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ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
164960	PAPER	DUPLICATE OF #164959, REQUEST FOR PRODUCTION [OF DOCUMENTS]	10	ND	B1	
164961	FORM	REQUEST FOR APPOINTMENTS	1	7/12/1988	B3	B6

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Freedom of Information Act - [5 U.S.C. 552(b)]

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UNCLASSIFIED WITH TOP SECRET ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 88-0080-02
	)	
OLIVER L. NORTH	)	

FURTHER MEMORANDUM AND ORDER RE CIPA AND TRIAL SCHEDULE

Two major pretrial issues in this case have been hotly contested. Each issue has raised questions concerning the government's ability to prosecute one or more of the counts naming Oliver L. North.

The Court has rejected North's pretrial claim that the government has misused his immunized testimony before Congress. What has remained unresolved are North's various claims that the requirements of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. IV, as applied to this unique case, will result in denying him the right to use certain classified government documents he needs for his defense and will, in other respects, deprive him of his constitutional protections as a criminal defendant. These claims had some merit. In its Memorandum Opinion of June 22, 1988, the Court refused mechanically to apply certain CIPA procedures because of its concern that their strict application in this case would contravene established constitutional protections afforded all

defendants facing criminal charges. In addition, the Court urged that the Attorney General designate an appropriate official to carry out the Executive Branch's responsibilities under Section 6 of CIPA to avoid any question as to Independent Counsel's authority, and this has been done.[1]

This further Memorandum considers the principal remaining CIPA questions which concern North's ability to conduct adequate documentary discovery before trial and his right to use material obtained through discovery at trial, along with certain classified material found in government exhibits which the government intends to redact and withhold from the jury.

Although numerous documents have been disclosed to North in classified form, Independent Counsel has advised the Court that the interagency group responsible for declassifying and releasing classified material for use at trial remains adamantly opposed to any public disclosure of the classified information redacted from the Independent Counsel's case-in-chief documents. Independent Counsel has scrupulously deferred to agency representatives who insist on withholding certain information from public view. However, North contends that much of this redacted material is relevant to his defense.

A continuing dispute has also developed between the parties as to the relevance and materiality of certain documents

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[1] The Attorney General has appointed Edward S.G. Dennis, Jr., Acting Assistant Attorney General, Criminal Division, as his statutory designee under Section 6(c) of CIPA.

requested by North, which North suggests reflect both the incompleteness of Independent Counsel's grand jury inquiry into the underlying facts and the insufficiency of the government's proof.

Although North contends this withholding of information distorts the documentary evidence and fails to reveal the true nature and effect of certain events disclosed by those portions of papers to be publicly released, he has resolutely refused to disclose any details of his defense to Independent Counsel for fear that this could alert the government prematurely to what he considers the inherent weakness in the Independent Counsel's theory of prosecution. This, in turn, led him to make insufficiently particularized discovery requests and prevented his access through discovery to papers related to his theory of defense. The informal give-and-take between the parties which normally takes place during pretrial stages of criminal cases never occurred and issues have remained unresolved.

The Court has attempted to remove these obstacles by its decision, announced in open court on June 23, 1988, and not opposed by Independent Counsel, to hear North's counsel at an in camera, ex parte hearing for the sole purpose of becoming more precisely informed as to the details of North's proposed defense, as it relates to his demand for access to classified materials the government has indicated it will refuse to release publicly, and materials which the government has already redacted from its proposed proof and apparently considers wholly irrelevant and

immaterial.

At the in camera, ex parte hearing,[2] on July 6, 1988, which lasted over four hours, North's counsel particularized and illustrated by reference to specific documents his need for certain classified material not included in the government's case-in-chief, and illustrated how some of the material tended to exonerate North of guilt on certain charges. He also demonstrated how his theory of the defense requires use of redacted portions of the government's case.

After considering counsel's representations the Court has concluded that:

(A) The government has redacted certain information from its documentary case-in-chief which must be available to North for his use at trial.

(B) The Court is also satisfied that some defense discovery claims, supported by information presented to the Court, may be sufficiently pertinent to require disclosure of other classified documents previously sought under North's supplemental discovery request (Defendants' Joint Pretrial Motion No. 12).

North contends that money raised by Secord and Hakim from the sale of missiles to Iran was combined in private accounts with money received from foreign governments and private donations. In turn, the combined funds were used to plan and

[2] This hearing was recorded but not transcribed and the reporter's notes are sealed in the Court's SCIF. No transcription may be ordered or prepared except under written Court order.

carry out various covert operations, including actions directly or indirectly supporting the contras. Further, he contends that these initiatives were all approved at or near cabinet level; their execution was closely monitored through the use of a variety of intelligence methods and sources -- sometimes at the specific request of North -- and were made generally known to North's superiors through a variety of means. Thus he will submit that his activities were known and authorized and he seeks material that will reinforce this position. Among materials sought are documents bearing primarily on issues of criminal intent, which is of particular significance to the first three counts of the indictment. The materials he seeks -- even if not a "smoking gun" -- may serve to corroborate testimony of defense witnesses, including North himself, if he takes the stand. They may also support defense challenges to the credibility of certain known prosecution witnesses who have, in the past, denied that North's funding and other activities were monitored, known and approved at the highest levels of the government.

