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CLERK, U. S. DIST. COURT
SAN FRANCISCO

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4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
6

7 RONALD V. DELLUMS; ELEANOR GINSBERG;)
8 MYRNA CUNNINGHAM;)

9 Plaintiffs,)

10 vs.)

No. C-83-3228 SAW

11 WILLIAM FRENCH SMITH, individually)
12 and in his official capacity as)
13 Attorney General of the United States;)
14 D. LOWELL JENSEN, individually and in)
15 his official capacity as Assistant)
16 Attorney General, Criminal Division)
17 of The United States Department of)
18 Justice;)

19 Defendants.)
20)
21)
22)
23)
24)
25)
26)
27)
28)

29 MEMORANDUM FOR JUDGMENT

30 SUMMARY OF DECISION

31 The plaintiffs in this case are three individuals more fully
32 identified below. The defendants are William French Smith,
33 Attorney General of the United States and D. Lowell Jensen,
34 Assistant Attorney General. The plaintiffs sue in this Court
35 because one of them, Ronald V. Dellums, alleges residence within
36 the venue of the United States District Court for the Northern
37 District of California. Jurisdiction to decide the case vests
38 with this Court because plaintiffs' claims are based on federal
39 law. 28 U.S.C. § 1331. Defendants raise no question as to
40 jurisdiction and venue.

41 /////

1 Plaintiffs ask for an order requiring the Attorney General
2 to conduct a preliminary investigation as to whether the President,
3 the Secretary of State, the Secretary of Defense and other federal
4 executive officers have violated the Neutrality Act, a federal
5 criminal law, by supporting paramilitary operations against
6 Nicaragua.

7 Plaintiff Ronald V. Dellums claims to be injured by the
8 refusal of the Attorney General to make a preliminary investiga-
9 tion because it has deprived him of his constitutional right as
10 a member of Congress to vote on the question as to whether the
11 United States should make war on Nicaragua. Plaintiff Eleanor
12 Ginsberg claims that the alleged paramilitary training near her
13 home in Florida constitutes a nuisance and disrupts her enjoyment
14 of her property. Plaintiff Myrna Cunningham complains that while
15 serving as a doctor in Nicaragua, she was kidnapped and raped by
16 members of paramilitary forces supported by the United States.

17 Plaintiffs rely upon the Ethics in Government Act, (28
18 U.S.C. §§ 591 et seq.) which declares that the Attorney General
19 "shall conduct an investigation whenever [he] receives information
20 sufficient to constitute grounds to investigate" that any designa-
21 ted federal officer has committed a violation of federal criminal
22 law.

23 The plaintiffs allege that they have presented sufficient
24 information to the Attorney General to require him to investigate
25 whether there have been criminal violations of any or all of three
26 Acts of Congress namely: the Neutrality Act (18 U.S.C. § 960)
27 which makes it a crime to organize or launch a paramilitary
28 expedition against a country with which the United States is not

1 at war; an Act of Congress prohibiting conspiracy to injure
2 property of a foreign government (18 U.S.C. § 956)-, and another
3 Act of Congress prohibiting unlicensed shipment of firearms (18
4 U.S.C. § 922).

5 Plaintiffs focus on alleged violations of the Neutrality Act,
6 18 U.S.C. § 960, which declares that:

7 Whoever, within the United States,
8 knowingly begins or sets on foot or
9 provides or prepares a means for or
10 furnishes the money for, or takes part
11 in, any military or naval expedition or
12 enterprise to be carried on from thence
13 against the territory or dominion of
14 any foreign prince or state, or of any
15 colony, district, or people with whom the
16 United States is at peace, shall be fined
17 not more than \$3,000 or imprisoned not
18 more than three years, or both.

19 The Attorney General does not deny that on January 27, 1983,
20 he received from plaintiffs in writing the following information:

21 That in November 1981, at the request of President
22 Reagan and other persons in his administration, the CIA
23 presented a plan covertly to aid, fund and participate
24 in a military expedition and enterprise utilizing
25 Nicaraguan exiles for the purpose of attacking and over-
26 throwing the government of Nicaragua;

27 That the plan was reviewed and approved in
28 November 1981 by various members of the National
Security Council, including, but not limited to
Ronald Reagan, William Casey, Alexander Haig, Jr.,
Thomas Enders [Assistant Secretary of State], Caspar
Weinberger and Nestor Sanchez [Assistant Secretary of
Defense]:

 That the plan was and is being implemented
and includes:

(1) providing at least \$19 million to finance
covert paramilitary operations against the people
and property of Nicaragua;

(2) financing the training of invasionary forces
in the United States and Honduras, including former
Somoza National Guardsmen, various terrorist groups
and others;

(3) conducting intelligence activities by the

1 CIA to determine the specific targets for such anti-
2 Nicaraguan terrorist forces;

3 (4) using Honduras as a base for invasionary
4 forces;

5 (5) supporting organizations of Nicaraguan and
6 Cuban exiles based in the United States which, in
7 turn, train and support invasionary forces on United
8 States soil;

9 (6) sending hundreds of CIA officers and agents
10 and other U.S. government agents to Honduras and
11 Costa Rica to participate and assist in covert military
12 operations against the people and government of Nicaragua;

13 Plaintiffs claim that the Attorney General's receipt of the
14 foregoing information triggered his duty, under the Ethics in
15 Government Act, to conduct a preliminary investigation. The
16 Attorney General refused to conduct any investigation, stating
17 that the material provided "does not constitute specific informa-
18 tion of a federal offense 'sufficient to constitute grounds to
19 investigate.'" Plaintiffs then brought this action to compel the
20 Attorney General to perform his statutory duty and have filed a
21 motion for summary judgment. Defendants have filed a cross-motion
22 to dismiss the complaint.

23 In several previous cases, courts have declined to allow
24 private persons to bring a direct challenge to the legality of
25 Administration actions in Latin America under the Neutrality Act.
26 They refrained from deciding these cases on two principal grounds,
27 namely, (1) that it is extremely difficult or impossible for a
28 court to discover exactly what is happening in foreign countries
such as Nicaragua and (2) that the precise extent to which the
Neutrality Act limits the power of the President to conduct
foreign policy is best determined through political avenues
available to Congress and the President.

1 This case is different.

2 Plaintiffs do not ask the Court to declare illegal any
3 action by the President or his subordinates. They ask only that
4 the Attorney General be required to make an investigation called
5 for by the Ethics in Government Act. That statute unambiguously
6 directs the Attorney General to conduct a preliminary investiga-
7 tion for a period not to exceed ninety days upon receiving specific
8 information from a credible source that a federal criminal law has
9 been violated by designated federal executives. The Ethics in
10 Government Act goes on to provide that the Attorney General must
11 call for appointment of independent counsel if the Attorney
12 General finds reasonable grounds to believe that further investi-
13 gation or prosecution is warranted or if ninety days elapse from
14 receipt of the information without his determination that there
15 are no reasonable grounds to believe that further investigation or
16 prosecution is warranted.

