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THE WHITE HOUSE  
WASHINGTON



Date: 11/22/88

**FOR:** Arthur B. Culvahouse, Jr.

**FROM:** **WILLIAM J. LANDERS**  
Associate Counsel to the President

- Action
- Your Comment
- Let's Talk
- FYI

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA, . DOCKET NO. CR 88-80  
-VERSUS- . WASHINGTON, D.C.  
OLIVER L. NORTH, . NOVEMBER 21, 1988  
. 9:30 A.M.  
DEFENDANT .  
.....

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE GERHARD A. GESELL,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

LAWRENCE E. WALSH, ESQ.  
GERARD E. LYNCH, ESQ.  
BRUCE A. GREEN, ESQ.  
OFFICE OF INDEPENDENT COUNSEL  
555 13TH STREET, N.W.  
WASHINGTON, D. C. 20004

FOR THE DEFENDANT:

BRENDAN V. SULLIVAN, ESQ.  
BARRY S. SIMON, ESQ.  
JOHN CLINE, ESQ.  
NICOLE SELIGMAN, ESQ.  
WILLIAMS & CONNOLLY, ESQS.  
HILL BUILDING  
WASHINGTON, D.C. 20006

COURT REPORTER:

SANTA THERESA ZIZZO  
ROOM 4800C - U.S. DISTRICT COURT  
3RD & CONSTITUTION AVENUE, N.W.  
WASHINGTON, D. C. 20001

(COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES)

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## P R O C E E D I N G S

1  
2 THE DEPUTY CLERK: CRIMINAL ACTION 88-80, UNITED  
3 STATES OF AMERICA VERSUS OLIVER L. NORTH. MR. WALSH FOR  
4 THE GOVERNMENT. MR. SULLIVAN AND MR. SIMON FOR THE  
5 DEFENDANT.

6 THE COURT: THE COURT HAS SET ASIDE TODAY TO HEAR  
7 ARGUMENTS ON EIGHT MOTIONS TO DISMISS, NORTH'S MOTIONS 39,  
8 40, 41, 42, 44, 45, 46 AND 49. I INQUIRED THROUGH MY LAW  
9 CLERK OVER THE WEEKEND WHETHER YOU GENTLEMEN HAD REACHED  
10 ANY RESOLUTION OF HOW THE TIME WOULD BE DIVIDED AND I HAVE  
11 HEARD NO INDICATION THAT YOU HAVE BEEN ABLE TO AGREE. SO  
12 IT APPEARS TO ME THAT WE OUGHT TO TRY TO FULLY ARGUE COUNT  
13 ONE AND THE POLITICAL QUESTION MOTION WHICH SEEM QUITE  
14 RELATED, TRY TO GET THAT DONE REASONABLY BEFORE TWELVE  
15 O'CLOCK. AND THEN IN THE AFTERNOON WE COULD TAKE UP THE  
16 MULTIPLE CONSPIRACY ISSUES AND ANY PROBLEMS THAT RELATE TO  
17 COUNTS TWO AND THREE. SO I WOULD THINK THAT THAT LOOKS  
18 TOWARD ROUGHLY TWO HOURS PERHAPS THIS MORNING AND I SUGGEST  
19 THAT EACH SIDE TAKE NOT MORE THAN AN HOUR TO DISCUSS COUNT  
20 ONE PROBLEMS OTHER THAN MULTIPLE CONSPIRACY AND THE  
21 POLITICAL QUESTION MATTERS.

22 I'LL HEAR FROM COUNSEL FOR NORTH.

23 MR. CLINE: GOOD MORNING, YOUR HONOR. MY NAME IS  
24 JOHN CLINE AND I'M APPEARING FOR COLONEL NORTH.

25 YOUR HONOR, WE HAVE AGREED, AS YOU REQUESTED,

1 WITH THE INDEPENDENT COUNSEL TO ARGUE FOUR MOTIONS TOGETHER  
2 THE FIRST THING THIS MORNING, THE BOLAND MOTION, THE  
3 EXECUTIVE ORDER OF DECEMBER, THAT'S 39, THE EXECUTIVE ORDER  
4 NUMBER 12333 MOTION, THAT'S 41, THE FAIR NOTICE MOTION,  
5 THAT'S 42, AND THE NOVEL PROSECUTION MOTION, THAT'S 49, AND  
6 SEPARATELY THE POLITICAL QUESTION MOTION AND THEN THE  
7 COUNTS TWO AND THREE MOTIONS, THE MOTIONS THAT FOLLOW THAT.

8 THE COURT: WELL, HOW ARE YOU GOING TO DIVIDE  
9 YOUR TIME?

10 MR. CLINE: AMONG THAT FIRST --

11 THE COURT: YOU HAVEN'T GIVEN ME ANY INDICATION  
12 HOW YOU'RE GOING TO DIVIDE YOUR TIME. HOW ARE YOU GOING TO  
13 DIVIDE YOUR TIME? I WANT BOTH SIDES TO HAVE EQUAL TIME,  
14 THAT'S ALL I CARE ABOUT.

15 MR. CLINE: I ANTICIPATE, YOUR HONOR, THAT THE  
16 FIRST GROUP OF FOUR MOTIONS SHOULD TAKE ME NOT MORE THAN  
17 HALF AN HOUR TO 45 MINUTES.

18 THE COURT: AND THEN YOU WOULD BE ABLE TO DEAL ON  
19 THE SCHEDULE THAT I INDICATED WITH THE TWO MATTERS BY  
20 LUNCH.

21 MR. CLINE: YES, THE POLITICAL QUESTION --

22 THE COURT: DOES THAT SEEM SATISFACTORY TO THE  
23 PLAINTIFF?

24 MR. WALSH: YES. MR. LYNCH WILL REPRESENT THE  
25 GOVERNMENT, YOUR HONOR.

1 THE COURT: MR. LYNCH, DOES THAT SEEM  
2 SATISFACTORY TO YOU?

3 MR. LYNCH: THAT'S FINE, YOUR HONOR. NO PROBLEM.

4 THE COURT: VERY WELL.

5 MR. CLINE: YOUR HONOR, LET ME BEGIN THIS GROUP  
6 OF FOUR MOTIONS BY SUMMARIZING OUR POSITIONS BRIEFLY AND  
7 I'LL GET INTO THE SPECIFICS OF THE VARIOUS PROVISIONS.

8 FIRST, IT'S OUR POSITION THAT THE BOLAND  
9 AMENDMENTS DO NOT AND COULD NOT CONSTITUTIONALLY APPLY TO  
10 THE NATIONAL SECURITY COUNCIL STAFF. SECOND, IT'S OUR  
11 POSITION THAT THE EXECUTIVE ORDER 12333 AND THE NSDD 1559,  
12 THAT THE PROCEDURAL REQUIREMENTS IN THOSE PROVISIONS UPON  
13 WHICH THE INDEPENDENT COUNSEL RELIES DO NOT APPLY TO THE  
14 NATIONAL SECURITY COUNCIL OR TO ITS STAFF. THE THIRD, IT'S  
15 OUR POSITION THAT SECTION 371 OF THE CRIMINAL CODE DOES NOT  
16 CRIMINALIZE THE FAILURE OF EXECUTIVE BRANCH OFFICIALS TO  
17 PROVIDE FOREIGN AFFAIRS INFORMATION TO CONGRESS IN THE  
18 ABSENCE OF A SPECIFIC STATUTE REQUIRING THAT OFFICIAL TO DO  
19 SO AND IF SECTION 371 WAS INTENDED TO APPLY UNDER THOSE  
20 CIRCUMSTANCES IT'S OUR POSITION THAT SECTION 371 IS  
21 UNCONSTITUTIONAL AS APPLIED. FIRST BECAUSE IT'S AN  
22 IMPERMISSIBLE ENCROACHMENT BY CONGRESS UPON THE EXECUTIVE'S  
23 FOREIGN AFFAIRS POWERS AND, SECOND, UNDER THE RULE  
24 ANNOUNCED BY THE SUPREME COURT IN THE CASE OF INS VERSUS  
25 CHADHA. WE AGREE WITH AND ADOPT THE POSITION THAT THE

1 DEPARTMENT OF JUSTICE HAS TAKEN IN ITS AMICUS BRIEF WITH  
2 RESPECT TO THOSE PARTICULAR ISSUES.

3           LET ME TURN FIRST TO THE BOLAND AMENDMENTS. THE  
4 CRITICAL FEATURE OF THE BOLAND AMENDMENTS OF COURSE IS THE  
5 LANGUAGE OF THOSE AMENDMENTS. DURING THE PERIOD RELEVANT  
6 TO THIS CASE THE AMENDMENTS PROHIBITED THE EXPENDITURE OF  
7 FUNDS AVAILABLE TO THE CENTRAL INTELLIGENCE AGENCY, THE  
8 DEPARTMENT OF DEFENSE, OR ANY OTHER AGENCY OR ENTITY OF THE  
9 UNITED STATES INVOLVED IN INTELLIGENCE ACTIVITIES, THAT'S  
10 THE CRITICAL LANGUAGE, FOR PURPOSE OF SUPPORTING DIRECTLY  
11 OR INDIRECTLY MILITARY OR PARAMILITARY OPERATIONS IN  
12 NICARAGUA. THAT LANGUAGE, YOUR HONOR, DOES NOT, AS THE  
13 INDEPENDENT COUNSEL CLAIMS, CONSTITUTE A COMPLETE CUT OFF  
14 OF ALL U.S. GOVERNMENT SUPPORT FOR THE NICARAGUA  
15 RESISTANCE. IT CUTS OFF ONLY SUPPORT FOR MILITARY AND  
16 PARAMILITARY OPERATIONS AND IT CUTS OFF ONLY SUPPORT  
17 THROUGH ENTITIES THAT ARE INVOLVED IN INTELLIGENCE  
18 ACTIVITIES, WHICH IS THE CRITICAL LANGUAGE, FOR THE  
19 PURPOSES OF OUR MOTION.

20           NOW, IT'S EVIDENT THAT CONGRESS DID NOT INTEND TO  
21 CUT OFF ALL AID FOR THE RESISTANCE, NOT ONLY FROM THE  
22 LANGUAGE THAT IT USED BUT FROM ANOTHER FACT AS WELL. AT  
23 THE TIME THAT CONGRESS WAS CONSIDERING THE VERY FIRST  
24 BOLAND AMENDMENT, THIS IS IN DECEMBER OF 1982, CONGRESS  
25 CONSIDERED AND REJECTED A COMPLETE CUT OFF OR ALL FUNDING



1 FOR RESISTANCE. THAT WAS KNOWN AS THE DODD AMENDMENT  
2 PROPOSED BY SENATOR DODD AND THAT AMENDMENT WHICH WAS  
3 REJECTED PROVIDED THAT NO FUNDS SHOULD BE OBLIGATED OR  
4 EXPENDED DIRECTLY OR INDIRECTLY AFTER JANUARY 20, 1983 IN  
5 SUPPORT OF THE RESISTANCE.

6 THAT AMENDMENT WAS REJECTED ON DECEMBER 18, 1982.  
7 AND THAT REPRESENTS CONGRESS'S REFUSAL TO INSTITUTE A  
8 COMPLETE CUT OFF OF ALL AID FOR THE RESISTANCE. THEY HAD  
9 THE OPPORTUNITY. THEY DIDN'T TAKE IT. INSTEAD THEY  
10 ENACTED THE BOLAND RESTRAINTS WHICH ARE NOT COMPLETE  
11 CUTOFFS OF RESISTANCE.

12 SO THE CRITICAL QUESTION IS WHAT CONSTITUTES AN  
13 ENTITY INVOLVED IN INTELLIGENCE ACTIVITIES. WHAT GROUP OF  
14 ENTITIES WITHIN THE GOVERNMENT WAS THAT INTENDED TO  
15 ENCOMPASS. THE PHRASE ENTITY INVOLVED IN INTELLIGENCE  
16 ACTIVITIES IS A TERM OF ART THAT'S BEEN USED IN  
17 INTELLIGENCE LEGISLATION SINCE 1980. IT FIRST APPEARED IN  
18 THE INTELLIGENCE OVERSIGHT ACT OF 1980 WHICH WAS A CRITICAL  
19 PIECE OF LEGISLATION IN PART BECAUSE REPRESENTATIVE BOLAND  
20 FOR WHOM THE BOLAND AMENDMENTS WERE NAMED WAS THE KEY  
21 FIGURE IN ENACTING THAT ACT. HE WAS THE FOREMANAGER, THE  
22 CO-SPONSOR. HE WAS INTIMATELY FAMILIAR WITH IT AT THE TIME  
23 THAT HE PREPARED HIS AMENDMENT.

24 NOW, THE INTELLIGENCE OVERSIGHT ACT OF 1980  
25 IMPOSED CERTAIN REPORTING REQUIREMENTS FOR THE INTELLIGENCE

1 ACTIVITIES ON CERTAIN ENTITIES OF THE U.S. GOVERNMENT.  
2 THOSE REQUIREMENTS FALL UPON THE DIRECTOR OF CENTRAL  
3 INTELLIGENCE AND THE HEADS OF OTHER AGENCIES AND ENTITIES  
4 INVOLVED IN INTELLIGENCE ACTIVITIES. IT'S CLEAR FROM THE  
5 LEGISLATIVE HISTORY AS WELL AS THE LANGUAGE OF THAT STATUTE  
6 THAT THAT PHRASE "ENTITIES INVOLVED IN INTELLIGENCE  
7 ACTIVITIES" WAS NOT INTENDED TO TO APPLY TO THE NATIONAL  
8 SECURITY COUNCIL. WE SUBMIT THAT THAT PHRASE WHEN IT WAS  
9 USED IN THE BOLAND AMENDMENTS LATER AUTHORED BY THE SAME  
10 PERSON WHO SPONSORED THE INTELLIGENCE OVERSIGHT ACT HAD  
11 EXACTLY THE SAME MEANING AND DID NOT INCLUDE THE NATIONAL  
12 SECURITY COUNCIL.

13 THAT CRITICAL LANGUAGE OR VERY CLOSE VARIANT OF  
14 IT WAS ALSO USED IN THE REPROGRAMMING STATUTE, 50 USC.  
15 SECTION 414. AGAIN, THE PHRASE THERE IS INTELLIGENCE OR  
16 INTELLIGENCE RELATED ACTIVITIES BUT THE POINT IS THE SAME.  
17 AND IN THAT STATUTE WHICH IS EVEN BROADER THAN THE BOLAND  
18 AMENDMENTS THE LANGUAGE WAS NOT USED TO APPLY TO THE  
19 NATIONAL SECURITY COUNCIL. THE PARTICULARLY CRITICAL  
20 FEATURE OF SECTION 414 IS THAT WHICH APPEARED IN AN  
21 INTELLIGENCE AUTHORIZATION ACT SPECIFICALLY IN 1986 I  
22 BELIEVE WHICH ALSO CONTAINED THE BOLAND AMENDMENT.

23 SO HERE YOU'VE GOT VIRTUALLY THE SAME LANGUAGE IN  
24 TWO PARTS OF THE SAME STATUTE AND WE CONTEND THEY SHOULD BE  
25 GIVEN THE SAME MEANING. IN NEITHER CASE SHOULD THEY BE

1 HELD TO APPLY TO THE NATIONAL SECURITY COUNCIL.

2           NOW, IT'S ALSO SIGNIFICANT IN DETERMINING THE  
3 MEANING OF THAT PHRASE "ENTITIES INVOLVED IN INTELLIGENCE  
4 ACTIVITIES" THAT THE BOLAND AMENDMENT WAS PLACED EACH YEAR  
5 IN TWO STATUTES, THEY WERE PLACED IN THE INTELLIGENCE  
6 AUTHORIZATION ACTS WHICH BY ITS OWN TERMS APPLIED SOLELY TO  
7 THE TRADITIONAL INTELLIGENCE COMMUNITY, I BELIEVE TEN  
8 AGENCIES, THE CIA, DOD, THE NSA AND A HANDFUL OF OTHER  
9 SPECIFIED AGENCIES TO WHICH THAT STATUTE APPLIED AND ONLY  
10 TO THOSE AGENCIES, AND THE NATIONAL SECURITY COUNCIL WAS  
11 NEVER INCLUDED IN THIS LIST OF AGENCIES TO WHICH THAT  
12 STATUTE APPLIED.

13           THE BOLAND AMENDMENT ALSO APPEARED IN THE DEFENSE  
14 AUTHORIZATIONS ACTS FOR EACH OF THOSE YEARS. THE NSC WAS  
15 NEVER FUNDED UNDER THE DEFENSE AUTHORIZATION ACT.

16           THE COURT: MR. NORTH IS NOT CHARGED WITH A  
17 CRIMINAL VIOLATION OF THE BOLAND AMENDMENT.

18           MR. CLINE: THAT'S CORRECT.

19           THE COURT: THE BOLAND AMENDMENT DOESN'T CARRY  
20 ANY CRIMINAL SANCTIONS. HE'S NOT INDICTED, AS I UNDERSTAND  
21 IT, FOR VIOLATING THE BOLAND AMENDMENT SO IF YOU CAN FOCUS  
22 YOUR ARGUMENTS TO THE CASE BEFORE ME WITH THAT IN MIND I'D  
23 APPRECIATE IT.

24           MR. CLINE: WELL, YOUR HONOR, ALTHOUGH COLONEL  
25 NORTH IS CHARGED UNDER SECTION 371 THE HEART OF THAT CHARGE

1 IT SEEMS TO ME IS AN ALLEGED VIOLATION OR A CONSPIRACY TO  
2 VIOLATE THE BOLAND AMENDMENT BY COLONEL NORTH. IN OTHER  
3 WORDS, IF THE BOLAND AMENDMENT DID NOT APPLY TO HIS  
4 ACTIVITIES, IF HE HAD NO -- WHAT HE IS ALLEGED TO HAVE DONE  
5 IS NOT IN ANY WAY RESTRICTED BY THE BOLAND AMENDMENT, THEN  
6 I DON'T THINK THAT THE INDEPENDENT COUNSEL'S CONSPIRACY  
7 THEORY CAN STAND AND I'LL ADDRESS WHY THAT IS IN A MOMENT.

8 BUT IF COLONEL NORTH DID NOT VIOLATE ANY OF THE  
9 STATUTES UPON WHICH THE SECTION 371 COUNT IS PREDICATED  
10 THEN THERE CAN BE NO VIOLATION OF SECTION 371. THAT FOR  
11 THE REASONS ARTICULATED BY THE JUSTICE DEPARTMENT AND FOR  
12 THE REASONS THAT I STATED EARLIER, SECTION 371 WAS NOT  
13 INTENDED TO APPLY TO A FAILURE TO PROVIDE INFORMATION TO  
14 CONGRESS BY AN EXECUTIVE OFFICIAL WHERE THERE'S NO  
15 STATUTORY OBLIGATION TO DO SO AND IT COULD NOT -- NOT ONLY  
16 WAS IT NOT INTENDED TO APPLY BUT IT COULD NOT  
17 CONSTITUTIONALLY APPLY TO THOSE CIRCUMSTANCES SO I THINK IT  
18 IS CRITICAL TO THE INDEPENDENT COUNSEL'S FIRST COUNT AS  
19 WELL AS TO THE SECOND AND THIRD COUNT THAT THE BOLAND  
20 AMENDMENT APPLIED TO THE NATIONAL SECURITY COUNCIL. I  
21 THINK THAT'S WHY THEY DEVOTED A GREAT DEAL OF ATTENTION TO  
22 THAT ISSUE IN THEIR BRIEF.

23 NOW, THE INDEPENDENT COUNSEL IN ARGUING THAT THE  
24 BOLAND AMENDMENT DOES APPLY TO THE NATIONAL SECURITY  
25 COUNCIL, AS THEY DO AT LENGTH, THEY RELY PRIMARILY UPON THE

1 LEGISLATIVE HISTORY OF THE STATUTE. PARTICULARLY UPON  
2 VARIOUS COMMENTS MADE BY LEGISLATORS IN THE COURSE OF THE  
3 DEBATES OVER THE BOLAND AMENDMENTS AS TO ITS EFFECT. ITS  
4 SCOPE AND ITS EFFECT. AND THEY ARGUE THAT THOSE COMMENTS  
5 MADE BY SENATORS AND CONGRESSMEN AMOUNT TO A STATEMENT OF  
6 THE PROPOSITION THAT THE BOLAND AMENDMENTS CONSTITUTED A  
7 TOTAL AND COMPLETE CUT OFF OF ALL AMERICAN SUPPORT FOR THE  
8 CONTRAS. THAT'S THE INDEPENDENT COUNSEL'S POSITION. THAT  
9 IS SIMPLY HYPERBOLE.

10 EVEN AT THE HEIGHT OF THE BOLAND RESTRICTIONS,  
11 THAT IS, THE PERIOD FROM OCTOBER, 1984 UNTIL AUGUST OF  
12 1985, THE SO-CALLED COMPLETE BOLAND, WHEN IT WAS -- WHEN  
13 THERE WAS NO ADVICE EXCEPTION OR COMMUNICATIONS EXCEPTION  
14 REPRESENTATIVE BOLAND HIMSELF ACKNOWLEDGED THAT EVEN THE  
15 CIA WHICH WAS CLEARLY COVERED BY THE BOLAND AMENDMENT,  
16 WHATEVER IT MEANT, COULD PROVIDE DEFENSIVE INTELLIGENCE TO  
17 THE RESISTANCE.

18 SIMILARLY IN THE FALL OF 1985 A CONFERENCE  
19 COMMITTEE REPORT FOR THE RELATED STATUTE MADE CLEAR THAT  
20 INFORMATION SHARING WAS PERMITTED, EVEN BY THE TRADITIONAL  
21 INTELLIGENCE COMMUNITY, EVEN BY THE CIA AND THE DOD COULD  
22 SHARE INFORMATION AND COULD HAVE SHARED INFORMATION DURING  
23 THE ENTIRE PERIOD THAT THE BOLAND AMENDMENT WAS IN EFFECT.

24 THE LANGUAGE OF THE STATUTE ALSO MAKES CLEAR THAT  
25 THERE WAS NOT A COMPLETE CUT OFF OF ALL UNITED STATES

1 SUPPORT FOR THE RESISTANCE. CONGRESS DID NOT ENACT THE  
2 DODD AMENDMENT WHICH WOULD HAVE AFFECTED A COMPLETE CUT OFF  
3 OF ALL AID, INSTEAD CONGRESS CHOSE THIS VERY CAREFUL  
4 LANGUAGE PROHIBITING ONLY SUPPORT BY ENTITIES INVOLVED IN  
5 INTELLIGENCE ACTIVITIES AND EVEN THEN ONLY SUPPORT FOR  
6 MILITARY AND PARA-MILITARY OPERATIONS. IT WAS NOT A  
7 COMPLETE CUT OFF.

