General.

It may be noted that the government acknowledged during oral argument that it makes no claim that the statute is unconstitutional.

The Ethics Act plainly contemplates that when the Attorney General receives specific and credible information of law violations by high-level officials, he shall do no more than to conduct a limited investigation with a view solely to determining whether an Independent Counsel should be appointed. Once he has done that, he must stop. He may not conduct his own full-fledged investigation and draw his own conclusions from that investigation. The entire point of the Ethics Act is that, when there are even preliminary indications that high-level officials violated criminal laws, the decision on how to proceed further must be left to independent authority.[43/]

According to the allegations of the complaint, ample grounds exist for the conduct of an investigation leading to a determination whether an Independent Counsel ought to be appointed. The only substantive basis[44/] on which the Department of Justice has defended or on which it could defend[45/] its failure to conduct a preliminary investigation under the Act -- that the evidence of wrongdoing is not sufficiently specific or credible to warrant

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43/ This is on the common sense assumption that the Independent Counsel who has no political and other loyalties might view collected evidence differently than would an attorney general faced with allegations against his colleagues. In addition, the Independent Counsel might require the development of facts which would not be pursued under the direction of the Department of Justice.

44/ In addition to the technical defense that no one has standing to question the Attorney General's decision.

45/ See S. Rep. No. 97-496 at 11-12, reprinted in 1982 U.S. Code Cong. & Ad. News at 3537-38, 3547. But see note 22 supra.

even a preliminary inquiry -- is without any reasonable basis. In short, the Department of Justice appears to have simply ignored the requirements of the Ethics Act.[46/]

Thus, the procedural mechanism adopted in the aftermath of Watergate for an independent, dispassionate inquiry into possible wrongdoing has been frustrated at the very outset. If the Department's decision stands, the public will never know whether the special division of the Court of Appeals would have been satisfied with the scope and the results of the inquiry and whether an Independent Counsel would or would not have found evidence of wrongdoing. The Attorney General fiat would effectively end any possibility of an independent decision. This

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46/ Even if no one had standing, the Attorney General would still have his own, independent obligation under the Act. Upon coming into possession, from any source, of information concerning law violations by high-level officials, he has the responsibility under the statute to conduct a preliminary investigation and to submit the results to the special judicial division. If that had been done when the Department learned of possible law violations, and if at that juncture the special judicial division had been satisfied that the evidence was not sufficiently specific or credible for the appointment of an Independent Counsel, the statutory requirements would have been satisfied. On the other hand, if at the conclusion of the preliminary investigation unexplored evidence of law violations remained, further investigative efforts would have been required to be conducted under the aegis of an Independent Counsel. The third hypothesis -- that there was insufficient evidence for an investigation -- is conclusively contradicted by the fact that the Department saw a valid basis for conducting its own eight-month inquiry. The course of action evidently adopted by the Department -- to merge the preliminary investigation with a full-fledged, final investigation -- failed entirely to take account of the statutory mandate that the two inquiries are to be directed by two different prosecutorial entities.

result comports neither with the language nor with the purpose of the Ethics Act.

The motion to dismiss is denied. The defendants shall file their answer to the complaint within ten days.

Harold H. Greene
United States District Judge

Dated: February 29, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN F. BANZHAF, III, et al.,

Plaintiffs,

v.

WILLIAM F. SMITH, et al.,

Defendants.

Civil Action No. 83-3161

FILED

FEB 29 1984

JAMES E. DAVEY, Clerk

ORDER

For the reasons stated in the Opinion filed this date, it is this 29th day of February, 1984,

ORDERED That defendants' motion to dismiss be and it is hereby denied, and it is further

ORDERED That defendants shall have ten days from the date of this order to answer the complaint.

Harold H. Greene
United States District Judge

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June 27, 1983

Mr. Richard A. Hauser
Deputy Counsel to the President
The White House
Washington, D. C.

Dear Mr. Hauser:

You and Mr. Gergen have requested a copy of the briefing book used by President Carter in his preparations for the October 28, 1980 debate.

Enclosed is a copy of that briefing book, as well as the supplementary foreign policy questions and answers. We have checked with all of those involved in preparing President Carter for the debate, and all concerned agree that the enclosed materials are the only issue briefing materials prepared for and sent to President Carter for that debate.

You will notice that this book very closely matches Mr. James Baker's description of a 300 page, 3 inch thick black-bound looseleaf notebook, and contains questions and answers as described by Mr. Frank Hodsell in his June 18, 1983 Washington Post interview.

We understand that you are conducting an internal investigation in the Counsel's Office, and we are hopeful that the enclosed materials will facilitate a thorough investigation that will determine exactly what happened and who was involved.

Sincerely,

Patrick H. Caddell

Enclosure

DEBATE BRIEFING MATERIALS

- DOMESTIC -

COPY

JUN 27 1983

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ANSWER AND REBUTTAL OBJECTIVES

1. Present Presidential image and experience -- make clear that there is a marked difference between you and Reagan in knowledge and experience -- and leave no doubt why you are now President and what you have learned as President. The next four years will be better because of the unique learning experience you have acquired.

2. Draw contrasts between your approach to problem-solving with Reagan's -- you are moderate, he's not; you are cautious, he may not be; you are now trained for the job, he's inexperienced; you understand complexities; he doesn't.

