UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CROSS-MOTION OF THE GOVERNMENT FOR MODIFICATION OF THE COURT'S ORDER OF JULY 8, 1988

PLEASE TAKE NOTICE that for the reasons stated in the accompanying Memorandum of Points and Authorities In Support of Cross-Motion of the United States for Modification of the Court's Order of July 8, 1988, the Government hereby moves for an order modifying the Court's Order of July 8, 1988 to relieve the government of the August 1 deadline for production of documents specified at pages 6-7 of the Order, and to provide alternative procedures for addressing the issues as to which that discovery was ordered.

Dated: Washington, D.C.
July 25, 1988

LAWRENCE E. WALSH
Independent Counsel

Suite 701 West
555 13th Street, N.W.
Washington, D.C. 20004
Tel.: (202) 383-8940

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR MODIFICATION OF THE COURT'S ORDER OF JULY 8, 1988

The Government respectfully submits this Memorandum in support of its motion for modification of the Court's Order of July 8, 1988 to relieve the government of the August 1 deadline for production of documents specified at pages 6-7 of that Order, and to provide alternative procedures for addressing the issues as to which that discovery was ordered.

FACTUAL BACKGROUND

In its Orders of June 6, 1988 and June 22, 1988, the Court twice denied defendants' Supplemental Classified Motion to Compel Discovery, originally served on May 23, 1988. On July 8, 1988, following an ex parte conference held with defense counsel, the Court granted discovery on Items 1-20 of defendants' Supplemental Motion (with certain modifications), along with certain extracts from the President's Daily Briefing and documents forwarded to the White House from the Central American Joint Intelligence Task Force.

Upon receiving the July 8 Order, Independent Counsel promptly forwarded it to the interagency group for compliance. Although Independent Counsel did not agree that the discovery was required under Rule 16 or Brady, it appeared to Independent Counsel that the irrelevance of the documents called for by the request could be best demonstrated by allowing the discovery ordered by the Court to go forward -- particularly in light of the Court's explicit reservation of decision on the admissibility at trial of any of the information disclosed to North by the discovery (July 8, 1988 Order at 8).

Last week, the intelligence agencies advised Independent Counsel that although they were willing to provide the discovery to North (with a few exceptions as to which they might request in camera review by the Court), they were unable to produce the documents by August 1. Accordingly, if the September 20 trial date established by the Court is to be preserved as to the portions of the Indictment affected by the discovery, a modification of the Court's Order is needed.

ARGUMENT

In view of the stated inability of the intelligence agencies to comply with the schedule for production set forth in the Court's July 8 Order, Independent Counsel respectfully submits that for the reasons given below, the Court should modify its Order.

A. Defendant is Not Entitled to Compel Continuance or Severance Based Solely Upon The Basis of Ex Parte Statements

The ex parte conference held on July 6, as originally set up by the Court's June 22, 1988 Memorandum and Preliminary Order re CIPA, was to take place on July 14. The conference was to follow the Court's and the government's receipt of a submission by North in which he was to list, pursuant to Section 5 of CIPA, the classified documents he wished to use at trial. The Court also authorized North to make "a precise demand for other classified materials revealed by . . . discovery" and "a particular and clearly identifiable demand for separate documents known to defendant that he requires for his defense." (June 22, 1988 Order at 12) (emphasis added). At the hearing held on June 23, defense counsel was relieved of the need to file a CIPA Section 5 Notice, and the date for the ex parte conference was advanced to July 6.

It appears from the Court's July 8 Order that at the July 6 conference, defense counsel specifically revisited their Supplemental Motion for Discovery (twice denied by the Court), and argued successfully for discovery that goes well beyond the "precise demand" for additional documents and the "particularized and clearly identifiable demand for documents known to defendant" that the Court had in mind when it set up the conference. In fact, the intelligence agencies have advised Independent Counsel that merely gathering the documents called for by the Court's Order would require between several

weeks and several months, depending upon the request, because the standards for production set down by the Court require that huge numbers of documents be sorted through to determine which are responsive and which are not.