8 OUR FINAL POINT IN ASSISTING THE COURT IN  
9 CONSTRUING THE BOLAND AMENDMENT, DETERMINING WHETHER THAT  
10 PHRASE "ENTITIES INVOLVED IN INTELLIGENCE ACTIVITIES"  
11 APPLIED TO THE NATIONAL SECURITY COUNCIL IS A  
12 CONSTITUTIONAL POINT. WE'VE ARGUED THAT POINT IN OUR  
13 BRIEF. I'LL SIMPLY SAY THIS, IT IS A FUNDAMENTAL RULE OF  
14 STATUTORY CONSTRUCTION THAT STATUTES SHOULD BE CONSTRUED,  
15 WHERE POSSIBLE, TO AVOID CONSTITUTIONAL ISSUES. IF THE  
16 COURT CONSTRUES THE BOLAND AMENDMENTS TO APPLY TO THE  
17 NATIONAL SECURITY COUNCIL THEN IT'S GOT TO ADDRESS THE  
18 BASIC ISSUE OF WHETHER THE BOLAND AMENDMENTS ARE  
19 CONSTITUTIONAL. WE SUBMIT THAT IF THEY APPLY TO THE  
20 NATIONAL SECURITY COUNCIL THEN TO THAT EXTENT AT LEAST THEY  
21 ARE UNCONSTITUTIONAL FOR THE REASONS THAT WE'VE STATED IN  
22 OUR BRIEF BUT MORE FUNDAMENTALLY WE ARGUE THAT THE COURT  
23 SHOULD CONSTRUE THE STATUTES NOT TO APPLY TO THE NATIONAL  
24 SECURITY COUNCIL, TO VOID THAT ISSUE.

25 LET ME TURN TO THE EXECUTIVE ORDER AND THE NSDD

1 WHICH ARE THE OTHER PILLARS, IF I CAN USE THAT TERM, UPON  
2 WHICH COUNT ONE IN PARTICULAR RESTS. THE EXECUTIVE ORDER  
3 AND THE NSDD IMPOSED CERTAIN PROCEDURAL REQUIREMENTS, ONLY  
4 PROCEDURAL REQUIREMENTS, ON THE INTELLIGENCE COMMUNITY.  
5 THE EXECUTIVE ORDER PROVIDES THAT WHEN AN AGENCY OTHER THAN  
6 THE CIA IS GOING TO UNDERTAKE A SPECIAL ACTIVITY WHICH IS A  
7 DEFINED TERM IN THE EXECUTIVE ORDER THE PRESIDENT HAS TO  
8 MAKE A DETERMINATION THAT THAT AGENCY IS BETTER ABLE THAN  
9 THE CIA TO CARRY OUT OR TO ACHIEVE THE OBJECTIVE.

10 BY THE WAY, ALL EXCEPT TWO PARAGRAPHS OF THE NSDD  
11 IS CLASSIFIED AT THIS POINT BUT THOSE TWO PARAGRAPHS  
12 PROVIDE THAT NO COMPONENTS OF THE INTELLIGENCE COMMUNITY  
13 OTHER THAN THE CIA CAN UNDERTAKE A SPECIAL ACTIVITY ABSENT  
14 A PRESIDENTIAL FINDING.

15 NOW THERE'S A STATUTE THAT REQUIRES THE FINDING  
16 FOR THE CIA TOO UNDER A SPECIAL ACTIVITY SO IN EFFECT NSDD  
17 EXPANDS THAT TO OTHER COMPONENTS OF THE INTELLIGENCE  
18 COMMUNITY.

19 NOW, WE'VE ARGUED IN OUR BRIEF THAT THESE  
20 PROCEDURAL REQUIREMENTS WERE NOT INTENDED TO APPLY TO THE  
21 NATIONAL SECURITY COUNCIL, THEY APPLY TO ONLY THE  
22 TRADITIONAL INTELLIGENCE COMMUNITY WHICH IS THE CIA, THE  
23 DEFENSE INTELLIGENCE AGENCY, THE TRADITIONAL INTELLIGENCE  
24 COMMUNITY OF WHICH THE NATIONAL SECURITY COUNCIL IS NOT A  
25 PART, AND THERE'S A GOOD REASON FOR THAT. THE TOWER

1 COMMISSION MADE CLEAR IN ITS REPORT THAT THE NATIONAL  
2 SECURITY COUNCIL OCCUPIES A SPECIAL ROLE. IT'S THE  
3 PRESIDENT'S FOREIGN POLICY ADVISORY. IT IS THE MEANS BY  
4 WHICH THE PRESIDENT EXERCISES HIS WILL IN THE FOREIGN  
5 POLICY REALM. AS A CONSEQUENCE, TO EFFECT THAT ROLE IT'S  
6 GOT TO HAVE THE FLEXIBILITY THAT COMES FROM NOT BEING  
7 ENCUMBERED BY THESE PROCEDURAL REQUIREMENTS. FOR THAT  
8 REASON WHEN THE EXECUTIVE BRANCH WAS DRAFTING THESE  
9 REQUIREMENTS IT CHOSE TO EXCLUDE THE NATIONAL SECURITY  
10 COUNCIL FROM THE PROCEDURAL REQUIREMENTS THAT EXECUTIVE  
11 ORDER 12333 AND NSDD 1559 IMPOSED.

12 THE COURT: IT DIDN'T SAY SO, DID IT?

13 MR. CLINE: IT DID NOT SAY SO EXPLICITLY BUT IT  
14 DID SAY SO IN THE SENSE THAT IT USED THE TERM AGENCY TO  
15 DEFINE THE TERMS THAT WERE COVERED BY THE PROCEDURAL  
16 REQUIREMENTS THAT THE INDEPENDENT COUNSEL RELIES UPON AND  
17 IT'S CLEAR FROM THE CONTEXT ON THE STATUTE THAT THE TERM  
18 AGENCY DID NOT ENCOMPASS THE NATIONAL SECURITY COUNCIL.  
19 THE NATIONAL SECURITY COUNCIL WAS VERY CAREFULLY REFERRED  
20 TO THROUGHOUT AS AN ENTITY. THE NATIONAL SECURITY COUNCIL  
21 IS AN ENTITY. ONLY AGENCIES, WHICH IS A SEPARATE TERM  
22 UNDER THE EXECUTIVE ORDER, ONLY AGENCIES ARE SUBJECT TO  
23 THESE REQUIREMENTS OF PRESIDENTIAL DETERMINATION ON THE ONE  
24 HAND AND THE FINDING ON THE OTHER.

25 THE COURT: WELL, IS NOT THE NATIONAL SECURITY



1 COUNCIL CREATED BY A STATUTE OF CONGRESS?

2 MR. CLINE: YES.

3 THE COURT: IT'S NOT AN OFFICE THAT THE PRESIDENT  
4 HAS SET UP TO HELP HIM. IT IS A STATUTORY BODY, IS IT NOT?

5 MR. CLINE: THAT'S CORRECT. HOWEVER, IT'S A  
6 STATUTORY BODY THAT WAS CREATED AND THEN LEFT TO THE  
7 PRESIDENT TO SHAPE AND EVER SINCE ITS CREATION IT HAS BEEN  
8 SHAPED IN VERY INDIVIDUAL WAYS BY THE DIFFERENT PRESIDENTS.  
9 THE TOWER COMMISSION REPORT MAKES THAT VERY CLEAR. IT  
10 REFERS TO THAT AS THE PRESIDENT'S CREATURE IN THE SENSE  
11 THAT IT'S THE PRESIDENT'S TO SHAPE AS HE WISHES, TO CARRY  
12 OUT THE PRESIDENT'S WILL IN FOREIGN POLICY, TO ADVISE THE  
13 PRESIDENT ON FOREIGN POLICY AND NATIONAL SECURITY MATTERS.  
14 IT IS IN A VERY PERSONAL SENSE THE PRESIDENT'S FOREIGN  
15 POLICY ADVISORY.

16 AS A CONSEQUENCE IT'S NOT SUBJECT TO  
17 CONGRESSIONAL OVERSIGHT. THE NATIONAL SECURITY ADVISOR IS  
18 NOT SUBJECT TO CONFIRMATION BY THE SENATE. HE'S NOT  
19 REQUIRED TO APPEAR BEFORE CONGRESS AND TESTIFY UNLESS HE  
20 CHOOSES TO. IT IS CREATED BY STATUTE BUT IT IS A UNIQUE  
21 INSTITUTION AND IT IS A VERY PERSONAL INSTITUTION THAT THE  
22 PRESIDENT HAS TRADITIONALLY SHAPED AS HE WISHES AND BECAUSE  
23 OF ITS UNIQUENESS, BECAUSE OF THE FLEXIBILITY THAT IT HAS  
24 TO HAVE TO PERFORM THE ROLE THAT THE PRESIDENTS HAVE  
25 ASSIGNED TO IT IT HAS BEEN LARGELY EXCLUDED FROM THE

1 PROCEDURAL REQUIREMENTS AND THERE'S A GOOD REASON FOR THAT.  
2 IT'S PRECISELY TO PRESERVE THAT FLEXIBILITY THAT'S SO  
3 IMPORTANT.

4           NOW, I'LL TOUCH BRIEFLY AGAIN ON THE INDEPENDENT  
5 COUNSEL'S VIEW ARTICULATED IN ITS PLEADINGS THAT EVEN IF  
6 THE BOLAND AMENDMENTS DID NOT APPLY TO THE NATIONAL  
7 SECURITY COUNCIL, EVEN IF THE EXECUTIVE ORDER PROVISIONS  
8 THAT THE INDEPENDENT COUNSEL RELIES UPON DID NOT APPLY TO  
9 THE NSC, EVEN IF THE NSDD DID NOT APPLY TO THE NSC, THE  
10 PORTION OF THE NSDD THAT THEY RELIED UPON, EVEN IF ALL  
11 THAT'S TRUE NEVERTHELESS SECTION 371 SOMEHOW MAKES COLONEL  
12 NORTH'S ALLEGED CONDUCT CRIMINAL BECAUSE HE DIDN'T GIVE  
13 CONGRESS THE OPPORTUNITY TO PASS A LAW THAT WOULD HAVE  
14 PROHIBITED HIS ACTIVITY. THAT IS MY UNDERSTANDING. I'LL  
15 BE HAPPY TO READ FROM THE INDEPENDENT COUNSEL'S BRIEF ON  
16 PRECISELY THAT POINT. THAT IS MY UNDERSTANDING OF THEIR  
17 POSITION THAT, AS THEY CAST IT, IF THERE WAS SOME SORT OF A  
18 LOOPHOLE THAT EXCLUDED THE NSC AND COLONEL NORTH FROM THESE  
19 ACTIVITIES THAT HE SOMEHOW PROHIBITED CONGRESS FROM CLOSING  
20 THAT LOOPHOLE AND FOR THAT REASON HIS CONDUCT IS PROSCRIBED  
21 IN SECTION 371.

22           WE DON'T THINK THAT THAT IS A TENABLE  
23 CONSTRUCTION OF SECTION 371 PARTICULARLY WHERE YOU'RE  
24 TALKING ABOUT AN EXECUTIVE BRANCH OFFICIAL DEALING WITH  
25 CONGRESS, AN AREA THAT HAS LONG BEEN OPEN TO DEBATE, IT'S

1 BEEN HIGHLY POLITICAL. IT'S AN AREA OF GREAT  
2 CONSTITUTIONAL DISPUTE ON BOTH SIDES. SECTION 371 WAS  
3 NEVER INTENDED TO CRIMINALIZE AN EXECUTIVE BRANCH  
4 OFFICIAL'S FAILURE TO SOMEHOW COMPLY WITH THE INTENT OF  
5 CONGRESS THAT HAS NOT BEEN ENACTED INTO A STATUTE.

6 IF SECTION 371 -- IF THE COURT DETERMINES THAT  
7 SECTION 371 WAS INTENDED TO APPLY UNDER THOSE CIRCUMSTANCES  
8 THEN SECTION 371, WE CONTEND, IS UNCONSTITUTIONAL BECAUSE  
9 IT ENCROACHES UPON THE PRESIDENT'S FOREIGN POLICY POWERS  
10 IMPERMISSIBLY AND BECAUSE IT DOESN'T BY MAKING THESE  
11 UNENACTED INTERESTS OF CONGRESS THE LAW AND CRIMINALIZING A  
12 FAILURE TO COMPLY WITH THEM IT VIOLATES THE REQUIREMENTS OF  
13 INS VERSUS CHADHA.

14 SO, SPEAKING TO THE FIRST TWO MOTIONS THAT I'VE  
15 ADDRESSED, THE BOLAND AMENDMENT MOTION AND THE EXECUTIVE  
16 ORDER MOTION WE SUBMIT THAT COUNTS ONE THROUGH THREE SHOULD  
17 BE DISMISSED, THE REFERENCES TO THOSE PROVISIONS SHOULD BE  
18 STRICKEN AND THERE SHOULD BE NO EVIDENCE AT TRIAL THAT  
19 THOSE PROVISIONS RESTRICTED OR LIMITED THE NATIONAL  
20 SECURITY COUNCIL.

21 NOW, I'LL TOUCH BRIEFLY UPON THE FAIR NOTICE AND  
22 THE NOVEL PROSECUTION MOTION, BOTH OF WHICH ARE RELATED TO  
23 THESE SAME ISSUES THAT I'VE BEEN DISCUSSING.

24 ON THE FAIR NOTICE QUESTION IF THE COURT REJECTS  
25 THE POSITIONS THAT I'VE BEEN URGING IT'S OUR POSITION THAT

1 AT AN ABSOLUTE MINIMUM THE LAW CONCERNING THE BOLAND  
2 AMENDMENT, CONCERNING THE EXECUTIVE ORDER AND THE NSDD AND  
3 MORE BROADLY CONCERNING SECTION 371 IS TOO UNSETTLED TO  
4 HAVE GIVEN ANYONE, INCLUDING COLONEL NORTH, FAIR NOTICE  
5 THAT THE CONDUCT ALLEGED IN THE INDICTMENT WAS CRIMINAL.  
6 EVEN IF THE COURT REJECTS OUR POSITION, AT A MINIMUM THE  
7 LAW WAS TOO UNSETTLED IN THE MATTER OF DUE PROCESS TO HAVE  
8 GIVEN FAIR NOTICE.

9 ON THE NOVEL PROSECUTION THEORY, I'LL JUST TOUCH  
10 BRIEFLY ON THIS. THE INDEPENDENT COUNSEL STATUTE REQUIRES  
11 THE INDEPENDENT COUNSEL TO COMPLY EXCEPT WHERE NOT POSSIBLE  
12 TO EXECUTIVE BRANCH AND DEPARTMENT OF JUSTICE POLICIES  
13 REGARDING CRIMINAL PROSECUTION. THE INDEPENDENT COUNSEL  
14 REGULATION, THE PARALLEL APPOINTMENT, HAS EXACTLY THE SAME  
15 REQUIREMENT AND IS VIRTUALLY IDENTICAL LANGUAGE AND THE  
16 REQUIREMENT IS IMPOSED AS A MATTER OF CONSTITUTIONAL LAW AS  
17 WELL.

18 THE SUPREME COURT LAST TERM IN THE MORRISON CASE  
19 RELIED HEAVILY ON THIS REQUIREMENT THAT THE INDEPENDENT  
20 COUNSEL ADHERE TO THE DEPARTMENT OF JUSTICE POLICY IN  
21 HOLDING THAT THE INDEPENDENT COUNSEL WAS AN INFERIOR  
22 OFFICER THAT COULD BE APPOINTED BY THE COURT, SO IT'S A  
23 CONSTITUTIONAL REQUIREMENT, IT'S A STATUTORY REQUIREMENT  
24 AND IT'S A REQUIREMENT IN THE REGULATION.

25 WE SUBMIT THAT THE INDEPENDENT COUNSEL IN TWO

1 RESPECTS WITH REGARD TO COUNTS ONE THROUGH THREE HAS NOT  
2 COMPLIED WITH ESTABLISHED DEPARTMENT OF JUSTICE AND  
3 EXECUTIVE BRANCH POLICY. FIRST WITH RESPECT TO ITS  
4 CONSTRUCTION OF THE BOLAND AMENDMENT WHICH IS CONTRARY TO  
5 THE PRESIDENT'S VIEW OF THE BOLAND AMENDMENT AS HE HAS  
6 ARTICULATED THAT VIEW IN RESPONSE TO INTERROGATORIES FROM  
7 THE INDEPENDENT COUNSEL AND SECOND WITH RESPECT TO THE  
8 INDEPENDENT COUNSEL'S INTERPRETATION OF SECTION 371 AND THE  
9 PRESIDENT'S ARTICLE II POWER. IN RELATION TO SECTION 371  
10 THE DEPARTMENT OF JUSTICE CHARACTERIZED THE INDEPENDENT  
11 COUNSEL'S POSITION "AS BEING AT ODDS WITH ESTABLISHED  
12 PROSECUTORIAL POLICIES OF THE UNITED STATES," THAT'S 317 OF  
13 THE AMICUS BRIEF. UNDER THOSE CIRCUMSTANCES COUNT ONE --  
14 ON THE LATTER POINT, COUNT ONE MUST BE DISMISSED AND ON THE  
15 BOLAND POINT WE BELIEVE THAT COUNTS ONE THROUGH THREE MUST  
16 ALSO BE DISMISSED.

17 THE COURT: THANK YOU.

18 MR. LYNCH: GOOD MORNING, YOUR HONOR, GERARD  
19 LYNCH FOR THE UNITED STATES.

20 SINCE THE 1970S, SINCE THE MID-1970S THE LAWS OF  
21 THE UNITED STATES HAVE PROVIDED A STRUCTURE OF SAFEGUARDS  
22 AND RESTRICTIONS ON COVERT AMERICAN MILITARY AND  
23 INTELLIGENCE OPERATIONS ABROAD. THIS STRUCTURE WAS PUT  
24 INTO PLACE IN RESPONSE TO WHAT THE CHURCH COMMITTEE'S  
25 REPORT IN 1976 DESCRIBED AS A PATTERN OF EXCESSIVE AND

1 SELF-DEFEATING COVERT OPERATIONS OR USE OF COVERT  
2 OPERATIONS, AND THE POINT OF THESE RESTRICTIONS IS TO SEE  
3 THAT THAT DOESN'T HAPPEN AGAIN.

4           THERE ARE TWO KINDS ESSENTIALLY OF STATUTORY AND  
5 REGULATORY RESTRICTIONS THAT I'M REFERRING TO. FIRST OF  
6 ALL, THERE ARE GENERAL STANDARDS WHICH REQUIRE TWO THINGS.  
7 THEY REQUIRE EXPLICIT PRESIDENTIAL AUTHORIZATION FOR COVERT  
8 MILITARY OR INTELLIGENCE OPERATIONS AND SECONDLY THEY  
9 REQUIRE TIMELY NOTICE TO CONGRESS OF SUCH OPERATIONS. THE  
10 IDEA IS TO ASSURE ACCOUNTABILITY AND CONTROL BY MAKING SURE  
11 THAT THE PRESIDENT SPECIFICALLY AUTHORIZES SUCH THINGS AND  
12 THAT THOSE AUTHORIZATIONS ARE REPORTED TO CONGRESS.

13           SECONDLY, THERE HAVE ALSO BEEN FROM TIME TO TIME  
14 SPECIFIC PROHIBITIONS ON COVERT OPERATIONS OF PARTICULAR  
15 KINDS OR COVERT OPERATIONS IN PARTICULAR PLACES THAT  
16 CONGRESS HAS DETERMINED NOT TO BE IN THE NATIONAL INTEREST.  
17 THE POINT OF THESE RESTRICTIONS -- THEY STEM FROM AND THEY  
18 SERVE TO PROTECT THE LEGITIMATE CONGRESSIONAL POWER TO  
19 OVERSEE AND TO DETERMINE THE APPROPRIATE LEVEL, IF ANY, OF  
20 FUNDING FOR COVERT OPERATIONS OF THIS KIND.

21           COUNT ONE --

22           THE COURT: WELL, AS I UNDERSTAND THE POSITION  
23 THAT IS BEING ARGUED IT IS NOT DIRECTED TO THE  
24 APPROPRIATION POWER OF CONGRESS. THERE ISN'T ANY QUARREL,  
25 THERE CERTAINLY CANNOT BE ANY QUARREL THAT CONGRESS HAS THE

1 PRIMARY PREROGATIVES WITH RESPECT TO APPROPRIATING FUNDS.  
2 WHAT I UNDERSTAND IS BEING ARGUED IS THAT THE PRESIDENT A  
3 PART FROM FUND RESTRICTIONS, WHATEVER THEY ARE, AND THERE'S  
4 A DISPUTE AS TO WHAT THEY WERE HERE, HAS A FREEDOM IN THE  
5 EXERCISE OF HIS PREROGATIVES TO CONDUCT ANY KIND OF A  
6 COVERT ACTION HE WANTS TO. THAT DOESN'T MEAN NORTH CAN,  
7 THAT HASN'T ANYTHING TO DO WITH NORTH, AND THE DISCUSSION  
8 SO FAR ISN'T ABOUT NORTH. THE WHOLE DISCUSSION IS ABOUT  
9 SOMETHING QUITE DIFFERENT THAN MR. NORTH. THE DISCUSSION  
10 IS WHAT THE PRESIDENT CAN DO AND THAT'S WHAT EVERYBODY  
11 SEEMS TO WANT TO TALK ABOUT. BUT, AS I UNDERSTAND IT,  
12 THEY'RE SAYING THAT THE PRESIDENT HAS CERTAIN PREROGATIVES  
13 THAT HE CAN EXERCISE IF HE WANTS TO EXERCISE THEM.

14 MR. LYNCH: YOUR HONOR, IT'S NOT CLEAR TO ME --

15 THE COURT: AND I DON'T SEE HOW ANYBODY CAN  
16 QUARREL WITH THE FACT THAT THE PRESIDENT HAS PREROGATIVES  
17 IF HE WANTS TO EXERCISE THEM, THAT HE CAN EXERCISE THEM,  
18 BUT I'M HAVING DIFFICULTY UNDERSTANDING WHAT THAT HAS TO DO  
19 WITH THIS CASE.

20 MR. LYNCH: WELL, I THINK I AGREE WITH YOU, YOUR  
21 HONOR.

22 THE COURT: ALL RIGHT. THEN IT ISN'T AN  
23 APPROPRIATION PROBLEM. IT'S A QUESTION OF -- IT SEEMS TO  
24 ME IT'S A QUESTION OF WHETHER IT IS A ROLE OF A CRIMINAL  
25 JUDGE TRYING A CRIMINAL CASE ON AN INDICTMENT TO BECOME

1 INVOLVED IN INTERPOSING ITS VIEWS AS TO HOW THE COURT  
2 THINKS THE PRESIDENT OUGHT TO RUN THE COUNTRY.

3 MR. LYNCH: BUT, YOUR HONOR, THE INDICTMENT DOES  
4 NOT IN ANY RESPECT ASK THE COURT TO DECIDE HOW THE  
5 PRESIDENT SHOULD RUN THE COUNTRY.