3. Through repetition, leave audience with clear impression of your themes. Your answers should follow a clear format (past, present, future) and your rebuttals to Reagan should follow a clear pattern.

4. Present your achievements (largely unrecognized) in a positive, forceful -- not defensive -- tone. Turn attacks back by comparing our policy for the future with Reagan's. Stress your record. Be forthright on your disappointments (No President gets everything he wants. Neither have I).

5. Make evident the substantive weaknesses and unrealities of Reagan's positions while indicating he is a decent and honest person.

6. Focus the audience's attention on the difference between the future you will give the Nation with what Reagan will give. Make clear that you are mainstream Democrat, while Reagan is representative of a small part of the Republican Party. The Democratic vs. Republican emphasis is critical. Stress that Reagan has the same beliefs Republicans have always had.

7. Present your personal qualities of greatest appeal -- integrity, sincerity, openness, intelligence, steadiness and common-man touch.

8. Use catch phrases which people can remember (e.g. Kemp-Roth is a "rich man's tax cut which would flood the country with dollars as fast as the printing presses could print them".) (We will provide them to you)

ONE

Present Presidential image -- make clear there is a difference between you and Reagan in knowledge and experience -- and leave no doubt why you are now the President.

You will have the same basic problem that Ford did in the 1976 debates -- how to appear Presidential (how to separate yourself from the challenger) when you are in a setting in which each candidate appears of equal rank. This problem can be overcome by the manner and substance of your answers. They should convey the fact that you are President, are forced to make the decisions others only talk about, are fully conversant with all issues, are able to point out the unrealistic, non-Presidential perspective of Reagan, are able to keep your cool in what may become heated exchanges, and are in the process of taking certain Presidential actions to solve certain of the problems being debated.

It will also be important to stress your experience and how it has taught you to be a better President (e.g., you have learned the bitter lessons of inflation and how deep-seated it is and that is why you so strongly oppose Kemp-Roth and support your effort to improve investment incentives and productivity or (e.g., you have learned how the Congress works and have developed close relations with its leadership and by committee chairmen.)

TWO

Draw contrasts between your approach to problem-solving with Reagan's -- you are moderate, he's extreme; you are cautious, he's a ~~hip~~-shooter; you are trained for the job, he's inexperienced; you understand complexities, he's simplistic.

JDR

One of the best ways to emphasize that you are Presidential and Reagan is not is by contrasting your styles in solving problems, particularly the type of critical, life-or-death issues that come across a President's desk. You should use appropriate occasions to point out how a President must fully weigh his words and actions for the impact will be felt not only in this country but throughout the rest of the world. You should emphasize, as well, the experience you have developed in solving national and international problems, and how that experience -- from which you have learned a great deal -- cannot be gained elsewhere or through any other job.

THREE

Through repetition leave audience with clear impression of your themes.

If the experience of previous Presidential debates holds, viewers will remember almost nothing about the substance of what the candidates say (unless there is a glaring error of the magnitude of Ford's in the second debate). They will remember the style, tone, forcefulness, and appearance to a much greater extent. That may be Reagan's saving grace. The best hope for getting the audience to remember our substantive points is repetition of the key positive and anti-Reagan themes. Ideally, every answer should begin with one of the positive themes and contain, later in the answer, one of our themes against Reagan. Every answer should talk about the past (the record and what you inherited), the present (trends in right direction), the future (contrast your program with Reagan's). It may be hard to attain the ideal. But repeated use of the key themes is the only way to leave the viewers with the basic messages we want to convey. This can be done with your rebuttals to Reagan's answers as well, wherever appropriate (e.g., "that answer simply won't solve the problem").

FOUR

Present your achievements in a positive, forceful -- not defensive -- tone.

Incumbents always face the danger in a debate of appearing defensive by necessarily having to defend their record. That was certainly the case with Ford. There is obviously no way for you to avoid having to spend part of the debate responding to charges about your record. But you should not appear defensive about some of the weaknesses in the record. That can be avoided by a positive, forceful presentation of your record in the area under attack (e.g., Yes we have had problems with inflation, but it's on a clear downward path and the consumer price index has averaged __% over the last ___ months, and its my realization the dangers of inflation which lead me to so strongly oppose Mr. Reagan's economic policy based on Kemp-Roth because it is so inflationary.)

FIVE

Make Evident the substantive weaknesses and unrealities of Reagan's positions.

You should make it clear that Reagan is a decent and honest man but without the solutions to the problems of the 1980's. Throughout the campaign, Reagan's substantive positions have gone largely unexamined by the press. You therefore need to work to point out in the debate the weaknesses of his basic positions. The point here is to drive home the message that his policies are simplistic and/or unrealistic, and that, unfortunately, Reagan does not understand the complexities of the problems involved.

SIX

Focus the audience's attention on the difference between the future you will give the Nation with what Reagan will give. Make clear that you are a mainstream Democrat, while Reagan is representative of a small part of the Republican Party.

Throughout the debate you should try to use every available opportunity to draw a stark contrast between what the consequences for the future of your positions versus the consequences for the future of Reagan's positions. For example, "I intend to see that, shortly, every American will have the protection of national health insurance; my opponent opposes NHI, and it will not be available to help the poor and the elderly if he has his way." Or, "I intend to seek SALT II ratification and to continue our efforts to reduce the threat of nuclear war. My opponent wants to abandon SALT II and engage in a nuclear arms race as a bargaining card." Or, "I will continue to pursue economic policies which will effectively bring down our basic inflation rate during the 1980's; my opponent supports a tax cut of such massive amounts that inflation can only skyrocket as a result during the coming years."