Particularly in these circumstances, it bears emphasizing that whatever right a criminal defendant may have to remain silent concerning his theory of the case and await developments at trial before deciding to testify, see Brooks v. Tennessee, 406 U.S. 605 (1972), we are aware of no case holding that he may expand that right and affirmatively demand discovery of the government based upon an ex parte declaration. Much of the information called for by the Court's July 8 Order can never be disclosed publicly; the need to search it out nonetheless now threatens to derail the schedule for trial set down by the Court. But without knowing precisely which documents are sought and what they are supposed to demonstrate, the government can neither contest relevance, focus the search by the intelligence agencies, nor propose concrete alternatives to providing the discovery. Defendant has no constitutional or other right to put the government in such a position.

B. No Theory of the Defense Known to the Government Requires that the Discovery Be Provided

The government is unaware of the arguments presented by the defense to the Court at the July 6 ex parte conference in support of the additional discovery ordered on July 8. Nevertheless, no defense theory of which we are aware necessitates that discovery. We will analyze below three of

the more likely of those theories. As to each of them, the government is prepared to make available to the Court appropriate officials to present, on an ex parte basis, the facts surrounding each of the covert actions that are the subject of the Court's July 8 Order.

First, defendant may have argued that his actions as charged in the Indictment somehow fell within a "custom and practice" used in previous covert actions, and that he therefore believed that his actions were appropriate when he undertook them. The documents sought cannot support such a claim. The government is not aware of any analogue or precedent for North's diversion of proceeds of the Iranian arms sales to other covert activities and uses. Diversion of funds from one covert action to another contravenes long-standing policy that covert actions are to be kept separate from one another. Indeed, even the notion of taking a profit from the covert sale of U.S. weapons (as distinct from a middleman taking a profit on acquisition of arms by the government) -- let alone the continuing control of such profits by a U.S. official -- is without precedent. No previous operation invites the trial-delaying discovery sought by defendant.

Second, North may have told the Court that knowledge by certain senior U.S. officials of some of his actions led him to believe that all of his activities were implicitly authorized. The government knows of no Presidential decision that North can point to as authorizing his activities. The

government also is not aware of any superior -- except North's co-conspirators McFarlane and Poindexter -- who knew enough about North's activities to have conveyed even informal or implicit approval. Even as a theoretical matter, for such knowledge by other officials to be of use to North as evidence of his lack of criminal intent, he must show that he was aware of such implicit authorization at the time -- an awareness which would allow him today at least to specify whose files should be searched for evidence of implicit authorization. Again, if North believes that some document shows the contrary, let him specify more narrowly where to look for it.1/

Third, North may have argued that because he was aware that the government continued other Nicaraguan programs even during the cessation of funding for military and paramilitary activities by the Contras, he believed that he was justified in "filling the gap" by funding and directing the military side of the Contras' activities. Yet North was acutely aware of the distinctions between these activities and the political and humanitarian activities covered by

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Presidential Findings. North was active in the negotiations with Congress over the restrictions on support for military and paramilitary activities of the Contras. As a Marine Lieutenant Colonel and an NSC staff officer, he knew perfectly well the difference between those activities and other sorts of activities that were continued by the government with Congress' full knowledge (see September 5, 1985 letter from Robert C. McFarlane to Lee Hamilton, Chairman of the House Permanent Select Committee on Intelligence, attached hereto as Exhibit A). North's Nicaragua-related activities, other than military and paramilitary assistance to the Contras, are irrelevant to this case. A claim that North could not tell the difference does not merit months of delay to uncover information about other government programs which could not in any event be exposed at a public trial.

CONCLUSION

For the foregoing reasons, the government submits that the Court should modify its Order of July 8, 1988 to require that before the discovery ordered at pages 6-7 goes forward, defendant be required to provide a basis for the materiality of the discovery sought and a more particularized description of the documents requested.

