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Collection Name	CULVAHOUSE, ARTHUR B.:FILES	***Withdrawer***	DLB 5/14/2014
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ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
164975	MOTION	MEMORANDUM AND ORDER FOLLOWING CIPA 6 IN CAMERA HEARINGS	8	12/12/1988	B1

The above documents were not referred for declassification review at time of processing

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

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
B-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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-- No documents have been withheld. The Independent Counsel and defendant's counsel has seen all documents in classified form.

-- The classified information that has been determined by the heads of the intelligence agencies as too sensitive for public disclosure does not relate to the President's or the Vice President's knowledge of the subject matter of the indictment.

-- Members of Congress have seen or have been briefed about the subject matter and programs of all the classified information which the heads of the intelligence agencies have determined is too sensitive for public disclosure.

-- Independent Counsel Walsh, who has seen all the information, and who has been investigating this matter for the past two years, has affirmatively stated that neither the President nor the Vice President were involved in any illegal activities.

-- Nothing has been withheld from prosecutors or the Court. This simply is a situation where some of the information which has been provided in classified form which the Court found relevant for trial cannot be publicly disclosed without grave damage to national security interests.

THE WHITE HOUSE
WASHINGTON

Date: 12/7/88

TO: WILLIAM J. LANDERS

FROM: **ARTHUR B. CULVAHOUSE, JR**
Counsel to the President

FYI:
We did not release a copy of my letter to Walsh. Fitzwater never
COMMENT:
saw it -- if that is an accurate quote.
ACTION:

Copy to Landers
also in my chronology file

Bill -- we did not release a copy of my letter to Walsh. Fitzwater never saw it -- if that is an accurate quote.

DATE: 12/4/88
PAGE: 97

The Boston Globe

Judge's actions furnish clues North will be brought to trial

By Adam Pertman
Globe Staff

WASHINGTON – The judge in the Iran-contra trial, Gerhard Gesell, appears to be pressing ahead toward a trial for Oliver North, despite President Reagan's announcement last week that he will withhold key documents that North's lawyers insist are essential to his defense.

Gesell held three days of closed-door hearings that ended Friday afternoon on defense motions to dismiss some charges and restore deletions that have been made in classified materials so they could be presented in open court. The judge has said he wants North's trial to begin late next month.

Attorneys for North, a retired Marine lieutenant colonel and former National Security Council aide, have said that many of the deletions – suggested by the White House to the special prosecutor, Lawrence Walsh – eliminate data vital for proving North acted within the law in running his Iran-contra enterprise.

Walsh's office, in court papers, said that a good case can be made by both sides without the top-secret references and that the defense is essentially attempting "graymail" by pressing for full disclosure, even of papers dealing with highly sensitive national security matters.

The term "graymail" was used to imply that North's lawyers want to intimidate Gesell into dropping major charges rather than risk responsibility for allowing government secrets to come out in his courtroom.

The White House increased the pressure on Gesell last week by saying it was up to the judge, rather than the administration, to decide the admissibility of many of the materials in question. An array of other documents, Reagan said, are too sensitive to even to be made available to the judge so he can decide whether they should become public during a trial.

"This information involves sensitive methods and sources and exceedingly sensitive programs, which are state secrets of the highest order," said the president's spokesman, Marlin Fitzwater. "We are talking about much more than identities of countries and identities of foreign leaders."

Gesell has provided no time frame for making rulings on the introduction of evidence, so it is unknown when he will address the crucial issues raised by last week's White House actions. In addition to saying he would not provide key documents, Reagan precluded the possibility of pretrial pardons for North or his former boss at the Security Council, John Poindexter.

Gesell has the choice of going ahead with a trial on all charges, dropping some because of Reagan's decision on withholding documents or dismissing the case altogether for the same reason. The judge's continuation of hearings for unusually long hours last week, combined with other actions he has taken in the 10 days or so since he was informed of the White House decision, indicate he plans to proceed on at least some of the charges.

Fitzwater said top administration officials decided in January to suppress particularly sensitive materials. He said the president's counsel, Arthur B. Culvahouse Jr., informed Gesell of the decision more than a week ago, after the judge made comments in court that indicated he was unaware of it.

Culvahouse also wrote a letter to Walsh saying some of the 40,000 pages of secret material sought by North's lawyers contain "information . . . that we know we cannot declassify."

Even after being advised of the White House action, Gesell made a significant ruling early last week that was widely viewed as a sign of his determination to begin a trial next month: He dismissed one of the three principal allegations against North but upheld the key conspiracy charge and one other charge.

On Friday, he rejected the last of North's motions to dismiss some of the 16 charges originally filed against him. That left 14 on which North can be tried.

On Thursday, the same day Reagan announced his decision to withhold some documents, Gesell released an edited version of a memo citing 10 types of sensitive information the government wanted deleted from prosecution exhibits in response to intelligence agencies' concerns. Walsh had given the judge a complete, sealed version of the memo a day earlier. The document also listed the categories of information the administration did not want released at all.

Some of the would-be evidence, according to the edited memo, would disclose "US intelligence sources and methods." That is the category in which Walsh does not oppose suppressing information but which North's attorneys maintain is necessary to their case.