It is important that you draw the political party contrast with Reagan. That is one of the best ways to counter the impression of many Anderson supporters and those currently undecided that there is no real difference between you and Reagan. You need to emphasize that one of the differences is that you are a Democrat -- in the mainstream of the Party of Roosevelt, Truman and Kennedy -- while Reagan is not only part of the Party of McKinley, Harding, Hoover and Nixon, but he is a representative of a small element of that Party.

Aside from talking about your Democratic predecessors, one way to include Democratic Party references is to refer to the Democratic Party traditions and ideals and to the Democratic Party platform (especially in comparison to the Republican platform).

Stress that Mr. Reagan's views are not unusual - they are what one would expect from Republicans. Show in your answer how your policies fit within the Democratic Party tradition and Reagan's (e.g., tax cuts to benefit predominately the wealthy) are consistent with Republican ideals. You have been doing this very effectively in your speeches.

COPY

SEVEN

Present your personal qualities of greatest appeal -- integrity, sincerity, openness, intelligence, steadiness and common-man touch.

JUN 2

From the start, the polls have shown that the public most admires many of your personal qualities -- integrity, sincerity, openness, intelligence, steadiness and common-man touch. These are qualities which are conveyed in many ways and over a period of time. It is not easy to convey such qualities in a brief, restricted debate format. However, an effort should be made to do so, both in the manner and style of your answers, as well as in their content. For instance, you might sprinkle throughout your answers references to your telling the truth to the public about our problems, to your discussions of Town Hall meetings at other places with average citizens, to your commitment to informing the public about the government's actions, and to your applying a steady hand in times of domestic uncertainty and international crisis.

ANSWER AND REBUTTAL THEMES

1. RECORD -- I have compiled a sound record of accomplishment -- one largely unreported and unrecognized.

I have:

- o PROTECTED THE PEACE -- through strong defense and diplomatic skills;
- o tackled tough, long-ignored and politically difficult issues (energy, inflation, government bureaucracy);
- o restored important values to government (ethics, integrity, openness, concern for human rights abroad and equal rights at home);
- o demonstrated compassion for problems of poor, minorities, unemployed, elderly.

Reagan has:

- o developed no national record and left a record as California Governor at odds with his claims about reduced taxes and less government.

2. EXPERIENCE AND PRESIDENTIAL SKILLS -- I have acquired the experience and the Presidential skills and knowledge needed to lead our Nation into the 1980's; Reagan has neither the experience nor the skills. I want to use the experience the American people have given to me.

I have:

- o learned from experience; that experience will naturally make me a better, wiser President during the second term;
- o begun policies which can be continued into a second term (Mideast peace, energy) without interruption or the need to become familiar with or educated about the major issues involved in those policies;
- o shown myself to be a cautious, moderate, balanced decision-maker -- one who understands the complexities of the problems facing a President and willing to put in the time and effort to deal with them directly and personally.

Reagan has:

- o not acquired the experience needed by a President -- not held national office; no substantial foreign policy background;

- o not demonstrated that he understands the complexities involved in Presidential decisions or in national and international affairs; that he takes simplistic positions, with surface appeal;

- o indicated he would undo much of the progress of the Democratic and Republican Administrations, ensuring a lack of continuity in our government.

3. DEMOCRAT -- I am a Democrat, in the tradition of Roosevelt, Truman, Kennedy and Johnson and am committed to the principles of our Party; Reagan is a leader of an extreme part of the Republican Party -- and the most conservative wing at that.

I have:

- o continued the traditions of my Democratic predecessors and have been in the mainstream of the Democratic Party;

- o put forward a program -- over the past 3-1/2 years and for the '80's -- which meets the ideals of the Democratic Party (peace, jobs, compassion for the disadvantaged, concern for working men and women, civil and equal rights).

Reagan has:

- o been a leader of the most conservative part of the Republican Party;

- o running on the agenda of that conservative wing -- ERA opposition, balanced budget amendments, school prayers, litmus tests for Federal judges, nuclear superiority.

4. RESPONSIBLE, SECURE FUTURE -- I have a vision of the future which continues and builds on our progress, which is responsible, which is safe, which offers security to Americans; Reagan's agenda offers uncertainties, unrealistic promises, and a retreat from the '60's and '70's.

I have:

- put forward a program and offered a vision for the '80's which builds on progress made by this Administration and by previous Democratic and Republican Administrations;

- put forward a program which is prudent, responsible, and safe; it offers realistic hope and realistic security for the future, and BEST OPPORTUNITY FOR PEACE AND FOR NON-INFLATIONARY ECONOMIC GROWTH.

Reagan has:

- offered an agenda that will disrupt the progress and programs developed under recend Democratic and Republican Presidents;

- made proposals which are unrealistic and which offer uncertainty for the future.

THE ECONOMY

Question: Hasn't your economic policy been an abject failure? Hasn't the misery index gotten twice as bad during your term? Given our problems with unemployment, recession and inflation, why do you believe your handling of the economy merits another four years? What policies would you follow in the next four years?