6 THE COURT: I DON'T SO INTERPRET IT.

7 MR. LYNCH: WHAT THE INDICTMENT CHARGES, WHAT  
8 COUNT ONE CHARGES, WHICH IS WHAT WE'RE CONCERNED WITH HERE,  
9 OF COURSE THERE ARE OTHER COUNTS OF THE INDICTMENT THAT  
10 HAVE NOTHING TO DO WITH THIS ISSUE AT ALL, SOME OF WHICH  
11 YOUR HONOR HAS ALREADY SUSTAINED BUT WHAT THIS COUNT  
12 CONCERNS IS A CHARGE THAT THE DEFENDANT NORTH WAS AT THE  
13 CENTER OF A CONSPIRACY THAT WAS INTENDED TO DEFEAT AND  
14 OBSTRUCT CERTAIN LEGITIMATE GOVERNMENTAL FUNCTIONS AND  
15 THOSE LEGITIMATE FUNCTIONS ARE CONTAINED IN THE SET OF  
16 RESTRICTIONS ON COVERT ACTIVITY THAT CONGRESS AND THE  
17 PRESIDENT HAVE PUT IN PLACE. THAT'S WHAT THE CHARGE IS.

18 THE CHARGE, I AGREE WITH YOUR HONOR, HAS NOTHING  
19 WHATEVER TO DO WITH LIMITING THE PREROGATIVES OF THE  
20 PRESIDENT. THE PRESIDENT IS NOT CHARGED WITH ANY SORT OF  
21 WRONGDOING IN THIS INDICTMENT. INDEED IN PORTIONS OF THE  
22 INDICTMENT THE PRESIDENT IS IN EFFECT ALLEGED TO BE THE  
23 VICTIM OF THE CONSPIRACY BECAUSE HIS INSTRUCTIONS AND HIS  
24 PREROGATIVES IN THE EXECUTIVE ORDER AND THE NATIONAL  
25 SECURITY DECISION DIRECTIVE WERE ALSO OBSTRUCTED BY THE



1 CONSPIRACY. THE POINT IS THAT THERE IS AN OVERALL  
2 STRUCTURE OF RESTRICTIONS, SOME FROM LEGISLATION PASSED BY  
3 CONGRESS AND SIGNED BY THE PRESIDENT, SOME IMPOSED BY THE  
4 PRESIDENT HIMSELF AS TO HOW THESE COVERT OPERATIONS ARE TO  
5 BE CONDUCTED.

6 THE COURT: WELL, THAT'S THE QUESTION THAT'S  
7 ARGUED HERE. AND THAT'S THE QUESTION OF WHETHER THE  
8 EXECUTIVE ORDER 12333 AND RESOLUTION, WHAT IS IT, 156 OR  
9 159, APPLIES TO THE ACTIVITIES OF THE EMPLOYEES OF THE  
10 NATIONAL SECURITY COUNCIL.

11 MR. LYNCH: YES, THAT'S CORRECT, YOUR HONOR. THE  
12 DEFENDANT'S POSITION ON THIS REALLY RESTS ON SORT OF  
13 CONTRADICTIONS. THE INFERENCE THAT THEY'RE TRYING TO DRAW  
14 IS THAT BECAUSE THE EXECUTIVE ORDER DOES NOT ESTABLISH THE  
15 NATIONAL SECURITY COUNCIL AS AN OPERATIONS AGENCY THAT  
16 CONDUCTS ACTUAL INTELLIGENCE OPERATIONS THEN THE  
17 RESTRICTIONS THAT APPLY WHEN AN AGENCY CONDUCTS OPERATIONS  
18 DON'T APPLY TO THE NSC. BUT OF COURSE THE PROBLEM IS THAT  
19 WHAT THE DEFENDANT IS CHARGED WITH DOING IS USING HIS  
20 POSITION ON THE NATIONAL SECURITY COUNCIL STAFF TO CONDUCT  
21 OPERATIONS.

22 NOW , THE WHOLE POINT OF THE CONSPIRACY IS AN  
23 EFFORT TO DEFEAT THE PROVISIONS THAT REQUIRE PRESIDENTIAL  
24 FINDINGS AND REPORTING TO CONGRESS BY SETTING UP SECRETLY  
25 WITHOUT PRESIDENTIAL AUTHORIZATION, WITHOUT NOTICE TO

1 CONGRESS, WITHOUT ANY AUTHORIZATIONS FROM CONGRESS A KIND  
2 OF A SEPARATE OPERATIONS ARM IN THE NSC THAT WAS ENTIRELY  
3 CONTROLLED BY THE DEFENDANTS NORTH AND POINDEXTER.

4           THERE'S NO AUTHORITY IN THE EXECUTIVE ORDER, IN  
5 THE NATIONAL SECURITY DECISION DIRECTIVE, IN ANY  
6 PRESIDENTIAL DIRECTIVE THAT ANYONE HAS REFERRED TO IN THIS  
7 CASE TO SET UP SUCH AN OPERATIONS ENTERPRISE WITHIN THE  
8 NATIONAL SECURITY COUNCIL. AND IT'S IN THAT RESPECT THAT  
9 THE OPERATIONS OF THIS ENTERPRISE IN EFFECT SUBVERTED THE  
10 OPERATION OF THIS ENTIRE STRUCTURE.

11           IT'S NOT REALLY AN ANSWER TO SAY THAT THE  
12 EXECUTIVE ORDER DOESN'T SPECIFICALLY SAY THAT THE NATIONAL  
13 SECURITY COUNCIL IS SUBJECT TO IT. THE ONLY BASIS FOR  
14 SAYING THE NATIONAL SECURITY COUNCIL IS OUT FROM UNDER IT  
15 IS SAYING THAT THE NATIONAL SECURITY COUNCIL ISN'T SUPPOSED  
16 TO BE DOING THIS STUFF AT ALL BECAUSE IT'S NOT ONE OF THE  
17 AGENCIES REFERRED TO AS AN AGENCY WITHIN THE INTELLIGENCE  
18 COMMUNITY THAT'S SUPPOSED TO DO THIS SORT OF STUFF. THAT'S  
19 THE PROBLEM WITH THAT ARGUMENT.

20           THE INTENT OF THE EXECUTIVE ORDER, THE INTENT OF  
21 THE NATIONAL SECURITY DECISION DIRECTIVE, PARTICULARLY WHEN  
22 TAKEN TOGETHER WITH THE CONGRESSIONAL LEGISLATION THAT  
23 SPECIFICALLY REQUIRES TIMELY REPORTING TO CONGRESS OF ALL  
24 SIGNIFICANT INTELLIGENCE ACTIVITIES, INCLUDING ANTICIPATED  
25 INTELLIGENCE ACTIVITIES, IS TO ASSURE THAT THESE THINGS ARE

1 NOT DONE WITHOUT APPROPRIATE SUPERVISION FROM THE PRESIDENT  
2 AND APPROPRIATE NOTICE TO CONGRESS. AND THAT'S EXACTLY  
3 WHAT THESE DEFENDANTS ARE CHARGED WITH DOING, IS SETTING UP  
4 AN ORGANIZATION ON THEIR OWN TO ENGAGE IN SUCH ACTIVITIES  
5 WITHOUT THE KINDS OF AUTHORIZATION AND WITHOUT THE KIND OF  
6 NOTICE THAT THESE PROVISIONS DEMAND.

7 LET ME GET BACK FOR A MOMENT, IF YOUR HONOR  
8 PLEASES, TO THE THEORY OF THE CONSPIRACY CHARGE BECAUSE I  
9 THINK IT'S BEEN SOMEWHAT MISCONSTRUED IN SOME OF THE  
10 PLEADINGS THAT HAVE BEEN SUBMITTED TO THE COURT.

11 THE INDICTMENT CHARGES A CRIMINAL CONSPIRACY  
12 BECAUSE THE PURPOSE OF THE CONSPIRATORS IN THE WORDS OF THE  
13 CASE OF HAMMERSCHMIDT AGAINST THE UNITED STATES WAS "TO  
14 INTERFERE WITH AND OBSTRUCT LAWFUL GOVERNMENT FUNCTIONS AND  
15 TO DO SO BY DECEIT, CRAFT, TRICKERY AND DISHONEST MEANS."

16 IN OTHER WORDS, THE CONSPIRACY TO DEFRAUD IS  
17 BROADER THAN A VIOLATION OF ANY PARTICULAR INDIVIDUAL  
18 STATUTE OR REGULATION. BUT THAT DOESN'T MEAN THAT THE  
19 CONSPIRACY COUNT CHARGES ONLY THE VIOLATION OF SOME  
20 AMORPHOUS OR UNEXPRESSED POLICY OF CONGRESS. WHAT IT DOES  
21 MEAN IS THAT THE CONSPIRACY IS NOT MERELY TO VIOLATE  
22 PARTICULAR RULES BUT TO SUBVERT AND OBSTRUCT AN ENTIRE  
23 STRUCTURE OF REGULATIONS.

24 I THINK I CAN EXPLAIN THE DIFFERENCE BY REFERENCE  
25 TO THE SUPREME COURT'S DECISION IN HAAS AGAINST HENKEL IN

1 1910. IN HAAS SOME COMMODITIES SPECULATORS BRIBED AN  
2 OFFICIAL OF THE DEPARTMENT OF AGRICULTURE TO GIVE THEM  
3 ADVANCE NOTICE OF A CROP REPORT THAT THE GOVERNMENT WAS  
4 GOING TO PUBLISH AND THAT THIS VIOLATED -- THIS BREACH OF  
5 SECRECY VIOLATED THE CUSTOMS, PRACTICES AND REGULATIONS OF  
6 THE DEPARTMENT. BUT THE CONSPIRACY TO DEFRAUD DIDN'T  
7 DEPEND ENTIRELY UPON THE VIOLATION OF REGULATIONS. IF THIS  
8 AGRICULTURE EMPLOYEE HAD GIVEN THE SAME REPORT TO SOMEBODY  
9 WHO WAS CONDUCTING SOME KIND OF ACADEMIC STUDY AND WANTED  
10 UP-TO-DATE INFORMATION, THAT WOULD HAVE BEEN A BREACH OF  
11 THE REGULATIONS AND HE COULD NO DOUBT HAVE BEEN PUNISHED  
12 FOR IT. WHAT MADE IT A CRIMINAL CONSPIRACY WAS THAT THE  
13 INTENTION OF THE CONSPIRATORS WAS TO DEFEAT THE ENTIRE  
14 PURPOSE OF THE PROGRAM WHICH WAS TO PROVIDE IMPARTIAL,  
15 OBJECTIVE, ACCURATE REPORTS TO THE GENERAL PUBLIC AND NOT  
16 TO GIVE PRIVATE INFORMATION IN ADVANCE TO PEOPLE WHO COULD  
17 PROFIT FROM THEM. THAT'S THE DIFFERENCE THAT WE'RE TALKING  
18 ABOUT HERE.

19 THE BASIS OF THE CHARGE AGAINST THE DEFENDANT  
20 NORTH IS NOT A CONSPIRACY, THE OBJECT OF WHICH WAS TO  
21 VIOLATE THE BOLAND AMENDMENT BUT THAT HE AND HIS  
22 CO-CONSPIRATORS WERE SEEKING AN OVERALL PURPOSE OF  
23 DEFEATING AND IMPAIRING THE CONSTITUTIONAL FUNCTIONS THAT  
24 THOSE REGULATIONS WERE DESIGNED TO PROTECT. THAT'S THE  
25 DIFFERENCE THAT WE'RE TALKING ABOUT HERE.

1 IF I CAN NEXT MOVE ONTO THE QUESTION OF THE  
2 INTERPRETATION OF THE BOLAND AMENDMENT THAT THE DEFENDANT  
3 REFERRED TO IN ARGUMENT. DURING THE PERIOD COVERED BY THIS  
4 INDICTMENT THE BOLAND AMENDMENT AT ALL TIMES EITHER  
5 PROHIBITED OR SPECIFICALLY -- AND STRICTLY AND SPECIFICALLY  
6 LIMITED THE USE OF AMERICAN FUNDS FOR MILITARY ASSISTANCE  
7 TO THE NICARAGUAN CONTRAS. THE DEFENDANT'S MOST  
8 SIGNIFICANT CLAIM, CERTAINLY THE ONES IN WHICH HE'S DEVOTED  
9 THE MOST ATTENTION IN BRIEFING AND ARGUMENT IS THE CLAIM  
10 THAT THE BOLAND AMENDMENT WAS NOT INTENDED TO APPLY TO THE  
11 NATIONAL SECURITY COUNCIL STAFF OR IF IT WAS THAT IT COULD  
12 NOT CONSTITUTIONALLY DO THAT.

13 AS FAR AS THE MEANING OF THE AMENDMENT, THERE'S A  
14 VERY SIMPLE RESPONSE WHICH IS BASED ON THE LANGUAGE OF THE  
15 AMENDMENT AND ITS LEGISLATIVE HISTORY. THE LANGUAGE OF THE  
16 AMENDMENT IS THAT DURING FISCAL YEAR 1985 AND 1986 THE  
17 AMENDMENT EXCEPT FOR CERTAIN LIMITED FUNDS SPECIFICALLY  
18 PROVIDED IN 1986 "PROHIBITED THE EXPENDITURE AND SUPPORT OF  
19 MILITARY OPERATIONS IN NICARAGUA OF ANY FUNDS AVAILABLE TO  
20 THE CENTRAL INTELLIGENCE AGENCY, THE DEPARTMENT OF DEFENSE  
21 OR ANY OTHER AGENCY OR ENTITY OF THE UNITED STATES INVOLVED  
22 IN INTELLIGENCE ACTIVITIES." THE LANGUAGE HERE IS BROAD  
23 LANGUAGE AND IT'S FUNCTIONAL LANGUAGE. IT DOESN'T SAY  
24 THERE'S A LIST OF ENTITIES THAT ARE PROHIBITED FROM  
25 EXPENDING THESE FUNDS. IT SAYS ANY AGENCY THAT'S INVOLVED

1 IN INTELLIGENCE ACTIVITIES IS PROHIBITED FROM DOING SO. IT  
2 DOESN'T SAY ANY AGENCY THAT'S INVOLVED IN THE SENSE OF  
3 CONDUCTING OPERATIONS OR IS INVOLVED IN INTELLIGENCE  
4 OPERATIONS. THIS IS ANY AGENCY INVOLVED IN INTELLIGENCE  
5 ACTIVITIES, WHICH IS VERY BROAD. IS THE NSC AND ITS STAFF  
6 INVOLVED IN INTELLIGENCE ACTIVITIES? IN ANY ORDINARY  
7 MEANING OF THE WORD IT IS. IN FACT, ITS MANDATE IS  
8 PRECISELY TO BE INVOLVED IN INTELLIGENCE ACTIVITIES.

9 THE COURT: WHAT WEIGHT, IF ANY, ON THIS ARGUMENT  
10 THAT'S GOING ON BACK AND FORTH DO YOU FEEL THE COURT SHOULD  
11 PLACE UPON THE FACT THAT PEOPLE FROM THE WHITE HOUSE,  
12 INCLUDING MR. NORTH, WERE REPRESENTING THAT THEY WERE  
13 COMPLYING WITH YOUR INTERPRETATION OF THE BOLAND AMENDMENT?  
14 THE OTHER COUNTS OF THE INDICTMENT DETAIL SPECIFIC  
15 REPRESENTATIONS THAT THE BOLAND AMENDMENT WAS BEING FULLY  
16 COMPLIED WITH BY THE NATIONAL SECURITY COUNCIL. NOW, I  
17 KNOW THAT'S AN EVIDENTIARY MATTER ON SOME OF THE OTHER  
18 COUNTS BUT WHAT IS ITS RELATION TO THE WAY IN WHICH YOU  
19 FEEL THE COURT SHOULD DEAL WITH THIS ARGUMENT?

20 MR. LYNCH: IT'S EXTREMELY IMPORTANT, YOUR HONOR,  
21 BECAUSE THE THEORY OF CONSPIRACY TO DEFRAUD, THE NATURE OF  
22 A CONSPIRACY TO DEFRAUD AS THE SUPREME COURT SAID IN  
23 HAMMERSCHMIDT IS THE CONSPIRACY TO OBSTRUCT GOVERNMENT  
24 FUNCTIONS BY CRAFT, FRAUD, DECEIT, DISHONESTY. IN OTHER  
25 WORDS, BOTH THINGS ARE NECESSARY.

1 AS WE POINT OUT IN OUR BRIEF WE'RE NOT SAYING IT  
2 WOULD HAVE BEEN A CRIME HAD THE PRESIDENT TAKEN THE  
3 POSITION OR HAD THE NATIONAL SECURITY COUNCIL STAFF TAKEN  
4 THE POSITION THIS DOESN'T APPLY TO THE NATIONAL SECURITY  
5 COUNCIL STAFF AND THEN THE NATIONAL SECURITY COUNCIL STAFF  
6 HAD GONE AHEAD AND CONDUCTED CERTAIN ACTIVITIES. IN THAT  
7 CASE THERE WOULD HAVE BEEN AN OPPORTUNITY TO RAISE THE  
8 QUESTION OF WHAT THE BOLAND AMENDMENT MEANS, EITHER IN  
9 CONGRESS OR THE COURTS, MORE LIKELY IN CONGRESS AND THEN  
10 CONGRESS WOULD HAVE BEEN ABLE TO EXERCISE ITS FUNCTIONS.  
11 BUT BY REPRESENTING TO CONGRESS THAT THE NATIONAL SECURITY  
12 COUNCIL STAFF WAS NOT IN FACT CONDUCTING ACTIVITIES THAT  
13 WOULD VIOLATE THE BOLAND AMENDMENT IF IT APPLIES TO THE  
14 NATIONAL SECURITY COUNCIL STAFF, BY DOING THAT THE  
15 DEFENDANTS, IN PARTICULAR THE DEFENDANT NORTH, WERE  
16 MISLEADING CONGRESS ABOUT WHAT WAS GOING ON.

17 THEREFORE THERE IS NOT ONCE AGAIN A CONSPIRACY TO  
18 VIOLATE THE BOLAND AMENDMENT. IT'S A CONSPIRACY TO DEFEAT  
19 THE FUNCTION OF CONGRESSIONAL APPROPRIATIONS AND OVERSIGHT  
20 THROUGH CRAFT AND DECEIT, THROUGH FALSEHOODS, INCLUDING  
21 SPECIFIC AND DIRECT LIES TO CONGRESS.

22 THE COURT: BUT WHAT I WAS TRYING TO INQUIRE  
23 ABOUT, I UNDERSTAND THE THEORY OF THE PROSECUTION, I  
24 THINK -- I GUESS THE QUESTION I'M ADDRESSING IS THAT I'M  
25 HAVING DIFFICULTY UNDERSTANDING WHY IT IS NECESSARY IN THIS

1 CRIMINAL CASE TO DETERMINE WHAT THE BOLAND AMENDMENT MEANS.

2 MR. LYNCH: WELL, WE'VE SUGGESTED, YOUR HONOR,  
3 THAT IT'S NOT, STRICTLY SPEAKING, NECESSARY TO DO THAT.  
4 THAT THE NATURE OF THE CHARGE OF CONSPIRACY --

5 THE COURT: WELL, YOU SUGGEST IT BY SAYING YOU'RE  
6 WILLING TO REVISE THE INDICTMENT BY STRIKING OUT A LARGE  
7 NUMBER OF PARAGRAPHS. THAT ISN'T WHAT I'M TALKING ABOUT.  
8 I'M TALKING ABOUT THE INDICTMENT AS IT STANDS.

9 MR. LYNCH: NO, I THINK THE INDICTMENT AS IT  
10 STANDS DOES NOT SPECIFICALLY SAY IN ANY PLACE THAT I'M  
11 FAMILIAR WITH THAT THE INDICTMENT CHARGES A CONSPIRACY TO  
12 VIOLATE THE BOLAND AMENDMENT. THE FACT THAT THE BOLAND  
13 AMENDMENT EXISTS IS OBVIOUSLY HIGHLY RELEVANT TO THE  
14 CHARGES. IT WOULD BE IMPOSSIBLE I THINK FOR A JURY OR  
15 ANYONE ELSE TO COMPREHEND WHAT'S THE POINT OF THE DECEPTION  
16 OF CONGRESS WITHOUT KNOWING THAT THE BOLAND AMENDMENT  
17 EXISTED AND KNOWING ESSENTIALLY WHAT IT PROVIDED. AT LEAST  
18 IN TERMS OF ITS LANGUAGE. SO THE BOLAND AMENDMENT'S  
19 EXISTENCE AND AT LEAST IN BROAD OUTLINES ITS MEANING IS  
20 HIGHLY RELEVANT TO THE CASE. IT PROVIDES, AS IT WERE, THE  
21 MOTIVATION FOR THE DECEPTION AND IT PUTS THE DECEPTION INTO  
22 CONTEXT.

23 SO IN THAT SENSE THE REFERENCES TO THE BOLAND  
24 AMENDMENT IN THE INDICTMENT ARE, IT SEEMS TO ME, NOT ONLY  
25 PROPER BUT ESSENTIAL BUT I DON'T THINK THAT THERE'S ANY



1 NEED TO STRIKE ANYTHING FROM THE INDICTMENT IN ORDER TO  
2 MAKE IT SAY WHAT THE GOVERNMENT SAYS IT SAYS. I THINK WHAT  
3 WE'VE SAID IN THE BRIEF THE INDICTMENT SAYS IS WHAT THE  
4 INDICTMENT SAYS BUT I SUPPOSE THE PRINCIPAL REASON THAT  
5 WE'RE HERE THIS MORNING SAYING THAT THE BOLAND AMENDMENT  
6 DOESN'T MEAN WHAT THE DEFENDANT NOW SAYS IT MEANS IS THAT  
7 THEY'VE MADE A MOTION THAT DEPENDS ON THE ASSERTION THAT  
8 THE BOLAND AMENDMENT DIDN'T APPLY TO HIM. WE THINK THAT'S  
9 AN INCORRECT INTERPRETATION OF THE LAW.

10 THE COURT: WELL, ON THE SCHEDULE YOU HAVE FIVE  
11 MORE MINUTES.

12 MR. LYNCH: THANK YOU, YOUR HONOR.

13 THE LANGUAGE OF THE BOLAND AMENDMENT COVERS THE  
14 NATIONAL SECURITY COUNCIL PARTLY BECAUSE THE NATIONAL  
15 SECURITY COUNCIL'S MANDATE IS PRECISELY TO SUPERVISE AND  
16 DIRECT, TO COORDINATE, IN THE WORDS OF THE STATUTE THAT  
17 SETS IT UP, THE INTELLIGENCE ACTIVITIES OF THE UNITED  
18 STATES. PRESIDENT REAGAN'S EXECUTIVE ORDER ALSO SAYS THAT  
19 "THE NSC IS TO ACT AS THE HIGHEST EXECUTIVE BRANCH ENTITY  
20 THAT PROVIDES REVIEW OF, GUIDANCE FOR AND DIRECTION TO THE  
21 CONDUCT OF ALL NATIONAL FOREIGN INTELLIGENCE,  
22 COUNTERINTELLIGENCE AND SPECIAL ACTIVITIES." SO THE VERY  
23 DEFINITION OF WHAT THE NSC IS SUPPOSED TO DO MAKES IT  
24 DEEPLY INVOLVED IN INTELLIGENCE ACTIVITIES.

