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Commission Request Regarding Former NSC
Personnel (Including Defense Opinion)
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PRESIDENT'S SPECIAL REVIEW BOARD

New Executive Office Building - Room 5221

Washington, D.C. 20506

202-456-2566

JOHN TOWER

Chairman

EDMUND MUSKIE

BRENT SCOWCROFT

February 4, 1987

RHETT DAWSON

Director

W. CLARK MCFADDEN II

General Counsel

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

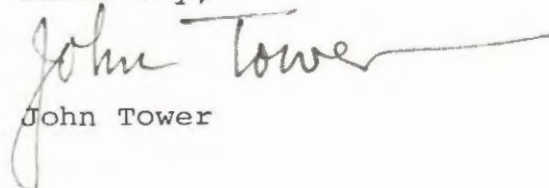
For the last several weeks, the President's Special Review Board has been studying the National Security Council process. Pursuant to your direction, a focus of the Board's attention has been the recent transfers of arms to Iran and the possible diversion of funds to the Contras. Establishing the essential facts surrounding these transactions has proven to be a difficult challenge.

Two individuals, Admiral John Poindexter and Lt. Col. Oliver North, played central roles in these transactions. The ability of the Board to make an informed and useful appraisal of the Iran-Contra matter would be greatly enhanced by the testimony of these individuals. To this end, the Board invited these individuals to appear before it, but through their attorneys, they declined.

Under these circumstances and consistent with the responsibility which the Board has accepted, the Board respectfully requests that in your capacity as Commander-in-Chief you order these individuals to appear before the Board and to cooperate in connection with its inquiry. In this way we believe the Board can most effectively accomplish its purpose.

Thank you for your cooperation.

Sincerely,



John Tower



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301

February 5, 1987

MEMORANDUM FOR MR. PETER J. WALLISON, COUNSEL TO THE PRESIDENT

SUBJECT: Tower Commission Request Regarding Former NSC Personnel

In my opinion, the request by the Tower Commission that the President, as Commander-in-Chief, order Vice Admiral Poindexter and Lieutenant Colonel North to answer the Commission's questions should be denied. In the absence of a grant of testimonial immunity, the Commission's request asks the President to issue an order which would be clearly unlawful and, therefore, unenforceable through the provisions of the Uniform Code of Military Justice (UCMJ).

Military personnel are protected against compelled self-incrimination by both the Fifth Amendment and Article 31 of the UCMJ, 10 U.S.C. §831. Although Article 31 only applies to interrogations or investigations conducted by persons subject to the UCMJ, Fifth Amendment protections apply independently to both civilian and military investigations. United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

Military personnel may be prosecuted before courts-martial for willful violations of the lawful orders of their military superiors. Articles 90 and 92, UCMJ, 10 U.S.C. §§890, 892. As Commander-in-Chief of the armed forces, the President is the military superior of both individuals; willful failure to obey his lawful orders does violate Article 92. Violation of his lawful orders is sufficiently "service-connected" to support the exercise of military jurisdiction, regardless of where given or disobeyed. United States v. Fuller, 2 M.J. 702 (A.F.C.M.R. 1976).

However, to be lawful, an order "must not conflict with the statutory or constitutional rights of" the recipient. Part IV, Paragraph 14c(2)(a)(iv), Manual for Courts-Martial, E.O. 12473 (1984). An order which contravenes the recipient's rights under Article 31 and the Fifth Amendment is not a lawful order. United States v. Jordan, 22 C.M.R. 242 (C.M.A. 1957); United States v. Jackson, 1 M.J. 606 (A.C.M.R. 1975). To the extent an order requires the recipient to perform a self-incriminating act, it violates Article 31, and cannot serve as the basis of a conviction for violating Articles 90 or 92. United States v. Hay, 3 M.J. 654 (A.C.M.R. 1977).

Nor can servicemembers be administratively separated from the service or otherwise penalized for invoking their protection against self-incrimination. Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Sanitation Men v. Sanitation Commissioner, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967). Inasmuch as the Government is clearly on notice of the assertion of Fifth Amendment rights by both officers, they would almost surely obtain de facto immunity for their statements if they chose to obey rather than refuse the order.

If afforded testimonial immunity by the Attorney General under 18 U.S.C. §6002, Vice Admiral Poindexter and Lieutenant Colonel North may then be ordered to account for their official conduct. Refusal to do so might then provide a basis for prosecution under the UCMJ provisions discussed above, or adverse administrative action under service regulations. Gardner, 392 U.S. at 279. However, neither their statements nor any evidence derived therefrom may be used against them in a subsequent criminal prosecution or court-martial, except for perjury or other falsity arising out of their statements. Evidence independently derived would, of course, not be precluded from use by such immunity.