17 The Attorney General does not seriously dispute that the
18 information submitted by plaintiffs on January 27, 1983 is suffi-
19 ciently specific, nor does he present any reason to suggest plain-
20 tiffs are not credible sources.

21 The Attorney General argues that the Court should not hear
22 the case because plaintiffs as private persons have no right to
23 sue to enforce the Ethics in Government Act. The Court, after
24 careful consideration, concludes otherwise. The Attorney General's
25 other principal argument is that this case calls for decision on a
26 political question and is therefore not justiciable. The argument
27 is invalid. The beginning and end of plaintiffs' demand is to
28 require no more than that the Attorney General carry out the

1 mandate of Congress to investigate when presented with specific
2 information from credible sources that named federal government
3 officials have violated criminal law.

4 If, as the Attorney General suggests, a court cannot order
5 him to conduct an investigation upon the request of a credible
6 person or persons supplying specific information, then the Ethics
7 in Government Act is rendered meaningless and its salutary pur-
8 poses are defeated. Those purposes are manifest from the clear
9 provisions of the statute itself, as well as from the relevant
10 legislative history and Congressional Record.

11 One such purpose is to deny the Attorney General the power to
12 refuse to make at least a preliminary investigation upon receipt
13 of reasonably specific information from credible sources of viola-
14 tion of federal criminal law by members of the same branch of the
15 government he serves. Another of the statute's purposes is to
16 provide, in proper cases, for prosecution by independent counsel
17 free from conflict of interest by virtue of ties to the executive.
18 Yet another purpose is to insure that no one, however high or
19 important a position he holds in the executive branch, is insula-
20 ted from the investigation called for by the provisions of the
21 Ethics in Government Act. Finally, the underlying purpose --
22 perhaps the most salient of all -- is to help insure that neither
23 Congress nor the public shall be denied the facts when substantial
24 claims of violation of federal law implicate high federal offi-
25 cials.

26 This underlying purpose would appear to be particularly well
27 served in cases such as this involving claims of unlawful covert
28 action. If the Attorney General complies with the Ethics in

1 Government Act, the requisite information will be subject to re-
2 view by an independent arm of the government -- a special federal
3 court provided for by the statute. If the Attorney General re-
4 fuses to comply with the statute, the holding in this case provides
5 a federal court remedy to compel compliance with the statute. In
6 this way, improper secrecy or neglect by an arm of the executive
7 branch can be prevented. The Congress, the public and the press
8 will be appropriately informed.

9 It should be perfectly clear -- indeed, it is emphasized --

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1 that the Court passes no judgment as to whether or not any federal
2 official has violated any federal criminal law. It is the duty of
3 the Attorney General to investigate into that question.

4 For reasons further elaborated below, plaintiffs' motion to
5 require the Attorney General to make that investigation will be
6 granted.

7 CONCERNING JUSTICIABILITY

8 Defendants claim that the case must be dismissed because it
9 is not justiciable. This claim and the supporting arguments are
10 paramount. Therefore they receive the Court's first attention.

11 Defendants contend that the matter is nonjusticiable for
12 three reasons. First, they argue, the plaintiffs lack standing to
13 maintain the suit. Second, they contend that resolution of the
14 case would involve answering a "political question" that courts
15 should refrain from deciding. Third, they say the case is outside
16 the competence of a federal court because it calls for an advisory
17 opinion.

18 Plaintiffs have standing to sue.

19 Although "[g]eneralizations about standing to sue are largely
20 worthless as such," Data Processing Service v. Camp, 397 U.S. 150,
21 151 (1970), the relevant decisions provide a series of inquiries
22 from which an analysis of standing may proceed. To establish
23 standing, a plaintiff must show: (1) that "he personally has
24 suffered some actual or threatened injury as a result of the
25 putatively illegal conduct of the defendant;" (2) that "the injury
26 'fairly can be traced to the challenged action;" and (3) that the
27 injury "is likely to be redressed by a favorable decision."

28 Valley Forge Christian College v. Americans United for Separation

1 of Church and State, 454 U.S. 464, 472 (1982) (quoting Gladstone,
2 Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) and Simon
3 v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41
4 (1976)). In addition, when a plaintiff seeks review of agency
5 action claiming injury to some interest, the interest sought to be
6 protected must be "arguably within the zone of interests to be
7 protected or regulated by the statute or constitutional guarantee
8 in question." See Data Processing Service, 397 U.S. at 153-54.
9 The Court concludes that the plaintiffs in this case have standing
10 because they meet all of these requirements.

11 Plaintiffs allege injury sufficient for standing.

12 There can be no doubt that plaintiffs have been injured by
13 the refusal of the Attorney General to conduct a preliminary in-
14 vestigation.^{1/}

15 The Ethics in Government Act requires the Attorney General
16 to investigate whenever specific information describing a crime is
17 received from a credible person, thereby vesting in that person a
18 procedural right to have the allegations investigated. Plaintiffs
19 share that right with all members of the public to aid in ensur-
20 ing that violations of criminal law are not ignored because the
21 persons accused are Administration officials. The denial of that
22 right constitutes an injury which is legally cognizable.

23 Defendants contend that the alleged injury -- the refusal of
24 the Attorney General to conduct an investigation -- does not
25 implicate an interest sufficient to confer standing on plaintiffs.
26 Whether an alleged injury implicates an interest cognizable for
27 standing purposes in this case depends upon the provisions of the
28 Ethics in Government Act and the intent of Congress in enacting

1 it. If Congress thereby created a legal right to a preliminary
2 investigation for persons supplying the required information,
3 then the requisite interest for standing is found in the invasion
4 of that right.^{2/} See Schlesinger v. Reservists to Stop the War,
5 418 U.S. 208, 224 n.14 (1974). Thus, the critical question is
6 whether the Ethics in Government Act confers any procedural rights
7 upon persons who have supplied the Attorney General with appro-
8 priate information.^{3/}

9 The only case directly to address this issue is Nathan v.
10 Attorney General, 557 F. Supp. 1186 (D.D.C. 1983), in which the
11 court found that the Ethics in Government Act created such a pro-
12 cedural right. Judge Gesell there inferred the existence of this
13 right from the structure and purpose of the statute. He reasoned
14 that (p. 1189):

15 [i]f not plaintiffs, who can be said to have
16 a cause of action to insist that the Act be
17 carried out in accordance with its terms? The
18 Special Division of the Court responsible for
19 appointing Special Prosecutors, to which this
20 matter was initially presented, has ruled it
21 has no jurisdiction. . . . Nor does Congress
22 have any special enforcement power; under the
23 Act members of the Judiciary Committees of the
24 House or Senate can only request appointment
25 of a Special Prosecutor, and, in any event, if
26 an Attorney General ignores his duty to
27 investigate and report to Congress, Congress
28 remains uninformed and cannot act. Thus if
the Act is enforceable at all it must be through
those, like plaintiffs here, who have supplied
specific information and pursue their application
for an investigation in the District Court.