Other materials that the White House wants to keep secret are clearly less sensitive. They include the names of Central American countries and locations where the Nicaraguan rebels conducted some of their operations, information that was widely publicized during the Iran-contra hearings on Capitol Hill last year.

North had access to a wide array of highly sensitive information as a chief aide to the National Security Council, which would enable him to identify for his lawyers which materials would be most controversial if they were presented in court.

Cont'd

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM AND ORDER RE DEFENDANT'S THIRD CIPA NOTICE (TESTIMONY)

The Classified Information Procedures Act, 18 U.S.C. App. ("CIPA") applies to classified testimony as well as to classified documents. Classified information is defined in Section 1 of that Act as including "information and material" subject to classification or otherwise requiring protection from public disclosure. Information, of course, includes knowledge derived from one's work experience and hence, proposed testimony falls under the restrictions of CIPA.

Pursuant to the Court's pretrial responsibilities under CIPA, it directed North on November 23, 1988 to file a written statement of relevant and material testimony he expects to disclose or cause to be disclosed in his defense.[1] North responded, over objection, attaching a Warning Notice[2] to a narrative statement of classified information he desires to use or present at trial. This document consists of 162 typewritten

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[1] This and prior Orders have also led to processing of the classified material in North's documentary case.

[2] Appendix A to this Memorandum.

pages and, as directed by the Court, was filed ex parte under seal.

The Court now confronts a need to disclose this narrative to Independent Counsel for pretrial processing as required by Sections 5 and 6 of CIPA -- a course of action which North vigorously resists on the ground that this requirement is unconstitutional and violates his rights under the Fifth and Sixth Amendments.

The Court has closely examined the narrative statement in the light of its knowledge of the issues and proof gained over approximately ten months of intense pretrial activity. The nature of the notice is indicated below:

(1) A substantial portion of the narrative statement contains relevant and material facts and information of value to the defendant, which may be presented eventually in testimony or which may be used during cross-examination of government witnesses.

(2) Some of the facts noted in the narrative statement are known to Independent Counsel and some are immaterial. However, the statement contains references to many pertinent facts and circumstances which the Court believes are likely to alert Independent Counsel to aspects of issues not previously brought to his attention.

(3) The narrative statement, while somewhat evidentiary in character, does not indicate which individuals mentioned will be witnesses, nor does it develop in any detail how most the facts

mentioned will be proven.

(4) The narrative statement does not tie the information to any particular count in which North is charged or undertake to support statements by documentation found in North's own case or in papers disclosed to him by the government during the elaborate documentary discovery.

(5) The narrative statement is by its very nature only partially revealing because it makes no reference, of course, to related nonclassified proof which could place the classified information noticed into clearer perspective or significance.

(6) The narrative statement does not commit North to call any witness and does not identify any witnesses.

(7) In no way does the narrative represent, directly or indirectly, that North himself will or will not testify; when he may testify, if he does; or what he would testify about if he were to testify.

Given these circumstances, the Court has determined that immediate processing of the narrative statement under CIPA is appropriate for several major reasons.

A. CIPA mandates pre-trial disclosure. Under the Act it is necessary to inform the government of the extent to which sensitive classified information is likely to be revealed during trial (whether through testimony, cross-examination or opening statement) so that both Independent Counsel and the Attorney General can perform their separate responsibilities under

Section 6 of CIPA. See, Memorandum and Preliminary Opinion Re CIPA, filed June 22, 1988 at 15, 16.

B. CIPA's required pre-trial disclosure to Independent Counsel cannot be modified because this is not a case where limited classified information is only an incidental part of the case and disclosure could perhaps be deferred. Rather, in this instance classified information surrounds and immerses the entire case for both sides.

C. Trial is set to commence January 31, 1989.

North's constitutional claims lack merit. No further hearing is necessary. North has previously briefed the issues and there has been full argument in connection with his motion to declare CIPA unconstitutional on its face and as applied.

As to the Fifth Amendment due process claim, modern pretrial practice in complex criminal cases contemplates extensive pretrial disclosures by the parties in the interests of ascertaining the truth. Recent decisions of the Supreme Court as well as the Federal Rules of Criminal Procedure make this abundantly clear. See, e.g., United States v. Nobles, 422 U.S. 225 (1975); Wardius v. Oregon, 412 U.S. 470, 473 (1973); Fed. R. Crim.P. 12.1, 12.2, 16, 32(c)(3)(A),(C). North has had access to approximately 900,000 pages of government documents; the classified documents the government will use against him have been identified, as have the witnesses; and North will receive all Jencks material, including grand jury testimony, two weeks before trial. The prosecution has recently filed several

memoranda narrowing the issues in the case and explicating some aspects of its theory of the case. In addition, over several days of CIPA § 6 hearings, at which defense counsel were present, the Independent Counsel explained the significance to its theory of the case of many of the classified documents in its case-in-chief, and Independent Counsel responded frankly to the Court's numerous inquiries about its case. The Court cannot accede to North's view of due process that he is entitled to get everything and to disclose nothing. Due process is an even-handed concept and this claim is rejected.