Respectfully submitted,

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Independent Counsel

Christian J. Mixter
Associate Counsel

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(202) 383-8940

Dated: July 25, 1988

Crim. No. 88-0080 - 02 - GAG
Exhibit A

THE WHITE HOUSE

WASHINGTON

September 5, 1985

Dear Mr. Chairman:

This is in reply to your letter of August 20, 1985 in which you called attention to press reports of "...alleged activities by the National Security Council (staff) regarding the contras in Nicaragua..." and asked for a full report and legal justification for any such activities. Like you, I take such charges very seriously and consequently have thoroughly examined the facts and all matters which in any remote fashion could bear upon these charges. From that review I can state with deep personal conviction that at no time did I or any member of the National Security Council staff violate the letter or spirit of the law. While your letter refers to the language of the Boland amendment which proscribes activities "...for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual," I would extend my assurance to the violation of any law.

Your letter does provide a timely opportunity to restate the policy of this Administration with regard to the Nicaraguan Freedom Fighters and just what activities have been undertaken in support of this policy. First, it is I think clear that President Reagan believes in the cause espoused by the Freedom Fighters -- opposition to Sandinista repression and the achievement of democracy in Nicaragua. But it is also true that the President has made it emphatically clear that all US support was to be in strict compliance with the law. What then was the nature of our contacts with the Freedom Fighters?

In the fall of last year, with the enactment of the Boland Amendment, it was apparent that the Freedom Fighters were demoralized at the prospect of an end to US support for their cause. While we acknowledged to them that we could no longer contribute directly or indirectly to the military/paramilitary prosecution of their resistance, we stated that we would continue to seek Congressional support to do so and that meanwhile they could usefully devote their efforts in other directions. For example, it was clear that the Freedom Fighters were at a disadvantage to the extent that their goals, purposes and terms were poorly understood while those of the Sandinistas were promoted by their existing diplomatic and public affairs institutions and those of their bloc patrons. In order to help balance this promotional effort, we discussed with the Contra leaders the importance of their explaining their cause to the public and their providing information to interested Members of the Congress. We pointed out why there was a natural sentiment of antagonism toward them by some in the United States. In this

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latter regard, we stressed reports of alleged atrocities imputed to them and urged strongly that they investigate these charges and, if true, punish those responsible. Separately, we stressed that their purposes would suffer a lack of credibility for as long as their activities remained only military. We urged that they forge a representative political front involving credible non-military figures and that this front take responsibility for framing a political program centered on achieving a peaceful, democratic evolution in Nicaragua. Over time, these efforts led to the March 1 San Jose declaration in which the Freedom Fighters offered to lay down their arms and enter into a church-mediated dialogue with the Sandinistas. As this process began to mature this past spring we encouraged them to desist from military activities at a time when their proposal might have had some chance of adoption by the other side. At no time did we encourage military activities. Our emphasis on a policial rather than a military solution to the situation was as close as we ever came to influencing the military aspect of their struggle.

It is equally important to stress what we did not do. We did not solicit funds or other support for military or paramilitary activities either from Americans or third parties. We did not offer tactical advice for the conduct of their military activities or their organization. Nor did our liaison contacts seek to influence them toward other than a democratic outcome. Our most recent contacts with the Freedom Fighters have dealt with the administration of the $27 million in humanitarian assistance. Our effort has been to ensure that this program is properly administered and that it, too, is fully compliant with the legal requirements contained in the legislation. In short, we want to do it right.

With regard to the legal justification for the activities I have cited, I can only state the reasonable requirement that any Administration gain appropriate information on which to base coherent policy decisions. The Freedom Fighters comprised one significant element among many on whom it was and remains important for the Administration to be advised in a timely fashion. As a personal observation I would only add that had we failed to do so, the absence of influence, which in all likelihood would have ensued, could have led the Freedom Fighters to adopt a purely military effort -- a course which neither you nor I would support. But I wish to stress once more that at no time did it seem to me that any of our activities was in contravention of law or the public trust.