The Court is not the trier of fact in this case. The jury must decide where the truth lies. But North has sufficiently demonstrated to the Court that information redacted from Independent Counsel's case-in-chief documents and certain documents requested in his supplemental discovery motion require the Court to enter the following directives to assure that the truth, whatever it ultimately proves to be, "will out."

(1) North shall, by August 1, 1988, designate in the form of a CIPA § 5 notice those redactions made in documents in the government's case-in-chief he requires to support his defense.

(2) Independent Counsel shall supply all documents included within items 1 through 20, inclusive, of North's supplemental discovery request of May 23, 1988, (Defendants' Joint Pretrial Motion No. 12), which in any respect reflect any of the following: (a) the funding of the activity from any source; (b) whether or not senior government officials were aware of the activity; (c) whether or not North participated individually under any pseudonym; and/or (d) any use or contemplated use of the vessel Erria.

(3) North shall also receive all references to any form of aid or military assistance to the contras, or entities supporting the contras, direct or indirect, contained in any record of the daily Presidential intelligence briefing, specifically including non-identical copies of the President's Daily Briefing ("PDB"), formal or informal, together with records showing distribution of the information for the period September 1, 1984 through December 31, 1986.

(4) North shall also receive all information concerning activities in aid of the contras, direct or indirect, contained in any document forwarded to any offices in the White House from the Central American Joint Intelligence Task Force ("CAJIT") in the period from September 1, 1984 through December 31, 1986.

(5) These items 2-4, inclusive, shall be delivered in full

classified text to the defense SCIF for North's review on or before August 1, 1988.

(6) North shall, by August 1, 1988, notify the government pursuant to Section 5 of CIPA of any other classified document then in its possession he proposes to present in his defense at trial. This notice shall include all items selected under (1) above.

(7) North shall, on or before August 15, 1988, notify the government pursuant to Section 5 of CIPA of each classified document obtained under this Order he proposes to present in his defense at trial.

The Court may be obliged to widen North's discovery as the trial proceeds and reserves the right to do so, with notice to the prosecution, as exigencies of trial may demand. However, North's numerous other discovery requests do not presently appear sufficiently pertinent to justify pretrial discovery into areas involving sensitive national security.

(8) Independent Counsel shall, by August 1, 1988, also relate each document in its case-in-chief to the specific count or counts naming North -- other than the first three counts -- for which the document will be offered as proof.

(9) A jury trial on those counts remaining after the CIPA process takes its course is set for September 20, 1988, in Courtroom No. 6, commencing at 10:00 a.m. It presently appears that, at a minimum, substantive charges of cover-up, falsification and North's alleged receipt of personal benefit

derived from his conduct as a government employee can proceed to trial. This trial date is six months after indictment. It must be met.

Nothing in the foregoing involves even a tentative decision by the Court as to the merits of North's defense or the admissibility of any documentary evidence that may be offered by North. Nor is it intended to supersede prior orders requiring disclosure of Brady and other relevant and material records, including tapes and video records.

SO ORDERED.

Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 8, 1988.

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THE WHITE HOUSE

WASHINGTON

July 12, 1988

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: WILLIAM J. LANDERS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Scope of Office of Independent Counsel Case and Potential Disclosure Problems

Based on my briefings by the staff of the Office of Independent Counsel, I have come to the conclusion that the scope of the conspiracy charged in count one is extremely broad and it is difficult to argue that all of the defense discovery requests are irrelevant. Thus, despite assurances by the Independent Counsel's staff, the theory of the case certainly enhances the prospect that Judge Gesell will hold that secrets that the Intelligence community determines cannot be disclosed for legitimate reasons of national security are relevant and must be disclosed for the trial of the conspiracy to go forward. The recent order granting discovery of portions of 20 items in the Supplemental Discovery Request confirms that Judge Gesell may be headed in that direction.

It is imperative that the Intelligence Community immediately identify any critical secrets drawn into the case as it is now charged and arrive at a speedy determination at the highest levels of whether those secrets will be revealed. Once that is done, we can approach the Independent Counsel to ask how he intends to keep those secrets out of the case and protected. If the Independent Counsel cannot provide adequate assurances that those secrets will be protected, we must be prepared to respond with any suggestions -- including the narrowing of the case -- that we believe will allow the case to go forward.