25 The conclusion in Nathan concerning the intent of Congress is
26 supported by cases assessing the standing of citizen plaintiffs to
27 bring suit pursuant to an analogous statute, section 102(2)(C) of
28 the National Environmental Protection Act (NEPA), 42 U.S.C.
§ 4332(2)(C). That statute requires federal agencies contemplat-

1 ing action which may significantly affect the quality of the
2 environment to prepare a detailed environmental impact statement
3 (EIS). The federal agency must also make copies of the EIS,
4 accompanied by "the comments and views of the appropriate Federal,
5 State, and local agencies," available to the President, the
6 Council on Environmental Quality and the public. Id.

7 In City of Davis v. Coleman, 521 F.2d 661, 672 (9th Cir.
8 1975), the Ninth Circuit held that this provision gave the City of
9 Davis as "a local agency" the "right to comment on any EIS . . .
10 and to have its comments considered" with the EIS if an EIS was
11 required by NEPA. The court ruled that the deprivation of the
12 city's opportunity to present information and comments to the
13 federal agency constituted an injury sufficient to support stand-
14 ing to challenge the agency's decision that an EIS was not re-
15 quired under the circumstances of that case. Id. The court found
16 standing without reference to any explicit language in the statute
17 or its legislative history, i.e., simply by virtue of the statutory
18 scheme which envisioned comments by local agencies.

19 The Ethics in Government Act similarly envisions that informa-
20 tion supplied by persons pursuant to its provisions will be for-
21 warded and considered by appropriate decisionmakers named in the
22 statute. Such consideration is required whenever the Attorney
23 General must conduct a preliminary investigation. Under NEPA,
24 consideration is required when the federal agency must file an
25 EIS. In the case at bar as in City of Davis, plaintiffs have
26 standing because Congress conferred upon them a right to a judi-
27 cial determination.

28 That Congress in fact intended the information submitted by

1 private plaintiffs to be considered when it meets the statutory
2 requirements is shown by the careful structure of The Ethics in
3 Government Act. The Act requires the Attorney General to conduct
4 a preliminary investigation upon receiving information that a
5 covered federal official has committed a covered violation of law,
6 unless the information is not sufficiently specific or the source
7 is not sufficiently credible. 28 U.S.C. § 592(a)(1). Once the
8 Attorney General conducts a preliminary investigation he must
9 either request appointment of a special prosecutor or notify a
10 special court^{4/} created by the Act that no further investigation or
11 prosecution is warranted.^{5/} In the latter case, the Attorney
12 General must file with the special court a "memorandum containing
13 a summary of the information received [from the complainant] and a
14 summary of the results of any preliminary investigation."^{6/} 28 U.S.C.
15 § 592(b)(2).

16 Whether or not further investigation is recommended, the
17 special court has power to make the Attorney General's memorandum
18 or summary public "if it decides at the appropriate time that it
19 would be proper and useful to do so." S. Rep. No. 170, 95th
20 Cong., 1st Sess. 56, reprinted in 1978 U.S. Code Cong & Ad. News
21 4216, 4272. This power to make the complainant's information
22 public plainly includes the power to convey the information to
23 Congressional committees with oversight duties under the Ethics in
24 Government Act.

25 Merely because plaintiffs could approach Congress and the
26 public directly does not detract from the importance of their
27 statutory rights under the Ethics in Government Act. The ability
28 to communicate outside the statutory framework was equally present

1 in City of Davis. In that case, the court implicitly acknowledged
2 the importance of a right to have information considered within a
3 statutory procedural framework. See 521 F.2d at 672. Unsolicited
4 offerings outside such a framework lack commensurate status and
5 weight.

6 The principal purpose of the framework created by the Ethics
7 in Government Act is to avoid both actual and perceived conflicts
8 of interest for Justice Department officials confronted with
9 allegations of wrongdoing by Administration officials. See S.
10 Rep. No. 170, 95th Cong., 1st Sess. 5-6 (1977), reprinted in 1978
11 U.S. Code Cong. & Ad. News at 4221-22. In furtherance of this
12 objective, Congress intended that "as soon as there is any indi-
13 cation whatsoever that the allegations involving a high level
14 official may be serious or have any potential chance of substantia-
15 tion, a special prosecutor should be appointed to take over the
16 investigation." Id. at 54 (emphasis added). A clear working
17 assumption of Congress was that the Attorney General can be re-
18 quired to recuse himself under certain circumstances, and that he
19 can be forced to consider whether those circumstances exist. As
20 stated in Nathan,

21 [t]he Act creates procedural rights, and these
22 must be redressed or the entire statutory scheme,
23 designed to focus attention on claims of criminal
24 misconduct in high places, is meaningless. To
25 hold otherwise would be to declare that the
26 Ethics in Government Act is merely a pious
statement of pure political import designed to
assuage the public's concern for abuses of
trust that followed Watergate. This the Court
will not do.

27 557 F. Supp. at 1190.

28 The fact that if plaintiffs have no standing to sue, no one
would have standing, is not by itself a reason to find standing.

1 Schlesinger v. Reservists, 418 U.S. at 227. The Court also recog-
2 nizes that "[o]ur system of government leaves many crucial de-
3 cisions to the political processes." Id. But these principles
4 cannot be permitted artificially to limit the Court's inquiry into
5 the legislative intent and operation of a statutory scheme. In
6 order to preserve confidence in governmental accountability,
7 Congress, by enacting the Ethics in Government Act, and the Presi-
8 dent, by signing it, removed certain actions and determinations
9 from the oft-hidden realm of the "political process" and required
10 the creation of a record subject to public and congressional
11 scrutiny.

12 This Court will not declare that effort a nullity and accord-
13 ingly concludes that the plaintiffs have alleged sufficient injury
14 to maintain this action.^{7/}

15 Plaintiffs' injury will be redressed by the relief they seek.

16 In addition to a legally recognized injury caused by defen-
17 dants, standing requires that the court be able to provide plain-
18 tiffs with redress in the event of a favorable decision. Simon v.
19 Eastern Kentucky Welfare Rights Org., 426 U.S. at 38. Thus,
20 standing is proper in this case only if the Court may, upon the
21 appropriate findings, order the Attorney General to conduct a
22 preliminary investigation. The Court may grant this relief if (1)
23 the decision not to conduct a preliminary investigation is subject
24 to judicial review and (2) if the remedy of mandamus to the
25 Attorney General is permitted. In this case, both conditions are
26 satisfied.