Answer:

THEME

THE PAST TWO YEARS HAVE BEEN HARD FOR OUR NATION BUT RECESSION AND INFLATION HAVE ABATED. I HAVE LEARNED FROM HARD EXPERIENCE ABOUT INFLATION. WE'VE HAD SOME SUCCESSES AND SOME DISAPPOINTMENTS TOO. THAT'S WHY I HAVE PROPOSED AND BEGUN AN ECONOMIC RENEWAL PROGRAM AND AN ENERGY PROGRAM FOR THE 1980'S THAT WILL CREATE JOBS AND STRENGTHEN OUR NATION'S INDUSTRY WITHOUT REKINDLING INFLATION. MY OPPONENT, BY CONTRAST, PROMISES TO SOLVE ALL THE PROBLEMS OF THE ECONOMY PRIMARILY BY ONE SINGLE, SIMPLE AND WRONG IDEA: A RICH MAN'S LARGE ACROSS-THE-BOARD TAX CUT THAT EVEN HIS OWN RUNNING MATE ADMITTED WOULD BE INFLATIONARY AND A MISTAKE.

1. THE PAST AND THE PRESENT

We did not do a perfect job, and we have learned some hard lessons. I underestimated the underlying inflationary forces and could not forecast the huge increase in oil prices or the large drop in productivity. I share the disappointment with the American people at the high inflation rate and of the recession we have just gone through. But we have had successes in the economic area:

- I led the Nation out of the 1976 recession I inherited - the deepest recession since the Great Depression as a result of the programs I put into effect.

- During my Administration the United States has had an unparalleled record in creating jobs: nearly 9 million new jobs have been created. Employment has grown more in the United States than in any other major industrial nation. It has grown more under my Administration than any comparable period in our history.

- Similarly, industrial production in the United States has grown more than in any other industrial nation except Japan -- and we were not far behind them.

- We have met head-on the primary cause of inflation as well as unemployment -- excessive dependence on foreign oil.

WASTE IN GOVERNMENT

Question: Mr. President, in 1976, you pledged to cut out government waste and over-regulation, and to reduce the number of Federal agencies from 1900 to 200. Obviously, you haven't done that. Governor Reagan recently charged that under your administration, the number of pages of new regulations has risen fifty percent on an annual basis, spending for regulatory agencies has increased another fifty percent, and the economic cost of regulation for industry has gone from $66 billion to $100 billion. He also says there is $50 billion of "waste" in government spending that he would cut. How do you respond?

Answer:

THEME

MY ADMINISTRATION HAS DONE MORE TO REDUCE WASTE AND INEFFICIENCY THAN ANY ADMINISTRATION IN HISTORY. I AM COMMITTED TO CONTINUING THIS RECORD WITH RESPONSIBLE CUTTING AND REALISTIC CHANGES IN GOVERNMENT OPERATIONS.

1. THE PAST AND THE PRESENT

- I have a record in improving government efficiency which far surpasses that of previous Administrations.
- We have challenged the special interests and achieved deregulation in virtually every regulated industry -- airlines, trucking, rail, banking, communications, securities, energy. Airline deregulation saved consumers $2.5 billion in its first year alone and trucking deregulation will save consumers $8 billion annually. Since I signed the Trucking Deregulation bill this year, 50 major trucking companies have already cut their rates by 10%.
- We have reduced the amount of time American citizens spend filling out Federal forms by 15%.
- Two years ago, we enacted the Civil Service Reform Act, the first comprehensive overhaul of the Federal personnel system in nearly a century.
- We have established independent inspectors general in all the major departments and agencies, with broad powers to audit and investigate waste and abuse.
- We have eliminated over 300 agencies and advisory committees. We have consolidated government functions in key areas such as education, energy, and equal opportunity enforcement.
- We have improved cash management practices, saving billions of dollars a year for the Federal government.

2. THE FUTURE

A. Reagan

- Governor Reagan now says he would cut out more. And indeed he will have to do so, if he is actually going to implement a 30% tax cut and balance the budget at the same time. To do all that would require eliminating $130 billion from current government programs -- virtually the entire discretionary part of the domestic budget.

- Governor Reagan has provided no specifics about what he would cut; he says nothing more than we need to eliminate waste and abuse. Everyone agrees with that. There is not $130 billion in waste and abuse. In California, Reagan made a similar promise, yet government spending went up 126% during his term -- the largest real increase in California history.

- Governor Reagan has said a great deal about waste in government during this election campaign, but sometimes he seems not to have all the facts. Recently, he complained that the number of pages in the Federal regulation book had grown during my Administration. But that is because I had the size of the type-face increased so people could more easily read and understand what the government was proposing. The number of rules has not increased.

- I have learned in the last four years that there is always a powerful special interest supporting every rule, and every wasteful government function. These pressures can be enormous and no one can hope to cut waste in government without the courage to fight. But I noted that Governor Reagan has not taken a forthright position supporting trucking deregulation and has implied his appointees to the ICC would come from the very industry which opposed deregulation.

B. Carter

- I am proud that my Administration has put across the broadest, most comprehensive program to cut out waste and improve efficiency in our country's history. In the next four years, we will continue with those efforts. I am confident we can achieve even more deregulation and better government at less cost.