Mr. Chairman, I believe that future events will confirm that our contact with the resistance has had a positive effect on achieving a democratic outcome in the region. I well recognize that the Administration and the Congress may differ as to how best to achieve this goal. Nonetheless, we are both in agreement that such an outcome is desirable and that it must be achieved within the limits of our law. Should you so desire, I would be

most willing to discuss this matter further with you and other members of your committee. Thank you for this opportunity to clarify what has been a most unfortunate misrepresentation of the facts.

Sincerely,

Robert McFarlane

The Honorable Lee H. Hamilton
Chairman
Permanent Select Committee
on Intelligence
House of Representatives
Washington, D. C. 20515

P.S. Mr. Chairman, I would like to call to your attention a particularly unfortunate result of the recent public allegations. Following the appearance in a Sunday article of the charges, Lieutenant Colonel Oliver North, the officer who conducted many of the contacts with the Freedom Fighters, suffered a number of intrusions on his family life. Demonstrators at his home pushed down a fence; one of his pets was poisoned and his automobile was damaged. He and members of his family received numerous harassing telephone calls at various times of day and night. To avoid this harassment, he had to leave home with his family and take up temporary residence at a remote location until the demonstrations ceased. I would ask that you not share these events with anyone for neither he nor I wish to engender sympathy. I bring them to your attention in the interest of bringing this matter to a close. I am at your disposal to help in any way possible.

UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA	)	
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v.	)	Criminal No. 88-0080 - 02 - GAG
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OLIVER L. NORTH,	)	
	)	
Defendant.	)	

[Proposed] ORDER

The Court having considered the Government's Cross-Motion For Modification of the Court's Order of July 8, 1988,

IT IS HEREBY ORDERED that the Court's Order of July 8, 1988, shall be modified to require that before the discovery ordered at pages 6-7 of that order proceeds, defendant will be required to provide a basis for the materiality of the discovery sought and a more particularized description of the documents requested.

Dated:

Hon. Gerhard A. Gesell
United States District Judge

Service list:

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Richard W. Beckler, Esq.
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James E. Sharp, Esq.
Sharp, Green & Lankford
1800 Massachusetts Avenue, N.W.
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Office of Independent Counsel
Suite 701 West
555 Thirteenth Street, N.W.
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true copy of the attached Cross-Motion of the Government for Modification of the Court's Order of July 8, 1988 and memorandum in support thereof to be hand delivered to the offices of Williams & Connolly, 839 Seventeenth Street, N.W., Washington, D.C. 20006, Fulbright & Jaworski, 1150 Connecticut Ave., N.W., Washington, D.C. 20006, Janis, Schuelke & Wechsler, 1728 Massachusetts Ave., N.W., Washington, D.C. 20036, and Sharp, Green & Lankford, 1800 Massachusetts Ave., N.W., Washington, D.C. 20036, this 25th day of July, 1988.

Clifford M. Sloan

Clifford M. Sloan
Associate Counsel

THE WHITE HOUSE
WASHINGTON

Date: 7/26/88

FOR: ABC

FROM: WILLIAM J. LANDERS
Associate Counsel to the President

Attached are the filings from the OIC.

The statement re: Presidential knowledge is on pgs 5-6 of the "Cross-motion." It is clipped + highlighted in blue.

The statements re: non-disclosure are at page 4 of the "Cross motion," and on page 17 and in the exhibit attached to the Memorandum of Points + Authorities.

UNITED STATES DISTRICT COURT
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Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true copy of the attached Cross-Motion of the Government for Modification of the Court's Order of July 8, 1988 and memorandum in support thereof to be hand delivered to the offices of Williams & Connolly, 839 Seventeenth Street, N.W., Washington, D.C. 20006, Fulbright & Jaworski, 1150 Connecticut Ave., N.W., Washington, D.C. 20006, Janis, Schuelke & Wechsler, 1728 Massachusetts Ave., N.W., Washington, D.C. 20036, and Sharp, Green & Lankford, 1800 Massachusetts Ave., N.W., Washington, D.C. 20036, this 25th day of July, 1988.

Clifford M. Sloan

Clifford M. Sloan
Associate Counsel