27 The Court may review the Attorney General's refusal.

28 Since the Attorney General's decision not to conduct a pre-

1 liminary investigation injured plaintiffs' legal interests, the
2 Attorney General's decision is subject to judicial review. That
3 decision falls within the purview of the Administrative Procedures
4 Act (APA), 5 U.S.C. §§ 701-706. Section 702 of the APA provides
5 that "a person suffering legal wrong because of agency action, or
6 adversely affected or aggrieved by agency action within the mean-
7 ing of a relevant statute, is entitled to judicial review thereof."
8 The Attorney General is an "agency" subject to review jurisdiction
9 under the APA. See Proietti v. Levi, 530 F.2d 836, 838 (9th Cir.
10 1976). "Agency action" includes a failure to act. 5 U.S.C.
11 § 551(13); See City of Chicago v. United States, 396 U.S. 162,
12 166-67 (1969).

13 The APA authorizes judicial review of federal agency action
14 unless (1) such review is expressly precluded by statute, or (2)
15 the agency action is "committed to agency discretion." 5 U.S.C.
16 §701(a)(1), (2). The APA incorporates a strong presumption of the
17 right to judicial review unless there is clear and convincing
18 evidence that Congress intended to foreclose review. See Standard
19 Oil Co. of California v. F.T.C., 596 F.2d 1381, 1384 (9th Cir.
20 1979).

21 The Court's analysis of plaintiffs' rights under the Ethics
22 in Government Act compels the conclusion that no relevant statute
23 precludes judicial review of the Attorney General's determination
24 that he has not been presented information requiring him to conduct
25 a preliminary investigation. The remaining question is whether
26 the Attorney General's determination lies entirely within his
27 discretion. See Standard Oil, 596 F.2d at 1385.

28 The APA's exception for actions committed to agency discretion

1 applies "in those rare instances where 'statutes are drawn in such
2 broad terms that there is no law to apply.'" Citizens to Preserve
3 Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. Rep.
4 No. 752, 79th Cong., 1st Sess. 26 (1945)); Standard Oil, 596 F.2d
5 at 1385. In this case, where Congress has supplied specific
6 standards to govern the Attorney General's determination, there is
7 "law to be applied."

8 The Ethics in Government Act requires the Attorney General to
9 conduct a preliminary investigation "whenever [he] receives infor-
10 mation sufficient to constitute grounds to investigate that any of
11 the [specified officials] has committed a [non-petty federal
12 offense]." 28 U.S.C. § 591(a). The statute as originally enacted
13 in 1978 permitted the Attorney General to consider only the speci-
14 ficity of the information in determining whether "grounds to
15 investigate" existed. Pub. L. No. 95-521, § 601(a), 92 Stat.
16 1867, 1868 (1978). The Senate Report explained that

17 [section 591(a)] directs the Attorney General to
18 conduct an investigation . . . whenever the
19 Attorney General receives specific information
20 that any of the [specified officials] may have
21 violated any federal law other than a petty
22 offense. The term 'specific information' is
used so that the provisions of this chapter
will not apply to a generalized allegation
of wrongdoing which contains no specific
factual support.

23 In 1983, the Ethics in Government Act was amended to redefine
24 what constitutes "grounds to investigate" as information that is
25 both specific and derived from a credible source. Pub. L. No.
26 97-409, § 2(a)(1), 96 Stat. 2039, 2040 (1983) (to be codified at 5
27 U.S.C. § 592(a)(1)(A) & (B)). The legislative history to these
28 amendments made clear that the announced criteria of specificity

1 and credibility are the only ones to be applied in determining
2 whether a preliminary investigation is required. See S. Rep. No.
3 496, 97th Cong., 2d Sess. 11-12, reprinted in 1982 U.S. Code Cong.
4 & Ad. News 3537, 3547-48, 3557.

5 The Attorney General is thus called upon to perform an essen-
6 tially ministerial task, i.e., that of determining whether he has
7 been supplied specific information from a credible source that a
8 high-ranking official may have committed a crime. This is not the
9 sort of unlimited discretion precluding review under the APA. The
10 legislative history gives sufficient guidance concerning the in-
11 tended content of the terms "specific" and "credible" to provide
12 the Court with the necessary "standard by which to measure the
13 lawfulness of agency action." See Standard Oil, 596 F.2d at 1385.
14 "Courts are as expert as administrators in matters of statutory
15 construction." East Oakland-Fruitvale Planning Council v.
16 Rumsfeld, 471 F.2d 524, 529 (9th Cir. 1972). Section 592(a)(1)
17 "does not permit the Attorney General to adopt a definition of
18 'specific information' [or credible source] different from the
19 standard originally set by Congress." Nathan, 557 F. Supp. at
20 1189 n.4. The decision whether to conduct a preliminary investi-
21 gation is not, therefore, committed to agency discretion. ^{8/}

22 Mandamus is a proper remedy.

23 Defendants contend that an order of mandamus here would
24 result in undue judicial interference with the prosecutorial
25 discretion of the Attorney General and contravenes the separation
26 of powers doctrine. Defendants' argument proceeds on two erro-
27 neous assumptions: first, that the Ethics in Government Act does
28 not prescribe any mandatory duties, and second, that going forward

1 with a preliminary investigation is indistinguishable from the
2 decision to prosecute.

3 Once the Attorney General has received the requisite informa-
4 tion, he must conduct a preliminary investigation. The statute
5 states that the Attorney General "shall" conduct a preliminary
6 investigation upon the receipt of the information, not that he
7 "may" do so. 28 U.S.C. § 592(a)(1). The legislative history
8 presents hypothetical examples of the statute's operation which
9 lead to the same conclusion. See e.g., S. Rep. No. 170, at 55,
10 1978 U.S. Code Cong. & Ad. News at 4271; S. Rep. No. 496 at 12,
11 1982 U.S. Code Cong. & Ad. News at 3548. Examples of the actual
12 operation under the Ethics in Government Act show that the pre-
13 vious administration recognized a mandatory duty to conduct a
14 preliminary investigation when presented with sufficiently specific
15 allegations. See Special Prosecutor Provisions of the Ethics in
16 Government Act: Hearings Before the Senate Committee on Government
17 Affairs, 97th Cong., 1st Sess. 253-55 (1981); see also id. at 359
18 (hearsay that Hamilton Jordan used cocaine sufficient to trigger
19 preliminary investigation.)

20 The legislative history repeatedly uses the terms "must" or
21 "required" with respect to the Attorney General's obligation to
22 conduct a preliminary investigation. See, e.g., id. at 117
23 (Statement of Ass't Attorney General R. Guiliani); id. at 219
24 (Statement of Fred Wertheimer, President of Common Cause); id. at
25 236 & 241 (Letter of Ass't. Attorney General Michael Dolan); S.
26 Reps. Nos. 170 and 496, passim. As discussed above, determination
27 that specific information has been received from a credible source
28 is not left to the Attorney General's unfettered discretion.

1 Consequently, the Court rejects defendants' contention that the
2 Ethics in Government Act imposes no mandatory duty to conduct a
3 preliminary investigation.