- But I want to draw a sharp and clear line between my program, my vision of the future, and those for whom "eliminating waste" sometimes sounds like a code word for eliminating government completely. I have no intention of abandoning citizens of our cities who would like to look forward to a future without smog. I will not abandon families who worry that chemical wastes may infiltrate the soil under their homes. I will not abandon workers who know that substances in their workplaces may someday bring illness down on them or their children.

- We are a great and civilized nation, and we do not need to buy prosperity by sacrificing the health of our citizens or the beauty of our environment. I pledge never to make such a trade-off.

URBAN POLICY

Question: What would you do to reverse the decline of our Nation's cities? Hasn't your urban policy failed to improve the lives of the residents of our Nation's cities?

Answer:

THEME

I HAVE A SOLID RECORD OF AIDING THE CITIES. WE HAVE PUT IN PLACE THE NATION'S FIRST COMPREHENSIVE URBAN POLICY. OUR URBAN POLICY AND MY ECONOMIC RENEWAL PROGRAM WILL ALLOW OUR CITIES TO CONTINUE TO MAKE PROGRESS IN THE DECADE OF THE 1980's.

1. THE PAST AND THE PRESENT

There was no urban policy before I became President. The doors of the White House were not fully open to Mayors. The Federal government was insensitive to the needs of our urban areas.

- The health and stability of our Nation's cities has been one of my principal concerns as President. When I traveled our Nation in 1976 as a Presidential candidate, I found that eight years of Republican neglect had broken the economics and the spirits of our Nation's cities. Through the policies of my Administration, we have reversed this trend of neglect and decline.

- We have put into place the Nation's first comprehensive urban policy. Urban aid is up more than 40 percent during my Administration.

- The future of our cities is in the private sector, and my Administration has provided the tools that our cities need to develop their private sector economies to their fullest. We have increased the incentives for private investment in our cities by 3000 percent, (e.g. UDAG) and have generated more than $10 billion of new investment in our cities and more than half a million new jobs.

- In addition, we have greatly expanded jobs and training money for the unemployed and disadvantaged, particularly our Nation's youth.

- We have provided large increases in aid for mass transit, neighborhood aid, housing, education and other programs that are essential to the health of our cities.

2. THE FUTURE

Reagan

- Governor Reagan represents the least moderate element of a Republican party that consistently has been insensitive to the needs of the cities.

- Governor Reagan himself has said this year "urban aid programs are the biggest phonies in the Federal system." I disagree.

- The entire Reagan urban program consists of two proposals, both of which have been at least partially implemented by the Carter Administration.

- The first - urban homesteading - was enacted by a Democratic Congress in 1974 as a demonstration program. I have expanded the program until 93 cities now are participating.

- The second Reagan proposal - "enterprise zones" - involves offering tax incentives for private investment in high unemployment areas. We have effectively already done this as well. Working with the Congress, we extended the investment tax credit to urban rehabilitation in 1978 and I have proposed an additional ten percent investment tax credit for high unemployment areas in my economic renewal program.

- Finally, Governor Reagan has proposed the transfer of numerous and unspecified Federal programs back to the States and cities. This will have one effect and one effect only - it will increase State and local taxes, especially the property tax. In my view, it would be a serious error to increase the already excessive property tax burden on our Nation's citizens.

B. Carter

- While great progress has been made during the past four years, more remains to be done.

- First, I will work closely with the Congress to enact several critical pieces of legislation during the post-election session: the counter-cyclical aid bill, general revenue sharing, the private sector economic development programs and the youth employment and training bills.

- Second, my Economic Renewal program offers substantial new incentives for private sector revitalization in our cities.

- Finally, I intend to maintain my partnership with the leaders of our great and small cities. Our cities now have a friend in the White House; someone who listens to their concerns and responds. I intend to continue that relationship.

- When the courts decide that a law he favors is unconstitutional, Governor Reagan criticizes the judges. When the Chief Justice he appointed to the California Supreme Court wrote the Court's opinion that a California death sentence statute was unconstitutional, Governor Reagan criticized the decision and publicly regretted appointing the Chief Justice.

- Last February he attacked the present Justices of the Supreme Court of the United States, even though six out of nine were appointed by Republican presidents. He was angry with the Court over a minor procedural point -- the Court's decision not to stay a lower court ruling on the funding of abortions while it was being appealed. He accused the Court of "an abuse of power as bad as the transgressions of Watergate." He said the President should put "new justices in the court, men and women who respect and reflect the values and morals of the American majority."

- In both cases, Governor Reagan was attacking the independence of the courts. He was doing the same thing when he said, earlier this year, that his judicial nominees would have to oppose abortion and when he initially indicated support for the abortion litmus test in the Republican platform. He now says he disagrees with the platform, but his critical views still trouble me greatly.

B. Carter

- I will continue the merit selection process if re-elected. I will also work to preserve the independence of the judiciary - that is one of the bulwarks of our freedom.

- When a Supreme Court opening occurs, I will continue my record of quality appointments and judicial independence. I am determined to have the best people our country has on the Court.

- But I will not commit in advance to appoint a member of any group to the Court. Governor Reagan has promised to appoint a woman. The political purpose underlying that commitment is obvious. I will not engage in that type of political campaigning. I respect the Court too much to use it as a bargaining chip to get votes. My judicial appointment of women stands for itself as testimony to my positive position of women on the Federal bench.

B. Carter

- Improving the quality and efficiency of Federal programs through reorganization and management reforms will continue to be a high priority.