25 SECONDLY, THE LANGUAGE -- BECAUSE THE LANGUAGE OF

1 THE BOLAND AMENDMENT IS FUNCTIONAL LANGUAGE ONCE THEY GO  
2 OFF AND START DOING INTELLIGENCE ACTIVITIES THEY OBVIOUSLY  
3 ARE AN AGENCY INVOLVED IN INTELLIGENCE ACTIVITIES AND THAT  
4 BRINGS US TO THE LEGISLATIVE HISTORY WHICH I THINK IS VERY  
5 CLEAR. MR. CLINE SAID, WELL, THE BOLAND AMENDMENT DOESN'T  
6 CUT OFF ALL SUPPORT. TRUE. IT PROVIDES IN FISCAL 1986 FOR  
7 SPECIFIC TYPES OF SUPPORT AND IT ALWAYS PROHIBITS ONLY  
8 SUPPORT FOR MILITARY AND PARA-MILITARY OPERATIONS. BUT THE  
9 DEFENDANT HAS NEVER ARGUED THAT HIS ACTIVITIES WERE  
10 ANYTHING OTHER THAN PROVIDING SUPPORT FOR MILITARY AND  
11 PARA-MILITARY ACTIVITIES, SO THAT'S A RED HERRING.

12 THE QUESTION IS ONLY WHAT AGENCIES ARE INVOLVED  
13 IN INTELLIGENCE ACTIVITIES AND AS TO THAT, AS TO WHAT  
14 AGENCIES WERE COVERED, THERE'S NO AMBIGUITY AT ALL IN THE  
15 LEGISLATIVE HISTORY. AT EVERY POINT THE EMPHASIS IS THAT  
16 WE ARE INTENDING TO CUT OFF ALL MILITARY ACTIVITIES. THOSE  
17 WHO SUPPORT THE BOLAND AMENDMENT ARGUE THAT IT'S A BAD  
18 THING TO BE GIVING MILITARY SUPPORT TO THE CONTRAS AND IT  
19 SHOULD BE STOPPED. THOSE WHO OPPOSE THE BOLAND AMENDMENT  
20 SAY IT'S A GOOD THING TO GIVE MILITARY SUPPORT TO THE  
21 CONTRAS AND IT SHOULD BE CONTINUED. NOBODY SAYS THE ISSUE  
22 HERE IS WHETHER THE CIA SHOULD BE STOPPED FROM DOING THIS  
23 AND THE DEFENSE DEPARTMENT AND THE AGENCIES OF THE  
24 TRADITIONAL INTELLIGENCE COMMUNITY SHOULD BE STOPPED FROM  
25 DOING IT AND THE NSC OR THE DEPARTMENT OF AGRICULTURE

1 SHOULD BE PUT IN CHARGE. THE POINT IS TO CUT OFF THE  
2 MILITARY SUPPORT. NOT TO REDIRECT IT TO SOMEBODY ELSE.

3 I'D LIKE TO TAKE ONE LAST MINUTE TO TALK ABOUT  
4 THE FAIR NOTICE AND NOVEL PROSECUTION THEORY ARGUMENTS.  
5 WE'RE TALKING HERE WHEN WE'RE TALKING ABOUT THE CONSPIRACY  
6 TO DEFRAUD THE UNITED STATES PROVISIONS ABOUT LEGAL  
7 THEORIES THAT HAVE BEEN ESTABLISHED IN SUPREME COURT CASES  
8 SINCE 1917. WE'RE NOT TALKING ABOUT NOVEL THEORIES OF  
9 CONSPIRACY LAW.

10 WITH RESPECT TO THE SPECIFIC APPLICATIONS  
11 INVOLVING THE BOLAND ACT AND WHETHER THERE CAN BE A  
12 CONSPIRACY TO DEFRAUD THE FUNCTIONS OF THESE INTELLIGENCE  
13 OVERSIGHT STATUTES, WELL, THOSE STATUTES HAVE ONLY EXISTED  
14 FOR A SHORT PERIOD OF TIME. THEY ONLY APPLY, IN EFFECT, TO  
15 A VERY SMALL NUMBER OF EXECUTIVE BRANCH OFFICERS WHO  
16 PRESUMABLY MOSTLY COMPLY WITH THE LAW SO IT'S HARD TO SEE  
17 WHAT PRECEDENCE THERE COULD BE FOR APPLYING IT THIS WAY OR  
18 HOW THERE CAN BE A DEPARTMENT OF JUSTICE POLICY AGAINST  
19 DEALING WITH THOSE RESTRICTIONS UNDER THE ESTABLISHED  
20 CONSPIRACY TO DEFRAUD POSITION AND INsofar AS THE  
21 DEPARTMENT OF JUSTICE'S SUBMISSION IS RELEVANT TO THIS AT  
22 ALL THEY'RE REALLY TAKING ISSUE ONLY WITH POINTS AROUND THE  
23 FRINGES OF THE INTERPRETATIONS OF THE POWERS OF CONGRESS  
24 AND OF THE PRESIDENT THAT AREN'T, IT SEEMS TO ME, DIRECTLY  
25 RELEVANT TO THIS CASE.

1           WHAT THEY'RE REALLY SAYING, IT SEEMS TO ME, IN  
2 THEIR SUBMISSIONS IS THAT SINCE WE'RE TALKING ABOUT THE  
3 FUNCTIONS THAT THE DEFENDANTS HERE OBSTRUCTED WHICH ARE  
4 MOSTLY LEGITIMATE FUNCTIONS OF CONGRESS WE DON'T DEVOTE  
5 EQUAL TIME TO THE -- TO DESCRIBING AND DEFENDING THE CORE  
6 FUNCTIONS OF THE PRESIDENT, AND WE'RE PERFECTLY HAPPY THAT  
7 THEY'RE HERE EXPLAINING THE CORE FUNCTIONS OF THE  
8 PRESIDENT. BUT NO ONE, NOT EVEN THE DEFENDANT IN THIS  
9 CASE, CONTENDS THAT IT'S A CORE FUNCTION OF THE PRESIDENT  
10 TO PROVIDE FINANCIAL AND MILITARY SUPPORT TO A FOREIGN  
11 INSURGENCY THAT CONGRESS HAS DENIED FUNDING TO. AND THAT'S  
12 THE ONLY CONSTITUTIONAL QUESTION OR POTENTIAL PREROGATIVE  
13 OF THE PRESIDENT THAT COULD BE INVOLVED HERE.

14           WE'RE NOT TALKING ABOUT NOVEL THEORIES BUT ABOUT  
15 ESTABLISHED THEORIES AND WE DON'T BELIEVE THERE'S ANY BASIS  
16 TO CONCLUDE THAT THE DEFENDANT DOESN'T HAVE FAIR NOTICE,  
17 THAT DECEIVING CONGRESS ABOUT WHAT'S GOING ON, THAT  
18 CONDUCTING INTELLIGENCE OPERATIONS IN A COUNTRY WHERE THE  
19 CONGRESS HAS SAID NO FUNDING IS GOING TO GO FOR SUCH  
20 ACTIVITIES, WITHOUT PRESIDENTIAL AUTHORIZATION AND WITHOUT  
21 THE NOTICE TO CONGRESS THAT STATUTE AND EXECUTIVE ORDER  
22 PROVIDE FOR, IS UNLAWFUL BEHAVIOR. ANYONE SHOULD KNOW THAT  
23 THAT'S UNLAWFUL BEHAVIOR.

24           THANK YOU, YOUR HONOR.

25           THE COURT: MR. CLINE, DO YOU HAVE ANYTHING YOU

1 WANT TO SAY IN THE TWO OR THREE MINUTES IN RESPONSE?

2 MR. CLINE: JUST A COUPLE OF BRIEF POINTS?

3 THE COURT: CERTAINLY.

4 MR. CLINE: YOUR HONOR, I'D LIKE TO MAKE THREE  
5 BRIEF POINTS AND THEN I'LL EITHER LAUNCH INTO THE POLITICAL  
6 QUESTION OR WE COULD TAKE A --

7 THE COURT: I WOULD THINK THAT WOULD BE THE WAY  
8 TO DO IT. YOU, FIRST OF ALL, TAKE SOME TIME, WHATEVER YOU  
9 NEED TO MAKE YOUR POINTS AND THEN WE'LL TAKE A RECESS AT  
10 THE END OF YOUR POLITICAL QUESTION ARGUMENT AND COME BACK  
11 AND HEAR THE OTHER SIDE.

12 MR. CLINE: OKAY. FIRST TO REPLY TO WHAT MR.  
13 LYNCH HAS SAID. WE THINK THAT THE INDICTMENT, PARTICULARLY  
14 COUNTS ONE THROUGH THREE, CLEARLY DEPENDS UPON THE  
15 APPLICABILITY OF THE BOLAND AMENDMENT TO THE NSC. I DON'T  
16 THINK THERE'S ANY WAY TO AVOID RESOLUTION OF THAT QUESTION.  
17 IF THE BOLAND AMENDMENT DOES NOT APPLY THERE'S NO  
18 ILLEGALITY ALLEGED HERE IN THE CONTEXT OF AN EXECUTIVE  
19 BRANCH OFFICIAL DEALING WITH CONGRESS. THAT'S OUR RESPONSE  
20 TO THAT POINT. WE DON'T THINK THE BOLAND AMENDMENT ISSUE  
21 CAN BE VOIDED IN THE WAY THAT THE INDEPENDENT COUNSEL  
22 SUGGESTS.

23 THE COURT: IN OTHER WORDS, IT'S YOUR VIEW THAT  
24 THE EXECUTIVE THROUGH HIS PEOPLE CAN REPRESENT TO CONGRESS  
25 THEY'RE COMPLYING WITH THE STATUTE AND AT THE SAME TIME BE

1 AFFIRMATIVELY KNOWINGLY DISOBEYING THE STATUTE BECAUSE THE  
2 STATUTE IS UNCONSTITUTIONAL BUT THEY DON'T SAY SO.

3 MR. CLINE: THAT ALLEGATION --

4 THE COURT: IS THAT YOUR POSITION?

5 MR. CLINE: THAT ALLEGATION --

6 THE COURT: IS THAT YOUR POSITION?

7 MR. CLINE: THAT IS NOT THE POSITION I'M TAKING  
8 WITH RESPECT TO COUNT ONE. THOSE ALLEGATIONS APPEAR  
9 ELSEWHERE IN THE INDICTMENT.

10 THE COURT: NO, NO, NO. YOU DON'T HAVE TO ANSWER  
11 IT IF YOU DON'T WANT TO. I JUST WANT TO KNOW IF THAT WAS  
12 YOUR POSITION.

13 MR. CLINE: THAT POSITION IS NOT NECESSARY TO MY  
14 POSITION WITH RESPECT TO COUNT ONE, NO, YOUR HONOR. AND  
15 IT'S NOT THE POSITION THAT I'M TAKING WITH RESPECT TO COUNT  
16 ONE BUT IT'S NOT INVOLVED IN MY ARGUMENT ON COUNT ONE.  
17 THAT'S NOT THE ARGUMENT THAT I MAKE.

18 THE COURT: I UNDERSTAND THAT ARGUMENTS ARE  
19 TAILORED TO THE CONVENIENCE OF THE FACTS. I WANT TO KNOW  
20 WHAT YOUR POSITION IS ABOUT THAT, IF YOU WANT TO TELL ME.

21 MR. CLINE: MY POSITION, YOUR HONOR, IS THAT  
22 COUNT ONE DOES NOT STAND OR FALL ON THAT POINT. WE'RE  
23 TALKING NOW ABOUT COUNT ONE, PARTICULARLY PARAGRAPH 13A.  
24 COUNT ONE, PARAGRAPH 13B, ALLEGES A CONSPIRACY TO MAKE  
25 FALSE STATEMENTS TO CONGRESS. WE HAVE ALL KINDS OF

1 PROBLEMS WITH THOSE WHICH THE COURT HAS FOR THE MOST PART  
2 REJECTED BUT THAT'S NOT THE -- WHAT'S ALLEGED IN COUNT ONE,  
3 PARAGRAPH 13A.

4 THE COURT: WELL, I WILL NOT PURSUE IT. YOU'RE  
5 AWARE OF THE POSITION. IF YOU DON'T WANT TO ADDRESS IT YOU  
6 DON'T HAVE TO.

7 MR. CLINE: MY SECOND POINT, YOUR HONOR, IS THAT  
8 CONGRESS DOES NOT AS MR. LYNCH SUGGESTED TEND TO PRECLUDE  
9 ALL AGENCIES OF THE FEDERAL GOVERNMENT FROM SUPPORTING THE  
10 RESISTANCE. IF IT HAD CHOSEN TO DO THAT IT WOULD HAVE  
11 ADOPTED THE DODD AMENDMENT, FOR EXAMPLE, WHICH CUT OFF ALL  
12 FUNDING OR IT WOULD HAVE USED LANGUAGE SIMILAR TO, FOR  
13 EXAMPLE, THE CLARK AMENDMENT WHICH CUT OF AID TO THE ANGOLA  
14 REBELS. CONGRESS DIDN'T CHOOSE THAT LANGUAGE. IT CHOSE  
15 THE LANGUAGE THAT IT CHOSE, "ENTITIES INVOLVED IN  
16 INTELLIGENCE ACTIVITIES" FOR SPECIFIC REASONS. IT TENDED  
17 BY THAT LANGUAGE IN THE REASONS THAT WE'VE STATED TO  
18 DISCUSS THE TRADITIONAL INTELLIGENCE COMMUNITY. TO  
19 ENCOMPASS WITHIN THE PROHIBITION THE CIA, THE DEPARTMENT OF  
20 DEFENSE, THOSE ARE THE ENTITIES THAT ARE INVOLVED.

21 FINALLY, ONE POINT ON THE CONSTITUTIONAL ISSUES.  
22 IT IS THE CORE FUNCTION OF THE PRESIDENT TO HANDLE FOREIGN  
23 AFFAIRS AND NATIONAL SECURITY MATTERS AND THAT IS PRECISELY  
24 WHAT THE BOLAND AMENDMENT GOES TO. THERE'S A SERIOUS  
25 CONSTITUTIONAL QUESTION PRESENTED IF THE COURT FINDS

1 THAT THE BOLAND AMENDMENT APPLIES TO THE NATIONAL SECURITY  
2 COUNCIL. WE WOULD SUGGEST THAT WE CONTEND IT'S  
3 UNCONSTITUTIONAL IF IT APPLIES.

4 LET ME MOVE TO THE POLITICAL QUESTION ARGUMENT.  
5 WE CONTEND, YOUR HONOR, THAT THE POLITICAL QUESTION  
6 DOCTRINE PRECLUDES RESOLUTION OF PARTICULAR ISSUES IN THIS  
7 CASE, BOTH SPECIFIC FACTUAL ISSUES AND SPECIFIC LEGAL  
8 ISSUES.

9 IT'S IMPORTANT TO NOTE THAT WE'RE NOT SAYING THAT  
10 THIS IS A POLITICAL CASE. THERE IS NO SUCH THING AS A  
11 POLITICAL CASE. THERE ARE POLITICAL ISSUES. WE'RE SAYING  
12 THAT THERE ARE A NUMBER OF ISSUES THAT FALL WITHIN THE  
13 SCOPE OF THE POLITICAL QUESTION DOCTRINE.

14 FIRST, WITH RESPECT TO CENTRAL AMERICA THERE ARE  
15 A NUMBER OF FACTUAL ALLEGATIONS IN COUNTS ONE THROUGH THREE  
16 WHICH WE'VE SET OUT IN OUR BRIEF IN SOME DETAIL WHICH WOULD  
17 REQUIRE THE COURT TO MAKE SENSITIVE DETERMINATIONS BASED ON  
18 HUGE AMOUNTS OF EVIDENCE, MUCH OF IT PRESENTLY CLASSIFIED,  
19 SOME OF IT UNAVAILABLE, SOME OF IT INACCESSIBLE TO THE  
20 COURT, THE COURT'S PROCESSES, CONCERNING SECRET COVERT  
21 ACTIVITIES AND PRECISELY THE KINDS OF FACTUAL ALLEGATIONS  
22 THAT THE COURT IN THE CROCKETT CASE AND THE  
23 SANCHEZ-ESPINOSA CASE HELD TO BE NON-JUDICIABLE BY A COURT.

24 SIMILARLY WITH RESPECT TO THE IRAN INITIATIVE,  
25 THE GOVERNMENT CONTENDS THAT COLONEL NORTH SOMEHOW WENT



1 OUTSIDE THE SPECIFIED GOVERNMENTAL OBJECTIVES OF THE IRAN  
2 INITIATIVE. THAT REQUIRES THE COURT TO DETERMINE JUST WHAT  
3 THOSE SPECIFIED GOVERNMENTAL OBJECTIVES WERE WHICH REQUIRES  
4 PROBING THE EXECUTIVE DECISIONMAKING IN A WAY THE COURTS  
5 HAVE NEVER DONE AND SHOULD NEVER DO. IT'S BEYOND THE --

6 THE COURT: I KNOW YOU'VE MADE THAT ARGUMENT IN  
7 THE BRIEF.

8 MR. CLINE: YES.

9 THE COURT: IF IT'S OF ANY VALUE TO YOU, I DON'T  
10 UNDERSTAND IT. I READ THE INDICTMENT AS SAYING THAT THE  
11 INITIATIVE TO RELEASE THE HOSTAGES WAS A LEGITIMATE, LAWFUL  
12 ACTIVITY SO I DON'T UNDERSTAND HOW IT IS YOU FEEL THAT THE  
13 COURT IS CALLED UPON TO DECIDE WHETHER IT WAS A GOOD IDEA  
14 OR NOT TO RELEASE THE HOSTAGES OR WHETHER THREE SHOULD HAVE  
15 BEEN RELEASED OR ONE SHOULD HAVE BEEN RELEASED AND ALL  
16 THAT. I DON'T UNDERSTAND IT.

17 MR. CLINE: THE COURT IS NOT CALLED UPON TO  
18 DECIDE THAT QUESTION AT ALL, CLEARLY NOT. BUT THE  
19 GOVERNMENT ALLEGES, YOUR HONOR, THAT COLONEL NORTH SOMEHOW  
20 AND THE CONSPIRATORS SOMEHOW CORRUPTED THAT INITIATIVE AND  
21 ONE OF THE WAYS THEY ALLEGEDLY CORRUPTED IT WAS BY GOING  
22 OUTSIDE OF ITS SPECIFIED PURPOSES. THAT'S ONE OF THE  
23 INDICTMENTS, YOUR HONOR, THAT'S ONE OF THE KEY ALLEGATIONS.

24 THE COURT: OUTSIDE BY ENGAGING IN CONDUCT THAT  
25 WAS OUTSIDE THE PURPOSE OF RELEASING THE HOSTAGES.

1 MR. CLINE: THAT'S NOT WHAT THE INDICTMENT SAYS.

2 THE COURT: THAT'S WHAT OBVIOUSLY ENGLISH MEANS,  
3 SO THAT'S THE ISSUE, ISN'T IT?

4 MR. CLINE: NO. ACTUALLY, YOUR HONOR, THE  
5 INDICTMENT SPECIFIES A COUPLE OF OTHER PURPOSES AS WELL, IN  
6 ADDITION TO RELEASING THE HOSTAGES BUT --

7 THE COURT: OH, YES, IT MENTIONS MORE PERSONAL  
8 MATTERS BUT BASICALLY THAT'S WHAT YOU'RE TALKING ABOUT.  
9 NOW, I DON'T UNDERSTAND -- ALL I WANT TO TELL YOU IS I  
10 DON'T UNDERSTAND YOUR POINT AND I WANT YOU TO HAVE AN  
11 OPPORTUNITY TO DEVELOP IT IN ANY WAY YOU WANT. I'M NOT  
12 CRITICIZING YOU. I'M JUST SAYING I DON'T UNDERSTAND IT.

13 MR. CLINE: LET ME TRY TO EXPLAIN. THE  
14 GOVERNMENT ALLEGES THAT COLONEL NORTH CORRUPTED THE  
15 INITIATIVE BY GOING OUTSIDE ITS SPECIFIED PURPOSES. THAT  
16 IMPLIES THAT THE INITIATIVE HAD CERTAIN SPECIFIED PURPOSES  
17 THAT COLONEL NORTH ALLEGEDLY WENT OUTSIDE OF OR EXCEEDED.  
18 WELL, THAT'S A QUESTION OF FACT. DID IT HAVE SPECIFIED  
19 PURPOSES, WHAT WERE THOSE PURPOSES? YOU CAN'T PROVE THAT  
20 HE CORRUPTED THE INITIATIVE BY EXCEEDING ITS SPECIFIED  
21 PURPOSES.

22 THE COURT: WELL, ARE YOU SAYING OBLIQUELY BY  
23 THAT ARGUMENT THAT THE PRESIDENT OF THE UNITED STATES  
24 AFFIRMATIVELY INTENDED TO SKIM OFF THE PROFITS OF THE  
25 ENTERPRISE AND USE THEM TO BUY ARMS IN NICARAGUA?

1 MR. CLINE: I'M MAKING NO REPRESENTATION ON THAT  
2 WHATEVER. YOUR HONOR, IT'S A QUESTION OF FACT --

3 THE COURT: SIR, MR. CLINE, I CAN'T DEAL WITH  
4 THEORY. THIS IS A CRIMINAL TRIAL. I WANT TO KNOW WHAT  
5 YOU'RE SAYING. IF -- TO BE SURE. THAT WOULD PRESENT REAL  
6 ISSUES, IF THAT'S WHAT YOU'RE SAYING. BUT IF YOU ARE  
7 SAYING, WELL, IT MAY BE THERE AND THEREFORE YOU CAN'T DO  
8 ANYTHING, JUDGE, THAT DOESN'T SEEM TO ME TO HAVE -- THAT  
9 SEEMS LIKE JELLO. IT DOESN'T HAVE ANYTHING I CAN PICK UP  
10 WITH MY HAND.

11 MR. CLINE: WHAT WE ARE SUGGESTING, YOUR HONOR,  
12 IS THAT THE INDICTMENT SPECIFIES CERTAIN PURPOSES FOR THE  
13 IRAN INITIATIVE. IT'S A QUESTION OF FACT PUT IN ISSUE BY  
14 LIEUTENANT COLONEL NORTH'S PLEA IN THIS CASE AS TO WHETHER  
15 THOSE WERE THE SOLE PURPOSES OF THE IRAN INITIATIVE. THAT  
16 IS A QUESTION OF FACT THAT THE COURT HAS TO DETERMINE.  
17 WHAT THOSE PURPOSE WERE, WHETHER COLONEL NORTH STEPPED  
18 BEYOND THEM. AND THAT IS THE QUESTION OF FACT THAT WE SAY  
19 IS INAPPROPRIATE FOR JUDICIAL DETERMINATION. IT'S THERE IN  
20 THE INDICTMENT, YOUR HONOR, THE CHARGE IS THAT HE CORRUPTED  
21 THE INITIATIVE BY EXCEEDING ITS SPECIFIED PURPOSES.  
22 THERE'S NO WAY OF GETTING AROUND THE NECESSITY OF  
23 DETERMINING WHAT THOSE SPECIFIED PURPOSES WERE.