We cannot delay in this process. The court's recent discovery order provides an indication of some of the secrets that it views may legitimately be part of the defense. The Intelligence Community must decide now which of those items cannot and will not be publicly disclosed. I am fearful that if discovery of those items is provided and the case is allowed to progress on its present course, the court may be too firmly committed to the case as currently charged to allow the Independent Counsel to narrow it. Thus, if secrets that the court believes are needed by the defense are not disclosed, the court will simply dismiss the conspiracy count.

It should go without saying that if any count is dismissed because the Intelligence Community cannot consent to the

disclosure of some relevant secret, that secret will not be a secret for long. Given the notoriety of the case and the political climate, it is almost certain that the secret will have to be disclosed to Congress. And I am not at all confident that disclosure to Congress will be the end of it. In short, any secret that is legitimately drawn into this case will be disclosed either because the Intelligence Community consents to its disclosure so that the trial may go forward or because it will become necessary to make numerous disclosures to rebut challenges of stonewalling and a cover-up by the Intelligence Community.

In order to focus the decision that we must now make -- i.e. whether there is any part of the conspiracy count that the Intelligence Community is reasonably certain can go forward -- the following presents a brief synopsis of the theory of conspiracy, the potential defense theories, a brief discussion of the sensitive and potentially non-disclosable items that appear to be drawn into the case at this time, and possible responses that can be made to the Independent Counsel.

I. Theory of the Conspiracy.

The conspiracy is divided into two parts: a conspiracy to defraud the United States and a conspiracy to commit the substantive offenses set out in the remainder of the indictment. The second part of the conspiracy does not appear to present any immediate problems. The first part, however, has three branches: (1) an allegation that the entire resupply operation was unauthorized, (2) an allegation that the diversion of funds from the Iranian arms sales was improper and (3) an allegation that the conversion of the arms sales into a profit-making transaction for purposes of creating a "slush fund" was unlawful.

It is the first of these three allegations that causes the case to become very broad. As explained, this allegation is built upon the premise that all covert or special actions must be authorized in writing pursuant to E.O. 12333 and NSDD 159 and that no program may be conducted unless so authorized. It is argued that North defrauded the U.S. because he knew that the specific authorization procedure had to be followed, that in fact it was not followed with respect to the resupply operation. It is argued that because the procedures were not followed, North intentionally kept the resupply operation hidden and therefore deceived others within the Executive Branch and Congress. This provides the necessary deception element of a fraud charge.

Most of the information needed to prove the case-in-chief has been declassified and we are down to a short list of items at issue. Perhaps the most significant classification issue in the view of the Independent Counsel is the identity of the Central American countries. I am reasonably satisfied that the case-in-chief can go forward so long as a few substitutions for some NSA materials can be made.

II. Potential Defense Theories.

Because the first part of the conspiracy inherently involves an element of North's knowledge of the procedures required to be followed to authorize covert action, two areas of proof are relevant to his defense. First, North may argue that he had a good faith belief that his activities were within the scope of any findings and authorizations that were existence. Thus, he might attempt to prove the scope of the activities that the government undertook pursuant to any existing Central American finding since those activities would be evidence of the government's view of the scope of permissible activity. Second, North may argue that there was no cast-in-concrete procedure for authorizing covert action or that there was some residual authority for his activity, or at least he had a good faith belief that this was the case. Relevant to this theory would be proof of other government activity similar or analogous to North's activity that was undertaken without strict compliance with E.O. 12333 and NSDD 159 or based on some other authority.

A third defense theory is opened up by another aspect of the Independent Counsel's theory. Because the Independent Counsel must prove lack of authorization for North's activity and that North intended to not have his activity properly authorized in order to hide it, North may argue that he believed he had implicit authorization at high levels of the government. To prove this he would seek to introduce evidence that substantial intelligence about his activities was collected and disseminated throughout the government.

It seems clear from the recent discovery order that the court may be inclined to let North delve into these areas. Items numbered 7, 10, 11, 12 and 13 of the Supplemental Discovery Request are certainly items pertaining to the scope of legitimate government activity in Central America. Additionally, items numbered 2, 4, 8 and 9 are examples of activities that North might argue demonstrate a wide range of government action undertaken pursuant to a number of general authorities. Finally, the court's order that intelligence material distributed to the President and through CAJIT be provided certainly indicates that the court views the potential third defense as viable.

III. Identification of Non-Disclosable Items

The Intelligence Community has already identified a number of items that have appeared in case-in-chief documents that cannot be disclosed. At least seven of those items appear to be among the parts of the 20 items ordered to be produced in discovery. We must confirm at the highest levels that these items are in fact not to be disclosed and that there are substantial reasons for not disclosing them.