- Major areas of our emphasis:

  -- Passage of Paperwork Reduction bill and implementation of new paperwork budget.

  -- Improving the structure of government to support reindustrialization and economic development.

  -- Putting into place a "fast track" process for expediting government decisions and permits for critical energy facilities and projects. (E.M.B.)

  -- Reform of Federal administrative services to eliminate waste in the government's overhead.

  -- Renewal of reorganization authority to reform the structure of government. I will seek additional authority to eliminate functions and programs.

JUDGE SELECTIONS

Question: What standards do you use in selecting judges? What standard would you use in selecting a Supreme Court Justice?

Answer:

THEME

I HAVE A SOLID RECORD OF SELECTING JUDGES SOLELY ON THEIR MERIT AND QUALIFICATIONS. I HAVE NOT USED SONEONE'S VIEWS ON AN ISSUE AS A STANDARD. I WOULD CERTAINLY AVOID DOING THAT OR PROMISING APPOINTMENTS IN ADVANCE TO CERTAIN GROUPS, WITH RESPECT TO THE SUPREME COURT.

THE PAST AND THE PRESENT

Politics was a chief criterion in judicial selections before my Administration.

- In 1976 I promised to appoint judges on merit, and I have done that. I have established judicial nominating panels for Circuit Court appointments and have urged Senators to establish their own panels for District Court appointments. This process has worked well. I believe most objective analysts, like bar associations, would agree that my appointments have been unrivalled in quality and diversity.

- And I have been very concerned about diversity. I have been concerned that so many classes of people have been virtually excluded from the Federal bench. I have reversed that. I have appointed more women, Blacks, and Hispanics to the courts than all Presidents from Washington to Ford combined. However this election is decided, that will be what I regard as one of most significant legacies, for these judges will be interpreting the laws and protecting our rights into the next century.

- In not a single one of my court appointments have I asked a potential nominee his or her views on an issue, or sought that information. My concern has been quality.

THE FUTURE

Reagan

- I regret that my opponent has taken a different approach to judicial nominations.

- In California, he appointed his appointments Secretary to the State Supreme Court even though the bar association said the man was completely unqualified. And his diversity of appointments was not very good: of 600 nominees, only 12 were women and were minorities.

- What is even more troubling to me is Governor Reagan's views of the independence of the judiciary.

GOVERNMENT REORGANIZATION

Question: How do you explain your failure to reduce the number of government agencies by the magnitude you promised in 1976 (down to 200)? Do you dispute the view that your reorganization effort has generally been a failure?

Answer:

THEME

I HAVEN'T DONE EVERYTHING I HOPED BUT I HAVE MADE REAL PROGRESS IN REORGANIZING THE GOVERNMENT AND IN MAKING THE GOVERNMENT MORE EFFICIENT. I AM DETERMINED TO CONTINUE THAT EFFORT IN A RESPONSIBLE WAY IN A SECOND TERM.

1. THE PAST AND THE PRESENT

No President before me paid any serious attention to streamlining government and reducing government regulations and paperwork.

- When I talked about reorganizing the government in the last campaign, I promised to make improvements in the management and organization of government a high priority of my Administration. I kept that promise. To improve the productivity of the Federal worker, I carried out the most far-reaching reform of the civil service system in a hundred years; to develop a foundation for carrying out energy policy, we consolidated scattered energy programs and launched the Synthetic Fuels Corporation; to give education the priority it deserves and at the same time reduce HEW to more manageable size, I gave education a seat at the Cabinet table, to create a stronger system for attacking waste and fraud, I reorganized audit and investigative functions by putting an Inspector General in major agencies. Since I took office, we have submitted 14 reorganization initiatives such as those and had them all approved by Congress. We have not done as much as I would like but we have done more than anyone expected.

- Some efforts -- civil service, energy, inspectors general -- received a lot of attention; others -- such as Federal disaster assistance and enforcement of equal employment laws, have gone largely unnoticed, except by the storm victims and minority job applicants directly affected.

- We have tried to eliminate obsolete and ineffective agencies where politically feasible (last year's figures show net reduction of over 400 -- mainly advisory committees, but some more substantial ones -- LEAA and CAB are on their way out; current numbers are probably less favorable). Sometimes the special interests defending such agencies were too strong. One thing I have learned as President -- there is no agency so obscure or incompetent that a special interest will not rise to defend it.

- Of course, reorganization is not really a numbers game. I accept some of the blame for characterizing it that way in 1976, but I have learned from my experience as President. I have learned that reforming the management systems of government is often more important than changing its architecture.

- Since 1977, we have devoted as much attention to reorganizing Federal personnel management, more cost-conscious regulatory management, and an expanded and independent audit and investigation system as we have to moving boxes around.

- Much more important than the number of agencies and personnel is the burden of paperwork and regulatory requirements imposed by the Federal government on its criterion. I have reduced the paperwork burden by 15% and imposed a new paperwork budget for Federal agencies which promises to reduce it more. A strong management program to ensure the cost-effectiveness of new regulations and the sunsetting of old ones is now in place. Through airline, rail and trucking deregulation, we have taken far-reaching steps to reduce unnecessary government interference in the marketplace.

2. THE FUTURE

A. Reagan

- Reagan clearly is running against government -- and in doing so, he is running down its people and its institutions. In proposing a total freeze on Federal employment, he ignores the fact that a hiring freeze is already in place -- but a responsible freeze that provides for exceptions for emergencies and vital programs.