24 THE COURT: THEY RECITED THEM IN THE INDICTMENT.

25 MR. CLINE: WELL, THEY ARE ALLEGED IN THE

1 INDICTMENT, YOUR HONOR, AS MANY OTHER THINGS ARE ALLEGED IN  
2 THE INDICTMENT. THAT DOESN'T MAKE IT SO. IT MAKES IT AN  
3 ALLEGATION.

4 THE COURT: IT JUST INDICATES WHAT THEY'RE  
5 SAYING. IT POSES THE ISSUE.

6 MR. CLINE: IT POSES THE ISSUE WHICH IS PUT IN  
7 ISSUE AS ARE ALL THE OTHER ALLEGATIONS IN THE INDICTMENT BY  
8 THE PLEA IN THIS CASE WHICH LEAVES IT FOR THE COURT TO  
9 DETERMINE WHETHER IN FACT THOSE WERE THE SPECIFIED AND THE  
10 SOLE GOVERNMENTAL PURPOSES OF THE IRAN INITIATIVE. IT'S AN  
11 INESCAPABLE ISSUE OF FACT FOR THE COURT TO DECIDE AND IT'S  
12 AN INAPPROPRIATE ISSUE FOR THE COURT TO DECIDE. THE MERE  
13 FACT, YOUR HONOR, THAT IT'S ALLEGED IN THE INDICTMENT THAT  
14 THERE WERE THESE THREE OR HOWEVER MANY PURPOSES FOR THE  
15 IRAN INITIATIVE DOESN'T MAKE IT SO. IT'S A FACTUAL  
16 ALLEGATION THAT WAS PUT IN ISSUE ALONG WITH ALL THE OTHER  
17 FACTUAL ALLEGATIONS IN THIS CASE.

18 THE COURT: WELL, IT DOESN'T MAKE ANYTHING SO. I  
19 UNDERSTAND THAT.

20 MR. CLINE: IT'S A FACTUAL QUESTION. WHAT WERE  
21 THESE SPECIFIED -- WHAT WERE THE GOVERNMENTAL PURPOSES OF  
22 THE IRAN INITIATIVE? IT'S A FACTUAL QUESTION THAT THE  
23 COURT HAS TO DECIDE IF IT'S GOING TO DETERMINE WHETHER  
24 COLONEL NORTH, AS THE I.C. CONTENDS, CORRUPTED THAT  
25 INITIATIVE AND THAT'S A FACTUAL ALLEGATION THAT WE CONTEND

1 IS INAPPROPRIATE FOR JUDICIAL RESOLUTION.

2 THE FINAL POINT ON THE POLITICAL QUESTION  
3 ARGUMENT, AN ATTEMPT BY THE COURT TO INTERPRET AND USE AS A  
4 PREDICATE FOR A CRIMINAL PROSECUTION A PROVISION SUCH AS  
5 THE EXECUTIVE ORDER AND THE NSDD WHICH ARE INTERNAL  
6 EXECUTIVE BRANCH COVERT ACTION PROCEDURES IN ESSENCE WOULD  
7 IN OUR VIEW IN THE FUTURE, NOT JUST WITH RESPECT TO THOSE  
8 PARTICULAR PROVISIONS BUT WITH RESPECT TO ALL SIMILAR  
9 PROVISIONS, IMPOSE A KIND OF RIGIDITY AND INFLEXIBILITY  
10 WHICH IS INAPPROPRIATE FOR THE COURT TO IMPOSE. IN OTHER  
11 WORDS, IN THE FUTURE ANYONE CARRYING OUT COVERT ACTIVITY IN  
12 THE CONTEXT OF THESE PROVISIONS --

13 THE COURT: I'M NOT IMPOSING ANY CONDITIONS, SIR.  
14 I'M A TRIAL JUDGE. I'VE GOT A CRIMINAL CASE IN FRONT OF  
15 ME.

16 MR. CLINE: THAT'S RIGHT.

17 THE COURT: YOUR BRIEFS ARE FULL OF DISCUSSION  
18 ABOUT HOW I AM USURPING THE FUNCTION OF THE PRESIDENT AND  
19 I'M IMPOSING ALL KIND OF CONDITIONS. I'M JUST TRYING A  
20 CASE. IT SEEMS TO ME THAT A LOT OF THE DISCUSSION IS  
21 ADDRESSED TO THE WRONG AUDIENCE. I DIDN'T BRING THE CASE.

22 MR. CLINE: WE UNDERSTAND THAT BUT THERE ARE  
23 ISSUES --

24 THE COURT: THE PRESIDENT BROUGHT THE CASE. I  
25 DIDN'T BRING IT. I DON'T UNDERSTAND WHY THE SUGGESTION IS

1 ALWAYS TRYING TO SAY THE COURT IS DOING SOMETHING. I'M NOT  
2 DOING ANYTHING BUT TRYING A CASE.

3 MR. CLINE: THERE IS NO IMPUTATION --

4 THE COURT: IT WOULD BE A MISTAKE TO SAY THAT  
5 THIS IS AN EVERYDAY CASE. IT'S NOT AN EVERYDAY CASE. MY  
6 EXPERIENCE AND MY KNOWLEDGE OF THE LAW GAINED IN THE TRIAL  
7 OF MANY CRIMINAL CASES AND I'M MOVING TOWARD THE TRIAL OF  
8 THE CASE, WE KNOW IT'S GOING TO BE TRIED, WE'VE GOT A LOT  
9 OF COUNTS THAT HAVE TO BE TRIED, WHETHER THESE COUNTS ARE  
10 GOING TO BE TRIED IS WHAT WE'RE DISCUSSING NOW BUT IT'S A  
11 STRAIGHTFORWARD KIND OF A BUSINESS AND I DON'T UNDERSTAND  
12 HOW UNTIL FACTS EVOLVE IT'S POSSIBLE TO MEASURE THE  
13 SIGNIFICANCE OF THE ARGUMENT YOU'RE MAKING BECAUSE I DON'T  
14 KNOW ANYTHING ABOUT WHAT THE FACTS ARE. I'M NOT IN THE  
15 FACTS. I DON'T DECIDE THE FACTS. I HAVE NOTHING TO DO  
16 WITH THE FACTS IN THIS CASE. I TELL THE JURY THAT EVERY  
17 DAY WHEN THEY'RE IN HERE.

18 MR. CLINE: YOUR HONOR, IN MAKING --

19 THE COURT: SO I FIND MYSELF CONSTANTLY UNABLE TO  
20 UNDERSTAND THE PURPORT OF WHAT YOU'RE TRYING TO SAY AND I  
21 WANT YOUR HELP. I'M NOT -- I NEED YOUR HELP AND I WANT  
22 YOUR HELP.

23 MR. CLINE: IN MAKING THE POLITICAL QUESTION  
24 ARGUMENT, YOUR HONOR, WE'RE NOT SUGGESTING THAT THE COURT  
25 IS USURPING OR ANYTHING OF THAT KIND. THE POLITICAL

1 QUESTION ISSUE COMES UP ALL THE TIME WHEN COURTS ARE  
2 PRESENTED WITH ISSUES THAT THE PARTIES ARE ASKING THEM TO  
3 RESOLVE.

4 THE COURT: SURE.

5 MR. CLINE: IN THIS CASE THE INDEPENDENT COUNSEL  
6 AND TO SOME EXTENT THE DEFENDANT ARE ASKING YOU TO RESOLVE  
7 A NUMBER OF ISSUES. ALL WE'RE SAYING, YOUR HONOR, AND IN  
8 THE POLITICAL QUESTION ARGUMENTS IS THAT CERTAIN OF THOSE  
9 ISSUES, PARTICULARLY ISSUES THAT ARE ESSENTIAL TO COUNTS  
10 ONE, TWO AND THREE ARE NOT FIT FOR JUDICIAL RESOLUTION.  
11 THAT'S NOT AN ATTEMPT TO IMPUGN THE COURT IN ANY WAY.

12 THE POLITICAL QUESTION DOCTRINE IS A JUDICIALLY  
13 CREATED DOCTRINE. IT'S A RECOGNITION BY THE COURTS THAT  
14 THEY ARE SOMEWHAT LIMITED IN THE CAPACITY TO DECIDE  
15 PARTICULAR KINDS OF ISSUES AND WHAT WE'RE SAYING IS THAT  
16 CERTAIN OF THE ISSUES PRESENTED IN COUNTS ONE THROUGH THREE  
17 ARE THAT KIND OF ISSUE. CERTAIN FACTUAL ISSUES ARE THE  
18 KINDS OF ISSUES THAT COURTS HAVE DECLINED TO DECIDE IN THE  
19 PAST AND CERTAIN OF THE LEGAL ISSUES ARE OF THAT KIND ALSO.  
20 THAT'S ALL WE'RE SAYING ON THOSE COUNTS. IT'S NOT A  
21 QUESTION OF THE COURT USURPING ANYTHING. IT'S A QUESTION  
22 OF ISSUES BROUGHT TO COURT BY THE PARTIES THAT ARE NOT  
23 JUDICIALLY MANAGEABLE. THAT IS THE POINT OF THE POLITICAL  
24 QUESTION ISSUE AND THOUGH CERTAINLY THE ISSUE COMES UP  
25 PRIMARILY --

1 THE COURT: WELL, IF WE WERE TO REACH IN THE  
2 COURSE OF THE TRIAL SOME SUCH ISSUE IT COULD BE DECIDED BUT  
3 IT DOESN'T SEEM TO ME THAT THE ISSUES THAT YOU'VE SELECTED  
4 EVEN IF THEY WERE DECIDED YOUR WAY WOULD HAVE ANYTHING TO  
5 DO WITH WHETHER OR NOT THE COUNT GOES FORWARD.

6 MR. CLINE: I THINK THEY WOULD, YOUR HONOR,  
7 BECAUSE --

8 THE COURT: WELL, THAT'S WHAT I DON'T UNDERSTAND.  
9 I DON'T UNDERSTAND -- I CONCEDE MANY INDICTMENTS CONTAIN,  
10 AS DO MANY DEFENSES, ALL KINDS OF ARGUMENTS. THE QUESTION  
11 IS WHETHER THE PROOF IS CONSISTENT WITH THE COUNT AND  
12 SUFFICIENT TO SUPPORT THE COUNT, THE COUNT OF FRAUD.  
13 THAT'S WHAT I'M TRYING. I'M NOT TRYING ANYTHING ELSE.  
14 IT'S A FRAUD COUNT AND I'M TRYING A FRAUD COUNT. AND IT  
15 DOESN'T FOLLOW THAT BECAUSE SOME ASPECT OF THE PROOF MAY BE  
16 NON-JUDICIABLE FOR CONSTITUTIONAL OR OTHER REASONS THAT THE  
17 FRAUD COUNT ISN'T STILL A FRAUD COUNT AND THE EVIDENCE  
18 ISN'T SUFFICIENT TO SUPPORT THE FRAUD COUNT.

19 MR. CLINE: THE ULTIMATE ISSUE, YOUR HONOR, MAY  
20 BE FRAUD OR AS THE I.C. CASTS, CRIMINALITY.

21 THE COURT: WELL, IT IS FRAUD IN THE SENSE THAT  
22 CHIEF JUSTICE TAFT AND THE SUPREME COURT CONSISTENTLY  
23 THEREAFTER HAS DEFINED IT. THAT'S WHAT THEY ARE TALKING  
24 ABOUT.

25 MR. CLINE: THE ULTIMATE ISSUE IS, AS THE I.C.



1 CASTS IT, WHETHER COLONEL NORTH ENGAGED IN CRIMINAL CONDUCT  
2 BUT IN REACHING THAT ULTIMATE ISSUE AND IN DECIDING IT AS  
3 THE COURT AND THE JURY WOULD BE REQUIRED TO DO THERE ARE A  
4 NUMBER OF SUBSIDIARIES, FACTUAL ISSUES AND LEGAL ISSUES  
5 THAT HAVE TO BE DECIDED AND IT'S OUR POSITION THAT WITH  
6 RESPECT TO COUNTS ONE THROUGH THREE THE FACTUAL AND LEGAL  
7 ISSUES THAT HAVE TO BE DECIDED TO REACH THAT ULTIMATE ISSUE  
8 ARE NOT THE KIND OF ISSUES THAT THE COURT CAN DECIDE. BOTH  
9 THE FACTUAL ALLEGATIONS AS TO CENTRAL AMERICA -- THEY CAN'T  
10 JUST BE CUT OUT OF THE INDICTMENT. THEY ARE CENTRAL TO  
11 COUNTS ONE, TWO AND THREE. THOSE FACTUAL ALLEGATIONS AS  
12 IN THE CROCKETT CASE AND THE SANCHEZ-ESPINOSA CASE SIMPLY  
13 ARE NOT JUDICIABLE BY THE COURT AND THOSE FACTUAL  
14 ALLEGATIONS ARE ESSENTIAL TO THAT ULTIMATE QUESTION.

15 AND WE SUBMIT THE SAME ARGUMENT AS TO THE LEGAL  
16 PROVISIONS THAT THE INDEPENDENT COUNSEL INVITES THE COURT  
17 TO CONSTRUE, EXECUTIVE ORDER 12333 AND THE NSDD 1159.  
18 THOSE COUNTS HAVE TO BE CONSTRUED PARTICULARLY IF COUNT ONE  
19 IS TO BE DECIDED AND IT'S PRECISELY THOSE TYPES OF  
20 PROVISIONS THAT THE COURT OUGHT NOT TO CONSTRUE.

21 THANK YOU.

22 THE COURT: WELL, PERHAPS WE DON'T NEED TO TAKE A  
23 RECESS QUITE YET.

24 MR. LYNCH: YOUR HONOR, I'M PREPARED TO GO  
25 FORWARD. IT WILL ONLY TAKE ABOUT FIVE MINUTES.

1 THE COURT: LET'S STOP AFTER THE FIVE MINUTES FOR  
2 A BRIEF RECESS AT THIS TIME.

3 MR. LYNCH: YOUR HONOR, REALLY ALL I WANT TO DO  
4 ABOUT THE POLITICAL QUESTION ISSUE IS TO ADDRESS VERY  
5 BRIEFLY WHAT THE THREE QUESTIONS ARE THAT AT LEAST TODAY  
6 MR. CLINE SUGGESTED THE COURT SHOULDN'T OR CAN'T RESOLVE.  
7 ONE IS HE REFERRED TO THE FACTUAL ALLEGATIONS REGARDING  
8 CENTRAL AMERICA AS IF THIS IS SOMETHING THAT IS IMPOSSIBLE  
9 TO UNDERSTAND WHAT HAPPENED DOWN THERE FOR SOME REASON.

10 THE FACTS THAT ARE CHARGED ARE FAIRLY  
11 STRAIGHTFORWARD AND THEY'RE FACTS THAT CONGRESS HAS  
12 INVESTIGATED, THE TOWER COMMISSION HAS INVESTIGATED, AND  
13 THAT THE COURT WILL HEAR EVIDENCE ON BY HAVING WITNESSES  
14 APPEAR IN COURT. GRANTED THERE ARE SOME CLASSIFIED  
15 INFORMATION PROBLEMS BUT THOSE ARE TO BE HANDLED IN THE  
16 CONTEXT OF CIPA.

17 SECONDLY, THEY SAY THAT THE PURPOSE OF THE IRAN  
18 INITIATIVE ARE SOMEHOW SOMETHING THAT CAN'T BE FATHOMED OR  
19 SHOULDN'T APPROPRIATELY BE FATHOMED BY A COURT. THE  
20 INDICTMENT SPECIFICALLY STATES THAT THE SPECIFIED PURPOSES  
21 OF THE IRAN INITIATIVE ARE THOSE CONTAINED IN THE  
22 PRESIDENTIAL FINDING. THE PRESIDENTIAL FINDING SAYS WHAT  
23 THE PURPOSES OF THE INITIATIVE ARE, WHAT THE AUTHORIZED  
24 PURPOSES ARE. IF YOU READ THE NATIONAL SECURITY DECISION  
25 DIRECTIVE IT'S CRYSTAL CLEAR THAT THE PURPOSES OF COVERT

1 OPERATIONS ARE SUPPOSED TO BE SET FORTH IN THE FINDING.  
2 AND IF THEY -- OTHER THINGS ARE DONE, YOU HAVE TO COME BACK  
3 AND GET A NEW FINDING OR A MODIFICATION.

4 THE COURT: WELL, I'M NOT SURE THAT'S SO. IF  
5 THERE'S SUFFICIENT PURPOSES TO JUSTIFY THE FINDING I TAKE  
6 IT THE ARGUMENT IS THAT IF THERE MAY BE OTHER SUBSIDIARY  
7 FOREIGN POLICY PURPOSES OF SOME SHAPE OR DESCRIPTION,  
8 ASSUMING THEY'RE LAWFUL PURPOSES, THAT THE PRESIDENT ISN'T  
9 UNDER AN OBLIGATION TO PUT DOWN EVERY ASPECT OF HIS  
10 THINKING ABOUT THE PROBLEM FROM A TO Z.

11 MR. LYNCH: OH, THAT'S CERTAINLY FAIR ENOUGH,  
12 YOUR HONOR, BUT THE QUESTION IS WHAT'S --

13 THE COURT: THAT'S BASICALLY WHAT THEY'RE SAYING.  
14 THEY'RE SAYING THE FINDING DOESN'T NECESSARILY STATE ALL  
15 THE PURPOSES.

16 MR. LYNCH: WELL, BUT UNLESS THEY'RE SAYING THAT  
17 THE FINDING SECRETLY HAD A PURPOSE OF COVERTLY SKIMMING OFF  
18 THE MONEY AND SENDING IT TO THE CONTRAS THEN IT'S NOT CLEAR  
19 WHAT THE RELEVANCE OF ANY OTHER SUBSIDIARY PURPOSES WOULD  
20 BE TO THIS CASE. THAT'S WHAT THE DIVERSION ISSUE IS ABOUT.

21 THE THIRD THING THEY SUGGEST IS THAT THE COURT  
22 SOMEHOW SHOULD NOT INTERPRET THE EXECUTIVE ORDER AND THE  
23 NATIONAL SECURITY DECISION DIRECTIVE BECAUSE IF THE COURT  
24 SAYS, WELL, THIS IS WHAT IT SAYS AND THIS IS WHAT IT MEANS  
25 THAT WOULD TIE THE HANDS OF THE PRESIDENT OR THE EXECUTIVE

1 IN FUTURE OPERATIONS. THE ANSWER TO THAT IS WHAT THE  
2 SUPREME COURT SAID IN UNITED STATES AGAINST NIXON. OF  
3 COURSE AN EXECUTIVE ORDER IS SOMETHING THAT THE PRESIDENT  
4 CAN MODIFY. IF THE PRESIDENT DOESN'T LIKE THE WAY THE  
5 PRESENT EXECUTIVE ORDER READS HE CAN CHANGE IT AND CHANGE  
6 THE CONDITIONS UNDER WHICH THE EXECUTIVE BRANCH IS  
7 INSTRUCTED TO OPERATE. BUT AS THE COURT SAID IN THE UNITED  
8 STATES AGAINST NIXON AS LONG AS THAT EXECUTIVE ORDER EXISTS  
9 IT IS LAW. THE ONLY WAY THAT THE HANDS OF SUBORDINATE  
10 EXECUTIVE BRANCH OFFICIALS WILL BE TIED IF THE EXECUTIVE  
11 ORDER IS INTERPRETED TO MEAN WHAT IT SAYS IT MEANS IS THAT  
12 THEY WILL BE OBLIGED TO COMPLY WITH THE EXECUTIVE ORDER AND  
13 I DON'T UNDERSTAND WHY IT SHOULD BE THAT IT UNFAIRLY TIES  
14 THE HANDS OF THE EXECUTIVE TO SAY THAT SUBORDINATE  
15 OFFICIALS HAVE TO FOLLOW THE RULES THAT WERE LAID DOWN IN  
16 THE EXECUTIVE ORDER OR IN THE NATIONAL SECURITY DECISION  
17 DIRECTIVE. IT DOESN'T TIE THE PRESIDENT'S HANDS AT ALL  
18 WITH RESPECT TO THE TERMS OF THOSE REGULATIONS.

19 UNLESS THERE ARE OTHER QUESTIONS, YOUR HONOR,  
20 THAT'S ALL I HAVE TO SAY ABOUT THIS.

21 THE COURT: VERY WELL. WE'LL TAKE TEN MINUTES  
22 AND THEN IT LOOKS LIKE WE'LL BE ABLE TO FINISH UP THIS  
23 ARGUMENT BY NOON, DOES IT NOT?

24 MR. LYNCH: THANK YOU, YOUR HONOR.

25 THE COURT: YES.

TEN MINUTES.

(BRIEF RECESS)

(TRANSCRIPT CONTINUED ON PAGE 52)

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1 THE COURT: ALL RIGHT, SIR.

2 MR. CLINE: YOUR HONOR, I WILL BE VERY BRIEF ON THE  
3 MULTIPLE CONSPIRACIES QUESTION. IT'S OUR POSITION THAT COUNT  
4 1 OF THE INDICTMENT CHARGES TWO SEPARATE CONSPIRACIES. THE  
5 FIRST IS A CENTRAL CONSPIRACY TO VARIOUS OBJECTS PROVIDING  
6 SUPPORT FOR THE RESISTANCE, ALLEGEDLY, ALLEGEDLY CORRUPTING  
7 THE IRAN INITIATIVE. THE SECOND CONSPIRACY IS A SUBSIDIARY,  
8 AFTER THE FACT OF CONSPIRACY, TO COVER UP THE FIRST ONE. IT  
9 INVOLVES OBJECTS 13(B)(3) THROUGH (5) OF COUNT 1, CONCERNING  
10 PRIMARILY EVENTS ALLEGED TO HAVE OCCURRED IN NOVEMBER OF  
11 1986, INCLUDING ALLEGED FALSE STATEMENTS TO THE ATTORNEY  
12 GENERAL, OBSTRUCTION AND THE DESTRUCTION OF DOCUMENTS. THERE  
13 IS ALSO AN OBSTRUCTION OF CONGRESS COUNT. THOSE SUBSTANTIVE  
14 COUNTS ARE THE CONSPIRATORIAL COUNTS ALLEGED IN PARAGRAPHS  
15 13(B)(3) THROUGH (5).