4 Defendants' argument that the duty to conduct a preliminary
5 investigation is indistinguishable from his discretionary power to
6 prosecute is equally without merit. The two are distinct steps in
7 the statutory procedures. Defendants' discretion to decide
8 whether or not to prosecute is left intact. This issue was ad-
9 dressed by the court in Nathan:

10 The Attorney General is concerned that the Act
11 may intrude unduly upon his office by forcing
12 appointment of a Special Prosecutor to take over
13 his constitutional functions. In this regard,
14 however, he misinterprets the effect of the
15 Act. Where specific information is provided,
16 the Act requires only preliminary investigation;
17 it does not oblige the Attorney General to seek
18 an outside prosecutor.

15 557 F. Supp. at 1189-90 (footnote omitted).

16 In contending that the Court lacks power to order the Attor-
17 ney General to conduct a preliminary investigation, defendants
18 rely upon Inmates of Attica Correctional Facility v. Rockefeller,
19 477 F.2d 375, 379-82 (2d Cir. 1973), and Moses v. Kennedy, 219 F.
20 Supp. 762, 765-66 (D.D.C. 1963). These cases do consider the
21 power of courts to compel prosecution, but they are not control-
22 ling here. Under the Ethics in Government Act, Congress (1)
23 segregated the preliminary investigation from the prosecution,
24 strictly limiting its function and distinguishing it from a normal
25 investigation supporting a prosecution,^{9/} and (2) clearly made
26 conduct of a preliminary investigation mandatory under the circum-
27 stances alleged to exist in this case. In Inmates of Attica, the
28 court found in the governing statute no "intent by Congress to

1 depart so significantly from the normal exercise of executive
2 discretion." 477 F.2d at 381.

3 Assuming arguendo that a preliminary investigation would
4 normally be viewed as an exercise of prosecutorial discretion
5 despite its limited scope and purpose, Congress clearly intended
6 departure from the normal rule of executive discretion in the
7 Ethics in Government Act by making a preliminary investigation
8 mandatory. In Wren v. Merit Systems Protection Board, 681 F.2d
9 867, 875 n.9 (D.C. Cir. 1982), the court strongly suggested that
10 such an investigation may be ordered despite the general rule that
11 courts will not interfere with "prosecutorial" decisions. The
12 Court cannot agree with defendants that an order compelling the
13 preliminary investigation required by the statute would unduly
14 intrude upon the domain of the Executive. Consequently, the
15 mandamus remedy sought by plaintiffs may be ordered by this Court.
16 See, e.g., Nathan v. Attorney General, 563 F. Supp. 815, 816-17
17 (D.D.C. 1983).

18 Where federal officials have acted outside statutory authority,
19 injunctive relief against them is appropriate. See Larson v.
20 Domestic & Foreign Commerce Corp., 337 U.S. 682, 701-02 (1949).
21 Moreover, the APA specifically authorizes the Court to compel
22 agency action found to be unlawfully withheld. 5 U.S.C. § 706(1);
23 Guerrero v. Garza, 418 F. Supp. 182, 190 (W.D. Wis. 1976); NRDC v.
24 Morton, 388 F. Supp. 829, 834 n.7 (D.D.C. 1974), aff'd mem., 527
25 F.2d 1386 (D.C. Cir.), cert. denied, 427 U.S. 913 (1976). When,
26 as here, the thrust of a statutory command addressed to a public
27 official is unmistakable, his duty to comply with it is "ministe-
28 rial." Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342, 346

1 (D.C. Cir. 1965). When the claim of a plaintiff is clear and
2 certain and the duty of an officer is ministerial, mandamus is
3 traditionally a proper remedy. Elliott v. Weinberger, 564 F.2d
4 1219, 1226 (9th Cir. 1977), rev'd in part on other grounds, 442
5 U.S. 682 (1979).

6 Once the Court interprets the law, the Attorney General's
7 duty will be clear; the Court is not telling him how to exercise
8 his discretion. See id. (quoting Knuckles v. Weinberger, 511 F.2d
9 1221, 1222 (9th Cir. 1975)). The order plaintiffs seek will not
10 mandate the manner in which the Attorney General must conduct his
11 investigation, but only that a preliminary investigation must be
12 conducted. For these reasons, defendants' contention that the
13 Ethics in Government Act imposes no mandatory duties and that
14 mandamus is therefore impermissible must be rejected.

15 Because plaintiffs' claims as framed in this action meet all
16 of the requirements listed by the Supreme Court in Valley Forge,
17 they have standing to maintain it.

18 This Case Does Not Present a Nonjusticiable Political Question.

19 The defendants also maintain that this case should not be
20 decided because it presents a "political question." According to
21 defendants, "this Court is being asked to render an opinion on,
22 and thus to inject itself into, foreign policy issues which are
23 essentially non-justiciable." Defendants also suggest that the
24 question whether the Neutrality Act applies to the President's
25 official acts is "political" in nature and should be left to the
26 "political branches" of the federal government for decision.

27 The precise outlines of the political question doctrine
28 remain nebulous. The doctrine consists of the reluctance of

1 courts to adjudicate certain types of issues because of respect
2 for the separation of powers. The Supreme Court identified these
3 categories of issues in Baker v. Carr, 369 U.S. 186, 217 (1962):

4 Prominent on the surface of any case held to
5 involve a political question is found a textually
6 demonstrable constitutional commitment of the
7 issue to a coordinate political department; or
8 a lack of judicially discoverable and manageable
9 standards for resolving it; or the impossibility
10 of deciding without an initial policy determination
11 of a kind clearly for nonjudicial discretion; or
12 the impossibility of a court's undertaking independent
13 resolution without expressing lack of the respect
14 due coordinate branches of government; or an
15 unusual need for unquestioning adherence to a
16 political decision already made; or the potentiality
17 of embarrassment from multifarious pronouncements
18 by various departments on one question.

19 In several recent cases, courts have declined on political
20 question grounds to adjudicate suits challenging Administration
21 actions in Latin America. In Crockett v. Reagan, 558 F. Supp. 893
22 (D.D.C. 1982), 29 members of Congress brought an action against
23 the President, seeking a declaration that military aid supplied to
24 the government of El Salvador violated the War Powers Resolution,
25 50 U.S.C. §§ 1541-1548, and other federal statutes. Id. at 895.
26 The court ruled that the factfinding necessary to resolve the
27 statutory issue was beyond its competence, and rendered the case
28 nonjusticiable. Id. at 893. In Sanchez-Espinoza v. Reagan, 568
F. Supp. 596 (D.D.C. 1983), the plaintiffs included the individuals
who are plaintiffs in the present action. They sought damages,
injunctive relief and a declaration that the defendants, including
the President, had violated the Neutrality Act, 18 U.S.C. § 960,
the War Powers Resolution and other statutes by financing and
supporting paramilitary activities designed to overthrow the
government of Nicaragua, a nation with which the United States is

1 not at war. Id. at 598. The court ruled that action nonjusti-
2 ciable because of (1) the absence of judicially manageable stan-
3 dards for resolving the dispute, (2) the impossibility of re-
4 solving the dispute without disagreeing with either Congress or
5 the President concerning the merits of the controversy, and (3)
6 the danger of embarrassment to the federal government from multi-
7 farious pronouncements by different branches on the same question.
8 Id. at 600. Defendants err in claiming that the same considera-
9 tions make this case inappropriate for judicial decision.