- By threatening to dismantle the Departments of Energy and Education and to reassess the synthetic fuels program, Reagan will plunge these vital programs into confusion and waste precious energy in a fight he could not win.

- Reagan's proposal to pay thousands of outside auditors to assess all government programs is wasteful and naive. I have already put independent Inspectors General with expanded audit and investigative resources in major agencies. The General Accounting Office, an independent arm of Congress, provides audit and inspection of Federal agencies.

- I will ask the American people to:

  — Continue their efforts at energy conservation - at home, at work, at leisure;

  — restrain their wage and price increases - this is essential if we are to reduce the underlying inflation rate;

  — recognize that domestic programs cannot be expanded at the rate needed to meet all pressing needs - and to recognize that real defense increases will continue to be needed in the future.

TONE OF CAMPAIGN

Question: Don't you think your attacks on Governor Reagan - for warmongering, for racism, for dividing the country - have been primarily responsible for the generally low-road tone of the campaign?

Answer:

- I have at times resorted to characterizations and I regret that the tone has not always been what I would prefer. But I have tried to focus on the sharp differences between us on the great issues of the day. I do regret, though, that some of my statements in this campaign have been misconstrued. I gather from Governor Reagan's public comments that he regrets as well that a number of his statements during this campaign have been misconstrued and misinterpreted. I am pleased we can now focus on the issues and the different futures for the country that our two candidacies represent.

- I have always tried to campaign on the issues and on the positive reasons why I believe I deserve someone's vote. I did that in 1976 against President Ford and I am trying to do it again this year. I wish that my statements on the issues received one-tenth the coverage from the press as the polls or campaign tactics do.

- What is vital from this point forward is that we have a full airing of the issues and a full opportunity for the voters to decide which type of future they would prefer. I believe this one-on-one debate is a major step forward in that process. I wish we could have had it earlier and more often. But I certainly appreciate Governor Reagan's decision to join me in this debate.

- I think that over the last few weeks, the tone of the campaign has shifted to the important issues of whether we want SALT II ratified or discarded, whether we want an economic revitalization program or a massive tax cut for the wealthy, whether we want to ratify ERA or not, whether we want National Health Insurance or not, whether we want to keep the Windfall Profits Tax or not, whether we want to abolish the Department of Education or not, and - perhaps most importantly - whether we want to engage in a nuclear arms race or whether we want to reduce tensions and nuclear armaments. These are the issues we need to debate.

serve another term, not just to be President for 4 more years, but to use those 4 years to reach the high goals the Democratic Party and I have set for the country.

o My goals would be:

-- Energy security, building on and implementing my comprehensive energy policy, and continuing to reduce America's dependence on foreign oil.

-- Preservation of peace -- 8 uninterrupted years of peace.

-- Reduction in nuclear armament by mutual reductions, through ratification of a SALT Treaty.

-- Middle East Peace, fulfilling the Camp David process I began.

-- Passage of Economic Renewal Package to revitalize American industry.

-- Continued reduction of inflation and unemployment.

-- ERA ratification.

-- National Health Insurance.

-- Increased opportunities for minorities and women.

-- Continued fiscal strength of Social Security.

SACRIFICE

Question: Is it going to be necessary for the American people to sacrifice over the next four years? How will you be asking the American people to sacrifice during the next four years? Will they respond?

Answer:

THEME

I HAVE ASKED THE AMERICAN PEOPLE TO MAKE SOME SACRIFICES OVER THE PAST FOUR YEARS AND THEY HAVE RESPONDED WELL. WITH SOME FURTHER SACRIFICES, WE CAN BUILD ON PROGRESS WE HAVE ALREADY MADE AND HAVE A SECURE FUTURE - FREE OF CRIPPLING INFLATION AND FOREIGN OIL DEPENDENCE.

1. THE PAST AND THE PRESENT

- I told the American people from my first months in office that sacrifice would be necessary to free ourselves of energy dependency on OPEC - that we would have to conserve, stop our wasteful appetite for oil, drive our cars more frugally.

- The American people have responded. We are importing 25% less oil now than we were in 1977. A large part of that reduction is due to conservation - better insulation, more efficient autos, changed life styles, and a greater attention to energy use.

2. THE FUTURE

A. Reagan

- I know that Governor Reagan disagrees with my view that energy conservation is an essential sacrifice that the American people can make. His view is that the oil companies, when turned loose, can produce all the energy we need. I disagree.

- I also disagree with the Governor's apparent posture in the campaign against asking the American people to sacrifice. I say that because, place after place, event after event, wherever Governor Reagan goes he indicates what additional Federal benefits he will provide (lower inheritance taxes, greater Social Security benefits, a massive increase in defense spending).

B. Carter

- I believe the American people will continue to need to sacrifice in a number of important areas over the next several years if we are to beat the problems of foreign oil dependence and inflation and to ensure a secure future and a sound economy.

-- SALT II

-- Nuclear Arms Race

-- ERA

-- Reagan-Kemp-Roth

-- National Health Insurance

-- Windfall Profits Tax

-- Department of Education

o These differences are becoming much better known to the public. This debate will help. I wish we could have had it sooner.

o As the differences do become better known, the public's interest in the election will increase. And I predict the voter turnout will be substantial -- better than 1976.

o Finally, let me urge all Americans to exercise their right to vote -- it is precious, it was hard-earned and preserved, it is the basis of our great democracy. No matter who your choice is, please vote on November 4.