I do not want to list these items in this memo so that it can remain unclassified. However, the Intelligence Community has

been examining this issue and we can discuss at the General Counsel meeting today. It is imperative that the first order of business be to direct the Intelligence Community to make firm and supportable disclosure decisions at the highest levels with respect to these items and others that they reasonably perceive to be relevant to the defense.

IV. Response to Office of Independent Counsel

Once we know the limits of disclosure we should seek to obtain assurances from the Independent Counsel that the case can go forward without public disclosure of this information. However, I must candidly admit that in view of the theory of the conspiracy I am not sanguine that much of the critical information already identified can be kept out.

Assuming that no reassuring response comes from the Independent Counsel, we have two options. First, since the disclosure problems arise principally under the conspiracy count, we could attempt to get a firm decision from the court as to whether count one charges a crime. Our pitch would be that there is no need for the court to resolve the time consuming classified information problems if in fact count one does not charge an offense. While this is a theoretical possibility, I am certain Judge Gesell will not be receptive and will rule that a crime is charged. In the end, we may only succeed in driving a wedge between ourselves and the Independent Counsel, something we have successfully avoided.

Second, we could urge that the Independent Counsel narrow the conspiracy to focus simply on the diversion. Under this theory the legality or authority to conduct the resupply operation would not be in issue and many of the very sensitive items would be eliminated from the case.

The Independent Counsel is not completely hostile to this latter suggestion, but his staff is inclined to litigate the classified information problem as fully as possible and to retrench the conspiracy only if Judge Gesell orders information to be disclosed that the Intelligence Community adamantly refuses to release. The problem with this approach is that if the proceedings go on for too long, Gesell may not allow any narrowing of the case, and may simply tell the Independent Counsel to go with the full conspiracy as charged or no conspiracy. The Independent Counsel's staff apparently favors this approach, however, because they believe it is possible to stipulate or substitute many of the items that would be in issue.

If we are going to suggest a narrowing of the case in order for it to go forward, we must be absolutely certain that all information needed for that case can be released. If we conclude that even a more narrow case cannot go forward, we must decide when it is best to front that issue with the court. It may be

that if no conspiracy at all can go forward, it would be better to resolve that now rather than on the eve of trial.

AGENDA

GENERAL COUNSEL'S MEETING

JULY 12, 1988

I. Overview of Office of Independent Counsel Case

II. Potential Defense Theories

a. Activity within scope of findings as evidenced by other government actions

b. Strict compliance with E.O. 12333 and NSDD 159 not required as evidenced by other government actions undertaken without a finding

c. Intelligence reporting gave Cabinet level official knowledge

III. Court's Discovery Order

a. 20 items to be produced by August 1

- disclosure to Office of Independent Counsel
- limiting language
- time frame to produce

b. Objections to redactions to be filed August 1

c. Designation of defense documents by August 15

IV. Identify Absolute Non-Disclose Items

a. Redacted items in case-in-chief

b. Items within discovery order

c. Other items brought in by North's defense

V. Narrowing of Case

a. Only obstruction and false statement counts

b. Restructure conspiracy count to cover only diversion of funds

- Tactical advantage re: discovery/disclosure problems
- Walsh not opposed to considering

(1) Ordering of Secrets / to be Molecular at Bayview Home Camp By Thursday

— President entitled to advice of legal agency

(2) Presentation to Walsh Webster / CIA

(3) Case Summary / Show them our DOJ

(4) Briefing Intelligence Community

A copy of the Agenda will be over later.

J

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PRESS GUIDANCE RE: JUDGE WALSH AND DISCOVERY COMPLIANCE

- The Administration has cooperated fully with Independent Counsel Walsh's investigation. We have provided him with thousands of documents aggregating hundreds of thousands of pages, much of which originally was highly classified. The Administration has worked with the Independent Counsel since the indictment was returned on March 16 to declassify the information which he expects to introduce at trial as part of his prosecution case. We have been told that the information that has been declassified is sufficient to allow the Independent Counsel to prosecute his case.

- On July 8, Judge Gesell ordered the Government to provide 20 items of highly sensitive classified information to defendant Oliver North by August 1. Two weeks ago the Independent Counsel informed the Court that it would take several months to locate and produce all documents responsive to some of those items.

- The Independent Counsel filed affidavits from the affected agencies detailing the production problems. However, Judge Gesell insisted last Wednesday that the Government meet the August 1 deadline. In an effort to comply, the Independent Counsel asked the Executive Branch agencies to locate and produce documents that provided answers to four questions

would allow additional time to compile the responsive documents while trial of the remaining counts -- concerning false statements and obstruction -- proceeds as scheduled.

- The agencies involved are continuing their searches to locate all documents responding to the discovery order. They will continue these efforts if additional time is allowed by the Court.