10 The Supreme Court has declared that the political question
11 doctrine must be the subject of case-by-case inquiry. Baker v.
12 Carr, 369 U.S. at 211. That the subject matter of the allegations
13 involved in the present case somewhat resembles that of Crockett
14 and Sanchez-Espinoza does not, therefore, determine the justici-
15 ability of this action. Rather, the Court must consider the
16 precise facts and posture of the particular issues in this case.
17 See id. at 217. Comparison of this case with Crockett and Sanchez-
18 Espinoza, in the light of factors discussed in Baker v. Carr,
19 shows this case does not contain the same elements of political
20 question that compelled those decisions.

21 Unlike the complaints in Crockett and Sanchez-Espinoza, the
22 complaint in the case at bar does not directly challenge the
23 legality of any action taken by the President. Plaintiffs seek
24 only to compel good faith performance of a statutory duty.
25 Such relief is unquestionably within judicial competence. The
26 case before this Court does not require any assessment by the
27 Court as to the accuracy of the data reported by plaintiffs to the
28 Attorney General. The sole issue is whether the report is suffi-

1 cient to trigger the preliminary investigation plaintiffs contend
2 is required by the Ethics in Government Act.^{10/} The limited task
3 requested of the Court is thus judicially manageable, unlike those
4 requested in Crockett and Sanchez-Espinoza. Should plaintiffs
5 prevail, the Attorney General, not the Court, will investigate the
6 allegations and then determine whether any prosecution is warranted
7 as a matter of fact and law. There is consequently no danger of
8 "multifarious pronouncements" such as the court feared in Sanchez-
9 Espinoza. All subtleties of factfinding concerning events in
10 Latin America will be left with the political branches, which are
11 better equipped to perform those functions. Cf. Sanchez-Espinoza,
12 568 F. Supp. at 600, 602; Crockett, 558 F. Supp. at 898-99.

13 Defendants also argue that the case is not justiciable
14 because it touches a question of the propriety of the President's
15 foreign policy. Certainly, courts must hesitate before enter-
16 taining questions of the President's authority in the conduct of
17 foreign relations. See Goldwater v. Carter, 444 U.S. 996, 1002
18 (1979) (Rehnquist, J., concurring in judgment). But not every
19 case involving foreign relations lies beyond judicial cognizance.
20 Baker v. Carr, 369 U.S. at 211. The issue of justiciability must
21 in such cases be resolved by

22 a discriminating analysis of the particular question
23 posed, in terms of the history of its management by
24 the political branches, of its susceptibility to
25 judicial handling in light of its nature and posture
26 in the specific case, and of the possible consequences
27 of judicial action.

28 Id. at 211-12.

The last two of these criteria have already been examined
and found to present no obstacle to justiciability here. The

1 issue presented, in its present posture, is well-suited for
2 judicial resolution. The Court will not be required to interfere
3 with the Executive's conduct of foreign relations. Nor is the
4 Court asked to declare any Presidential action illegal. ^{11/}

5 The other criterion -- the history of the question's manage-
6 ment by the political branches -- yields little guidance because
7 the Ethics in Government Act is recent legislation. As shown
8 above, the statute envisions judicial enforcement of its require-
9 ments. It follows that neither Congress nor the President intended
10 to reserve for decision in the political arena questions of whether
11 the Attorney General must conduct a preliminary investigation when
12 supplied information concerning alleged official wrongdoing.

13 In sum, none of the analytical threads that describe the
14 political question doctrine catches this case. See Baker v. Carr,
15 369 U.S. at 211. The case is justiciable. See id. at 217.
16 This Case Does Not Call For an "Advisory Opinion".

17 Finally, defendants contend that the case is not justiciable
18 because it requires the Court to render an opinion on the question
19 whether the President can violate the Neutrality Act. This
20 opinion, defendants argue, would be an "advisory opinion" beyond
21 the power of a federal court to render. The argument does not
22 merit extended discussion. A court is called upon for an advisory
23 opinion if presented with a case that is unripe, see United Public
24 Workers v. Mitchell, 330 U.S. 75, 89-90 (1947), moot, see United
25 States Parole Commission v. Geraghty, 445 U.S. 388, 395-97 (1980),
26 or one in which the plaintiff lacks standing, see Duke Power Co.
27 v. Carolina Environmental Study Group, 438 U.S. 59, 72 (1978).
28 The present case falls into none of these categories. A court can

1 also be called upon to render an improper "advisory opinion" if it
2 is asked to decide an issue while the case is in a procedural
3 stage at which decision of the issue is unnecessary. E.g.,
4 United States v. Fruehauf, 365 U.S. 146, 157 (1961). In this
5 case, any explicit or implicit decision by the Court concerning
6 the scope and applicability of the Neutrality Act will be reached
7 only because absolutely necessary to resolve the claims plaintiffs
8 have raised on their motion for summary judgment. To the extent
9 such a question is raised by this case, it is presented in an
10 adversary context and in a form historically viewed as capable of
11 resolution through the judicial process. See Flast v. Cohen, 392
12 U.S. 83, 95-97 (1968). The decision is not advisory in any sense.

13 DECISION ON THE MERITS

14 Plaintiffs have moved for summary judgment pursuant to Fed.
15 R. Civ. P. 56. No material facts are in dispute. Defendants
16 agree that:

17 1. Exhibits A and B to plaintiffs' state-
18 ment of material facts are the documents received
19 from plaintiffs in connection with their request
20 for institution of a preliminary investigation
21 pursuant to the Ethics in Government Act;

22 2. Exhibit C to plaintiffs' statement of
23 material facts is the letter of March 18, 1983 to
24 plaintiff Ronald V. Dellums from D. Lowell Jensen,
25 Assistant Attorney General, denying plaintiffs'
26 request;

27 3. No preliminary investigation was undertaken
28 and no recommendation for appointment of an independent

1 counsel was submitted;

2 4. Paragraph 3(a) through 3(s) of plaintiffs'
3 statement of material facts contains an accurate
4 reproduction of allegations received from plaintiffs
5 in connection with their request to the Attorney
6 General under the Ethics in Government Act.

7 This Court must review the Attorney General's determination
8 that the material plaintiffs submitted "did not constitute spe-
9 cific information of a federal offense 'sufficient to constitute
10 grounds to investigate' as required by the Ethics in Government
11 Act as amended on January 3, 1983." Letter of D. Lowell Jensen.
12 Under the Administrative Procedures Act, the Court must decide
13 whether this determination was arbitrary, capricious, an abuse of
14 discretion not in accordance with law, or unsupported by sub-
15 stantial evidence on the record as a whole. 5 U.S.C. § 706(2);
16 Good Samaritan Hospital, Corvallis v. Mathews, 609 F.2d 949, 951-
17 52 (9th Cir. 1979).