16 THE COURT: WHY DO YOU SAY "AFTER THE FACT"?

17 MR. CLINE: WELL, IT APPEARS FROM THE WAY THE  
18 INDICTMENT IS ALLEGED THAT THE OBJECTIVES OF THE CENTRAL  
19 CONSPIRACY, IF WE CAN CALL IT THAT, THE INITIAL CONSPIRACY,  
20 WERE UNACCOMPLISHED AT THE TIME OF THIS ALLEGED COVER-UP IN  
21 NOVEMBER OF 1986. THAT IS, IF PROVIDING SUPPORT TO THE  
22 RESISTANCE WAS THE PURPOSE OF ALL OF THIS, THE ALLEGED  
23 DIVERSION AND SO FORTH, THAT WAS DONE IN OCTOBER, OCTOBER  
24 18TH, OF 1986. THE SUPPORT WAS BACK IN EFFECT AND THE OBJECT  
25 OF THAT ALLEGED CONSPIRACY WAS EITHER OBTAINED OR NO LONGER

1 SIGNIFICANT.

2 THE COURT: WELL, IS IT NOT APPARENT THAT  
3 CONCEALMENT ALLEGEDLY WAS AN INTEGRAL PART OF THE PLAN,  
4 STARTING WITH THE VARIOUS EFFORTS TO MAXIMIZE THE FUND?

5 MR. CLINE: THE INDEPENDENT COUNSEL CAN MAKE THAT  
6 ARGUMENT WITH RESPECT TO THE FALSE STATEMENTS THAT ARE  
7 ALLEGED IN SEPTEMBER OF 1985, FOR EXAMPLE, AND OCTOBER OF  
8 1985. I DON'T THINK THE ARGUMENT CAN BE MADE WITH RESPECT TO  
9 THE ALLEGED COVER-UP THAT TOOK PLACE IN NOVEMBER OF 1986.

10 AT THAT POINT, AGAIN, THE OBJECT OF THE CENTRAL  
11 CONSPIRACY, IF I CAN REFER TO IT THAT WAY, WAS ACCOMPLISHED.  
12 THE ONLY CONCEIVABLE PURPOSE OF THE SUBSIDIARY CONSPIRACY  
13 THAT'S ALLEGED IN THIS COUNT 1 WAS TO COVER UP THE  
14 ALREADY-COMPLETED FIRST CONSPIRACY.

15 THAT'S OUR POINT AND WE THINK IT REQUIRES DISMISSAL  
16 OF COUNT 1 FOR THAT REASON. THANK YOU, YOUR HONOR.

17 MR. LYNCH: YOUR HONOR, I THINK THE CENTRAL  
18 MISCONCEPTION HERE IS THE NOTION THAT THE INDICTMENT ALLEGES  
19 A SO-CALLED CENTRAL CONSPIRACY TO PROVIDE SUPPORT FOR THE  
20 NICARAGUAN CONTRAS. THAT'S NOT WHAT THE INDICTMENT ALLEGES.  
21 IT ALLEGES A CONSPIRACY TO DEFEAT THE OPERATIONS OF THE  
22 PROGRAM OF RESTRICTION ON COVERT ACTIONS BY DECEIVING  
23 CONGRESS IN NOVEMBER OF 1986. THERE STILL WAS MONEY IN  
24 SWITZERLAND THAT HAD NOT BEEN PROVIDED TO THE UNITED STATES  
25 AS IT SHOULD HAVE BEEN UNDER THE SALE OF ARMS TO ELEMENTS IN

1 IRAN. WE ARE TALKING ABOUT A CONSPIRACY, THE WHOLE POINT OF  
2 WHICH IS TO CONCEAL ALL OF THESE ACTIVITIES FROM CONGRESS.  
3 AND IF THEY CAME IN, IN NOVEMBER OF 1986, AND SAID, "OH, BY  
4 THE WAY, NOW THAT YOU'VE RECOMMENCED PROVIDING SOME MILITARY  
5 SUPPORT TO THE CONTRAST, HA, HA, WE'VE BEEN DOING IT ALL  
6 ALONG SECRETLY AND YOU SHOULD JUST KNOW THAT," IT'S OBVIOUS  
7 THAT THE GOALS OF THE CONSPIRACY WOULD HAVE BEEN TOTALLY  
8 DEFEATED.

9 WE'RE NOT TALKING HERE ABOUT A CONSPIRACY TO DO  
10 SOME PARTICULAR CRIME, A BANK ROBBERY OR SOMETHING LIKE THAT,  
11 AND THEN THE WHISTLE BLOWS, AND FROM THEN ON THE CONSPIRATORS  
12 ARE ENGAGED SOLELY IN SAVING THEMSELVES FROM PROSECUTION.  
13 THE POINT OF THE CRIME, THE INTEGRAL RELATIONSHIP OF THE  
14 COVER-UP, AS MR. CLINE CALLS IT, TO THE SO-CALLED CENTRAL  
15 CONSPIRACY, IS INTEGRAL. THE CONSPIRACY IS ABOUT CONCEALMENT  
16 AND ITS PURPOSES WOULD NOT BE SERVED IF REVELATION TO  
17 CONGRESS WAS MADE STILL IN NOVEMBER OF 1986.

18 THAT'S ALL WE HAVE TO SAY ABOUT THAT, YOUR HONOR.

19 THE COURT: WELL, NOW, WHAT IS LEFT IS COUNTS 2 AND  
20 3. I GUESS YOU HAVE NOTHING YOU WANT TO SAY, MR. CLINE?

21 MR. CLINE: CORRECT, YOUR HONOR.

22 THE COURT: ON THIS POINT. WE HAVE COUNTS 2 AND 3  
23 THEN. GOOD MORNING.

24 MS. SELIGMAN: GOOD MORNING, YOUR HONOR. NICOLE  
25 SELIGMAN FOR DEFENDANT NORTH.



1           YOUR HONOR, I ANTICIPATE THAT I CAN GET THROUGH OUR  
2 ARGUMENT ON COUNTS 2 AND 3 FAIRLY QUICKLY AND IF THE  
3 INDEPENDENT COUNSEL IS IN AGREEMENT, I WILL ARGUE THE TWO OF  
4 THOSE TOGETHER.

5           THE COURT: I WOULD LIKE TO HAVE THEM ARGUED  
6 TOGETHER. IF THAT'S YOUR WISH, IT'S MY WISH, TOO.

7           MS. SELIGMAN: OKAY. I THINK SO.

8           THE COURT: SO GO TO IT.

9           MS. SELIGMAN: OKAY. THANK YOU, YOUR HONOR.

10           COUNT 2 PURPORTS TO CHARGE THE DEFENDANT WITH  
11 CONVERTING MONEY AND THINGS OF VALUE OF THE UNITED STATES,  
12 AND COUNT 2 FURTHER IDENTIFIES THE MONEY AND THINGS OF VALUE  
13 THAT ALLEGEDLY WERE CONVERTED AS PART OF THE PROCEEDS OF THE  
14 TRANSFER OF UNITED STATES WEAPONS TO IRAN AND PART OF THE  
15 REALIZABLE VALUE OF SUCH WEAPONS WHICH, ACCORDING TO COUNT 2,  
16 THE DEFENDANTS USED FOR PURPOSES UNAUTHORIZED BY LAW,  
17 INCLUDING SUPPORT OF THE CONTRAS.

18           THE DEFENDANT HAS MOVED TO DISMISS COUNT 2 ON THE  
19 GROUND THAT AS A MATTER OF LAW THE FACTS ALLEGED IN THE COUNT  
20 DO NOT ESTABLISH AN ESSENTIAL ELEMENT OF SECTION 641, WHICH  
21 IS THAT THE DEFENDANT CONVERTED MONEY OR PROPERTY OF THE  
22 UNITED STATES.

23           I DON'T THINK THERE IS A GREAT DEAL OF DISPUTE THAT  
24 641 DOES REQUIRE, AS AN ESSENTIAL ELEMENT OF THE PROOF, THAT  
25 THE MONEY BELONGED TO THE UNITED STATES AND, IN FACT, THAT

1 THE GOVERNMENT'S PROPERTY RIGHTS WERE VIOLATED.

2 DEFENDANT ARGUED IN OUR OPENING BRIEF THAT A SERIES  
3 OF CASES UNDER SECTION 641 MAKE CLEAR THAT, FOR EXAMPLE, A  
4 DEBTOR/CREDITOR RELATIONSHIP DOES NOT SUFFICE TO STATE A  
5 CLAIM UNDER SECTION 641 BECAUSE THE GOVERNMENT MIGHT BE OWED  
6 MONEY BY AN INDIVIDUAL BUT THAT THAT MONEY IS NOT THE  
7 PROPERTY OF THE UNITED STATES FOR PURPOSES OF SECTION 641.  
8 AND WE'VE CITED THE CASES TO THE COURT THAT HOLD THAT.

9 WE, THEREFORE, STATED THAT THERE WERE NO  
10 IDENTIFIABLE LEGAL GROUNDS FOR HOLDING THAT THE MONEY  
11 ALLEGEDLY RECEIVED FROM THE PROCEEDS OF THE SALES WERE, IN  
12 FACT, PROPERTY OR MONEY OF THE UNITED STATES.

13 IN RESPONSE, THE INDEPENDENT COUNSEL HAS STATED  
14 THAT THE GOVERNMENT HAD A PROPERTY INTEREST IN THE PROCEEDS  
15 UNDER WHAT IT CALLS A CONSTRUCTIVE TRUST THEORY. IN  
16 PARTICULAR, AT PAGES 19 TO 20, NOTE 28 OF ITS BRIEF, IT  
17 STATES THAT, "ALL PROCEEDS FROM THE RESALE OF THE WEAPONS  
18 WERE HELD IN CONSTRUCTIVE TRUST FOR THE UNITED STATES  
19 GOVERNMENT."

20 BY IDENTIFYING THE CONSTRUCTIVE TRUST THEORY, YOUR  
21 HONOR, AS THEIR LEGAL BASIS FOR CLAIMING THAT THE PROCEEDS  
22 WERE PROPERTY OF THE UNITED STATES, THE INDEPENDENT COUNSEL  
23 HAS, IN ESSENCE, PROVED THAT THE COUNT MUST BE DISMISSED,  
24 BECAUSE THE CASES ESTABLISH, TREATISES ESTABLISH, IT'S  
25 UNIFORMLY UNDERSTOOD, THAT UNDER A CONSTRUCTIVE TRUST THEORY

1 THE INDIVIDUAL HOLDING PROPERTY IN CONSTRUCTIVE TRUST FOR THE  
2 BENEFICIARY, IN FACT, HAS THE PROPERTY INTEREST HIMSELF, AND  
3 THE PROPERTY INTEREST IS NOT THAT OF THE BENEFICIARY. BY  
4 DEFINITION --

5 THE COURT: WELL, THEN ISN'T THE ANSWER MADE TO  
6 THAT THAT YOUR CLIENT HAD CONTROL OF IT; IN OTHER WORDS, THEY  
7 ARGUE THAT HE WAS THE ONE THAT GAVE THE ORDERS WHERE IT WOULD  
8 BE SPENT?

9 MS. SELIGMAN: YOUR HONOR, I --

10 THE COURT: I BELIEVE YOU CORRECTLY STATED, I  
11 THINK, THE WAY IT GOES, AND I THINK THEN THEY MAKE THAT  
12 RESPONSE OR SOMETHING LIKE THAT.

13 MS. SELIGMAN: WELL, YOUR HONOR, THAT WOULD BE NO  
14 DIFFERENT FROM ANY CONSTRUCTIVE TRUST CASE. THE THEORY OF  
15 CONSTRUCTIVE TRUST IS --

16 THE COURT: SOMEBODY HAS TO DO IT.

17 MS. SELIGMAN: WELL, IS THAT AN EMPLOYEE OR AN  
18 AGENT MISHANDLES FUNDS IN SOME WAY AND THAT THE BENEFICIARY  
19 IS ENTITLED TO RECLAIM THOSE FUNDS BECAUSE EQUITY DOES NOT  
20 WANT TO LEAVE THEM IN THE HANDS OF THE AGENT OR EMPLOYEE.

21 IN ANY CASE WHERE THERE IS AN AGENT OR EMPLOYEE, BY  
22 DEFINITION THERE WOULD BE A THEORY OF CONTROL. IT'S NO  
23 DIFFERENT FROM THIS CASE. BUT NONETHELESS, UNDER FUNDAMENTAL  
24 COMMON LAW PROPERTY RULES, THE PROPERTY INTEREST RESIDES WITH  
25 THE EMPLOYEE OR THE AGENT WHEN HE HAS THE PROFITS OR THE

1 PROCEEDS OF, FOR EXAMPLE, THE SALE ON BEHALF OF HIS  
2 PRINCIPAL.

3 SO THEIR ARGUMENT SIMPLY DOESN'T GET THEM ANYWHERE  
4 BECAUSE WHILE IT'S TRUE THAT THAT IS THE CASE IN CONSTRUCTIVE  
5 TRUST CASES, IT SIMPLY IS NOT THE CASE THAT THAT QUALIFIES IT  
6 AS A 641 CASE.

7 AN EXAMPLE, YOUR HONOR, IS THE CASE UNITED STATES  
8 VERSUS FREEMAN, WHICH IS, IN FACT, A SECTION 641 CASE, IN  
9 WHICH JUDGE ORRICK IN THE NORTHERN DISTRICT OF CALIFORNIA  
10 DISMISSED THE CASE ON THE GROUND THAT THE CONSTRUCTIVE TRUST  
11 THEORY DOES NOT SUFFICE UNDER SECTION 641. AND HIS CLAIM,  
12 THE CLAIM OF THE DEFENDANT, WHICH WAS VERY SIMILAR TO OURS  
13 HERE, WAS THAT INCOME PRIVATELY EARNED THROUGH THE  
14 MISAPPLICATION OF FEDERAL GRANT FUNDS DOES NOT CONSTITUTE  
15 PROPERTY OF THE UNITED STATES CAPABLE OF BEING EMBEZZLED  
16 UNDER SECTION 641.

17 THE COURT AGREED IN THAT CASE AND SAID THAT  
18 PROPERTY THAT IS BEING HELD IN A CONSTRUCTIVE TRUST MAY BE  
19 OWED TO THE GOVERNMENT, AND THAT IS WHAT THE CONSTRUCTIVE  
20 TRUST REMEDY IS FOR, BUT IT DOES NOT SUFFICE TO BRING A CLAIM  
21 UNDER SECTION 641. THE WAY THAT ONE GOES ABOUT RECOVERING  
22 MONEY UNDER THAT IS WITH A CIVIL ACTION IN A COURT OF EQUITY,  
23 ASKING FOR AN ORDER THAT THE PROPERTY BE RETURNED IF IT CAN  
24 BE DEMONSTRATED THAT IT, IN FACT, SHOULD BE, WHICH, OF  
25 COURSE, WE DON'T CONCEDE.

1 MOREOVER, THE CASES MAKE CLEAR THAT THE RIGHT OF  
2 THE GOVERNMENT TO GO INTO A COURT OF EQUITY AND TRY TO  
3 RECOVER THE MONEY IS NOT SUFFICIENT TO CONSTITUTE A PROPERTY  
4 INTEREST UNDER SECTION 641, BECAUSE THE RIGHT OF A  
5 BENEFICIARY TO TRY TO RECOVER WHAT HE CLAIMS TO BE HIS OWN  
6 PROPERTY DOES NOT CONSTITUTE TITLE TO THE PROPERTY. TITLE  
7 RESIDES, LEGAL TITLE RESIDES, UNDER THE CONSTRUCTIVE TRUST  
8 THEORY, WITH THE PERSON HOLDING THE PROPERTY IN CONSTRUCTIVE  
9 TRUST. AND UNDER SECTION 641, THAT SIMPLY DOES NOT SUFFICE.

10 THE COURT: WHO DO YOU UNDERSTAND THAT WAS IN THIS  
11 CASE?

12 MS. SELIGMAN: I UNDERSTAND COUNT 2, THE  
13 ALLEGATIONS OF COUNT 2, TO BE THAT THE DEFENDANTS WERE -- I  
14 UNDERSTAND THE RESPONSE FILED BY THE INDEPENDENT COUNSEL TO  
15 STATE THAT THE DEFENDANTS HELD THE FUNDS IN CONSTRUCTIVE  
16 TRUST. THAT IS THE LEGAL THEORY THAT THEY OFFER FOR WHY THAT  
17 MONEY WAS THE PROPERTY OF THE UNITED STATES.

18 I KNOW OF NO OTHER THEORY OFFERED, AND UNDER THE  
19 CONSTRUCTIVE TRUST THEORY I KNOW THAT IT IS NOT THE PROPERTY  
20 OF THE UNITED STATES.

21 SIMILARLY, NOT ONLY IS THERE THE FREEMAN CASE UNDER  
22 SECTION 641 BUT, IN ADDITION, THERE ARE FOUR MAIL FRAUD CASES  
23 WHICH SIMILARLY, SINCE MCNALLY, HAVE HAD TO ADDRESS WHETHER  
24 MONEY IS THE PROPERTY OF THE UNITED STATES. EACH OF THOSE  
25 CASES AGAIN HAS HELD THAT UNDER THE GOVERNMENT'S THEORY THAT

1 THERE WAS A CONSTRUCTIVE TRUST, THAT A CONSTRUCTIVE TRUST  
2 AGAIN DOES NOT SUFFICE TO SHOW THAT IT IS PROPERTY OF THE  
3 UNITED STATES. THOSE CASES, FOR YOUR HONOR, ARE UNITED  
4 STATES VERSUS HOLZER IN THE SEVENTH CIRCUIT.

5 THE COURT: THEY ARE THE ONES IN YOUR BRIEF?

6 MS. SELIGMAN: NO, YOUR HONOR.

7 THE COURT: IF THEY ARE NOT, THEN --

8 MS. SELIGMAN: THE PROBLEM WAS THAT THIS ARGUMENT  
9 WAS TO BE BY WAY OF REPLY, AND THEY FIRST RAISED THE  
10 CONSTRUCTIVE TRUST THEORY IN THEIR RESPONSE.

11 THE COURT: I HAVE NO OBJECTION TO YOUR PUTTING THE  
12 CASES FORWARD. I WANT TO SAY IF YOU ARE GOING TO START  
13 CITING A STRING OF CASES I'D RATHER HAVE A LETTER FROM YOU  
14 CITING THE CASES RATHER THAN MISS THEM.

15 MS. SELIGMAN: I WILL DO THAT.

16 THE COURT: I'M NOT TRYING TO STOP LEARNING ABOUT  
17 YOUR CASES BUT IN ARGUMENT IT'S HARD TO -- JUST SEND ME A  
18 LETTER WITH THOSE FOUR MAIL FRAUD CASES OR WHATEVER IT IS.

19 MS. SELIGMAN: WE WILL DO THAT, YOUR HONOR.

20 THE COURT: AND A COPY TO THE INDEPENDENT COUNSEL,  
21 AND I WILL KNOW WHAT THEY ARE AND I WILL LOOK AT THEM.

22 MS. SELIGMAN: OKAY, YOUR HONOR.

23 THE COURT: YOUR POINT IS THAT THERE IS LAW  
24 CONSISTENT WITH YOUR POSITION IN SOME OF THESE MAIL FRAUD  
25 CASES.

1 MS. SELIGMAN: YES, IN FOUR CASES, THE SEVENTH,  
2 FIRST, TENTH AND THIRD CIRCUITS. THEY ARE ALL VERY RECENT  
3 CASES. THEY ARE ALL CASES IN WHICH THE GOVERNMENT SOUGHT TO  
4 ARGUE THAT THE DEFENDANT HELD MONEY IN A CONSTRUCTIVE TRUST  
5 THAT BELONGED TO THE BENEFICIARY, AND IN EACH CASE THE COURT  
6 SAID, NO, THAT DOES NOT SUFFICE TO SHOW THAT IT WAS PROPERTY  
7 BELONGING TO THE BENEFICIARY, AS IS REQUIRED UNDER THE MAIL  
8 FRAUD AND WIRE FRAUD STATUTES.

9 FINALLY, YOUR HONOR, TWO OTHER CASES HAVE HELD IF A  
10 PROPERTY INTEREST IS TOO INCHOATE IT WILL NOT SUFFICE UNDER  
11 SECTION 641 AND ALSO THE MAIL AND WIRE FRAUD STATUTES, AND  
12 THOSE CASES WE CAN CITE TO THE COURT LATER ALSO, BUT IT'S  
13 UNITED STATES VERSUS TANA AND UNITED STATES VERSUS EVANS,  
14 WHICH I THINK IS CITED IN OUR OPENING BRIEF.

15 THE POINT THERE IS SIMPLY THAT IF THE GOVERNMENT  
16 WERE TO ASSERT THAT THE PROPERTY INTEREST, WHICH WOULD  
17 SUFFICE UNDER SECTION 641, IS THE RIGHT TO GO INTO A COURT OF  
18 EQUITY AND TO TRY TO PROVE A CONSTRUCTIVE TRUST, THAT THAT IS  
19 SIMPLY TOO INCHOATE.

20 IN ONE OF THE CASES, TANA, THE COURT SAID THAT THE  
21 GOVERNMENT'S SECURITY INTEREST IN ASSETS THAT WERE ALLEGEDLY  
22 MISHANDLED SIMPLY DID NOT SUFFICE. IT JUST WASN'T THE KIND  
23 OF THING THAT SUFFICES TO BRING A CRIMINAL PROSECUTION.

24 SO WE WOULD ARGUE, YOUR HONOR, WITH RESPECT TO  
25 SECTION 641 THAT, FIRST OF ALL, THERE IS NO PROPERTY OF THE

1 UNITED STATES INVOLVED; THAT UNDER THE ONLY LEGAL THEORY THE  
2 INDEPENDENT COUNSEL HAS ARTICULATED, THE PROPERTY INTEREST  
3 RESIDES IN FACT WITH THE DEFENDANTS AND NOT WITH THE UNITED  
4 STATES; THAT THE RIGHT TO TRY TO HAVE THAT PROPERTY INTEREST  
5 RETURNED TO THE UNITED STATES IS NOT IN ITSELF A PROPERTY  
6 INTEREST AND, IN SHORT, THAT THE REQUIREMENT THAT THERE BE  
7 PROPERTY OF THE UNITED STATES AT ISSUE SIMPLY IS NOT MET.

8 WITH RESPECT TO COUNT 3, THE ISSUE IS SOMEWHAT THE  
9 SAME. WE ARGUE AS A PRELIMINARY MATTER, UNDER COUNT 3, THE  
10 WIRE FRAUD CLAIM, THAT THERE IS NO SUFFICIENT ALLEGATION THAT  
11 THERE WAS ANY PROPERTY OF THE UNITED STATES AT ALL. IT'S  
12 QUITE CLEAR, IN REVIEWING COUNT 3 AND THE PARAGRAPHS  
13 INCORPORATED IN COUNT 3 BY REFERENCE, THAT AS DRAFTED IT WAS  
14 A CONSPIRACY TO DEPRIVE THE UNITED STATES OF THE FAITHFUL AND  
15 HONEST SERVICES OF ITS EMPLOYEES.