As to North's Sixth Amendment claim, disclosure involves no significant interference or substantial prejudice to North's right to the effective assistance of counsel. His attorneys are still free to call or not to call any witness and equally free to determine what questions to ask or not to ask. The tactical disadvantage that may accrue by minimizing surprise is slight. Government witnesses cannot readily adjust or coordinate their testimony to meet the defense, as North suggests, because they are committed under oath and otherwise to their positions. Moreover, the federal courts have long recognized that a degree of defense disclosure is necessary to prevent introduction of vital or unexpected proof, which has a tendency to force adjournment delay to permit investigation or to resolve new legal problems presented. Williams v. Florida, 399 U.S. 78, 80-86 (1970). It is the Court's obligation to assure issues are delineated before trial commences. See, Fed.R.Crim.P. 17.1. The

fact that the alleged violations in this instance occurred behind the screen of classification over a period of time should not place this defendant in any different position; indeed, it enhances the need for pretrial disclosure by the defense.

North has by his Warning Notice apparently anticipated this ruling and has indicated he desires to seek relief by some kind of application to the Court of Appeals. The Court has given no consideration to the merits, or lack of merit, of such an application. It will, however, delay transmitting the narrative statement to Independent Counsel.

Accordingly, defendant North and his counsel are hereby notified that the narrative statement will be transmitted to Independent Counsel under seal by 4:00 p.m. on January 3, 1989 for processing by Independent Counsel and consideration by the Attorney General, where appropriate under CIPA. Independent Counsel shall submit proposed redactions and substitutions in camera on or before January 11, 1989.

SO ORDERED.

Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

December 23, 1988.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 88-0080 -- 02 - GAG
	)	
OLIVER L. NORTH,	)	
	)	(EX PARTE, UNDER SEAL)
Defendant.	)	(CONTAINS CLASSIFIED INFORMATION)

W A R N I N G N O T I C E

THIS PLEADING CONTAINS DEFENSE WORK PRODUCT PROVIDED TO THE COURT ONLY OVER DEFENSE OBJECTIONS.

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LAW OFFICES
WILLIAMS & CONNOLLY
HILL BUILDING
WASHINGTON, D.C. 20006

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THE WHITE ~~HOUSE~~
WASHINGTON

Date: 1-13-89

FOR: A.B.

FROM: KEN DUBERSTEIN

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

Following is Charlie's, not mine

United States Information Agency

Washington, D.C. 20547

Director

USIA

January 12, 1989

Dear Ken:

In the matter of Colonel North, in talking with Judge Sofaer about various allegations that the Administration politically withheld classified material, he provided me with the attached.

I asked why he had not gone on television with these cogent points that refute any such allegations.

He said he would have liked to. However, the White House and State had a prohibition against this.

You might find it valuable to review whether his television appearances could put an accurate perspective on the Administration's position of fidelity.

Sincerely,

Charles Z. Wick

The Honorable
Kenneth M. Duberstein
Chief of Staff
The White House

United States Department of State

The Legal Adviser

Washington, D.C. 20520

January 9, 1989

MEMORANDUM

TO: Charles Z. Wick, Director
United States Information Agency

FROM: L - Abraham D. Sofaer

Attached are some points which I believe fairly and effectively describe the Administration's position on Counts 1 and 2.

Attachment:
Points

Dismissal of Counts 1 and 2

--The national security issues implicated by the conspiracy counts have been a matter of discussion between the Executive Branch and the Independent Counsel from very early on in the case.

--We worked closely with Walsh's staff to minimize the problems in the case-in-chief, but both the Executive Branch and Walsh were aware of the problems created by North's defense which had been drawn with a very broad brush. Judge Gesell indicated from the beginning that he intended to permit North very wide latitude.

--North sought and was granted broad discovery, and we anticipated significant problems. In fact, the agency heads met in July to discuss our response. At that time, at the request of Judge Walsh, it was decided to go ahead with the discovery and to give Walsh an opportunity to argue the lack of relevancy, and seek protective rulings from the Judge that would permit all counts to be tried.

--Gesell's CIPA rulings protected a significant amount of material, but contained some serious omissions, and had implications for the defense case as well.

--Another agency head decision was taken on the remaining classified information. Decisions were taken that would have permitted Walsh to go forward with his case.

--As Walsh has said, it was his decision nevertheless to drop the conspiracy counts, and he was satisfied that the Executive Branch had done its work conscientiously, and had given him the opportunity to make his case to the Judge.

--With the exception of the diversion, the remaining counts contain all the criminal conduct that was alleged in the first two counts, without the problems created by a conspiracy charge.

--The Executive Branch has made no secret of its concern about the breadth of the conspiracy counts, and filed a brief dissociating ourselves from an overbroad reading of those vague charges.

--We think the Judge in the case will agree. He has warned that the classified information contained in the documents, and which would be brought out in testimony during the trial on the first two counts would be substantial, and to a large extent not possible to control.

--Those on the Hill who conducted the Select Committees investigation are satisfied that the dismissal of these counts has not interfered with the public examination and discussions of the very important policy issues involved in this case which began with their investigation and which will run through the criminal prosecutions.

6789L