18 Section 592(a)(1) of the Ethics in Government Act states that

19 In determining whether grounds to investigate
20 exist, the Attorney General shall consider --
21 (A) the degree of specificity of the
22 information received, and
23 (B) the credibility of the source of the
24 information.

25 As shown above, this language, read in the light of its legisla-
26 tive history, plainly limits the grounds for a refusal by the
27 Attorney General to investigate to a lack of specificity of the
28 information presented or a lack of credibility of the person
presenting the information. Defendants do not claim that the
plaintiffs, who presented them with the information, are not

1 credible.^{12/} The Attorney General's refusal to investigate can be
2 sustained, therefore, only if the allegations presented by plain-
3 tiffs were insufficiently specific.

4 The standard for assessing the specificity of information
5 presented is revealed by the legislative history of the Ethics in
6 Government Act and its amendments. "Specific information" means a
7 complaint more detailed than a "generalized allegation of wrong-
8 doing which contains no specific factual support." S. Rep. No.
9 170, at 52; 1978 U.S. Code Cong. & Ad. News at 4268. Provided as
10 an example of an insufficiently specific complaint is a letter
11 saying only that a Cabinet member is a "crook." Id. However, the
12 Senate Report suggests that a preliminary investigation would be
13 required upon a report that "a cabinet secretary took a bribe on
14 July 1, 1976 in New Orleans," even if "it can be quickly estab-
15 lished that the secretary was in Albany, New York on that day."
16 Id. at 55, 1978 U.S. Code Cong. & Ad. News at 4271.

17 The 1983 amendments to the Ethics in Government Act did not
18 change this standard. The Senate Report to those amendments re-
19 iterates that "if a credible source informs the Department of
20 Justice that a named, covered official took money on a given date,
21 in a given place, and provided facts which indicate that it may
22 have been a bribe, this information should trigger a preliminary
23 investigation." S. Rep. No. 496 at 12, 1982 U.S. Code Cong. & Ad.
24 News at 3549.

25 The information plaintiffs provided the Attorney General was
26 much more than mere "generalized allegations of wrongdoing" with-
27 out factual support. Plaintiffs gave the Attorney General pages
28 of names, dates, times and places in support of the claim that

1 federal officials sponsored paramilitary expeditions against
2 Nicaragua in violation of the Neutrality Act all as more fully
3 detailed at pages 3-4, supra.

4 The Court finds the Attorney General's conclusion that the
5 information provided by plaintiffs was "not specific information
6 of a federal offense 'sufficient to constitute grounds to investi-
7 gate'," to be unreasonable and wholly unsupported by the record.
8 Consequently, the Court must set aside the Attorney General's
9 determination and accompanying failure to act as unlawful. 5
10 U.S.C. § 706(2); see, e.g., Washington State Farm Bureau v.
11 Marshall, 625 F.2d 296, 302 (9th Cir. 1980). The law requires the
12 Court to compel agency action unlawfully withheld or unreasonably
13 delayed. 5 U.S.C. § 706(1); Environmental Defense Fund, Inc. v.
14 Costle, 657 F.2d 275, 283 (D.C. Cir. 1981).

15 Plaintiffs are entitled to an order requiring the Attorney
16 General to conduct a preliminary investigation. See F.T.C. v.
17 Anderson, 631 F.2d 741, 750 (D.C. Cir. 1979).

18 Accordingly,

19 IT IS HEREBY ORDERED that plaintiffs' motion for summary
20 judgment is granted.

21 IT IS HEREBY FURTHER ORDERED that defendants' motion to
22 dismiss the complaint is denied.

23 IT IS HEREBY FURTHER ORDERED that The Attorney General shall
24 conduct a preliminary investigation pursuant to 28 U.S.C. § 592
25 into the conduct of any person presently covered by the Ethics in
26 Government Act named in the information submitted by plaintiffs
27 relating to violations of the Neutrality Act, 18 U.S.C. § 960,
28 arising out of actions connected to paramilitary-expeditions

1 against Nicaragua, as more specifically detailed in the informa-
2 tion received from plaintiffs by the Attorney General on January
3 27, 1983.

4 IT IS HEREBY FURTHER ORDERED that if the Attorney General
5 does not make the determination described in 28 U.S.C. § 592(b)(1)
6 within ninety days of the date of this order, he shall apply for
7 the appointment of an independent counsel as provided in 28 U.S.C.
8 § 592(c)(1).

9 Dated: November 3, 1983.

10
11 STANLEY A. WEIGEL

12 _____
13 Senior Judge
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FOOTNOTES

1 1. Plaintiffs also contend that they have standing because
2 they have been harmed by the underlying criminal acts they have
3 alleged. These injuries are particularized, but they cannot
4 confer standing on plaintiffs to bring this lawsuit. The required
5 nexus between plaintiffs' status and the claim sought to be adjudi-
6 cated as well as the Court's ability to redress the harm in this
7 action, are absent. See Linda R.S. v. Richard D., 410 U.S. 614,
8 618-19 (1973). The likelihood that an injunction would lead to
9 actions curtailing future harm to plaintiffs is no less specula-
10 tive than in Linda R.S. Cf. id.

11 2. The injury need not be to an economic interest. Data
12 Processing Service v. Camp, 397 U.S. 150, 154 (1970); see, e.g.,
13 Sierra Club v. Morton, 415 U.S. 727, 734 (1972); Benton Franklin
14 Riverfront Trailway v. Lewis, 701 F.2d 784, 787 (9th Cir. 1983).

15 3. Defendants' reliance on Cort v. Ash, 422 U.S. 66 (1975),
16 as supporting a negative answer is misplaced. Plaintiffs "ask
17 only that the court review the government's own enforcement effort
18 against the standards established by the [statutory scheme]. . .
19 The reluctance of courts to imply separate private enforcement
20 rights from statutes or regulations which provide explicitly for
21 government enforcement procedures and penalties, [citing Cort v.
22 Ash], is not applicable to such a private proceeding as this."
23 Legal Aid Soc. of Alameda Co. v. Brennan, 608 F.2d 1319, 1332 (9th
24 Cir. 1979).

25 4. This special court is created by 28 U.S.C. § 49, enacted
26 as Pub. L. No. 95-521, § 602(a), 92 Stat. 1873 (1978). The court
27 is denominated a division of the United States Court of Appeals
28 for the District of Columbia. Its members are appointed to two

1 year terms by the Chief Justice; one must be a judge of the D.C.
2 Circuit Court of Appeals; the two others are to be selected by the
3 Chief Justice from among the active and retired justices of the
4 Supreme Court and the active and senior judges of the United States
5 Circuit Courts.