16 IT WAS A THEORY THAT WAS WELL ACCEPTED IN EVERY  
17 CIRCUIT UNTIL THE MCNALLY AND CARPENTER CASES IN THE SUPREME  
18 COURT. IN THE LAST YEAR OR SO THAT LAW HAS ESSENTIALLY BEEN  
19 CHANGED DRAMATICALLY. THERE ARE A TREMENDOUS NUMBER OF  
20 PARAGRAPHS IN THE INDICTMENT THAT SEEM TO ALLEGE A  
21 DEPRIVATION OF THE FAITHFUL AND HONEST SERVICES OF EMPLOYEES  
22 THAT IN LIGHT OF MCNALLY AND CARPENTER HAVE NO BEARING ON  
23 THIS CASE WHATSOEVER.

24 THE COURT: I THINK I UNDERSTAND WHAT YOU ARE  
25 SAYING. IN THAT COUNT, HOWEVER, IN COUNT 1 I'M TALKING



1 ABOUT, WHICH IS INCORPORATED, RIGHT?

2 MS. SELIGMAN: CERTAIN PARAGRAPHS ARE, ONLY CERTAIN  
3 ONES.

4 THE COURT: YES. DO THEY NOT INCORPORATE SOME OF  
5 THE ALLEGED AGREEMENTS TO VIOLATE SPECIFIC STATUTES THAT  
6 WOULD COME WITHIN THE SCOPE OF THE WIRE FRAUD STATUTE?

7 MS. SELIGMAN: YOUR HONOR, I BELIEVE THE PARAGRAPHS  
8 INCORPORATED PREDOMINANTLY ARE THE ONES, AND I CAN CHECK THE  
9 SPECIFICS --

10 THE COURT: WELL, I WILL CHECK IT, TOO.

11 MS. SELIGMAN: IT'S PREDOMINANTLY THE ONES THAT  
12 ALLEGE THE MANNER IN WHICH THE ARMS WERE TRANSFERRED TO IRAN,  
13 THE AMOUNT OF MONIES THAT WERE RECEIVED, THE AMOUNT THAT WAS  
14 RETURNED TO THE UNITED STATES GOVERNMENT AND THE FACT OF  
15 TRANSFER.

16 THE COURT: SO YOUR POINT IS THAT BY REFERENCE  
17 BACK, THEY DO NOT STATE THE TYPE OF FRAUD COMPREHENDED WITHIN  
18 THE WIRE FRAUD STATUTE?

19 MS. SELIGMAN: WELL, I WILL PUT IT THIS WAY: WHAT  
20 THEY DO IS HAVE NUMEROUS PARAGRAPHS, AND I THINK WE CITED  
21 SOME OF THESE IN OUR OPENING BRIEF, WHICH STATE THAT THE --  
22 THAT THERE WAS MISLEADING OR THAT THERE WERE SOMEHOW  
23 DECEPTIVE PRACTICES BY THE DEFENDANTS. THEY ARE ALLEGATIONS  
24 THAT ARE THE PROTOTYPICAL ALLEGATIONS IN MAIL FRAUD CASES OR  
25 WIRE FRAUD CASES WHEN THE CLAIM IS NOT THAT MONEY OR PROPERTY

1 IN PARTICULAR WAS DEFRAUDED OR THAT THE GOVERNMENT WAS  
2 DEFRAUDED OF MONEY OR PROPERTY BUT OF FAITHFUL SERVICES.

3 THE COURT: WELL, I UNDERSTAND THAT ISSUE. I'VE  
4 WRITTEN ON THAT IN PERHOLTZ.

5 MS. SELIGMAN: RIGHT.

6 THE COURT: AND APPARENTLY THE COURT'S VIEW OF IT  
7 HAS BEEN SUSTAINED. SO I'M AWARE OF THAT. I'M TRYING TO GET  
8 YOUR ARGUMENT AS TO THE OVERLAP BETWEEN THE FIRST COUNT AND  
9 THE THIRD COUNT.

10 MS. SELIGMAN: OKAY. WELL, WITH RESPECT TO THE  
11 THIRD COUNT, OUR PRINCIPAL ARGUMENT IS THAT THE COUNT WAS  
12 DRAFTED AS A DEPRIVATION OF FAITHFUL AND HONEST SERVICES  
13 COUNT, AND THAT THE ONLY ALLEGATIONS, WITH ONE EXCEPTION THAT  
14 I WILL GET TO, THAT THE ONLY ALLEGATIONS WERE INTANGIBLE.  
15 THEY WERE NOT PROPERTY OR MONETARY.

16 THE COURT: AND THAT'S NOT THE KIND COMPREHENDED  
17 WITHIN THE CASES.

18 MS. SELIGMAN: MCNALLY AND CARPENTER, EXACTLY.  
19 THERE IS ONE COUNT -- ONE PARAGRAPH, I AM SORRY, I BELIEVE  
20 IT'S PARAGRAPH 4, WHICH STATES THAT AGAIN THE PROCEEDS OF THE  
21 ARMS TRANSFERS WERE CONVERTED TO THE USE OF THE DEFENDANTS,  
22 IN EFFECT. OUR ARGUMENT IS THAT THE GRAND JURY NEVER CLAIMED  
23 THAT THOSE MONIES BELONGED TO THE UNITED STATES. AT THE  
24 TIME, IN THE PRE-MCNALLY PERIOD, THERE WOULD HAVE BEEN NO  
25 REQUIREMENT OF THAT ALLEGATION. THERE IS NO SUCH ALLEGATION,

1 THAT I SEE, IN COUNT 3.

2           THERE IS A CLAIM THAT THE DEFENDANTS GENERATED AND  
3 DIVERTED PART OF THE PROCEEDS OF THE TRANSFER OF UNITED  
4 STATES WEAPONS TO IRAN AND DIVERTED PART OF THE REALIZABLE  
5 VALUE OF SUCH WEAPONS FOR PURPOSES UNAUTHORIZED BY LAW. IT  
6 NEVER SAYS WHO THE MONEY BELONGED TO. THERE IS NO ALLEGATION  
7 THAT IT WAS PROPERTY OF THE UNITED STATES. UNDER MCNALLY AND  
8 CARPENTER, TO DEFRAUD THE UNITED STATES GOVERNMENT YOU HAVE  
9 TO HAVE A DEPRIVATION OF THE PROPERTY OR A SCHEME TO DEFRAUD  
10 THE UNITED STATES GOVERNMENT OF MONEY OR PROPERTY.

11           THE INDEPENDENT COUNSEL RESPONDS, IN EFFECT, SAYING  
12 THAT COUNT 3 STATES AN OFFENSE BECAUSE THE GOVERNMENT HAD A  
13 PROPERTY INTEREST IN THE ARMS SALE PROCEEDS, I.E., THE VALUE  
14 THAT WAS REALIZED FROM THE GOVERNMENT ARMS SALES. THAT'S IN  
15 THEIR RESPONSE.

16           WE DON'T IN ANY WAY ACKNOWLEDGE THAT THAT SUFFICES  
17 TO OVERCOME THE FACT THAT THE INDICTMENT DOESN'T SAY ANYWHERE  
18 THAT IT WAS PROPERTY OF THE UNITED STATES, BUT ASSUMING THAT  
19 IT DOES, THAT IN ITSELF IS NOT SUFFICIENT, BECAUSE, AGAIN,  
20 THAT IS A CONSTRUCTIVE TRUST THEORY. THEY ARE ADVANCING THE  
21 SAME THEORY UNDER COUNT 3.

22           THE COURT: IT'S TOO INCHOATE?

23           MS. SELIGMAN: IT'S TOO INCHOATE, AND ALSO UNDER  
24 THE FOUR CASES THAT I MENTIONED EARLIER AND ALSO UNDER THE  
25 FREEMAN CASE WITH RESPECT TO SECTION 641, THIS SIMPLY IS A

1 UNANIMOUS OR AN OVERWHELMING VIEW, THAT I'M AWARE OF, THAT  
2 THE MERE FACT THAT PROPERTY IS HELD IN CONSTRUCTIVE TRUST FOR  
3 THE GOVERNMENT DOES NOT MEAN THAT THE GOVERNMENT HAS A  
4 PROPERTY INTEREST IN THAT MONEY SUFFICIENT TO WARRANT A MAIL  
5 OR WIRE FRAUD PROSECUTION, JUST AS IT DOESN'T A SECTION 641  
6 PROSECUTION.

7           SO, IN A SENSE, THE ANSWER IS THE SAME BECAUSE THEY  
8 HAVE ANSWERED US IN THE SAME WAY. WITH RESPECT TO BOTH COUNT  
9 2 AND 3, WE SAID, "HOW CAN YOU CLAIM THAT IT'S THE MONEY?  
10 TELL US WHAT LEGAL THEORY THAT MONEY BELONGS TO THE UNITED  
11 STATES." THEY HAVE SAID UNDER A CONSTRUCTIVE TRUST THEORY.

12           IN COUNT 3 WE DON'T EVEN BELIEVE THEY HAVE A RIGHT  
13 TO MAKE THAT ARGUMENT UNDER THE ALLEGATIONS OF THE  
14 INDICTMENT, BUT ASSUMING THAT THEY DO, UNDER NEITHER COUNT 2  
15 NOR COUNT 3 CAN THEY DEMONSTRATE THAT THE PROPERTY INTEREST  
16 WAS THAT OF THE UNITED STATES AS OPPOSED TO ONE THAT RESIDED  
17 WITH THE DEFENDANTS, WHICH THE UNITED STATES MIGHT HAVE HAD  
18 THE RIGHT TO GO AFTER BY GOING TO A COURT OF EQUITY AND  
19 TRYING TO HAVE IT RECOVERED THAT WAY.

20           THE COURT: THANK YOU.

21           MS. SELIGMAN: THANK YOU.

22           MR. GREEN: GOOD MORNING, YOUR HONOR, BRUCE GREEN  
23 FOR THE GOVERNMENT.

24           YOUR HONOR, THE DEFENDANT NORTH'S CHALLENGE TO  
25 COUNTS 2 AND 3 REALLY RISE AND FALL ON THIS SAME ISSUE. AS

1 THE DEFENDANT READS THE INDICTMENT --

2 THE COURT: WELL, THERE IS ANOTHER ISSUE I HOPE YOU  
3 WILL ADDRESS. WHY MUST THE JURY HAVE TO WADE THROUGH  
4 INSTRUCTIONS FROM THIS COURT ELABORATING AND REELABORATING  
5 AND CHASING ITSELF BACK AND FORTH OVER THREE COUNTS, WHEN THE  
6 SUBJECT MATTER, WHATEVER THE TECHNICAL PROBLEMS ARE  
7 CONCERNED, IS ALL THE SAME SET OF FACTS, AND WHEN NO JUDGE,  
8 THAT I'M AWARE OF, SHOULD THERE BE A CONVICTION ON COUNT 1,  
9 WOULD DO ANYTHING MORE THAN GIVE CONCURRENT SENTENCES ON THE  
10 OTHER TWO COUNTS ANYHOW?

11 I JUST DON'T UNDERSTAND WHY THE PROSECUTION IS  
12 TAKING ALL THIS BAGGAGE INTO THE CASE WHICH REALLY IS  
13 PERIPHERAL TO WHAT THE ASSIGNMENT OF THE INDEPENDENT COUNSEL  
14 WAS AND WHAT THE ISSUE IN THE CASE IS, ASSUMING FOR A MOMENT  
15 THAT COUNT 1 STANDS. THAT'S WHAT I'M HAVING ENORMOUS  
16 DIFFICULTY WITH, BECAUSE I HAVE THE JOB OF TRYING THE CASE,  
17 NOT RESOLVING WHETHER SOME DECISION OF A NEW JERSEY COURT CAN  
18 BE SO TRANSLATED INTO THIS CASE THAT I CAN SOMEHOW GET SOME  
19 SORT OF THEORY THAT THIS MONEY, WHEN IT DISAPPEARED INTO AN  
20 ACCOUNT WHERE THERE IS NO ACCOUNTING, WAS STOLEN. I MEAN, I  
21 WANT YOU TO ADDRESS THAT AS WELL AS YOUR LEGAL ARGUMENTS, IF  
22 YOU WOULD, BECAUSE I SIMPLY DON'T UNDERSTAND IT.

23 MR. GREEN: LET ME BEGIN BY ADDRESSING YOUR HONOR'S  
24 QUESTION AND THEN TURN TO THE LEGAL SUFFICIENCY OF COUNTS 2  
25 AND 3.

1           YOUR HONOR, IN THIS CASE, THE DEFENDANT NORTH IS  
2 CHARGED WITH VERY SERIOUS CRIMES WHICH INVOLVED A CONTINUOUS  
3 COURSE OF CONDUCT GOING BACK TO THE DIVERSION, LEADING UP TO  
4 THE OBSTRUCTION OF JUSTICE. AND WE SUBMIT THAT IT'S WITHIN  
5 THE GOVERNMENT'S DISCRETION TO CHARGE ALL OR MANY OF THE  
6 VARIOUS CRIMES THAT THE DEFENDANT NORTH COMMITTED IN THIS  
7 CASE.

8           THE COURT: I HAVEN'T QUESTIONED THE DISCRETION.  
9 I'VE ASKED WHY. THAT'S A WHOLLY DIFFERENT THING THAN  
10 QUESTIONING YOUR DISCRETION. WHAT PURPOSE DOES IT SERVE IN  
11 THE CASE?

12           MR. GREEN: WE THINK IT'S IMPORTANT TO PUT BEFORE  
13 THE JURY, YOUR HONOR, THE FULL SCOPE OF THE DEFENDANT'S  
14 CRIMINAL CONDUCT IN THIS CASE. AND WE ALSO RECOGNIZE THAT  
15 THE DIFFERENT CHARGES IN THE INDICTMENT DO CONTAIN DIFFERENT  
16 ELEMENTS AND IT WOULD BE POSSIBLE FOR THE JURY, WITHIN ITS  
17 FUNCTION, TO FIND --

18           THE COURT: WELL, IT MIGHT BE PRACTICALLY POSSIBLE,  
19 IF YOU CAN UNDERSTAND HOW TO CHARGE IT.

20           ALL RIGHT. LET'S HEAR YOUR LEGAL ARGUMENT THEN.

21           MR. GREEN: YOUR HONOR, THE DEFENSE CONSTRUES COUNT  
22 2 AS A CHARGE PREDICATED UNDER THE CONSTRUCTIVE TRUST THEORY,  
23 NOT AN ARGUMENT WHICH THEY MADE IN THEIR INITIAL BRIEF BUT AN  
24 ARGUMENT WHICH THEY MAKE HERE TODAY.

25           THE COURT: BUT THEY HAVE EVERY RIGHT TO COME HERE

1 AND RESPOND. ONE OF THE REASONS I SET THESE SIGNIFICANT  
2 MOTIONS DOWN FOR ARGUMENT WAS THAT I DID NOT WANT TO DEPRIVE  
3 THEM OF AN OPPORTUNITY TO RESPOND.

4 MR. GREEN: THAT'S CORRECT, YOUR HONOR. MY POINT  
5 IS THAT COUNT 2 IS NOT, IN FACT, PREDICATED ON A CONSTRUCTIVE  
6 TRUST THEORY. THAT IS CLEAR FROM READING BOTH COUNT 2 AND  
7 FROM READING THE GOVERNMENT'S BRIEF. THE DEFENSE FASTENS ON  
8 A FOOTNOTE IN WHICH THE GOVERNMENT MAKES AN ALTERNATIVE  
9 ARGUMENT.

10 BUT, IN FACT, THE EMBEZZLEMENT CHARGED IN THIS CASE  
11 IS REALLY QUITE STRAIGHTFORWARD AND NOT NOVEL AND NOT BASED  
12 UPON A CONSTRUCTIVE THEORY. THE GOVERNMENT'S THEORY IS THAT  
13 IN THIS CASE THE UNITED STATES SOLD ITS WEAPONS TO ELEMENTS  
14 IN IRAN AND PAYMENTS WERE MADE, BY REPRESENTATIVES OF THE  
15 IRANIANS, FOR THOSE WEAPONS, AND THAT THE PAYMENTS MADE WERE  
16 MONIES BELONGING TO THE UNITED STATES, RECEIVED IN SWISS  
17 ACCOUNTS OF THE CO-DEFENDANT SECORD AS AN AGENT.

18 WE ARE NOT IN ANY SENSE RELYING ON A CONSTRUCTIVE  
19 THEORY. THE LAW IS WELL SETTLED, AND I DON'T UNDERSTAND THAT  
20 THE DEFENSE IS CHALLENGING THE WELL SETTLED LAW, THAT WHERE  
21 AN EMPLOYEE OR AN AGENT SELLS PROPERTY BELONGING TO THE  
22 EMPLOYER OR PRINCIPAL, THE PROCEEDS OF THAT PROPERTY BELONG  
23 TO THE EMPLOYER, NOT TO THE EMPLOYEE OR TO THE AGENT. THE  
24 FAILURE TO RETURN THOSE PROCEEDS TO THE EMPLOYER OR TO THE  
25 PRINCIPAL IS AN EMBEZZLEMENT, AND WE CITE A NUMBER OF CASES

1 IN OUR BRIEF FOR THAT PROPOSITION.

2 THAT'S ALL REALLY THAT THE INDICTMENT ALLEGES IN  
3 THIS CASE, THAT ON BEHALF OF THE UNITED STATES, PURSUANT TO A  
4 PRESIDENTIAL FINDING WHICH SPECIFICALLY AUTHORIZED THE SALE  
5 OF UNITED STATES WEAPONS TO ELEMENTS IN IRAN, AT A TIME WHEN  
6 IT WOULD HAVE BEEN A CRIME FOR PRIVATE INDIVIDUALS TO SELL  
7 WEAPONS TO IRAN, ON BEHALF OF THE UNITED STATES, PURSUANT TO  
8 THAT FINDING, THE DEFENDANT NORTH NEGOTIATED WITH  
9 REPRESENTATIVES OF ELEMENTS IN IRAN FOR THE SALE OF THOSE  
10 WEAPONS; THAT HE AGREED UPON WHAT PRICE WOULD BE PAID AND  
11 WHAT WEAPONS WOULD BE DELIVERED; THAT AT DEFENDANT NORTH'S  
12 DIRECTION, PURSUANT TO THE FINDING, PAYMENTS WERE MADE BY  
13 REPRESENTATIVES OF IRAN INTO SECORD'S SWISS BANK ACCOUNTS  
14 WHICH WERE SUBJECT TO THE INFLUENCE OR CONTROL OF DEFENDANT  
15 NORTH, AND THAT PURSUANT TO THE AGREEMENT OF NORTH AND  
16 SECORD, SECORD DID NOT RETURN THOSE PROCEEDS TO THE UNITED  
17 STATES AS HE WAS RESPONSIBLE TO DO. INSTEAD, HE RETURNED THE  
18 SMALLER PORTION OF THOSE PROCEEDS AND USED THE REST FOR  
19 UNAUTHORIZED PURPOSES UPON WHICH THE DEFENDANTS NORTH AND  
20 SECORD AGREED.

21 THE COURT: WHAT DO YOU MEAN BY THAT, UNAUTHORIZED  
22 PURPOSES? YOU DON'T KNOW WHERE THE MONEY WENT, DO YOU?

23 MR. GREEN: WELL, THE INDICTMENT --

24 THE COURT: YOU CAN'T TRACE THE MONEY. YOU HAVE NO  
25 IDEA WHERE IT WENT.



1 MR. GREEN: YOUR HONOR, BOTH THE INDICTMENT AND THE  
2 BILL OF PARTICULARS ALLEGE THAT --

3 THE COURT: I'M TALKING ABOUT FACTS. SUPPOSE THE  
4 MONEY WENT FOR HUMANITARIAN AID IN NICARAGUA. IS THAT AN  
5 UNAUTHORIZED PURPOSE?

6 MR. GREEN: YOUR HONOR, BY "UNAUTHORIZED", WHAT I  
7 WAS REFERRING TO IS OUTSIDE THE SCOPE OF THE PRESIDENTIAL  
8 FINDING WHICH AUTHORIZED THE SALE OF UNITED STATES WEAPONS TO  
9 IRAN. IF THE MONEY HAD BEEN USED EVEN TO PROVIDE  
10 HUMANITARIAN AID TO THE CONTRAS IN NICARAGUA THAT STILL WOULD  
11 HAVE BEEN AN UNAUTHORIZED PURPOSE. THE RESPONSIBILITY OF THE  
12 DEFENDANTS NORTH AND SECORD, UPON RECEIVING THE MONEY IN  
13 PAYMENT FOR ARMS SOLD TO ELEMENTS OF IRAN, WAS TO RETURN THAT  
14 MONEY TO THE UNITED STATES.

15 THE COURT: BEAR WITH ME. ASSUME FOR A MOMENT THE  
16 MONEY IS OUT THERE, THIS PROFIT MONEY IS OUT THERE, AND THEN  
17 THE SECRETARY OF STATE OR THE HEAD OF THE CIA OR SOMEBODY  
18 ELSE SAYS, "WELL, WE THINK SOME OF IT OUGHT TO BE USED TO  
19 HELP THIS VENTURE OR THAT VENTURE OR THE OTHER VENTURE," NOT  
20 NECESSARILY A COVERT VENTURE, AND IT'S USED FOR THAT PURPOSE;  
21 ARE YOU SAYING THAT IT IS STILL THEFT OF THAT MONEY?

22 MR. GREEN: YOUR HONOR, MY --

23 THE COURT: I DON'T FOLLOW THAT.

24 MR. GREEN: MY RESPONSE TO THAT IS THREE-FOLD. THE  
25 FIRST POINT IS THAT EVEN ASSUMING, FOR SAKE OF ARGUMENT, AND

1 THIS IS CLEARLY NOT WHAT'S ALLEGED HERE, THAT --

2 THE COURT: WELL, I'M NOT DEALING WITH ALLEGATIONS.  
3 I'M DEALING WITH THE CASE.

4 MR. GREEN: OKAY. EVEN ASSUMING THAT SET OF FACTS,  
5 WE SUBMIT THAT THAT WOULD BE AN EMBEZZLEMENT OF GOVERNMENT  
6 PROPERTY, YOUR HONOR.

7 THE COURT: AND HOW WOULD I INSTRUCT THE JURY ON  
8 THAT? I WOULD SAY THAT THE MONEY WAS EMBEZZLED BY MR. NORTH  
9 IF YOU FIND BEYOND A REASONABLE DOUBT THAT IT WAS DIVERTED TO  
10 A PURPOSE THAT THE SECRETARY OF STATE DESIRED AND WHICH THE  
11 CIA INSTRUCTED HIM TO DO?