Statements made pursuant to a grant of immunity could be used to support any appropriate adverse administrative action, to include admonition, reprimand, determination of retired grade, or separation from the naval service. See United States v. Apfelbaum, 445 U.S. 124, 125 (1980) and cases cited therein.

Accordingly, I conclude that such an order from the President as is requested by the Tower Commission would not be lawful unless accompanied by a grant of immunity, and could not be enforced by threat of punishment under the UCMJ or other adverse action. Although the giving of such an order would not itself violate the law, it would set an extremely poor precedent within the military justice system by suggesting that commanders may, for reasons of command, confer de facto immunity to obtain information without adhering to established provisions of law governing grants of immunity.

I recommend the Tower Commission's request be rejected.


H. Lawrence Garrett, III

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THE WHITE HOUSE

WASHINGTON

February 6, 1987

Dear Senator Tower:

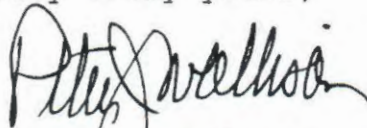
Thank you for your letter to the President of February 4, 1987, requesting that he, as Commander in Chief, order Vice Admiral John Poindexter and Lt. Col. Oliver North to appear before and cooperate with the President's Special Review Board.

On numerous occasions, the President has made clear his desire that both Vice Admiral Poindexter and Lt. Col. North cooperate fully with all on-going inquiries into the Iran matter and the alleged diversion of funds to the anti-Sandinista forces in Nicaragua. In these statements, however, the President has recognized that Messrs. Poindexter and North have a constitutional right not to testify, and that this right must be respected even when its assertion unduly hinders the disclosure process the President himself has set in motion.

In response to your request, we have confirmed with the General Counsel of the Department of Defense what had been our previous advice to the President -- that the order you seek would conflict with the constitutional rights of Messrs. Poindexter and North, as well as their rights under Article 31 of the Uniform Code of Military Justice, and hence would not be a lawful order under the Manual for Courts-Martial, E.O. 12473 (1984). A copy of the opinion of the General Counsel of the Department of Defense is attached.

If you have any questions, or if I may be of further assistance, please contact me.

Very truly yours,



Peter J. Wallison
Counsel to the President

The Honorable John G. Tower
Chairman
President's Special Review Board
The White House
Washington, D.C. 20500

Attachment

THE WHITE HOUSE

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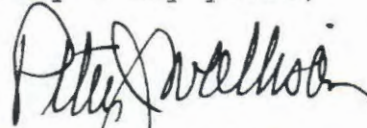
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Peter J. Wallison
Counsel to the President

The Honorable John G. Tower
Chairman
President's Special Review Board
The White House
Washington, D.C. 20500

Attachment

Press Guidance Regarding Request of Special Review Board's
Letter Requesting President to Order Poindexter and North to
Cooperate with Board

- On February 4, 1987 Chairman Tower requested that the President, as Commander-in-Chief, order Admiral Poindexter and Lt. Col. North to cooperate with Board's inquiry.
- On February 6, 1987 Counsel to the President, Peter Wallison, responded to Tower's letter:
 - President has made clear his intent that both North and Poindexter cooperate fully with all ongoing inquiries
 - President recognizes they have a constitutional right not to testify
 - An order from the President to North and Poindexter to testify would conflict with their constitutional rights as well as their rights under Article 31 of the Uniform Code of Military Justice, and hence would not be a lawful order
- Military personnel, like other citizens, are protected against compelled self-incrimination by the Fifth Amendment to the Constitution
- In addition, military personnel are protected against self-incrimination by Article 31 of the Uniform Code of Military Justice
- As Commander-in-Chief of the Armed forces, the President is the military superior of both North and Poindexter, and a willful failure to obey his lawful order can violate the UCMJ
- However, to be a lawful order, the order "must not conflict with the statutory or constitutional rights" of the order recipient
- An order which contravenes Article 31 and the Fifth Amendment is not a lawful order
- If North and Poindexter obeyed the otherwise unlawful order, they would obtain de facto immunity
- This immunity could immunize them from prosecution for any illegal actions they may have taken (transactional immunity), thus interfering with the Independent Counsel's investigation

THE WHITE HOUSE
WASHINGTON

2-10-87

TO: *FJW*

FROM: JAY B. STEPHENS
Deputy Counsel to the President

FYI: *Provided to Rusty as
background*

COMMENT: _____

ACTION: _____

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