6 5. Under 28 U.S.C. § 592(c), the Attorney General must apply
7 to the special division of the court for the appointment of an
8 independent counsel "if ninety days elapse without a determination
9 by the Attorney General that there are no reasonable grounds to
10 believe that further investigation or prosecution is warranted."
11 This requirement is imposed by the statute to prevent investiga-
12 tions concerning allegations of wrongdoing from being stalled by
13 total inaction within the Justice Department. See S. Rep. No.
14 170, 95th Cong., 1st Sess. 54, reprinted in 1978 U.S. Code Cong. &
15 Ad. News 4216, 4270. The "determination" required by subsection
16 592(c) can be reached in one of two ways. First, the Attorney
17 General can conclude that the information he has been presented is
18 insufficiently specific or that the source is insufficiently
19 credible to warrant a preliminary investigation pursuant to sub-
20 section 592(a)(1). Second, he may conclude that a preliminary
21 investigation is warranted, but that after conducting an investi-
22 gation, no reasonable grounds exist to believe that further investi-
23 gation or prosecution is warranted. See 28 U.S.C. § 592(b)(1).
24 In the latter event the Attorney General must notify the special
25 division of the court and submit a memorandum to that court with a
26 summary of the information presented. Id.; id. § 592(b)(2).
27 In this case, the Attorney General without conducting any pre-
28 liminary investigation made the "determination" required by

1 subsection 592(c)(1) in the form of a letter to plaintiffs stating
2 without elaboration that he did not consider the information
3 presented sufficient grounds to investigate. He made no report to
4 the court. His determination was thus necessarily of the first
5 type described above. It can be sustained only if the Attorney
6 General was correct in his conclusion that subsection 592(a)(1)
7 does not require an investigation upon the presentation of plain-
8 tiffs' information.

9 6. "The term 'summary' was used in this paragraph so that
10 the Attorney General would not have to file with the court all of
11 the investigative files or the total work product of the Federal
12 Bureau of Investigation or the Department of Justice attorneys."
13 S. Rep. No. 95-170, 95th Cong., 1st Sess. 55 (1977), 1978 U.S.
14 Code Cong. & Ad. News at 4271. However, it was anticipated that
15 even in the case of a "crank letter", the memorandum to the court
16 would include a copy of the letter. Id.

17 7. The same considerations prompting the conclusion that
18 plaintiffs have alleged injury to a legal interest created by
19 statute also show that plaintiffs' claims fall within the "zone of
20 interests" protected by the statute. The zone of interests test
21 serves the purpose of "allowing courts to define those instances
22 where it believes the exercise of its power at the instigation of
23 a particular party is not congruent with the mandate of a legisla-
24 tive branch in a particular subject area." Control Data Corp. v.
25 Baldrige, 655 F.2d 283, 297 (D.C. Cir. 1981) (quoting Tax
26 Analysts & Advocates v. Blumenthal, 566 F.2d 130, 140 (D.C. Cir.
27 1977), cert. denied, 434 U.S. 1086 (1978)). The Court has already
28 determined that the institution of an action by persons who supply

1 information is congruent with Congress's intent in enacting the
2 Ethics in Government Act. Plaintiffs therefore meet the "zone of
3 interests" test. See City of Davis, 521 F.2d at 672.

4 8. Even if other aspects of the Attorney General's duties
5 under the Ethics in Government Act, such as the form that the pre-
6 liminary investigation takes, may be committed to his discretion,
7 the question whether to conduct an investigation is reviewable
8 because it is not so committed. Under the APA, "separable issues
9 appropriate for judicial determination are to be reviewed, though
10 other aspects of the agency action may be committed to the agency's
11 expertise and discretion." East Oakland-Fruitvale Planning Council
12 v. Rumsfeld, 471 F.2d at 533.

13 9. See, e.g., S. Rep. No. 170 at 54-55, 1978 U.S. Code Cong.
14 & Ad. News at 4270 ("The purpose of . . . a preliminary investi-
15 gation is to allow an opportunity for frivolous or totally ground-
16 less allegations to be weeded out. . . . [T]he Attorney General
17 is not authorized to conduct whatever investigation [he] can fit
18 into [the statutory] period. The Attorney General does not have
19 the authority to conduct a full investigation . . . during the
20 period provided for a preliminary investigation . . ."). The
21 Ethics in Government Act prohibits the Attorney General from
22 convening grand juries, plea bargaining, granting immunity or
23 issuing subpoenas in connection with a preliminary investigation.
24 5 U.S.C. § 592(a)(2). This prohibition was made express by the
25 1983 amendments "in order to ensure that the Attorney General does
26 not conduct a full-blown investigation," because "[o]pening the
27 door to the use of these powers [would present] the potential for
28 circumvention of the Act by allowing the Attorney General to make

1 prosecutive decisions which should be left to a special prosecutor."
2 S. Rep. No. 496 at 13-14, 1982 U.S. Code Cong & Ad. News at 3549-
3 50 (emphasis added).

4 10. Defendants concede that "the truth vel non of these
5 allegations is not the issue in this action but rather whether
6 these allegations are sufficient to require the Attorney General
7 to institute a preliminary investigation under the Ethics in
8 Government Act." Defendants' Response To Plaintiffs' Statement Of
9 Material Facts Not In Dispute, p. 2, ¶3.

10 11. To require a preliminary investigation, the Court must
11 determine that the Executive actions alleged by plaintiffs, if
12 true, may violate federal law. It could be argued that this
13 subsidiary ruling itself involves a political question. The
14 President and Congress might differ from the Court in construction
15 of federal laws governing the legality of the alleged activities.
16 But the specter of varying interpretations, standing alone, does
17 not negate the obligation of this Court to decide a bona fide
18 controversy, properly presented, even though the controversy has
19 political overtones. See INS v. Chadha, 103 S.Ct. 2764, 2780
20 (1983). Court rulings on purely legal questions, not entailing
21 any finding of illegality, cannot be precluded simply because
22 other branches might adopt a different position on the same legal
23 question. Cf. Goldwater v. Carter, 444 U.S. 996, 1000 (Powell,
24 J., concurring in judgment) (purely legal inquiry presents no
25 political question because it demands no special competence or
26 information beyond the reach of the judiciary).

27 12. Defendants appear to accept, as indeed they must, that no
28 question of the sources' credibility is raised. None of the

1 Attorney General's filings in this action challenge plaintiffs'
2 credibility. The legislative history makes clear that plaintiffs
3 must be considered "credible sources" under any rational applica-
4 tion of the statutory criteria. Compare S. Rep. No. 170 at 55,
5 1978 U.S. Code Cong. & Ad. News at 4271, with S. Rep. No. 946 at
6 11-12, 1982 U.S. Code Cong. & Ad. News at 3547-48. Nothing in the
7 record suggests that complainants here are cranks, mentally ill,
8 motivated by "hate", or have "repeatedly supplied . . . allega-
9 tions which have proved to be groundless." Cf. id.

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