12 MR. GREEN: WELL, YOUR HONOR --

13 THE COURT: NOW, COME ON. HOW ARE WE GOING TO DEAL  
14 WITH THAT?

15 MR. GREEN: WELL, I THINK THAT THE ANSWER LIES IN  
16 TWO OTHER POINTS WHICH I'D LIKE TO MAKE. THE FIRST POINT --  
17 THE SECOND POINT, I SUPPOSE, IS THAT THAT IS NOT WHAT IS  
18 ALLEGED HERE. WHAT THE GOVERNMENT HAS ALLEGED AND IS  
19 PREPARING TO PROVE IS THAT THE MONEY WENT, IN LARGE PART, TO  
20 FUND THE CONTRAS IN NICARAGUA. IT WENT FOR VARIOUS OTHER  
21 PURPOSES WHICH WE'VE ALLEGED AND SPECIFIED IN THE BILL OF  
22 PARTICULARS, AND THOSE INCLUDE, WE'VE ALLEGED, THE PERSONAL  
23 PROFIT OF DEFENDANT SECORD AND HAKIM.

24 THE COURT: WELL, EMBEZZLEMENT REQUIRES YOU, DOES  
25 IT NOT, TO TRACE FUNDS? THE THEORY IN YOUR NUMBER ONE COUNT

1 DOESN'T REQUIRE YOU TO IDENTIFY FUNDS. BUT DOES NOT YOUR  
2 EMBEZZLEMENT CHARGE REQUIRE YOU TO TRACE FUNDS? AND IS IT  
3 NOT OBVIOUS THAT WHATEVER THE MONEY WAS, IT WAS ALL  
4 COMMINGLED WITH ALL KINDS OF LEGITIMATE FUNDS? WHERE ARE WE  
5 THEN?

6 MR. GREEN: WELL, TO BEGIN WITH, YOUR HONOR, WE ARE  
7 PREPARED TO PROVE THE ALLEGATIONS BY INTRODUCING, AMONG OTHER  
8 THINGS, RECORDS OF SWISS BANK ACCOUNTS, WHICH WE THINK WILL  
9 SHOW WHERE THIS MONEY WENT; THAT THE MONEY DID GO, IN FACT,  
10 IN LARGE PART, TO SUPPORT THE CONTRAS IN NICARAGUA.

11 NOW, ASSUMING THAT IT MIGHT NOT BE A CRIME OR WOULD  
12 BE MERELY A TECHNICAL VIOLATION OF THE EMBEZZLEMENT STATUTE,  
13 IF IN THIS CASE THE SECRETARY OF STATE HAD AUTHORIZED THESE  
14 USES OF THE MONEY EVEN THOUGH IT WAS OUTSIDE THE SPECIFIC  
15 FINDING ISSUED BY THE PRESIDENT IN THIS CASE, THAT'S NOT WHAT  
16 WE'VE ALLEGED HERE. WHAT WE'VE ALLEGED HERE IS THAT THE  
17 MONEY WENT FOR PURPOSES THAT WERE NOT AUTHORIZED AND, INDEED,  
18 IN THIS CASE COULD NOT HAVE BEEN AUTHORIZED, BECAUSE TO THE  
19 EXTENT THAT THAT MONEY BELONGED TO THE CIA AND TO THE  
20 GOVERNMENT, THE CIA COULD NOT HAVE USED IT TO FUND THE ARMING  
21 OF THE CONTRAS IN NICARAGUA, BECAUSE OF THE BOLAND AMENDMENT,  
22 AND THAT'S THE ARGUMENT THAT YOUR HONOR HAS ALREADY HEARD  
23 WITH RESPECT TO POINT ONE, COUNT 1.

24 SO IN THIS CASE, YOUR HONOR'S QUESTION, I THINK,  
25 DOES NOT ADDRESS THE ALLEGATIONS IN THIS CASE. WE ARE

1 PREPARED TO PROVE AND WE'VE ALLEGED THAT THE MONEY WENT, IN  
2 LARGE PART, TO FUND THE CONTRAS IN NICARAGUA AND WENT FOR  
3 OTHER PURPOSES NOT AUTHORIZED.

4 IN THIS CASE, AT LEAST IN THE DEFENSE BRIEF, THE  
5 DEFENDANTS PUT A LOT OF EMPHASIS ON THE FACT THAT THE MONEY  
6 WENT TO SECORD INITIALLY, WENT INTO SECORD'S SWISS BANK  
7 ACCOUNTS. AND I WOULD JUST LIKE TO ADDRESS THAT POINT  
8 BECAUSE THE SUGGESTION IS MADE IN THE DEFENDANT'S BRIEF THAT  
9 SOMEHOW SECORD IS A PURCHASER OF THE WEAPONS. AND I'D JUST  
10 LIKE TO POINT OUT, IT'S QUITE CLEAR FROM READING THE  
11 INDICTMENT THAT THAT IS NOT WHAT IS ALLEGED IN THIS CASE.

12 THE INDICTMENT ALLEGES THAT SECORD WAS OPERATING AS  
13 AN AGENT OF THE GOVERNMENT FOR THE RECEIPT OF UNITED STATES  
14 GOVERNMENT FUNDS FROM REPRESENTATIVES OF ELEMENTS IN IRAN.  
15 AND SO I DON'T THINK AN ARGUMENT CAN BE MADE THAT IN THIS  
16 CASE THE GOVERNMENT WAS NOT ENTITLED TO THAT MONEY BECAUSE  
17 SOMEHOW SECORD WAS A PURCHASER.

18 THE COURT: YOUR POSITION IS THAT HE AND MR. HAKIM  
19 WERE ENGAGED IN AN ELEEMOSYNARY ACTIVITY? NOW, COME ON.

20 MR. GREEN: THAT CERTAINLY IS NOT THE ALLEGATIONS  
21 IN THIS CASE, WHATEVER THE DEFENSE MIGHT BE.

22 THE COURT: IF THAT'S WHAT YOU ARE TELLING ME, THEY  
23 WEREN'T ENGAGED IN ELEEMOSYNARY ACTIVITIES. WHATEVER THEY  
24 WERE ENGAGED IN, IT WAS THEIR BUSINESS, WASN'T IT?

25 MR. GREEN: YOUR HONOR --

1 THE COURT: I MEAN, I REALLY NEED TO GET BEYOND  
2 LEGAL THEORY. AFTER MORE THAN EIGHT MONTHS, I'M BEGINNING TO  
3 KNOW SOMETHING ABOUT THE CASE.

4 MR. GREEN: YES, YOUR HONOR.

5 THE COURT: BUT YOU ARE TELLING ME YOU WANT TO  
6 PERSIST ON THESE COUNTS, BECAUSE TECHNICALLY THE ALLEGATIONS  
7 ARE SUFFICIENT?

8 MR. GREEN: WELL, WE THINK MORE THAN TECHNICALLY,  
9 YOUR HONOR. IF THE SUGGESTION IS THAT SOMEHOW, OF THE \$30  
10 MILLION THAT WAS PAID BY REPRESENTATIVES OF IRAN FOR U.S.  
11 GOVERNMENT ARMS, SECORD AND HAKIM WERE ENTITLED TO ABOUT \$18  
12 MILLION OF THAT BECAUSE THEY WERE BUSINESSMEN, WE SUBMIT THAT  
13 THAT IS NOT, IN FACT, LEGALLY CORRECT ON THE INDICTMENT IN  
14 THIS CASE.

15 TO BEGIN WITH, THERE WAS CERTAINLY NO ARM'S LENGTH  
16 AGREEMENT, AS THE INDICTMENT ALLEGES, BETWEEN NORTH AND  
17 SECORD AND HAKIM WHICH WOULD HAVE ENTITLED SECORD AND HAKIM  
18 TO MAKE A PROFIT ON THE SALE OF THE ARMS. THE INDICTMENT,  
19 QUITE CLEARLY, ALLEGES THAT NORTH CONTROLLED HOW THE  
20 ADDITIONAL MONEY WAS SPENT THAT WAS NOT RETURNED TO THE CIA.  
21 AND SO THIS ISN'T A CASE WHERE PRIVATE BUSINESSMEN ACTING AT  
22 ARM'S LENGTH NEGOTIATE A DEAL IN EXCHANGE FOR THEIR ACTING AS  
23 INTERMEDIARIES.

24 THE COURT: THIS WASN'T PUT UP FOR COMPETITIVE BID.  
25 I UNDERSTAND THAT.

1 MR. GREEN: YOUR HONOR --

2 THE COURT: WHAT DO YOU SAY ABOUT THE THIRD COUNT?

3 MR. GREEN: YOUR HONOR, I THINK THE DEFENSE  
4 ARGUMENT TO COUNT 3 IS ESSENTIALLY THE SAME ARGUMENT IN  
5 RESPONSE TO COUNT 2. I THINK THE INDICTMENT IS CRYSTAL CLEAR  
6 IN ALLEGING THAT THE UNITED STATES WAS DEPRIVED OF MONEY AND  
7 PROPERTY. THE INDICTMENT TRACKS THE LANGUAGE OF THE FRAUD  
8 COUNT AND INDICATES A DEPRIVATION OF MONEY AND PROPERTY. IT  
9 THEN HAS ADDITIONAL PARAGRAPHS WHICH SPECIFY WHAT THAT MONEY  
10 AND PROPERTY IS, NAMELY, THE PROCEEDS OF THE ARMS SALES, AND  
11 FINALLY, INCORPORATES BY REFERENCE ADDITIONAL PARAGRAPHS  
12 CONTAINED IN COUNT 1, WHICH MAKE IT AMPLY CLEAR THAT WHAT THE  
13 GOVERNMENT IS ALLEGING HERE IS THAT THE GOVERNMENT WAS  
14 DEFRAUDED OF THE PROCEEDS OF THE ARMS SALE AND THE REALIZABLE  
15 VALUE OF THE WEAPONS BY FRAUD. AND SO THE DEFENSE ARGUMENT  
16 IN COUNT 3, WE SUBMIT, IS NO STRONGER.

17 THE COURT: AND WHAT WAS THE FRAUD? WAS IT A MONEY  
18 FRAUD OR WAS IT A DEPRIVATION OF THE FAITHFUL SERVICES AND  
19 CARRYING OUT OF ESTABLISHED PROGRAM FRAUD? WHICH WAS IT?

20 MR. GREEN: WELL, THE FRAUD IN COUNT 3 WAS A  
21 BROADLY-BASED FRAUD. IT INCLUDED DEFRAUDING THE GOVERNMENT  
22 OF MONEY AND PROPERTY BY, AMONG OTHER THINGS, CONCEALING.

23 THE COURT: AND WHERE IS THAT ALLEGED IN THE  
24 INDICTMENT? DO YOU RELY ON PARAGRAPH 14?

25 MR. GREEN: YOUR HONOR, COUNT 3, THE SECOND

1 PARAGRAPH, ALLEGES THAT THE DEFENDANTS AND OTHERS KNOWN AND  
2 UNKNOWN, UNLAWFULLY, WILLFULLY AND KNOWINGLY DID DEVISE AND  
3 INTEND TO DEVISE A SCHEME AND ARTIFICE TO DEFRAUD THE UNITED  
4 STATES AND TO OBTAIN MONEY AND PROPERTY BY MEANS OF FALSE AND  
5 FRAUDULENT PRETENSES.

6           THEN, PARAGRAPH 4 REFERS TO THAT THE DEFENDANTS  
7 ACTING IN CONCERT DECEITFULLY AND IMPROPERLY, IN THE  
8 IMPLEMENTATION OF THE IRAN INITIATIVE, GENERATED AND DIVERTED  
9 PART OF THE PROCEEDS OF THE TRANSFER OF THE UNITED STATES  
10 WEAPONS TO IRAN AND DIVERTED PART OF THE REALIZABLE VALUE OF  
11 SUCH WEAPONS. AND, AGAIN, PARAGRAPH 3 OF THAT SAME COUNT  
12 REFERS TO THE FUNDS FROM THE SALE BY THE GOVERNMENT OF THE  
13 UNITED STATES OF ARMS TO ELEMENTS IN IRAN. SO ONE NEED NOT  
14 LOOK TO OTHER PARAGRAPHS IN COUNT 1. THE INDICTMENT, COUNT 3  
15 --

16           THE COURT: CARRIES OVER?

17           MR. GREEN: WELL, COUNT 3 SPECIFICALLY ALLEGES A  
18 DEPRIVATION OF MONEY OR PROPERTY.

19           YOUR HONOR, IF THERE ARE NO FURTHER QUESTIONS.

20           THE COURT: NO.

21           MR. GREEN: THANK YOU.

22           THE COURT: WELL, I'VE BEEN AIDED BY THE ARGUMENTS  
23 OF COUNSEL, AND THE COURT WILL NOW TAKE THE MOTIONS UNDER  
24 ADVISEMENT. I DO HAVE ONE COMMENT THAT I WANT TO ADDRESS TO  
25 AID COUNSEL, AS WELL AS HOPEFULLY BE OF SOME ASSISTANCE TO

1 AMICUS. ACADEMIC DISPUTES WITHIN THE DEPARTMENT OF JUSTICE  
2 INVOLVING INDEPENDENT COUNSEL'S VIEWS CONCERNING APPLICATION  
3 OF THE SEPARATION OF POWERS DOCTRINE TO ASPECTS OF THIS  
4 CRIMINAL CASE SHOULD, I BELIEVE, BE DEBATED SOMEWHERE ELSE.  
5 THE COURT IS NOT CONCERNED WITH THEORIES. RATHER, IT  
6 CONFRONTS THE REALITY OF TRIAL.

7 MOST RESPECTFULLY, THE COURT WISHES TO NOTE THE  
8 PRESIDENT'S AFFIRMATIVE INVOLVEMENT IN THIS CASE SO FAR. I  
9 DO THIS BECAUSE IT APPEARS TO REFUTE THE SUGGESTION THAT  
10 INDEPENDENT COUNSEL IS ACTING IN DISREGARD OF THE PRESIDENT'S  
11 PRIMARY RESPONSIBILITY FOR THE CONDUCT OF FOREIGN AFFAIRS AND  
12 PROTECTION OF NATIONAL SECURITY.

13 AS FAR AS THE COURT IS AWARE, THE PRESIDENT HAS  
14 MADE NO EFFORT WHATSOEVER TO PREVENT THIS CASE FROM GOING  
15 FORWARD. QUITE THE CONTRARY. IN THE FIRST PLACE, THE  
16 ATTORNEY GENERAL INITIATED THIS PROSECUTION OF MR. NORTH,  
17 NAMING HIM AS THE PRIMARY TARGET WHEN HE INVOKED THE ETHICS  
18 IN GOVERNMENT ACT. SINCE THEN, THE PRESIDENT HAS REPEATEDLY  
19 RESPONDED GENEROUSLY TO INDEPENDENT COUNSEL'S REQUESTS.

20 HE IS AIDING, AS FAR AS THE COURT IS AWARE, AND  
21 CERTAINLY NOT RESISTING, THE PREPARATION OF THIS CASE FOR  
22 TRIAL, AND HE HAS MADE ABSOLUTELY NO CLAIM WHATSOEVER OF  
23 EXECUTIVE PRIVILEGE.

24 NOW, TO BE SURE, THIS IS A PROSECUTION OF AN  
25 EMPLOYEE OF THE EXECUTIVE BRANCH WHO WORKED AT THE WHITE



1 HOUSE ON VARIOUS INTELLIGENCE AND FOREIGN RELATIONS  
2 ASSIGNMENTS. HOWEVER, NEITHER NORTH NOR NORTH'S COUNSEL CAN  
3 EVEN PURPORT TO SPEAK FOR THE PRESIDENT OF THE UNITED STATES.  
4 NOR CAN THEY LEGALLY WRAP THEMSELVES IN THE PRESIDENT'S CLOAK  
5 TO JUSTIFY NORTH'S ALLEGED CONDUCT, UNTIL IT APPEARS,  
6 CONTRARY TO THE ALLEGATIONS AND ARGUMENTS HERE AND ELSEWHERE  
7 TO DATE, THAT THE PRESIDENT DIRECTED THE DIVERSION OF THESE  
8 FUNDS, THAT HE DIRECTED THE OBSTRUCTION OF INQUIRIES,  
9 INCLUDING HIS OWN INQUIRY INTO NORTH'S CONDUCT, AND THAT HE  
10 APPROVED OTHER ASPECTS OF THE UNAUTHORIZED, ALLEGEDLY  
11 UNAUTHORIZED, ACTIVITIES SPECIFIED IN THE INDICTMENT.

12 NOW, THIS CASE IS RAPIDLY APPROACHING TRIAL,  
13 PROBABLY LATE JANUARY, AND PRIOR RULINGS OF THIS COURT  
14 ESTABLISH THAT AT LEAST SOME OF THESE COUNTS ARE GOING TO BE  
15 TRIED. I WANT TO REMIND AMICUS AND OTHERS THAT SEPARATION OF  
16 POWERS CONCERNS SHOULD FOCUS ON THE EVIDENCE WHICH WILL BE  
17 BOTH DOCUMENTARY AND TESTIMONIAL. THE COURT CANNOT EXCLUDE  
18 EVIDENCE BY REFERRING TO SEPARATION OF POWERS. IT'S NOT A  
19 RULE OF EVIDENCE. NOBODY HAS EVER SUGGESTED IT WAS.

20 AS TO THE DOCUMENTS WHICH ARE SUBJECT TO  
21 CLASSIFICATION TO PROTECT NATIONAL SECURITY, BOTH CONGRESS  
22 AND THE FEDERAL GOVERNMENT HAVE RECOGNIZED THAT  
23 CLASSIFICATION AND DECLASSIFICATION ARE THE PRIMARY  
24 RESPONSIBILITY OF THE PRESIDENT. THIS CASE IS LITTERED WITH  
25 CLASSIFIED DOCUMENTS, AND THE PRESIDENT'S REPRESENTATIVES

1 HAVE BEEN COOPERATIVE IN ATTEMPTING TO WORK OUT  
2 DECLASSIFICATION OF MANY OF SUCH PAPERS. THE PRESIDENT  
3 CONTINUES TO HAVE STATUTORY AUTHORITY, AND NO DOUBT  
4 CONSTITUTIONAL POWER, TO WITHHOLD ANY LETTER, CABLE,  
5 MEMORANDUM, TAPE RECORDING OR OTHER WRITTEN MATERIAL,  
6 REGARDLESS OF ITS RELEVANCE OR MATERIALITY TO THE CASE, IF HE  
7 DEEMS THAT APPROPRIATE IN TERMS OF THE PREROGATIVES OF HIS  
8 OFFICE. IF HE DOES SO, THE LEGAL EFFECT OF SUCH ACTION ON  
9 THE TRIAL IS FOR THE COURT TO DETERMINE AFTER HEARING THE  
10 PARTIES.

11 BUT A FAR MORE DIFFICULT SITUATION FOR THOSE WHO  
12 MAY HAVE FOREIGN POLICY OR NATIONAL SECURITY CONCERNS IS  
13 PRESENTED BY THE TRIAL TESTIMONY. OVER A PERIOD OF WEEKS OR  
14 MONTHS, GOVERNMENT OFFICIALS, BOTH PAST AND PRESENT,  
15 OFFICIALS WHO ARE ACQUAINTED WITH HIGH SECURITY MATTERS, WILL  
16 BE TESTIFYING. THEY WILL BE SUBJECT TO INTENSE  
17 CROSS-EXAMINATION. THE CONSTITUTION DOES NOT PERMIT THE  
18 COURT TO TAKE THIS TESTIMONY IN SECRET, AS DID THE CONGRESS.  
19 IT MUST BE PUBLIC.

20 MOREOVER, THE COURT HAS VERY LITTLE CONTROL OVER  
21 THE CONTENT OF THE TESTIMONY. I DON'T THINK IT SHOULD HAVE  
22 SUCH CONTROL. THE COURT CAN DEFINE THE BROAD LIMITS OF WHAT  
23 IS RELEVANT BUT IT CANNOT EVEN ATTEMPT TO DEFINE THE PRECISE  
24 SCOPE OF EACH QUESTION AND ANSWER WITHIN THE RELEVANT AREA.

25 BEYOND THIS, ISSUES OF CREDIBILITY WILL REPEATEDLY

1 ARISE BECAUSE MANY OF THESE WITNESSES HAVE BEEN GRANTED  
2 IMMUNITY BY THE PROSECUTION. THIS WILL BRING INTO THE  
3 TESTIMONY QUESTIONS TOUCHING ON MOTIVE OF THE WITNESS AND THE  
4 WITNESS' INVOLVEMENT IN SENSITIVE EVENTS OTHER THAN EVENTS  
5 RELEVANT UNDER THE INDICTMENT. NORTH, AS I HAVE REPEATEDLY  
6 INDICATED, WILL BE GRANTED WIDE LATITUDE TO CROSS-EXAMINE IN  
7 THIS REGARD, AND THE FLOW OF THE TESTIMONY CANNOT BE  
8 CONSTANTLY INTERRUPTED BY CLASSIFICATION EXPERTS SITTING IN  
9 THE AUDIENCE.

10 THE COURT HAS ALREADY REFUSED TO CENSOR DIRECT  
11 TESTIMONY AND IT CANNOT GIVE RULINGS ON THIS TYPE OF  
12 TESTIMONIAL EVIDENCE IN ADVANCE. ACCORDINGLY, IF ON ANALYSIS  
13 THIS IMMINENT PROSPECT GIVES GROUND FOR PRESIDENTIAL ACTION  
14 TO PROTECT ANY PERCEIVED THREAT TO THE FOREIGN POLICY  
15 OBLIGATIONS WHICH THE PRESIDENT HAS OF THE INTELLIGENCE NEEDS  
16 OF THE COUNTRY, THE CONSTITUTION AND THE STATUTES PROVIDE  
17 VARIOUS COURSES OF ACTION HE MAY TAKE.

18 THE COURT HAS A VERY LIMITED ROLE. IT WILL  
19 CONTINUE TO STRIVE FOR A FAIR TRIAL, BUT UNDER THE  
20 CONSTITUTION IT IS FOR THE PRESIDENT, NOT NORTH OR ANY  
21 WITNESS, TO PROTECT THE PREROGATIVES OF THE PRESIDENT'S  
22 OFFICE IF HE DEEMS THEM UNDULY THREATENED.

23 NOW, THE ONLY OTHER MATTER I WISH TO MENTION BEFORE  
24 WE ADJOURN IS THAT I INDICATED IN A PRIOR NOTICE TO COUNSEL  
25 THAT THIS WOULD BE THE OCCASION WHEN WE WOULD DISCUSS

1 SCHEDULING. INTERVENING EVENTS MAKE IT WHOLLY UNNECESSARY TO  
2 DISCUSS ANY SCHEDULING OF IN CAMERA PROCEEDINGS ON NORTH'S  
3 CIPA FILE NOTICE, AND THEREFORE I HAVE NO INTENTION OF  
4 SCHEDULING SUCH HEARINGS, AND THAT'S A MOOT MATTER. I THANK  
5 COUNSEL ON BOTH SIDES FOR THEIR ASSISTANCE.

6 (WHEREUPON, AT 11:50 A.M., THE HEARING ON MOTIONS  
7 WAS CONCLUDED.)

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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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Santa Fezzo

11-22-88

Minnie L. Colchici

11/22/88