GOALS

Question: What are your goals for the country by the end of your next term? Where do you want this country to be?

Answer:

THEME

I AM DETERMINED TO PURSUE A PROGRAM BASED ON MY EXPERIENCE IN OFFICE WHICH CONTINUES AND BUILDS ON PROGRESS WE HAVE MADE TO DATE, WHICH WILL ENSURE A SAFE, SECURE, PROSPEROUS FUTURE, WHICH HELPS EXTEND THE BOUNTY OF AMERICA TO THE DISADVANTAGED.

1. THE FUTURE

A. Reagan

- I have said many times in this campaign that the public has a choice to make between two futures -- the future that I see for this country, or the future that Governor Reagan sees.

- This point is starkly made by my description of my goals for the next four years. In most instances, they are directly opposed to Governor Reagan's goals:

  -- He's opposed to SALT II.

  -- He's suggested we play the card of a nuclear arms race.

  -- He's not supported the Camp David process.

  -- He's for a massive tax cut for the wealthy that is inflationary and does not create jobs like my Economic Renewal program does.

  -- He's against ERA.

  -- He's against National Health Insurance.

  -- He's against a strong Windfall Profits Tax, and he's for turning the oil companies loose.

- Time after time, Governor Reagan and I disagree on the way our country should move forward. That is the real issue in this campaign.

B. Carter

- We have made good progress in a number of areas during my first term and had disappointment in other areas. But, clearly, everything I wanted to accomplish has not been accomplished. I want to

B. Carter

- I do not claim that, because I have had the experience of being President and have learned from that experience, the future will be all wine and roses. There certainly will be tough problems ahead.

- My point, though, is that the experience I have had - the truly unique experience - has made me a better President. And during a second term I will be able to do things I did not or could not do in the first term.

- As a second term Democratic President dealing with a Democratic Congress, I am convinced that we can ratify SALT II, pass National Health Insurance and enact my Economic Revitalization Program (including the job creation element, the credit for Social Security taxes, the elimination of the marriage penalty). These would never see the light of day if my opponent were elected. I am convinced that we can begin to implement my energy program and continue our progress on Middle Eastern peace.

FRUSTRATION AT CARTER-REAGAN CHOICE

Question: Why do you believe so many Americans appear frustrated at the prospect of an election matching Carter and Reagan? Do you believe this frustration is likely to affect voter turnout?

Answer:

THEME

THERE ARE MAJOR DIFFERENCES BETWEEN GOVERNOR REAGAN AND MYSELF IN WHAT WE OFFER FOR THE FUTURE. AS THE PUBLIC INCREASINGLY RECOGNIZES THIS FACT, AND RECOGNIZES THAT A STARK CHOICE EXISTS, INTEREST IN THE ELECTION IS PICKING UP.

1. THE PAST AND THE PRESENT

- Over the past 4 years I have had to deal with a great many problems that previous Presidents ignored -- like energy. The decisions I had to make were not popular. That has naturally produced criticism of my policies -- from the many groups and organizations that would like the Federal government to provide them with 100% of their goals, be it increased benefits, grants, loans, wages, prices or contracts. And that is not possible.

- I am consoled by the fact that I am not the first President to be heavily criticized -- that occurred with Jefferson, with Lincoln, with Truman, with Johnson and others.

- I believe that, as the election draws closer, the American people are recognizing the realities facing me, and that the decisions I had to make were very tough and not readily subject to simple, politically popular decisions. As that has occurred, I think the "frustration" or "concern" over the choice being offered has dissipated. Support for Mr. Anderson has declined in large part because the public now recognizes it does have a real choice between Governor Reagan and myself. The focus has turned instead to making the right choice.

2. THE FUTURE

Reagan/Carter

- The choice facing the electorate is stark -- the differences between the candidates are greater probably than at any time since Lyndon Johnson and Barry Goldwater ran against each other. And the result, over the next four years and beyond, is two vastly different futures.

- On the major issues, Reagan and I differ sharply:

- I have learned much better over the past four years what can be achieved and what cannot, what is in our national interest and what is not.

2. THE FUTURE

A. Reagan

- Governor Reagan has not had the benefit of that experience. I can understand, therefore, why he has made some of his promises.

- In my view, many of his promises are unrealistic and naive. They have no chance of being enacted or implemented.

- For instance, he has promised to tear up the SALT II Treaty and begin new negotiations with the Soviets. But the Soviets will never agree to that. I found that out in 1977. He has promised to reduce government spending, balance the budget, protect defense spending, and cut taxes by 30% -- without fueling inflation. It simply is not possible, as I believe most Americans realize.

B. Carter

- Because I have learned from the previous four years, I have not been going around the country making promises to every group I speak before; unlike my opponent I have not been telling every group what it wanted to hear.

- I have set forth realistic goals for my second term that I am determined to pursue:

  -- Continued peace, and strengthened defense.
  -- SALT II ratification.
  -- Continued reduction in our dependence on foreign oil.
  -- ERA ratification.
  -- Clean environment.
  -- National Health Insurance.
  -- Welfare Reform.
  -- Continued efforts to bring women and minorities into government.